

**SPEED POST**



F. No. 373/115/B/SZ/2023-RA  
GOVERNMENT OF INDIA  
MINISTRY OF FINANCE  
(DEPARTMENT OF REVENUE)

14, HUDCO VISHALA BLDG., B WING  
6<sup>th</sup> FLOOR, BHIKAJI CAMA PLACE,  
NEW DELHI-110 066

Date of Issue..16/10/24.

Order No. 217 /24-Cus dated 16-10-2024 of the Government of India passed by Smt. Shubhagata Kumar, Additional Secretary to the Government of India, under Section 129DD of the Customs Act, 1962.

Subject : Revision Applications under Section 129 DD of the Customs Act, 1962, against the Order-in-Appeal No. COC-CUSTM-000-APP-43/2023-24 dated 31.07.2023, passed by the Commissioner of Customs (Appeals), Cochin.

Applicant : Shri Riswan Kochupurayil Nazeer, Ernakulam

Respondent : The Commissioner of Customs (Preventive), Cochin

---

**ORDER**

A Revision Application No. 373/115/B/SZ/2023-RA dated 05.12.2023 has been filed by Shri Riswan Kochupurayil Nazeer, Ernakulam (hereinafter referred to as the Applicant) against the Order-in-Appeal No. COC-CUSTOM-000-APP-43/2023-24 dated 31.07.2023, passed by the Commissioner of Customs (Appeals), Cochin. The Commissioner (Appeals) has upheld the order of the Additional Commissioner of Customs (Cochin), bearing no. 106/2022 dated 29.07.2022. The Applicant has also submitted an application for condonation of delay in filing the above RA.

2. Brief facts of the case are that, the Applicant, an Indian passport holder, who arrived in India at Cochin International Airport, Cochin from Ras Al Khaimah on 04.01.2021, was intercepted by the officers of the Customs Air Intelligence Unit at the exit gate of the arrival hall of the Airport. After detailed questioning and examination of his baggage and of his person, the Applicant admitted having concealed 04 white coloured polythene packets containing gold in paste form mixed with other compounds in his rectum. The Applicant himself extracted the four packets totally weighing 874.760 gms from which 788.940 gms of gold of 99.9% purity was recovered. The same was valued at Rs. 30,29,931/- (Assessable Value) and Rs. 34,99,286/- (Market Value) by an approved Chemical Examiner.

3. The adjudicating authority vide the aforementioned Order-in-Original dated 29.07.2022, confiscated the impugned gold under Section 111(d), 111(i) and 111(l) and 111(m) of the Customs Act, 1962. A penalty of Rs. 3,00,000/- was also imposed on the Applicant under Section 112(a) and (b) of the Customs Act, 1962.

4. Aggrieved, the Applicant filed an appeal before the Commissioner Appeals who has upheld the Order-in-Original No. 106/2022 dated 29.07.2022 and rejected the appeal vide impugned OIA dated 31.07.2023. Aggrieved by the OIA, the Applicant has filed this Revision Application.

5. The instant revision application has been filed mainly on the grounds that the absolute confiscation of gold and imposing penalty on the Applicant is not legal or proper; that gold is not a prohibited good; that the adjudicating authority ought to

have allowed redemption of the seized gold. The prayer is to set aside the impugned O-I-A and release the gold to the Applicant for home consumption or for re-export.

6. Personal hearing in the matter was fixed on 23.09.2024. Shri Baby Anthony, Advocate appeared on behalf of the Applicant and submitted that the only issue he is submitting for consideration is reduction in penalty. When pointed out that there is a delay of 27 days in filing the RA, he submitted that the delay was due to a clerical mix-up in his office by his staff and not attributable to the Applicant and humbly sought condonation. He stated that the Applicant carried the gold for someone else in good faith and requested a lenient view in respect of the penalty amount. Sh. Roy Varghese, Deputy Commissioner of Customs, Kochi Airport appeared for the Respondents and submitted that the Applicant concealed four capsules in his rectum and gave two voluntary statements admitting to the ingenious concealment and smuggling in order to get Rs. 30,000/- as remuneration, therefore the O-I-A should be upheld.

7. On examination of the relevant case records, it is observed that the impugned Order-in-Appeal dated 31.07.2023 was received by the Applicant on 11.08.2023 as admitted by him. The revision application has been filed on 05.12.2023. Thus, there is delay of around 27 days in filing revision application beyond the normal period of limitation. As per request application for condonation of delay filed by the Applicant, the reason cited for the delay has been attributed due to an inadvertent mistake by the concerned staff his Counsel's office who failed to dispatch the appeal on due date. Since the counsel has admitted to the delay attributable to his office staff and it was not due to any fault on part of the Applicant, the delay is condoned.

8. The Government has examined the matter. It is observed that the Applicant has not declared the possession of impugned gold in his Customs declaration form and it was only through persistent enquiry and examination of the Applicant, that the body concealment of the impugned gold in paste form came to light. The Appellate Authority has also observed that the Applicant in his voluntary statement dated 04.01.2021 under Section 108 of the Customs Act, 1962 admitted that he knew that importing of gold without payment of duty is an offence; that he had committed an offence by concealing the gold and not declaring the same to evade

payment of Customs duty; that the impugned gold was handed over to him by a person at Dubai with instructions to smuggle the same to India and promised the Applicant a remuneration of Rs. 30,000/- in return. The Applicant in his second voluntary statement recorded on 16.01.2021 reiterated his earlier statement. The Appellate Authority in para (11) of the said O-I-A, has also noted that, on 11.07.2022, the Authorised representative of the Applicant, Shri Nazeer, who is the father of the Applicant, has admitted to his son's offence and has also stated the Applicant has committed this offence knowingly for financial gains. The impugned gold items smuggled into India via ingenious body concealment cannot be considered as bonafide baggage. The entire proceedings have also been covered under a Mahazar in presence of independent witnesses which also corroborates the sequence of events.

9. As per Section 123 of the Act, *ibid*, in respect of the gold and manufactures thereof, the burden of proof that such goods are not smuggled is on the person, from whom goods are recovered. Leave alone declaring the gold as required under Section 77 of the Customs Act, 1962, the Applicant chose to ingeniously conceal it in his rectum and this was detected only upon during his search & examination. Had he been the owner of the gold and had intended to declare the gold to Customs, he would not have had to resort to such ingenious concealment. Thus, the lack of any documents establishing ownership and non-declaration is not surprising. Keeping in view the facts and circumstances of the case and as the Applicant has failed to discharge the onus placed on him in terms of Section 123, the Government concurs with the adjudicating & appellate authorities that the impugned goods were liable to confiscation under Section 111 *ibid* and that the penalty was imposable on the Applicant.

10.1 The Applicant has contended that the import of gold is not 'prohibited'. However, the Government observes that this contention of the Applicant is against several judgements of the Hon'ble Supreme Court in which it has been held that the goods, import/export whereof is allowed subject to certain conditions, are to be treated as 'prohibited goods' in case such conditions are not fulfilled. In the case of *Sheikh Mohd. Omer vs Collector of Customs, Calcutta & Ors {1971 AIR 293}*, the

Apex Court has held that for the purpose of Section 111(d) of the Customs Act, 1962, the term "Any prohibition" means every prohibition. In other words, all types of prohibition. Restriction is one type of prohibition. Gold is not allowed to be imported freely in baggage and it is permitted to be imported by a passenger subject to fulfilment of certain conditions. In the present case, as correctly brought out by the lower authorities, the Applicant in this case did not fulfil the conditions specified in this behalf. In the case of *M/s Om Prakash Bhatia Vs. Commissioner of Customs, Delhi {2003(155) ELT423(SC)}*, the Hon'ble Supreme Court has held that "*if the conditions prescribed for import or export of goods are not complied with, it would be considered to be prohibited goods*". Further, in the case of *UOI &Ors vs. M/s Raj Grow Impex LLP &Ors (2021-TIOL-187-SC-CUS-LB)*, the Hon'ble Supreme Court has followed the judgments in Sheikh Mohd. Omer (supra) and Om Prakash Bhatia (supra) to hold that "*any restriction on import or export is to an extent a prohibition; and the expression "any prohibition" in Section 111(d) of the Customs Act includes restrictions.*"

10.2 In the case of *Malabar Diamond Gallery P. Ltd. Vs ADG, DRI, Chennai [2016(341) ELT65(Mad.)]*, the Hon'ble Madras High Court (i.e the Hon'ble jurisdictional High Court) has summarized the position on the issue, specifically in respect of gold, as under:

*"64. Dictum of the Hon'ble Supreme Court and High Courts makes it clear that gold, may not be one of the enumerated goods, as prohibited goods, still, if the conditions for such import are not complied with, then import of gold, would squarely fall under the definition "prohibited goods", in Section 2 (33) of the Customs Act, 1962----."*

10.3 Moreover, the Hon'ble High Court of Delhi in its order dated 23.11.2023 in Writ Petition No. 8976 of 2020 in the matter of *Kiran Juneja Vs. Union of India & Ors.* has held that "*A fortiori and in terms of the plain language and intent of Section 2(33), an import which is effected in violation of a restrictive or regulatory condition would also fall within the net of "prohibited goods"*". Hence, there is no doubt that the goods seized in the present case are to be treated as "prohibited goods", within the meaning of assigned to it under Section 2(33) of the Act, *ibid.*

10.4 In view of the above, the contention of the Applicant that the offending goods are not 'prohibited goods', cannot be accepted.

11. The Government observes that the original authority had denied the release of gold items on payment of redemption fine, under Section 125 of Customs Act, 1962. It is settled by the judgment of the Hon'ble Supreme Court, in the case of Garg Woollen Mills (P) Ltd vs. Additional Collector of Customs, New Delhi [1998 (104) E.L.T. 306 (S.C.)], that the option to release 'prohibited goods' on redemption fine is discretionary. Hon'ble Delhi High Court has, in the case of Raju Sharma [2020 (372) ELT 249 (Del)], held that "*Exercise of discretion by judicial, or quasi-judicial authorities, merits interference only where the exercise is perverse or tainted by patent illegality, or is tainted by oblique motive.*" Further, the Hon'ble Delhi High Court in its order dated 21.08.2023 in W.P. (C) Nos. 8902/2021; 9561/2021; 13131/2022; 531/2022; & 8083/2023 held that "*.....an infraction of a condition for import of goods would also fall within the ambit of Section 2(33) of the Act and thus their redemption and release would become subject to the discretionary power of the Adjudging Officer*". Therefore, keeping in view the judicial pronouncements above, the Commissioner (Appeals) has correctly refused to interfere with the discretion exercised by the original authority.

12.1 As regards the prayer for permitting re-export of the offending goods, the Government observes that a specific provision regarding re-export of articles imported in baggage is made in Chapter-XI of the Customs Act, 1962, by way of Section 80. On a plain reading of Section 80, it is apparent that a declaration under Section 77 is a pre-requisite for allowing re-export. Hon'ble Allahabad High Court has, in the case of *Deepak Bajaj vs Commissioner of Customs (P), Lucknow*{2019(365) ELT 695(All.)}, held that a declaration under Section 77 is a *sine qua non* for allowing re-export under Section 80 of the Act, *ibid.* In this case, the Applicant had not made a true declaration under Section 77.

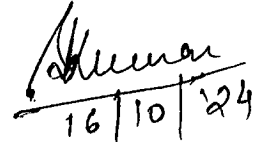
12.2 Further, the Hon'ble Delhi High Court has, in the case of *Jasvir Kaur vs. UOI* {2009 (241) ELT 621 (Del.)}, held that re-export is not permissible when article is

recovered from the passenger while attempting to smuggle it. Hence, the question of allowing re-export does not arise.

13. The case laws relied upon by the Applicant, in support of his various contentions, are not applicable in view of the dictum of Hon'ble Supreme Court and Hon'ble High Courts, as above.

14. In the facts and circumstances of the case, the Government finds that the order for absolute confiscation of the impugned goods as upheld by Commissioner Appeals does not require any interference. The quantum of penalty imposed on the Applicant is neither harsh nor excessive.

15. The revision application is rejected for the reasons aforesaid.

  
16/10/24

(Shubhagata Kumar)

Additional Secretary to the Government of India

Shri Riswan Kochupurayil Nazeer,  
S/o Shri Nazeer Kochupurayil Muhammed,  
Kochupurayil House,  
Kodikuthimala, Asokapuram P.O,  
Ernakulam, Kerala – 683 101

Order No. 217/24-Cus dated 16-10-2024

Copy to:

1. The Commissioner of Central Tax, Central Excise & Customs (Appeals), Central Revenue Building, I.S. Press Road, Kochi -682018.
2. The Commissioner of Customs (Preventive), 5<sup>th</sup> Floor, Catholic Centre, Broadway, Cochin -882031.
3. Shri Baby M.A., Advocate, Faizal Chambers, Palleppady Cross Road, Cochin – 682 018.
4. PPS to AS (RA).
5. Guard file.
6. Spare Copy
7. Notice Board

ATTESTED

  
रितेश कुमार / RITESH KUMAR  
अधीक्षक / Superintendent (R.A. Unit)  
वित्त मंत्रालय / Ministry of Finance  
राजस्व विभाग / Department of Revenue  
Room No. 605, 6th Floor., B-Wing  
14, Hudco Vishala Building, Bhikaji Cama Place,  
New Delhi-110066

