

SPEED POST



F. No. 373/17/B/SZ/2021-RA
GOVERNMENT OF INDIA
MINISTRY OF FINANCE
(DEPARTMENT OF REVENUE)

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

Date of Issue. 28/03/25

Order No. 35/25-Cus dated 28-03-2025 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 Application under Section 129 DD of the Customs Act, 1962, against the Order-in-Appeal No. COC-CUSTOM-000-APP-53/2020-21 dated 26.08.2020, passed by the Commissioner Customs (Appeals), Cochin.

Applicant : Shri Mohammed Harees Mohammed Farook, Sri Lanka.

Respondent : The Commissioner of Customs, Cochin.

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ORDER

A Revision Application No. 373/17/B/SZ/2021-RA dated 25.01.2021 has been filed by Shri Mohammed Harees Mohammed Farook, Sri Lanka (hereinafter referred to as the Applicant) against the Order-in-Appeal No. COC-CUSTOM-000-APP-53/2020-21 dated 26.08.2020, passed by the Commissioner Customs (Appeals), Cochin. The Commissioner (Appeals) has rejected the appeal of the applicant and upheld the Order-in-Original in O.S.No.294/2018 dated 13.08.2018 passed by the Additional Commissioner of Customs, Air Customs, Cochin International Airport, Nedumbassery.

2. Brief facts of the case are that the officers of Air Customs, Cochin International Airport, Nedumbassery seized one crude gold chain (98.850 grams), seventeen cut pieces of crude gold biscuits (560.850 grams) and two crude gold rings (45.550 grams) having purity 24 carat with total weight 705.250 grams and valued at Rs. 19,24,239/- (International Value) and Rs. 21,51,011/- (Market Value) from the Applicant at the exit gate on his arrival from abroad to Cochin on 08.08.2018. The gold chain and gold rings were recovered from the pocket of the pant worn by the Applicant during detailed examination of his person and the cut pieces of gold biscuits swallowed by him were recovered from his person after multiple defecation. Since the seized gold were undeclared and concealed by the Applicant, the Original Authority vide the said O-I-O dated 13.08.2018, confiscated the said gold absolutely under Section 111(d), (i), (l) and (m) of the Customs Act, 1962 read with Section 3(3) of the Foreign Trade (Development & Regulation) Act, 1992. A penalty of Rs. 1,00,000/- was also imposed on the Applicant under Section 112(a) & (b) of the Customs Act, 1962.

3. Aggrieved, the Applicant filed an appeal before Commissioner Appeals who has upheld the O-I-O and rejected the appeal of the Applicant. Aggrieved by the OIA, the Applicant filed this Revision Application.

4. The above revision application has been filed mainly on the grounds that the order of adjudicating authority is against law, weight of evidence and circumstances and probabilities of the case; that gold is not a prohibited item and according to the liberalized policy, the gold can be released on payment of redemption fine and baggage duty; that the Baggage Rules are not attracted in this case since the seized

gold was worn by the Applicant on his person and also declaration as per Section 77 of the Customs Act, 1962 is not required; that the adjudicating authority ought to have allowed redemption of the seized gold. The prayer is to set aside the impugned Order-in-Appeal, the impugned gold items be permitted for re-export/released and that the penalty be reduced.

5. Personal hearing in the matter was fixed on 24.01.2025. No one appeared from the Applicant's side. However, Smt. Kamalamalar Palanikumar, Advocate vide her letter dated 24.01.2025 stated that she was not able to attend due to illness and requested to the Revisionary Authority to decide the case and show leniency while passing the order. Sh. Roy Varghese, Deputy Commissioner of Customs, Kochi Airport appeared for the Respondents and submitted that in addition to a gold chain & a gold ring which was recovered from in his the inner pocket of the applicant's pants, the applicant was found to have swallowed 560 gms of cut gold bits which amounts to ingenious concealment. The OIA is therefore proper and just and ought to be uphold.

6. At the outset, it is observed that the impugned Order-in-Appeal dated 26.08.2020 was received by the Applicant on 14.09.2020 as admitted by him. The revision application has been filed by the Applicant on 25.01.2021 with a delay of around 44 days beyond the normal period of limitation i.e. after the expiry of three months from the date of receipt of the O-I-A. The Applicant has requested to condone the said delay in view of the relaxation granted due to COVID by the Hon'ble Supreme Court. In view of the COVID pandemic, the Hon'ble Supreme Court, vide Order dated 23.03.2020, in SMW(C) No. 3/2020 and order dated 08.03.2021 had extended the period of limitation prescribed under general law of limitation or under any special laws w.e.f. 15.03.2020, until 28.02.2022. Therefore, the delay is condoned.

7.1 The Government has examined the matter. The Applicant's contentious are devoid of merit as he smuggled the gold via ingenious concealment not just in inner pocket of his trousers but also by swallowing the same, which are all facts on record. Not only did the applicant not make a true declaration under section 77 of the Customs Act but has brazenly contested that no declaration was required to be

made as per law. But for the interception of the Customs officers of Cochin International Airport, Nedumbassery, the Applicant would have exited undetected without payment of Customs dues. The Applicant was a frequent traveler and was well aware of the Indian Customs regulations. The Applicant also admitted before Adjudicating Authority that he had brought the said gold for profit and admitted his mistake. As regard contentions of the Applicant on the applicability of Baggage Rules, declaration under Section 77 of the Customs Act, 1962, the Appellate Authority has discussed the same in detail in para 10 of the OIA and rejected the same. The Government concurs with his finding that this is a case of willful non-declaration and outright smuggling by the Applicant by way of ingenious concealment and therefore the Government holds that there is no ground for leniency in the matter.

7.2 As per Section 123 of Customs Act 1962, 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. The Applicant knowingly violated Section 77 of the Act, *ibid* and was intercepted after passing through the Green Channel. The Applicant has, thus, failed to discharge the burden placed on him, in terms of Section 123, *ibid*. Therefore, the Government agrees with the lower authorities that the seized goods were liable to confiscation under Section 111 *ibid* and the applicant was liable for imposition of penalty.

8.1 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 herein had not only not fulfilled the conditions

specified in this behalf but caught in the act of outright smuggling. 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.*"

8.2 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----."

8.3 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.*

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

9. 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.*" Further, the Division Bench of Hon'ble Madras High Court in the decision reported in 2009(247) E.L.T. 21 (Mad) (Commissioner of Customs Vs. Samynathan Murugesan) which held that if the manner of Import of Gold is by ingenious concealment and patently fraudulent, then, the adjudicating authority may direct absolute confiscation of the goods instead of exercising his discretion under Section 125 of the Act. Therefore, keeping in view the judicial pronouncements above, the Commissioner (Appeals) has correctly refused to interfere with the discretion exercised by the original authority.

10. The Applicant has requested to be allowed to re-export the impugned gold. The Government observes that a specific provision regarding re-export of baggage articles has been made under Section 80 of the Act, *ibid* and upon a plain reading of the same, 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 {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 made no declaration in respect of the subject goods. Further, the Hon'ble Delhi High Court has, in the case of *Jasvir Kaur vs. UOI {2019 (241) ELT 521 (Del.)}*, held that re-export "*cannot be asked for as of right-----*. *The passenger cannot be given a chance to try his luck and smuggle Gold into the country and if caught she should be given permission to re-export.*" Hence, the request for re-export cannot be allowed.

11. 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.

12. In view of the facts and circumstances of the case, there is no ground to interfere with order of Commissioner (Appeals) regarding absolute confiscation of impugned gold. The penalty imposed by the original authority, as upheld by the Commissioner (Appeals), is neither harsh nor excessive.

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

Shubhagata Kumar
28/2/2025

(Shubhagata Kumar)

Additional Secretary to the Government of India

Shri Mohammed Harees Mohammed Farook,
162/37, Mehoda Kolonnawa Road,
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Sri Lanka.

Order No. 35 /25-Cus dated 28-03-2025

Copy to:

1. The Commissioner of Customs (Appeals), Central Revenue Building, I.S Press Road, Kochi-682018.
2. The Commissioner of Customs, Cochin, Custom House, Willingdon Island, Cochin – 682 009.
3. Sh. S. Palanikumar, Kameshwaran & P. Kamalamalar, Advocates, No. 10, Sunkurama Street; 2nd Floor, Chennai-600001.
4. PPS to AS (RA).
5. Guard file.
6. ✓ Spare Copy
7. Notice Board

Shailendra Kumar Meena
ATTESTED
(Shailendra Kumar Meena)
अभिधीक्षक (आपल) / Section Officer
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Ministry of Finance (Dept. of Rev.)
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