

**REGISTERED
SPEED POST**



F.No. 373/48,53-55/B/13-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.. 6-1-14.....

Order No. 3-6 /14-cus dated 01-01- 2014 of the Government of India, passed by Shri D. P. Singh, Joint Secretary to the Government of India, under section 129DD of the Custom Act, 1962.

- Subject : Revision Application filed,
under section 129 DD of the Customs Act
1962 against the Order-in-Appeal No.
passed by the Commissioner of Customs
(Appeals), Custom House, Chennai, as mentioned in
Column 3 of the table in para 1 of this order.
- Applicant : As per column 2 of table in para I of this order.
Shri.S. Palanikumar, Advocate,
No. 10, II Floor, Sanku Ram Street, Chennai-1.
- Respondent : 1. Commissioner of Custom,
Custom House, P.B No. 5400,
C.R. Building, Queens Road, Bangalore.
2. Commissioner of Customs,
No. 1, Williams Road, Cantonment,
Tiruchirappali.

ORDER

These 4 revision applications have been filed by the applicants c/o Shri. Palanikumar, Advocate, No. 10., Sunk Ram Street, Chennai-600 001 against the Orders-in-Appeal Nos. passed by the Commissioner of Customs, (Appeals) Bangalore/Trichy with respect to Orders-in-Original Nos. as detailed in the following Table:-

S.No.	RA No. Name of the Applicant Shri	OIA No. & Date	Order-in-Original No. & Date	Description of Value and Goods (Rs.)	RF/PP/Order As per Order-in-Original (Rs.)	RF/PP/Order As per Order-in-Appeal (Rs.)
1	2	3	4	5	6	7
1.	373/46/B/13-RA Shri Pakeer Mohindeen Naleem Mohindeem Sri Lankan National	2004/13 dt. 27-03-2013 passed by Commissioner of Customs (Appeals), Bangalore	113/2012 dt. 16-01-2013	Gold Chain/Ring thickly coated with silver 207 gm/ 5,76,681/-	Absolute confiscation PP 75,000/-	Rejected Appeal
2.	373/53/B/13-RA Shri Abubacker Nainar Kaja	251/13 dt 25-04-2013 -----do-----	104/2012 dt. 30-11-2012	Gold biscuits 1.2 kg concealed in rectum/ 34,66,800/-	Absolute confiscation PP 5,00,000/-	-----do-----
3.	373/54/B/13-RA Shri Mohammed Asurudeen	252/13 dt. 25-04-2013 -----do-----	105/2012 dt. 30-11-2012	Gold biscuits 1.2 kg concealed in rectum/ 34,66,800/-	Absolute confiscation PP 5,00,000/-	-----do-----
4.	373/55/B/13-RA Mrs. Parvathi	29/13 dt. 29-03-2013 dt. 29-03-2013 Commissioner of Customs (Appeals), Trichy	18/2012 dt. 21-11-2012 dt. 21-11-2012	Gold biscuits 1.2 kg concealed in person concealed in person but subsequent put in baggage bag by wrapping in blue colour, adhesive tape 34,80,000/-	Absolute confiscation PP 6,00,000/-	-----do-----

2. Briefly stated facts of the case are that the applicants arrived at Bangalore Airport from abroad. They were intercepted at exit gate by the Air Intelligence Unit/DRI Officers of Customs Bangalore Airport. On examination search of their baggages and persons goods of description, quantity and value as mentioned in the column 5 of above table were recovered. The applicant at sl. No. 1 of above table was Sri Lankan National had thickly coated the gold on with white silver to avoid detection, applicant at sl. No. 2 & 3 of above table had concealing the gold in their rectum. The applicant No. 4 had concealed the impugned gold in her bag by wrapping it with blue carbon paper with and adhesive tape in order to avoid detection by customs. The applicant at Sr. No. 2 & 4 were carrier and the gold did not belong to them as the same had been carried by them for some other person for monetary consideration. These facts have been admitted by the applicants in their statements recorded under section 108 of Custom Act 1962. The applicant did not

declared the said gold before customs as required under section 77 of Customs Act, 1962. The gold imported by the applicants was in commercial quantity. Import of gold in commercial quantity, through baggage that too undeclared and attempted to be smuggled by concealment does not constitute bonafide baggage in terms of section 79 of Customs Act, 1962. The said gold is imported in violation of provisions of section 77,79,11 of Customs Act, 1962, para 2.20 of Foreign Trade Policy 2009-2014 and also the provision of section 3 (3) and 11 (1) of Foreign Trade (Development and Regulation) Act, 1992. The adjudicating authority after following due process of law confiscated the said goods under section 111 (d) (l) & (m) of Customs Act, 1962. A penalty as shown at column No. 6 of above table was also imposed on the said passenger under section 112 of Customs Act, 1962.

3. Being aggrieved by the said orders-in-original, applicant filed appeal before Commissioner (Appeals), who rejected the appeal.

4. Being aggrieved by the impugned Orders-in-Appeal, the applicants have filed this revision application under Section 129 DD of Customs Act, 1962 before Central Government mainly on the following grounds:

4.1 Order of the respondent is against law, weight of evidence and circumstances and probabilities of the case.

4.2 The applicant submits that the goods must be prohibited before export or import, simply because of non declaration of the goods cannot become prohibited after import. Therefore the authority had come to the conclusion that the gold is prohibited because of non declaration is nothing but clear not application of mind.

4.3 The Hon'ble Supreme Court has delivered a judgment on 30-09-2011 in Om Prakash's court Vs. Union of India wherein it is categorically stated that the main object of the enactment of the said act was the recovery of excise duties and not really to punish for infringement of its provisions. Further held that the offences are compoundable under section 137 of the said act and summary proceedings under

section 138 of Customs act. The gold is not prohibited item and accordingly to the liberalized policy the gold can be released on payment of redemption fine and applicably duty. The hon'ble Supreme Court said in recent judgments that the main object of the customs authority should collect the duty not to punish the person who violated the provisions of Customs act. The release of gold is not against the policy or not against section 125 of the Customs Act. In several similar cases the Hon'ble Supreme Court, Revisional authority and Commissioner of Customs (Appeals), Chennai has ordered to redemption of goods. There is no provision for absolute confiscation of goods. The option should be given under section 125 of the Customs Act. Further there are several judgments by revisional authority and CESTAT and hon'ble Supreme Court and high court said the authority should exercise the power under section 125 of the act because the same is mandatory. The adjudication authority rightly exercised his power given under the said act. The applicant further submits that in OS. No. Order-in-Original 161 to 164/11 dated 10-03-2012-Shri Lankan National 1) Mohamed Ansar, 2) H.M. Naushad, 3) Seiyed Faison Mohamed, 4) Mohamed Refeek; 5) Imtiyas Mohammed. The Commissioner of Customs (Appeals) has passed an order release the gold on payment of redemption fine; further the revisional authority Delhi also confirmed the Commissioner (Appeals) order dated 31-07-2012. The applicant further submits that at the time of remand before the CMM Trichy she filed a bail application on 10-11-2011 through her counsel wherein he stated that she is the owner of the seized gold and retracted his statement.

" The petitioner/accused further respectfully submits that the petitioner knows only Tamil and he does not know English through the petitioner was ready to make proper declaration and pay the appropriate duty but the officers did not hear his words, further they recorded the statement from him by way of third decree method and hence the petitioner hereby retract his confessional statement given before the officers. "

4.4 The adjudication authority has relied upon the judgment in Cestat order No. 1980/2009 dtd. 24-12-2009 has been stayed by the Hon'ble High Court Madras in CMA. No. 3773 of 2010 order dated 25-01-2011-G.V.Ramesh Vs Cestat Chennai and Commissioner of Customs (Air), Chennai. Though the Cestat order has been stayed

but the adjudication authority still relying upon the same is nothing but non application of mind.

4.5 That a reported judgment in 2012 (276) ELT 129 (GOI) in Re Chellani Mukesh the Hon'ble Revisional authority held confiscation and penalty (Customs) absolute confiscation –option of redemption fine –non declaration of Indian currency and attempt to export such illegally-currencies not being prohibited goods, absolute confiscation is very harsh-option to redeem confiscated currency granted in view of the various precedent decision of Cestat/GOI giving liberal interpretation as regards to absolute confiscation of currencies.

4.6 That according to section 132 of the Customs act clearly stated that:

" 132 false declaration, false documents etc" who ever makes signs or uses or caused to be made, signed or used, any declaration statement or documents in the transaction of any business relating to customs, knowing or having reason to believe that such declaration, statement or documents is false in any material particular, shall be punishable with imprisonment for a term which may extend to or with fine or with both."

The above section 132 of the customs act will apply only for false declaration, false documents, etc. Further it is advised submit that the above section will not apply for non declaration. Since the CBEC circular No. 9/2001 has specific direction to the officers and strict compliance of the circular if not action will be against the officers who have not follow the circular. Thus it is clearly established the declaration should not be blank and the same should be filed by the passenger if not filled the officer to help them to fill the declaration card. The present case the authority has not strictly followed the circular.

The applicant respectfully further submits that neither the words bonafied baggage's have neither been defined under the customs act 1962 nor the rules made there under. Attention of this authority is invited to the CBEC circular No. 9/2001-Cus dated 22-02-2011; wherein the board has categorically stated that in the event the passenger has not filled in the baggage declaration form, it is the responsibility of the officer at the airport to verify the details and ensure that the

baggage declarations filled up in full. Such an excise was never carried out by the officers concerned and instead the applicant has been unnecessarily incarcerated.

4.7 Further there is no express or specific prohibition under the customs act or any other law, what is prohibited means the central government by specific notification like face currency, arms, ammunition and NDPS are prohibited. But there is no specific notification that the gold is prohibited goods.

4.8 That subsequently, they obtained involuntary statement from him by way of force, threat and intimidation. The statement was recorded by the officers of custom as their own will and forcibly obtained signatures from him in some empty papers. He could not even make a complaint of ill treatment before the Magistrate Trichy at the time of remand due to the serious warning by the officers. Therefore, my client submits that the mahazar and statement are involuntary and false and they do not reflect true facts. The applicant further sent a retraction letter to the sponsoring authority and also retracted through bail application and denied the allegations and retracted his statement given before the officers.

4.9 That he is the owner of the goods and hence he is claiming the same. Further he has not smuggled the goods on behalf of third party. But the officers recorded the statement as if he is smuggled the gold for third party is not correct. The applicant further submits that under section 125 of the customs act. When even confiscation of any good is authorized by this act, the officer adjudging it may, in the case of any goods, the importation or exportation whereof is prohibited under this act or under any other law for the time being in force, and shall in this cases of any other goods, give to the owner of the goods or where such owner is not known the person from whose possession or custody been such goods have seized.

The applicant also cited the following case laws:

- a) Hargovind Dash Vs. Collector of Customs 1992 (61) ELT 172 (SC)
- (b) Sheik Jamal Basha Vs. GOI 1997 (91) ELT 277 (AP)
- (c) Muknadam Rafique Ahmed GOI Order No. 198/2010-Cus. Dated 20.5.10 2010(270) ELT 447 (GOI)

- d) Sabir Ahmed Abdul Rehman Vs. Commissioner of Customs, Mumbai replied in ELT 2009 (235) ELT 402 (Bom.)
- e) 2011 (263) ELT 685 (Tri. Mum.) Yakub-Ibrahim Yusuf Vs. Commissioner of Customs, Mumbai.
- f) Om Prakash Bhatia V. Commissioner of Customs, Delhi, reported in 2003 (155) ELT 423 (S.C.)- 2003 (6) S.C.C 161

The applicant finally prayed to allow re export of gold on payment of redemption fine and reduce personal penalty.

5. Personal hearing was scheduled in these cases on 26-05-2013, 24-07-2013, 31-10-2013 and 16-12-2013. Nobody appeared for the personal hearing on said dates. However the applicant vide their letter through Shri Palanikumar, advocate had been requesting for adjournment of these cases on the ground that in cases involving same issue, in WP No. 32981 to 32983/13 Hon'ble High Court of Madras vide order dtd. 12-12-2012 granted stay against the GOI Revision order No. 352-354/12-Cus dt. 28-08-2012 whereunder absolute confiscation of goods brought by carriers fir somebody else for monetary consideration was upheld.

6. Government has carefully gone through the relevant case records and perused the impugned Orders-in-Original and Orders-in-Appeal.

7. On perusal of records Government observes that the applicant passengers had brought the said either gold in a conspicuously concealed manner as they have concealed the said gold in their rectum or otherwise with a motive to smuggle the same into India by evading payment of Customs Duty. The passengers were not eligible to import gold in terms of notification No. 31/2003-Cus dtd. 01-03-2003 and did not declare the gold to customs as required under section 77 of Customs Act, 1962. In addition, all of them acted as carrier for monetary consideration and gold did not belong to them. These facts have been admitted by the applicant in their statement recorded under section 108 of the Customs Act, 1962. Since the gold imported in concealed manner and in trade quantity and that too not declared, so

the same cannot be treated as bonafide baggage in terms of section 79 of Customs Act, 1962. The said gold is imported in violation of Foreign Trade the provisions of section 77,79,11 of Customs Act, 1962, para 2.20 of Exim Policy 2009-2014 and also the provision of section 3 (3) and 11 (1) of Foreign Trade (Development and Regulation) Act, 1992. The adjudicating authority after following due process of law absolutely confiscated the said gold under section 111 (d) (l) & (m) of Customs Act, 1962. Penalties as shown at column 6 of above table were also imposed on the under section 112 of Customs Act, 1962. The Commissioner (Appeals) has rejected all the appeals. Now in these revision applications the applicants have contested the order of absolute confiscation and imposition of high penalty and requested to allow its redemption on payment of redemption fine under section 125 of Customs Act, 1962.

8. Applicants have pleaded for allowing redemption of goods under section 125 of Customs Act on payment of fine in lieu of confiscation or to allow re-export. Government observes that in these cases, the passengers did not declare goods to Customs and attempted to smuggle the same without payment of Customs duty. They had acted as carriers and goods did not belong to them. They had to receive monetary consideration for the carriage of these goods. These facts are admitted by the applicants in their statements recorded under section 108 of Custom Act. The lower authorities have not allowed redemption of goods under section 125 as the passengers were not the owners of goods and acted as carriers in addition to not declaring the goods to Custom and attempting to smuggle the goods without payment of duty.

8.1 Government notes that absolute confiscation in such cases is upheld in the judgments of Hon'ble High Court of Madras in the case of CC Air, Chennai Vs. Samynathan Murugesan 2009 (247) ELT 21 (Mad). Hon'ble High Court of Madras in this case has held as under :-

"Confiscation - Absolute confiscation of goods- 7 075 Kgs Gold ornaments recovered from T.V. Set- Goods were prohibited as petitioner did not belong to category of persons who could bring gold at concessional rate of duty - previous periods where petitioner stayed for longer duration, not relevant for the purpose of Notification No. 31/2003-Cus- Liberalization policy and repeal of Gold control order weighed with the Tribunal -Tribunal ought to have considered whether he could have carried the gold as part

of his baggage as an eligible passenger -Goods imported in violation of Import (control) Order, 1955 read with section 3 (i) of Import and Export Control Act, 1947 - Concealment weighed with the Commissioner to order absolute confiscation -Commissioner's order upheld - Section 111 of Customs Act, 1962."

The said order was upheld by Hon'ble Supreme Court in the order dated 11-01-2010 reported as 2010 (254) ELT A 015 (S.L) dismissing the petition for special leave to Appeal (Civil) No. 22072 of 2009 filed by Samyanathan Murugesan. Supreme Court passed the following order:-

" Applying the ration of the judgment in the case of Om Prakash Bhatia II Commissioner of Customs/ Delhi reported in 2003 (155) ELT 423 (S.C)= 2003 (6) s.ec 161/ to the facts of the case/ we find that; in the present case/ the assessee did not fulfill the basic eligibility criteria, which makes the imported item a prohibited goods; hence/ we see no reason to interfere with the impugned order. The special leave petition is accordingly dismissed. "

8.2 Hon'ble High Court of Madras in their judgment dated 02-03-2012 in WP No. 21086/2002 in the case of Aiyakannu Vs JC Customs reported on 2012-110L- 806-HC-MAD-Cus has also held as under:-

" Petitioner being a foreign (Sri Lankan) national is not entitled to import gold in terms of clause 3 of Foreign Trade (Exemption from application of Rules in certain cases) order 1993/ as it will apply to the passenger of Indian origin-attempt to smuggle 10 gold bars with Foreign markings wrapped in carbon paper by concealing in baggage justifies the order of absolute confiscation. "

8.3 Government also notes that Hon'ble High Court of Bombay in its judgment dated 23-07-2009 in the case of UOI Vs Mohammed Aijaj Ahmed (WP No.1901/2003) reported as 2009 (244) ELT 49 (Bom.) has set aside the order of CESTAT ordering to allow redemption of gold and upheld the absolute confiscation of gold ordered by Commissioner of Customs. In this case the gold did not belong to passenger Mr. Mohammed Aijaj Ahamed who acted as carrier of gold. The said order of Bombay High Court was upheld by Hon'ble Supreme Court in its decision reports as 2010 (253) ELT E83 (SC).

8.4 The adjudicating authority of Chennai Airport in its Order-in-Original No. 312/2001 dt. 08-06-2011, 496/2011 dt. 07-10-2011, 1142/2010 dt. 16-10-2010, 307/2011 dt. 08-06-2011, 310/2011 dt. 08-06-2011 and 311/2011 dt. 08-06-2011 and had ordered absolute confiscation in concealment cases. The said orders were

upheld by Commissioner (Appeals) in Order-in-Appeal No. 108/2012 dt. 29-02-2012, 71/2012 dt. 09-02-2012, 646/2011 dt. 14-09-2011, 393/2011 dt. 28-09-2011, 696/2011 dt. 28-09-2011 and 669/2011 dt. 28-09-2011. Finally absolute confiscation was also upheld by Government of India in these cases vide GOI Order No. 361- 366/12-Cus dt. 06-09-2012.

8.5 Government in the similar circumstances upheld the absolute confiscation of goods vide GOI Revision order No. 352-354/12-Cus dt. 28-08-2012. The said orders were challenged by parties before Hon'ble High Court of Madras vide WP No. 132981 to 32983/12 and Hon'ble High Court vide order dated 12-12-2012 granted interim stay in the mater. The applicants were repeatedly requesting for granting adjournments of hearing on the ground of said interim stay order. Now, Hon'ble high court vide order dated 05-11-2013 has passed the following order and vacated the interim stay order.

" Order: These petitions coming on for orders upon perusing the petitions and the respective affidavits filed in support thereof and upon hearing the arguments of Mr. B.Kumar Senior Counsel for M/s. S. Palanikumar, advocate for the petitioner in each of the petitions and of Mr. Rajnish Pathiyil SCGSC for the respondents in all the petitions the court made the following order:-

The matter is posted today for final disposal of the writ petition. Learned counsel for the petitioner still requests time for arguing the matter. Interim order is vacated.

Post this writ petition in the usual course. "

After receipt of said order, final opportunity of hearing was granted to the applicants on 16-12-2013. But, the learned counsel of applicant has again sought adjournment of case without giving any reason. Applicants have failed to attend even a single hearing. It means they have nothing more to submit in their defence.

9. Applicants have stated that their statement were recorded under duress and were not voluntary. In this regard, Government observes that the punchnama is drawn before independent witnesses and same is accepted as correct by applicants by signing the same. Moreover the statement rendered under section 108 of Customs Act, 1962 is a valid admissible evidence in the court of law. There is no evidence brought on record that statements were recorded under duress. As such, the confessional statements of the applicants cannot doubted and ignored Hon'ble Supreme Court has held in the case of Surjeet Singh Chabra Vs. UOI reported on 1997 (84) ELT 646 (SC) that statement made before customs officer though

retracted within 6 days is an admission and binding since customs officers are not police officers under section 108 of Customs Act. In view of principles laid down in said apex court judgment there is no merit in this pleading of the applicants.

10. Government notes that ratio of above cited judgments are squarely applicable as the facts of these cases are identical. The case laws cited by applicants cannot be made applicable to these cases as facts involved are not similar. In view of this position, Government upholds the absolute confiscation of gold as ordered by lower authorities.

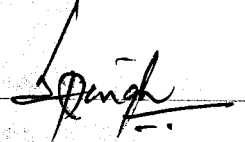
11. As regards pleading of the applicants to reduce penalty, Government notes that penalty imposed in these cases is 14% to 18% which appears to be on higher side and same can be reduced. Therefore, keeping in view the overall circumstances of the cases, Government reduces the penalty in these cases as under:-

S.No.	RA No. Name of the Applicant Shri	OIA No. & Date	Order-in-Original No. & Date	Penalty reduced to (Rs.)
1	2	3	4	5
1.	373/46/B/13-RA Shri Pakeer Mohindeen Naleem Mohindeem Sri Lankan National	2004/13 dt. 27-03-2013	113/2012 dt. 16-01-2013	57670/-
2.	373/53/B/13-RA Shri Abubacker Nainar Kaja	251/13 dt 25-04-2013	104/2012 dt. 30-11-2012	346680/-
3.	373/54/B/13-RA Shri Mohammed Asurudeen	252/13 dt. 25-04-2013	105/2012 dt. 30-11-2012	346680/-
4.	373/55/B/13-RA Mrs. Parvathi	29/13 dt. 28-03-2013	18/2012 dt. 21-11-2012	348000/-

12. The impugned Order-in-Appeal is modified to the above extent.

13. The revision applications are thus disposed off in terms of above.

14. So, ordered.

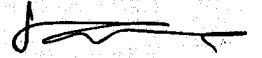


(D.P. Singh)

Joint Secretary to the Govt. of India

As per column 2 of table in para I.
c/o Shri.S. Palanikumar, Advocate,
No. 10, II Floor, Sunku Ram Street, Chennai-1.

ATTESTED



(टी. आर. आर्य / T.R. ARYA)
अधीक्षक, आर.ए./Superintendent RA
वित्त मंत्रालय, (राजस्व विभाग)
Ministry of Finance, (Deptt. of Rev.)
भारत सरकार / Govt. of India
नई दिल्ली / New Delhi

Order No. 3-6/13-Cus Dated 1.1.2014

Copy to:

1. The Commissioner of Customs, Custom House, Chennai-1.
2. Commissioner of Custom, Custom House, P.B No. 5400, C.R. Building, Queens Road, Bangalore.
3. Commissioner of Customs, No. 1, Williams Road, Cantonment, Tiruchirappali.
4. The Commissioner of Customs (Appeals), Custom House, 33 Rajaji Salai, Chennai-600001.
5. The Additional Commissioner of Customs, Chennai Airport and Air Cargo Meenabakkam, Chennai.
6. Shri.S. Palanikumar, Advocate, No. 10, II Floor, Sunku Ram Street, Chennai-1.
7. PS to JS(RA)
8. Guard File.
9. Spare Copy

ATTESTED



(T.R.Arya)

SUPRINTENDENT (REVISION APPLICATION)

