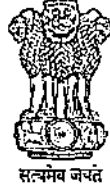


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GOVERNMENT OF INDIA  
MINISTRY OF FINANCE  
(DEPARTMENT OF REVENUE)

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Mumbai-400 005

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F.No. 380/26A/B/WZ/2017-RA 139 : Date of Issue : 12/01/2023

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ORDER NO. 10 /2023-CUS (WZ)/ASRA/MUMBAI DATED 01.01.2023  
OF THE GOVERNMENT OF INDIA PASSED BY SHRI SHRAWAN KUMAR,  
PRINCIPAL COMMISSIONER & EX-OFFICIO ADDITIONAL SECRETARY  
TO THE GOVERNMENT OF INDIA, UNDER SECTION 129DD OF THE  
CUSTOMS ACT, 1962.

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Applicant : Pr. Commissioner of Customs, CSMI, Mumbai.

Respondents (R1) : Mohammed Anas Ruknuddin

(R2) : Gulzar Ahmed

Subject : Revision Application filed, under Section 129DD of the  
Customs Act, 1962 against the Orders-in-Appeal No.  
MUM-CUSTM-PAX-APP-182 & 183/17-18 dated  
25.05.2017 issued on 29.05.2017 through F.No. 2/49-  
303 & 304/2016AP passed by the Commissioner of  
Customs (Appeals), Mumbai -III.

**ORDER**

This revision application has been filed by the Pr. Commissioner of Customs, CSMI Airport, Mumbai (herein after referred to as the Applicant) against the Orders-in-Appeal No. MUM-CUSTM-PAX-APP-182 & 183/17-18 dated 25.05.2017 issued on 29.05.2017 through F. No. 2/49-303 & 304/2016AP passed by the Commissioner of Customs (Appeals), Mumbai -III in respect of (i). Shri. Mohammed Anas Ruknuddin and Shri. Gulzar Ahmed (hereinafter referred to as the Respondents or alternately, as Respondent No. 1 (R1) or Respondent No. 2 (R2) resp).

2. Brief facts of the case are that the Respondent No. 1 (R1), an International passenger and Respondent No. 2 (R2), a domestic passenger, were intercepted on 18.03.2015 by Customs Officers at the Prayer Room located near Bay No. 85, Terminal 2, CSMI Airport, Mumbai, as soon as R1 had handed over 3 brown packets from his hand baggage to R2. R1 had arrived from Dubai onboard Jet Airways Flight No. 9W-543 and was scheduled to fly further to Bangkok by Jet Airways Flight No. 9W-70 / 18.03.2015. R2 was a domestic passenger scheduled to fly to Ahmedabad by Air India Flight AI-130 / 18.03.2015. Personal searches of both R1 & R2 were carried out and nothing incriminating was recovered. Detailed examination of the 3 brown coloured packets led to the recovery of assorted jewellery, totally weighing 1600 grams, valued at Rs. 28,26,000/-. The respondents admitted to their roles, knowledge, possession, carriage, non-declaration and recovery of the gold jewellery. Government Approved Valuer certified that the gold jewellery were of 18 Karats purity, of 75% purity, totally weighing 1600 grams and valued at Rs. 28,26,000/-.

3. After due process of the law, the Original Adjudicating Authority (OAA), viz Additional Commissioner Of Customs, CSMI Airport, Mumbai, vide Order-

In-Original No. ADC/RR/ADJN/408/2015-16 dated 21.03.2016 issued on 22.03.2016 through F.No. S/14-5-243/2015-16 ADJN [SD/INT/AIU/128/2015 AP'C'] ordered for the absolute confiscation of the 1600 grams of assorted jewellery, valued at Rs. 28,26,000/- under Section 111(d), 111(1) and 111 (m) of the Customs Act, 1962 and a penalty of Rs. 1,50,000/- each was also imposed on the respondents under Section of 112 (a) & (b) of the Customs Act, 1962.

4. Aggrieved by the said order, the respondent filed an appeal before the appellate authority viz, Commissioner of Customs (Appeals), Mumbai -III who vide Orders-In-Appeal No. MUM-CUSTOM-PAX-APP-182 & 183/17-18 dated 25.05.2017 issued on 29.05.2017 through F.No. 2/49-303 & 304/2016AP allowed to redeem the 1600 gms of gold jewellery, valued at Rs. 28,26,000/- on payment of a redemption fine of Rs. 5,50,000/-. Also, the penalty of Rs. 1,50,000/- each imposed on the respondents under Section 112(a) & (b) of the Customs Act, 1962 was upheld.

5. Aggrieved with the above order, the Applicant has filed this revision application on the following grounds;

5.01. that the respondent had failed to make a true declaration of the contents of his baggage as required under Section 77 of the Customs Act, 1962; that Section 80 of the Customs Act, 1962 stipulates that where the baggage of a passenger contains any article which is dutiable or the import of which is prohibited and in respect of which a true declaration has been made under Section 77 *ibid*, the proper officer may, at the request of the passenger, detain such article for the purpose of being returned to him on his leaving India; that in this case the respondent had not declared the gold jewellery on his arrival and hence, redemption of the goods by the AA was not proper.

5.02. that the respondent was not eligible to bring gold; that respondent had blatantly misused the facility of opting to clear goods through green channel; that the manner of exchange was clever and ingenious; that domestic passengers were not eligible to import gold.

- 5.03. that the AA had erred in releasing the impugned gold jewellery and had wrongly applied discretion under Section 125 of the Customs Act, 1962 and had not considered that the gold jewellery was attempted to be brought into the country in an ingenious manner.
- 5.03. that the ratio of the judgement passed by Madras High Court in the case of Commissioner of Customs (AIR), Chennai vs. Samyanathan Murugesan [2009 (247) ELT 21(Mad).] pertaining to ingenious concealment had not been considered by the appellate authority.
- 5.05. that the appellate authority had relied upon order of CESTAT, Chennai in the case of A. Rajkumari Vs CC (Chennai) 2015 (321) ELT 540 (Tri.-Chennai) for drawing the conclusion for release of the impugned gold on redemption fine and also held that the Hon'ble Apex Court vide order in the case as reported in 2015 (321) ELT A 207 (SC) had affirmed the said CESTAT Order; that this Order had been dismissed by the Apex Court on the grounds of delay and not on merits;
- 5.06. that the redemption on payment of fine and penalty would depend on the facts and circumstances of the case and other cases cannot be binding as a precedent; that judgment of Hon'ble Delhi High Court in the case of Jain Exports Vs Union of India 1987(29) ELT753 would be squarely applicable in this case..
- 5.07. that the judgement of the Hon'ble High Court of Kerala in the case of Abdul Razak vs. UOI {{2012-275-ELT-300 (Ker)}} on the issue of smuggling of gold without declaring the same and release of goods is not a matter of right, is squarely applicable to this case.

Applicant has prayed to set aside the order passed by the appellate authority and to restore the order passed by the original adjudicating authority or pass any order as deemed fit.

6. Personal hearing in the case was scheduled for 13.10.2021, 20.10.2021, 17.11.2021, 24.11.2021, 11.01.2022 and 03.02.2022. However, none appeared for the applicant or the respondent. Sufficient opportunities have been given to both the applicant and the respondent to put forth their case. As none appeared, the case is being taken up for a decision on the basis of evidence on record.

7.1. The relevant sections of the Customs Act are reproduced below :

**Section 2(33)**

“prohibited goods” means any goods the import or export of which is subject to any prohibition under this Act or any other law for the time being in force but does not include any such goods in respect of which the conditions subject to which the goods are permitted to be imported or exported have been complied with”

**Section 125**

Option to pay fine in lieu of confiscation. - (1) Whenever confiscation of any goods is authorised 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 the case 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 such goods have been seized, an option to pay in lieu of confiscation such fine as the said officer thinks fit :*

Provided that where the proceedings are deemed to be concluded under the proviso to sub-section (2) of section 28 or under clause (i) of sub-section (6) of that section in respect of the goods which are not prohibited or restricted, the provisions of this section shall not apply :

Provided further that, without prejudice to the provisions of the proviso to sub-section (2) of section 115, such fine shall not exceed the market price of the goods confiscated, less in the case of imported goods the duty chargeable thereon.

(2) Where any fine in lieu of confiscation of goods is imposed under sub-section (1), the owner of such goods or the person referred to in sub-section (1), shall, in addition, be liable to any duty and charges payable in respect of such goods.

(3) Where the fine imposed under sub-section (1) is not paid within a period of one hundred and twenty days from the date of option given thereunder, such option shall become void, unless an appeal against such order is pending.

7.2. It is undisputed that as per the Foreign Trade Policy applicable during the period, gold was not freely importable and it could be imported only by the banks authorized by the RBI or by others authorized by DGFT and to some extent by passengers. Therefore, gold which is a restricted item for import but which was imported without fulfilling the conditions for import becomes a

prohibited goods in terms of Section 2(33) and hence it liable for confiscation under Section 111(d) of the Customs Act. It is undisputed that Section (l) and (m) are also applicable in this case as the respondent had adopted an innovative method and it was not included in the declaration. Therefore, the gold was also liable for confiscation under these Sections.

8.1. The Hon'ble High Court Of Madras, in the case of Commissioner Of Customs (Air), Chennai-I V/s P. Sinnasamy reported in 2016 (344) E.L.T. 1154 (Mad.), relying on the judgment of the Apex Court in the case of Om Prakash Bhatia v. Commissioner of Customs, Delhi reported in 2003 (155) E.L.T. 423 (S.C.), has held that “ *if there is any prohibition of import or export of goods under the Act or any other law for the time being in force, it would be considered to be prohibited goods; and (b) this would not include any such goods in respect of which the conditions, subject to which the goods are imported or exported, have been complied with. This would mean that if the conditions prescribed for import or export of goods are not complied with, it would be considered to be prohibited goods. .... Hence, prohibition of importation or exportation could be subject to certain prescribed conditions to be fulfilled before or after clearance of goods. If conditions are not fulfilled, it may amount to prohibited goods.*” It is thus 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”.

8.2. Further, in para 47 of the said case the Hon'ble High Court has observed “*Smuggling in relation to any goods is forbidden and totally prohibited. Failure to check the goods on the arrival at the customs station and payment of duty at the rate prescribed, would fall under the second limb of section 112(a) of the Act, which states omission to do any act, which act or omission, would render such goods liable for confiscation.....*”. Thus failure to declare the goods and

failure to comply with the prescribed conditions has made the impugned gold “prohibited” and therefore liable for confiscation and the respondents thus, liable for penalty.

9. Once goods are held to be prohibited, Section 125 still provides discretion to consider release of the goods on redemption fine. Hon’ble Supreme Court in case of M/s. Raj Grow Impex [CIVIL APPEAL NO(s). 2217-2218 of 2021 Arising out of SLP(C) Nos. 14633-14634 of 2020 – Order dated 17.06.2021] has laid down the conditions and circumstances under which such discretion can be used. The same are reproduced below.

*71. Thus, when it comes to discretion, the exercise thereof has to be guided by law; has to be according to the rules of reason and justice; and has to be based on the relevant considerations. The exercise of discretion is essentially the discernment of what is right and proper; and such discernment is the critical and cautious judgment of what is correct and proper by differentiating between shadow and substance as also between equity and pretence. A holder of public office, when exercising discretion conferred by the statute, has to ensure that such exercise is in furtherance of accomplishment of the purpose underlying conferment of such power. The requirements of reasonableness, rationality, impartiality, fairness and equity are inherent in any exercise of discretion; such an exercise can never be according to the private opinion.*

*71.1. It is hardly of any debate that discretion has to be exercised judiciously and, for that matter, all the facts and all the relevant surrounding factors as also the implication of exercise of discretion either way have to be properly weighed and a balanced decision is required to be taken.*

10. A plain reading of the section 125 shows that the Adjudicating Authority is bound to give an option of redemption when goods are not subjected to any prohibition. There is no bar on the Adjudicating Authority allowing redemption of prohibited goods. This exercise of discretion will depend on the nature of the goods and the nature of the prohibition. For instance, spurious

drugs, arms, ammunition, hazardous goods, contaminated flora or fauna, food which does not meet the food safety standards, etc. are harmful to the society if allowed to find their way into the domestic market. On the other hand, release of certain goods on redemption fine, even though the same becomes prohibited as conditions of import have not been satisfied, may not be harmful to the society at large. In case of goods, such as, gold which become prohibited for violation of certain conditions, the Adjudicating Authority may allow redemption

11. Government notes that while allowing the redemption of the goods, the AA at paras 6 to 8 of his OIA has observed as under;

*"6. In this regard I find that Section 125 of Customs Act, 1962 provides that in case of prohibited goods the adjudicating authority **may** give an option of redemption and in this way he has discretionary power but for other than prohibited goods the adjudicating authority has to give option to pay fine in lieu of confiscation and in this way the adjudicating authority **shall** allow redemption to the offender:*

*"Whenever confiscation of any goods is authorised 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 the case 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 such goods have been seized.] an option to pay in lieu of confiscation such fine as the said officer thinks fit"*

*7. At this juncture I also find it worth to examine as to what has been construed as "Prohibited Goods" under Customs Act, 1962. In this regard I find that in terms of section 2(33) of Customs Act, 1962 "prohibited goods" means any goods the import or export of which is: subject to any prohibition under this Act or any other law for the time being in force but does not include any such goods in respect of which the conditions subject to which the goods are permitted to*



*be imported or exported have been complied with I find that import of gold jewellery is not subjected to any restrictions or prohibitions.*

*8. A plain reading of sub-section (2) of Section 125 of CA, 1962, shows that an option has to be given to the owner of the goods or where the owner is not known, to the person from whose possession or custody such goods have been seized. In the matter before me also, there is no indication in the order passed by the adjudicating authority that anybody else has claimed the goods. Undoubtedly, the gold has been seized from the possession of the appellant & there is no doubt about the ownership and since the Customs Act has clear provision in this regard, redemption can be given to the owner or to the person from whom goods have been recovered."*

12. Government finds that the AA has used his discretion in releasing the gold jewellery. The option to allow redemption of seized goods is the discretionary power of the adjudicating / appellate authority depending on the facts of each case and after examining the merits. Government observes that while allowing the goods to be redeemed, the AA has relied upon a host of cases where the adjudicating authority had released the gold of varying quantities and the same were accepted by the Department. Further, in the extant revision application, the applicant have not controverted the same. A case of parity and fairness was made out by the respondent before the AA.

13. Government further observes that there are a catena of judgements, over a period of time, of the Hon'ble Courts and other forums which have been categorical in the view that grant of the option of redemption under Section 125 of the Customs Act, 1962 can be exercised in the interest of justice. Some of these cases have been cited by the OIA.

14. Government finds that the AA has relied upon the precedent case laws on the subject and have applied the case laws judiciously while granting release of the gold jewellery. A case that the respondents were habitual offenders had not been made out. Basic contention of the applicant is that the gold had been handed over by R1 who was in transit i.e. an International flight to a R2 who

was travelling in the domestic sector. All these facts have been taken into account while imposing fine and penalty. Government finds that the AA has rightly held that the respondent no. 1 had claimed ownership of gold and investigations also failed to substantiate that the respondents were acting on behalf of somebody else. Moreover, the Government finds that the jewellery had a purity of 18 karats and R1 had also produced an invoice for purchase of the gold jewellery which establish that this is a case of non-declaration of the gold rather than smuggling. The AA has used discretion available under Section 125 of the Customs Act, 1962 and allowed the respondent no.1 to redeem the gold on payment of fine of Rs. 5,50,000/-. Government finds the OIA passed by the AA to be legal and proper and is not inclined to interfere in the same.

15. Revision Application filed by the applicant is disposed of on above terms.

*Shrawan*  
18/11/23  
( SHRAWAN KUMAR )

Principal Commissioner & ex-officio  
Additional Secretary to Government of India

**ORDER No. 10 /2023-CUS (WZ) /ASRA/MUMBAI DATED 10.01.2023**

To,

1. Pr. Commissioner of Customs, CSMI Airport, Terminal – 2, Sahar, Mumbai – 400 099.
2. Shri. Mohammed Anas Ruknuddin, H.No. 2, Khalifa Street, Bhatkal – 581320, Uttara Kannada.
3. Shri. Gulzar Ahmed, Naseman Street, Magdum Colony, Bhatkal – 581320, Uttara Kannada.

Copy To,

1. Sr. P.S. to AS (RA), Mumbai.
2. Guard File.
3. File Copy.
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