

REGISTERED
SPEED POST



GOVERNMENT OF INDIA
MINISTRY OF FINANCE
(DEPARTMENT OF REVENUE)

8th Floor, World Trade Centre, Centre - I, Cuffe Parade,
Mumbai-400 005

F.No. 371/66/B/WZ/2019-RA / 560 : Date of Issue : 01.02.2023

ORDER NO. 148 /2023-CUS (WZ/SZ)/ASRA/MUMBAI DATED 30.01.2023
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.

(i). F.No. 371/66/B/WZ/2019-RA

Applicant : Shri. Manoj Kumar

Respondent : Pr. Commissioner of Customs, CSMI Airport, Mumbai -
400 099.

Subject : Revision Application filed, under Section 129DD of the
Customs Act, 1962 against the Order-in-Appeal.
No. MUM-CUSTM-PAX-APP-732/2018-19 dated 19.11.2018
issued on 27.11.2018 through F.No. S/49-531/2016/AP
passed by the Commissioner of Customs (Appeals), Mumbai -
III.

ORDER

This revision application has been filed by Shri. Manoj Kumar (hereinafter referred to as the Applicant) against the Order-in-Appeal No. MUM-CUSTOM-PAX-APP-732/2018-19 dated 19.11.2018 issued on 27.11.2018 through F.No. S/49-531/2016/AP passed by the Commissioner of Customs (Appeals), Mumbai – III.

2. Brief facts of the case are that the applicant was intercepted by Customs Officers on 05.05.2015 at the exit gate of the CSMI Airport, Mumbai having earlier arrived from Bangkok onboard Jet Airways Flight No. 9W-0067 / 04.05.2015. Applicant had cleared himself alongwith his baggage through the green channel. Applicant had filed a blank Customs Declaration Form i.e. total value of dutiable goods being imported in col. 9 was left blank. To specific query put forth by the Officers whether he was carrying any dutiable items, the applicant had replied in the negative. Applicant was asked to pass through the door frame metal detector (DFMD) which indicated presence of some metal on his person. Accordingly, a search of his person was carried out which led to the recovery of one cut piece of FM gold bar, of 999.9% purity, weighing 430 grams, valued at Rs. 10,63,792/- which had been kept concealed in the socks worn by the applicant.

3. The Original Adjudicating Authority (OAA), viz, Addl. Commissioner of Customs, CSMI Airport, Mumbai vide Order-In-Original No. ADC/RR/ADJN/322/2016-17 dated 28.09.2016 through F.No. S/14-5-299/2015-16 Adjn [SD/INT/AIU/199/2015 AP'B' ordered for the absolute confiscation of the one cut pieces of FM gold bar, of 999.9% purity, totally weighing 430 grams and valued at Rs. 10,63,792/- under Section 111(d), 111(l)

& 111(m) of the Customs Act, 1962 and a penalty of Rs. 1,00,000/- under Section 112 (a) & (b) of the Customs Act, 1962 was imposed on the applicant

4. Aggrieved by the said order, the applicant preferred an appeal before the appellate authority (AA) viz, Commissioner of Customs (Appeals), Mumbai - III, who vide Order-In-Appeal No. MUM-CUSTOM-PAX-APP-732/2018-19 dated 19.11.2018 issued on 27.11.2018 through F.No. S/49-531/2016/AP did not find any reason to interfere in the impugned OIO passed by the OAA. Also, the personal penalty imposed on the applicant under Section 112 (a) and (b) of the Customs Act, 1962 was found commensurate with the offence committed.

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

5.01. that the order passed by the appellate authority was bad in law and unjust; that the OIA has been passed without due consideration to the documents on record and facts of the case; that the goods were neither restricted nor prohibited was not appreciated by the AA; that no previous case has been registered against applicant; that evasion of Customs duty can be done only in respect of dutiable goods and not on prohibited goods; that option to redeem the goods under Section 125 of the Customs Act, 1962 ought to have been granted by the AA; that various judgements passed by the Apex Court, High Courts, Tribunal have held that gold was neither restricted nor prohibited and therefore it should not be confiscated absolutely.

5.02. to buttress their case, the applicant has relied upon the following case laws;

(i). Hargovind Das K Joshi v/s. Collector of Customs [1992 (61) ELT 172 SC], Absolute confiscation of goods without considering question of redemption on payment of fine although having discretion to do so under Section 125, matter remanded back.

(ii). Alfred Menezes v/s. Commissioner of Customs (Mumbai) [2011 (236) ELT 587 (Tri-Mumbai)], Section 125(1) ibid clearly mandates

that it is within the power of the adjudicating authority to offer redemption of goods even in respect of prohibited goods.

(iii). T. Elvarasan v/s. Commr. Of Customs (Airport), 2011-266-ELT-167-Tri-Madras on the issue of gold chains brought from Singapore and seized on the ground of non-declaration on arrival; passenger living abroad for more than 6 months and entitled to import gold; gold not prohibited item option to redeem the goods; impugned gold ordered to be released provisionally subject to adjudication proceedings.

(iv). Yakub Ibrahim Yusuf v/s. Commissioner of Customs, Mumbai [Final Order No. A/362/2010-WBZ-II/(CSTB) dated 28.10.2010 in Appeal no. C/51/1996-Mum] [2011-263-ELT-685-Tri-Mumbai]. *Term prohibited goods refers to goods like arms, ammunition, addictive drugs, whose import in any circumstance would danger or be detriment to health, welfare or morals of people as whole and makes them liable to absolute confiscation.*

(v). Mohini Bhatia vs. Commr. Of Customs [1999-106-ELT-485-Tri-Mumbai on prohibited goods and restricted goods. Gold was not included in the part II of restricted item.

(vi). In Universal Traders vs. Commissioner [2009-240-ELT-A78-SC], the apex court allowed redemption of exported goods being not prohibited.

(vii). In Gauri Enterprises vs. C.C Pune [2002-145-ELT-706-Tri-Bang], held that if similar goods had been released on fine earlier, selective absolute confiscation was not called for, Absolute Confiscation should be exception rather than a rule.

(viii). In Shaik Jamal Basha v. Government of India 1997 (91) ELT 277 (A.P.) the Hon'ble High Court held that gold is allowed for import on payment of duty and therefore Gold in the form other than ornaments imported unauthorized can be redeemed.

(ix). In VP Hameed v. Collector of Customs, Mumbai - 1994 (73) ELT 425 (Tri.) it was held that there is no bar in allowing redemption of gold being an item notified under Section 123 of Customs Act, 1962 or for any other reason.

(x). In P. Sinnasamy v. Commissioner of Customs, Chennai 2007 (220) ELT 308 (Tri-Chennai), the Hon'ble Court allowed redemption of absolutely confiscated gold observing that option to redeem the gold to be given as there is no bar against such option by reason of goods being an item notified under Section 123 of Customs Act, 1962 or for any other reason.

- (xi). In Union of India Vs Dhanak M. Ramji - 2009 (248) ELT 127 (Bom.) affirmed vide 2010 (252) ELT A102 (S C) it was held that gold is not a prohibited item and discretion of redemption can be exercised to the person from whom it was recovered.
- (xii). In Kadar Mydin v. Commissioner of Customs (Preventive), West Bengal - 2001 (136) ELT 758 it was held that in view of the liberalised gold policy of the Government, absolute confiscation is unwarranted and redemption can be allowed.
- (xiii). In Sapna Sanjeev Kohli v. Commissioner of Customs, Airport, Mumbai - 2008 (230) ELT. 305 the Tribunal observed that the frequent traveller was aware of rules and regulations and absolute confiscation of gold jewellery not warranted which may be cleared on payment of redemption fine.
- (xiv). (G.O.I.); it was held that absolute confiscation is not warranted and redemption of gold should be allowed.
- (xv). Halithu Ibrahim v. CC [2002-TIOL 195-CESTAT-MAD. = 2002 (148) ELT 412 (Tribunal); it was held that absolute confiscation is not warranted and redemption of gold should be allowed.
- (xvi). Krishnakumari v. CC, Chennai - 2008 (229) ELT 222 (Tri-Chennai) ; it was held that absolute confiscation is not warranted and redemption of gold should be allowed.
- (xvii). S. Rajagopal v. CC, Trichy - 2007 (219) ELT 435 (Tri-Chennai); it was held that absolute confiscation is not warranted and redemption of gold should be allowed.
- (xvii). M. Arumugam v. CC, Tiruchirappalli, 2007 (220) ELT 311 (Tri-Chennai); it was held that absolute confiscation is not warranted and redemption of gold should be allowed.
- (ixx). In the COMMR. OF C. EX. & S.T., LUCKNOW VI MOHD. HALIM MOHD. SHAMIM KHAN Final Order No. A/71054/2017-SM(BR), dated 13-9-2017 in Appeal No. C/70595/2016, reported in 2018 (359) E.L.T 265 (Tri-All.) ; Only prohibited goods cannot be released on payment of redemption fine Gold not being prohibited goods, cannot be confiscated absolutely - Order permitting release of such gold on payment of redemption fine in lieu of confiscation upheld.
- (xx). Commissioner of Customs, Kandla v/s. Deluxe Exports. Order nos. 2064-2076/2000-WBZ/C-II dated 25.07.2000 in Appeals No. C/368, 554 to 564/2000. Adjudication Authority not to decide or investigate as to who is the owner of the goods.

Under the circumstances, the applicant has prayed to the Revision Authority that the gold may be released on payment of nominal redemption fine as per Section 125 of the Customs Act, 1962 alongwith applicable duty; personal penalty may be reduced or to pass any other order as deemed fit and proper.

6. The respondent vide their written submission bearing F.No. Aircus/Review/1717/2018-19 dated 06.05.2020 has stated that; the gold had been cleverly concealed inside the socks worn by the applicant; that relevant part in the CDF had been left blank; that he had failed to make a true declaration in terms of Section 77 of the Customs Act, 1962; that the green channel facility was meant for passengers who do not have anything to declare and the applicant had surreptitiously attempted to remove the gold;

7.01. that they rely on the following case laws,

- (a). Surjeet Singh Chhabra vs. UOI,[1997-89-ELT-646-SC] on the issue of confession though retracted, is an admission and binds the petitioner,
- (b). Apex Court's Order in the case of K.I Pavunny vs. Asstt. Collector (HQ), C.Ex, Cochin [1997-90-ELT-241-SC] on the issue that confessional statement made to Customs officials is admissible evidence,
- (c). Abdul Razak vs. UOI [2012-275-ELT-300 (Ker)] on the issue that appellant did not have right to get the confiscated gold.
- (d). In P. Sinnasamy v. Commissioner of Customs, it is held that non-fulfilment of conditions tantamount to prohibition.
- (e). Om Prakash Bhatia vs Commissioner of Customs, Delhi 2003(155) ELT 423 (S.C) it is held that non-fulfilment of conditions tantamount to prohibition.
- (f). Board's Circular No. 495/5/92-Cus-VI dated 10.05.1993 on the issue of no option to redeem if the goods had not been declared.
- (g). Baburaya Narayan Nayak vs. Commr. of Customs, Bangalore [2018-364-ELT-811-Tri-Bang] upheld absolute confiscation as evidence of licit purchase had not been provided.

Respondent has prayed to the Revision Authority to reject the revision application filed by the applicant.

7. The applicant has filed an application for the condonation of delay as the filing of the revision application had got delayed due to some domestic problems.

8. Personal hearing in the case through the online video conferencing mode was scheduled for 29.09.2022. Shri. N.J Heera, Advocate for the applicant appeared for personal hearing on 29.09.2022 and submitted that applicant brought small quantity of gold for personal use. He further submitted that gold should be released on nominal fine and penalty.

9. On the issue of condonation of delay, Government notes that the OIA was issued on 27.11.2018 and the applicant has stated that the same had been communicated to him on 04.12.2018. It is seen that the statutory 3 months period had expired on 04.03.2019. A further extension / condonable period of 3 months is available to the applicant. It is seen that the applicant has filed the revision application on 03.04.2019 and cause for delay was domestic problems. The delay is well within the further extension / condonable period of 90 days. Therefore, the Government accepts the COD application filed by the applicant and condones the delay.

10. The Government has gone through the facts of the case and notes that the applicant had failed to declare the goods in his possession as required under Section 77 of the Customs Act, 1962. The applicant had not disclosed the goods in the CDF filed by him and had he not been intercepted would have walked away with the impugned FM cut bar of gold bar without declaring the same to Customs. By his actions, it was clear that the applicant had no intention to declare the impugned gold to Customs and pay Customs duty on it. The Government finds that the confiscation of the one cut piece of the gold bar was therefore, justified.

11. 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”.

12. 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 ‘Applicant’ thus, liable for penalty.

13. Once goods are held to be prohibited, Section 125 still provides discretion to consider release of goods on redemption fine. Hon'ble Supreme Court in the 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.

14. The quantity of the gold under import is small and is not of commercial quantity. The gold bar had been kept inside the socks worn by the applicant. Government notes that at times travelers resort to such safe keeping for safety reasons to avoid theft of their valuables. There are no allegations that the applicant is a habitual offender and was involved in similar offence earlier. The facts of the case indicate that it is a case of non-declaration of gold, rather than a case of smuggling for commercial considerations. Under the circumstances, the seriousness of the misdemeanour is required to be kept in mind when using discretion under Section 125 of the Customs Act, 1962 and while imposing quantum of penalty.

15. The absolute confiscation of the gold, leading to dispossession of the applicant of the cut piece gold bar in the instant case is therefore, harsh and not reasonable. Government therefore, sets aside the impugned order of the

appellate authority. The impugned cut piece of the FM gold bar, totally weighing 430 grams and valued at Rs. 10,63,792/- is allowed to be redeemed on payment of fine of Rs. 2,00,000/- (Rupees Two Lakhs only). The Government finds that the penalty of Rs. 1,00,000/- (Rupees One lakh only) imposed on the applicant under Section 112(a) & (b) of the Customs Act, 1962 is appropriate and commensurate with the omission and commission committed and the same does not merit interference.

16. Revision Application is disposed of on the above terms.


(SHRAWAN KUMAR)

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

ORDER NO. 148/2023-CUS (WZ)/ASRA/MUMBAI DATED 30.01.2023.

To,

1. Shri. Manoj Kumar, WZ-635/B, Nangal Raya, New Delhi 110 046
2. Pr. Commissioner of Customs, Chhatrapati Shivaji Maharaj International Airport, Terminal 2, Level – II. Sahar, Mumbai 400 099.

Copy to:

1. A.M Sachwani / V.M Advani / N.J Heera / R.R Shah, Advocates, Nulwala Bldg, Ground Floor, 41 Mint Road, Opp. G.P.O, Fort, Mumbai – 400 001.
2. Sr. P.S. to AS (RA), Mumbai.
3. File Copy.
4. Notice Board.