



GOVERNMENT OF INDIA
MINISTRY OF FINANCE
(DEPARTMENT OF REVENUE)

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

F.No. 371/198/B/2018-RA / 759 : Date of Issue : 06.02.2023

ORDER NO. XGA/2023-CUS (WZ)/ASRA/MUMBAI DATED 31.01.2023
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.

Applicant : Late Harshad Jayant Shinde, through his representative
Shri Jayant Hanumant Shinde & Ms Sunita Jayant
Shinde

Respondent: Commissioner of Customs (Appeals), Mumbai-III.

Subject : Revision Application filed, under Section 129DD of the
Customs Act, 1962 against the Orders-in-Appeal No.
No.MUM-CUSTM-PAX-APP-616/2018-19 dated 28.09.
2018 [(DOI: 10.10.2018) [F.No.S/49-461/2016] passed
by the Commissioner of Customs (Appeals), Mumbai
Zone-III

ORDER

This revision application has been filed by Mr Jayant Hanumant Shinde and Ms Sunita Jayant Shinde, (hereinafter referred to as the Applicant), the Authorized person of Late Harshad Jayant Shinde (hereinafter referred to as the Passenger) against the Order-in-Appeal No. MUM-CUSTOM-PAX-APP-616/2018-19 dated 28.09.2018 [DOI: 10.10. 2018] [F. No: S/49-461/2016] passed by the Commissioner of Customs (Appeals), Mumbai Zone -III.

2. Brief facts of the case are that the Late Harshad Jayant Shinde, the passenger holding Indian Passport No. F 8038215 was intercepted by the Officers of AIU, CSI Airport, Mumbai on 19.03.2015, after he crossed the green channel and proceeded towards the exit gate at CSMI Airport, Mumbai, having earlier arrived from Sharjah by Air Arabia Flight No. G9 401/19.03.2015. On asking if he was carrying any contraband/dutiable goods, he replied in negative. During personal search the passenger was found in possession of 1 crude gold chain totally weighing 500 gms valued at Rs.11,81,250/- from the neck of the passenger. The said goods were seized by the officers under the reasonable belief that the same was smuggled into India in contravention to the provisions of the Customs Act, 1962.

3. The Original Adjudicating Authority (OAA), viz, Additional Commissioner of Customs CSI Airport, Mumbai, vide Order-In-Original No. ADC/RR/ADJN/249/2016-17 dated 05-08-2016 ordered for absolute confiscation of 1 crude gold chain totally weighing 500 gms valued at Rs.11,81,250/- under Sections 111(d), 111(l) & 111(m) of the Customs Act, 1962 and a personal penalty of Rs. 1,20,000/- was imposed under Section 112 (a) & (b) of the Customs Act, 1962.

4. Aggrieved by the said order, the applicant preferred an appeal before the appellate authority (AA) viz, Commissioner of Customs (Appeals), Mumbai Zone-III, who vide Order-In-Appeal No. MUM-CUSTOM-PAX-APP-616/2018-19 dated 28.09.2018 [DOI: 10.10. 2018] [F.No: S/49-461/2016] upheld the OAA's Order.

5. Aggrieved with the above order of the appellate authority with regards to the absolute confiscation of gold and also w.r.t the penalty imposed, the Applicant has filed this revision application on the following grounds;

5.01 that the impugned order passed by the Respondent is erroneous, bad in law and requires to be quashed and set aside.

5.02 that the OIA is illegal, short of proper and detailed reasoning.

5.03 that the OIA has erred in interpreting and applying the provisions of law.

6. Personal hearings in the case were scheduled on 04.08.2022, 26.08.2022, 23.09.2022 and 30.09.2022. However, no one appeared before the Revisionary Authority for personal hearing on any of the appointed dates for hearing. Since sufficient opportunity for personal hearing has been given in the matter, the case is taken up for decision on the basis of the available records.

7. The Government has gone through the facts of the case and notes that the passenger had failed to declare the goods in his possession as required under Section 77 of the Customs Act, 1962. The passenger had not disclosed that he was carrying dutiable goods and had he not been intercepted would have walked away with the 1 crude gold chain totally weighing 500 gms valued at Rs.11,81,250/- without declaring the same to Customs. By his actions, it was clear that the passenger had no intention to declare the impugned gold

to Customs and pay Customs duty on it. The Government finds that the confiscation of the impugned gold was therefore justified.

8. 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”.

9. 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 ‘Applicants’ thus, liable for penalty.

10. 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.

11. The quantity of gold jewellery under import is small and is not of commercial quantity. In his statement the passenger claimed the ownership of the gold and that he purchased the gold from his business account profit. Government finds that the gold was not ingeniously concealed, it was found in the neck of the passenger. There are no allegations that the passenger 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.

12. The absolute confiscation of the gold, in the instant case is therefore, harsh and not reasonable. Government therefore, sets aside the impugned order of the appellate authority. The Government finds that the Revision Application is filed by the Authorized representatives of the passenger who have submitted the passenger's death certificate. It is seen that the passenger had expired on 20.10.2016. The Authorized representative has requested to set aside the OIA. Hence the impugned 01 crude gold chain totally weighing 500 gms valued at Rs.11,81,250/-is allowed redemption on payment of fine of Rs. 2,20,000/- (Rupees Two Lakh Twenty Thousand only) to the legal heir or the authorized representative of the applicant.

13. The Government finds that since the applicant has expired, the penalty of Rs. 1,20,000/- imposed on the applicant under Section 112(a) & (b) of the Customs Act, 1962 stands abated. In this regard, following two judgements are relevant:

a) CESTAT judgement of the 2010 (20) S.T.R. 204 (Tri. - Ahmd.) in case of M/s ABHAY INTELLIGENCE & SECURITY SERVICE Versus COMMISSIONER OF CENTRAL EXCISE, VADODARA wherein it is held that:

"Appeal to Appellate Tribunal - Maintainability of - Penalty contended as not recoverable on death of proprietor - Penalty being personal in case of proprietary firm, the same not recoverable from legal representative - Proprietor expired before filing of appeal - Proprietary firm gets dissolved with the death of proprietor - Appeal filed by legal representative on behalf of firm not maintainable - Sections 76 and 86 of Finance Act, 1994".

b) And also Apex Court in the case of Shabina Abraham v/s. Collector of C.Ex & Customs [2015(322) ELT 372 (S.C)].

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

Shrawan
21/1/23
(SHRAWAN KUMAR)

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

ORDER NO. \64/2023-CUS (WZ)/ASRA/MUMBAI DATED 3\ .01.2023.

To,

1. Late Mr Harshad Jayant Shinde, C/o Mr Jayant Hanumant shinde, F/601, Sai silicon valley, Balewadi, Pune-411045
2. Commissioner of Customs (Appeals), Mumbai-III, Awas Corporate Point, 5th Floor, Makwana Lane, Behind S.M.Road, Andheri-Kurla Road, Marol, Mumbai-59.
3. Commissioner of Customs, CSI Airport, Terminal-2, Level-2, Sahar, Andheri East, Mumbai-99.

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