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GOVERNMENT OF INDIA  
MINISTRY OF FINANCE  
(DEPARTMENT OF REVENUE)  
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F. No. 371/22/B/16-RA | 887

Date of Issue | 02.02.2021

ORDER NO. 20/2021-CUS (WZ)/ASRA/MUMBAI DATED 04.02.2021 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 : Shri Divyesh Dhanvantray Gandhi

Respondent : Commissioner of Customs, Ahmedabad.

Subject : Revision Application filed, under Section 129DD of the Customs Act, 1962 against the Order-in-Appeal No. AHD-CUSTM-000-APP-247-15-16 dated 30.11.2015 passed by the Commissioner of Customs (Appeals), Ahmedabad.



ORDER

This revision application has been filed by Shri Divyesh Dhanvantray Gandhi (herein after referred to as the Applicant) against the Order in appeal No. AHD-CUSTM-000-APP-247-15-16 dated 30.11.2015 passed by the Commissioner of Customs (Appeals), Ahmedabad.

2. Briefly stated facts of the case are that the applicant and his wife arrived at the SVPI Airport on 17.05.2013. Both the passengers opted for the green channel and handed over their disembarkation slip, declaring that they were not carrying any dutiable goods. On being asked whether they were carrying any dutiable goods they answered in the negative. The officers then directed them through the X-ray machine which indicated metal concealment in their hand baggage. Examination of their hand baggage resulted in the recovery of 12 gold bars and gold jewelry totally weighing 3640.40 gms valued at Rs. 92,55,048/- ( Rupees Ninety two lacs Fifty five Thousand and forty eight).

3. The Original Adjudicating Authority vide Order-In-Original No. 41/ADC-MRM/SVPIA/O&A/2015 dated 19.03.2015 ordered absolute confiscation of the impugned goods under Section 111 (l) and (m) of the Customs Act,1962 and imposed penalty of Rs. 10,00,000/- ( Rupees Ten Lacs) under Section 112 (a) of the Customs Act.

4. Aggrieved by the said order, the applicant filed appeal before the Commissioner (Appeals) who vide Order-In-Appeal No. AHD-CUSTM-000-APP-247-15-16 dated 30.11.2015 rejected the appeal of the applicant.

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

i. The Appellate authority had grossly violated the principles of natural justice by not having referred to the various judicial decisions relied upon by the applicant. The Commissioner (Appeals) has upheld the order without taking any cognizance of legitimate grounds of Appeal.

ii. The entire case is standing on the seizure panchanama dated 17.05.2013, the panchanama does not confirm that the passengers were to smuggle gold, as it only states that couple of passengers were to bring gold in huge quantity. The admission of the Applicant recorded through statements were retracted later before the adjudicating authority. The prior specific information is therefore concocted.

iii. The facts and events leading to the seizure lead to infer that narration detailed in the panchanama was far from the truth.



iv. Merely because he is a frequent flier, it cannot be said that he had knowledge about the permissible quantity of gold under the Baggage Rules., and it also not a case that on each such visits the Applicant had smuggled gold.

v. Apart from the Applicant, his wife also carried a portion of the gold and as she was coming to India after a long stay, she was eligible to carry 1 kg gold of payment of concessional customs duty in foreign currency.

vi. The impugned gold was wrapped in paper and simply placed in hand bag. This cannot by any stretch of imagination be termed as concealment. If they really desired to smuggle gold it would have been concealed in other baggage so that the same cannot be easily noticed.

vii. The declaration form ( embarkation slip was kept blank only for the purpose of declaring the details in the manner as suggested by the Customs Officers so as to avoid the allegation of misdeclaration.

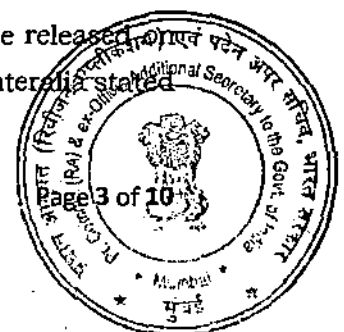
viii. It cannot be the case of the department that import of gold is prohibited or cannot be imported by a passenger. The quantity of gold brought by the Applicant can be considered as bonafide baggage. All dutiable articles, imported by a passenger in his baggage is restricted as per policy conditions -as provided under Customs and Baggage Rules by clause 3 (1) (h) of the Foreign trade ( Exemption of Application of Rules in Certain cases) Order, 1993. Gold brought in excess of the permissible quantity under the said notification can be allowed by charging duty at the rate prescribed under Notification No. 136/90-Cus dated 20.03.1990 dated 20.03.1990 as baggage.

ix. It was never the contention of the department that the goods were brought by the Applicant were prohibited goods, the only case made out against him was that the Applicant wanted to evade payment of Customs duties. Even though the Original adjudicating authority has termed the gold as smuggled and rendered them liable for confiscation, there is no justification for absolute confiscation as the gold could have been allowed to be redeemed on redemption fine as per section 125 of the Customs Act, 1962.

x. All the gold was brought by him for the marriage of his nephew, it is requested that the eligible quantity released and rest of that the gold be allowed to be re-exported.

xi. The Applicant cited case laws in favour of his case and prayed for setting aside the absolute confiscation of the gold and imposition of penalty or any other order as deemed fit in the facts and circumstances of the case.

6. Personal hearings in the case was scheduled on 05.12.2019, 12.12.2019, 10.12.2020 and 17.12.2020. Nobody attended the hearing on behalf of the department. The Advocate for the Applicant attended the personal hearing online on 17.12.2020. He contended that gold is not a prohibited item, therefore the same should be released on redemption fine or allowed to be reexported. In his written submissions he inter alia stated that



6.1 Option to redeem the goods was required to be given as import of gold whether in baggage or otherwise is not prohibited. In this regard attention is invited towards ITC(HS) - Schedule -I Chapter 98 especially Exim Code 9803 00 00 read with 2nd proviso to Rule 3(h) of Foreign Trade (Exemption from Application of Rules in Certain Cases) Order, 1993 which provides that the import of gold in any form including ornaments (but excluding ornaments studded with stones or pearls.) will be allowed as part of baggage by passengers of Indian Origin or a passenger holding a valid passport issued under the Passport Act, 1967 subject to following conditions, namely-

- (a) That the passenger importing the gold is coming to India after a period of not less than six months stay abroad;
  - (b) The quantity of gold imported shall not exceed 5 Kilograms per passenger;
  - (c) Import duty on gold shall be paid in convertible foreign currency.
- and
- (d) There will be no restriction on sale of such imported gold."

6.2 The learned Additional Commissioner has ignored the explanation to condition No. 35 of Notification No. 12/2012-Cus. dated 17.03.2012 as amended in as much as that from the said six months period of stay abroad, short visits, if any, made by the eligible passenger during the said period of six months shall be ignored if the total duration of stay on such visits does not exceed thirty days and such passenger has not availed of exemption under this notification or under the notification being superseded at any time of such short visits. It is admitted fact on records that such short visits do not exceed thirty days. Therefore, by any means import of gold as baggage cannot be considered as prohibited goods within the meaning of Section 3(2) ibid as well as Section 2(33) of the Customs Act, 1962. Therefore, order confiscating goods absolutely is liable to be set aside.

6.3 Attention is invited towards Sr. No. 321 of Notification No. 12/2012-Cos. dated 17.03.2012 as amended read with Corrigendum No. 334/1/2012-TRU dated 20.03.2012 read with Notification No. 26/2012-Cus. dated 18.04.2012 Gold bars and Jewellery), attracts duty of Customs @ 4% and 10% respectively / subject to condition No. 35. Thus, 2 Kg Gold (One Kg. gold by the applicant and one Kg Gold by applicant's wife) carried in one hand baggage as per panchnama and disembarkation slips) was importable on payment of said duty and balance quantity with duty @ 35% as per Notification No. 136/90-Cus. dated 20.03.1990 as amended read with tariff item 9803 00 00 of the First Schedule to the Customs Tariff Act, 1975. All dutiable articles, imported by passenger in his baggage as total quantity of Goods imported as baggage is less than 5 Kg.



6.4 Attention is invited towards the fact that even according to Show Cause Notice goods viz. Gold are not prohibited and therefore, there was no proposal to confiscate the Gold under Section 111(d) of the Customs Act, 1962 in the SCN. If the goods were prohibited department must have invoked the provisions of Section 111(d) of the Customs Act, 1962. Therefore, order holding the goods prohibited was far from the fact and even beyond the scope of show cause notice. It is settled position of law that any order beyond the scope of show cause notice is liable to be quashed on the ground alone. Thus, in any case order holding Gold as prohibited goods is liable to be quashed on this ground too.

6.5 Attention is invited towards relevant paragraphs of various decisions of Revisionary Authority and Tribunal in addition to decisions of Hon'ble Supreme Court and High Courts referred in grounds of revision application and submitted that ratio of the same is squarely applicable in the facts and circumstances of the case it is prayed that as per settled position of law and judicial discipline same may be followed.

- IN RE - Ashok Kumar Verma - 2019 (369) ELT 1677 (GOI) - Para 4 wherein Hon'ble Revisionary Authority has distinguished the decision of Honble Apex Court in the case of Om Prakash Bhatia Vs. Commissioner of Customs, Delhi - 2003 (155) ELT 423 (SC) and followed the ratio laid down by Hon'ble High Court of Madras in the cases of T. Elavarsan V. CC (Airport), Chennai - 2011 (266) ELT 167 (Mad.) and Hon'ble Andhra Pradesh in the case of Shaikh Jamal Basha Vs. GOI - 1997 (91) ELT 1277 (AP.)
- IN RE - Ranmeet Bhatia - 2018(364) ELT 1144 (G01)(Para 5)
- IN RE - Jatinder Singh - 2018 (361) EELT 958 (G01)(Para 4)
- Shaik Jamal Basha Vs. GOI - 1997 (91) ELT 277 (A.P.)(Para 3)
- Mohamed Ahmaed Mann Vs. Commr. of Cus., Chennai - 2006 (208 ELT 383 (Th. Chennai)(Para 3)
- Abdul Azeez Vs. Comrn. of Cus. (AIR), Chennai - 2009 (241) ELT 99 km. - Chennai)(Para4)
- IN RE - Mohd. Zia UI Hague - 2014 (314) ELT 849 (G01.) - Para 8.2 wherein Hon'ble Revisionary Authority has distinguished the judgement of Hon'ble High court of Madras in the case of CC(ikir), Chennai Vs. Samynathan Murugesan - 2009 (247) ELT 21 (Mad) and followed the ratio laid down by Hon'ble High Court of Madras in the case of Neyveli Lignite Corporation Ltd. Vs. UOI - 2009 (242) ELT 487 (Mad.)

In view of the above, it is prayed that order absolutely confiscating goods viz. Gold is totally erroneous and liable to be set aside. Even decisions on which the learned Additional Commissioner/Commissioner (Appeals) has relied upon in their orders



distinguished by Hon'ble Revisionary Authority as discussed above. Therefore, it is prayed that order absolutely confiscating the gold may be set aside.

6.6 In para 7 of the SCN, statement dated 07.06.2013 and 15.08.2013 of applicant is discussed wherein he had categorically deposed that "he had brought the aforesaid gold bar and ornaments from Dubai for the marriage of his nephew Shri Akshay Yogesh Gandhi "and" Gold Jewelleries are brought for my wife, my mother and my daughter". As submitted in para supra that quantity upto 5KG Gold can be imported as part of Baggage therefore, allegation of Commercial Purpose and Commercial Quantity" are far from the truth. It is also admitted facts on record that applicant and his wife were carrying one each hand baggage as per disembarkation card as well as panchnama dated 17.05.2013 and gold was kept on those hand baggage simply wrapped in paper and not concealed anywhere. Wrapping cannot be considered as concealment by any standard. As submitted in grounds of revision application, there was no intention to evade the payment of customs duty. Under the Customs Act, 1962 and Baggage Rules framed thereunder Bonafide Baggage should not be in commercial quantity is provided as goods specified under the said rules are personal belonging and of person uses and can be brought/imported as baggage without payment of tax. It does not mean that other goods cannot be brought and imported as baggage. As per tariff item 9803 00 00 All dutiable goods with the restriction specified in ITC(HS) can be imported as Baggage. Thus, the said allegations are far from the truth and without any base.

6.7 It is further submitted that it is admitted fact on record by way of statement under Section 108 of the Customs Act, 1962 that applicant is non-resident Indian and normally staying at Dubai only, goods were brought for the purpose of marriage and even payments were not made towards the Gold, goods may be allowed to re-export without payment of fine, penalty and duty of Customs, as per following settled position of law.

- IN RE - Mukadam Rafique Ahmed - 2011 (270) ELT 447 (GUI) • Mansukhlal Parmar Vs. Commr. of Cus., Hyderabad - 2003 (161) ELT 435 (Tri. -Bang.) • Groves Overseas Pvt. Ltd. Vs. Collector of Customs - 1990 (46) ELT 129 (Tribunal)
- Collector of Customs Vs. Mrs. Patel N. - 1992 (62) ELT 674 (GUI) • In Re - Maid. Ramzan - 1995 (75) ELT 207 (GUI) • Siemens Limited Vs. Collector of Customs - 1999 (113) ELT 776 (SC) • DIA Precious Jewellery Pvt. Ltd. Vs. CC (ACC 86 Import), Mumbai - 2014 (313) ELT 243 (Tri. - Mumbai)



6.8 In view of the above, it is prayed that order confiscating gold absolutely may be set aside and goods may be allowed to re-export without imposition of fine, penalty and payment of duty with consequential relief in the form of refund of duty already paid. Alternatively, order confiscating gold absolutely may be set aside with an option to pay bear minimum fine in lieu of confiscation (around 5% of value of goods i.e. equal to the profit likely to be earned on the goods as per practice followed by appellate authorities), payment of duty a 4% on 2Kg Gold as per Sr. No. 321 of Notification No. 12/2012-Cus. dated 17.03.2012 as amended and for balance quantity @ 36.05% as worked out in Annexure - A to the panchnama dated 17.05.2013 and bear minimum penalty under Section 112 of the Customs Act, 1962 on the grounds stated in the grounds of revision application. As per admitted facts on record, duty of Rs. 34,36,880/- as worked out in Annexure - A to the panchnama dated 17.05.2013 is already paid vide Challan No. 1/2013-14 dated 12.03.2014 (Page 78 of the Revision Application),

7. The Government has gone through the records of the case, written submissions and submissions made during personal hearing. Facts of the case reveal that applicant and his wife were intercepted on 17.05.2013 while crossing green channel at the Ahmedabad airport. On detailed scrutiny of the baggage in the presence of panchas, it was noticed that one hand baggage contained four heavy packets wrapped with paper. The packets contained 12 pieces of precious metal appearing to be gold. The other hand baggage revealed nine packets containing jewellery which also appeared to be of gold. Government approved valuer confirmed that 12 pieces are bars of pure gold (one bar weighing 1 kg. bearing mark "Johnson Matthey", one bar also weighing 1 kg. bearing mark "Suisse" and the remaining ten bars bore the mark "GIG"). On testing the nine packets of jewellery, the government approved valuer certified the same to be gold jewellery of 18, 21 and 22 carats and that all are machine made bearing mark 'GIG'.

8.1 I find original adjudication authority in para 17 has observed, *"As per Section 77 of the Customs Act, 1962 the owner of any baggage shall, for the purpose of clearing it, make a declaration of its contents to the proper officer. Hence, non-declaration on part of the notice has resulted in contravention of provisions of Section 77 of the Customs Act, 1962 as well as Rule 11 of Foreign Trade (Regulation) Rules, 1993. As per Section 111(l) of the Customs Act, 1962, any dutiable goods or prohibited goods which are not included or in excess of the declaration made under Section 77 is liable for confiscation. Similarly, goods are also liable for confiscation under Section 111(m) if the goods brought do not correspond in respect of value or in any other particular with the declaration made under Section 77. As the noticee had not declared the gold in the declaration form the said goods are liable for confiscation under Section 111(l) and 111(m) of the Customs Act, 1962, goods are held to be smuggled if there is any*



*omission on the part of the importer which would render the goods liable for confiscation under Section 111. Since, I have already held that the noticee having failed to declare the gold before the Customs authorities is liable for confiscation."*

8.2 Further, Adjudicating Authority under para 17.1 has noted "*Foreign Trade (Exemption from application of Rules in certain cases) Order, 1993 has been issued in terms of Section 3 of the Foreign Trade (Development and Regulation) Act, 1992. As per the order, the Regulation rules are not applicable for imports of gold in any form, including ornaments, through baggage if the passenger is importing the gold is coming to India after a period of not less than six months and the gold imported is not more than 5 kilograms. In other words, gold imported under baggage are free from any restrictions / prohibitions only if the passenger is coming to India after a period of six months."*

However, adjudicating authority did not consider the applicant an eligible passenger because of nine visits in five months, submission of the applicant that these were short visits, in total for less than thirty days, has not been considered. Applicant has submitted that not only he but his wife is also an eligible passenger. This has also not been considered by the adjudicating authority.

8.3 Regarding overseas stay of the Applicant, Adjudicating authority in its order under para 5 has observed that, "*He also stated that for the last two years, he was also serving on commission basis with M/s. Jasmin General Trading L.L.C Company and he earned approximately Rs.15,00,000/- to 30,00,000/- as a commission apart from salary; that in Dubai all facilities like House, Car etc. were being provided by his aforesaid company to him and approximately 2 1/ 2 years ago, he had taken his wife along with his children and his mother to Dubai and till date he is serving with M/s. Jasmin General Trading L.L.C. and the owner aforesaid company is Smt. Meenakumari. He also stated that in the year 2012 (month-June) he had started a partnership firm in the name and style of M/s. Paras Jewelry L.L.C. and included other partners viz. his mother Nirmalaben Dhavantrai Gandhi, Shri Devan Dhakan and Shri Mansur Ahmed Mansur Ali resident of Dubai and from June 2012, he visited India at his own expense. He had paid flight charges of the aforesaid visit through his credit card and their aforesaid firm M/s. Paras Jewelers L.L.C., Dubai is engaged in the work of trading wherein all the work related gold and silver were being done"*.

8.4 The above undisputed facts reveal that applicant is an eligible passenger to import gold up to 1 Kg as per the Notification No.12/12 as he had stayed more than 6 months abroad, before coming to India, Once applicant fulfills the conditions of the Notification 12/12 and is an eligible passenger to import gold and clear the gold on payment of concessional rate of duty, the import of gold by the applicant cannot be held prohibited.





8.5 Applicant has also submitted that Section 111(d) of the Customs Act, 1962 has not been invoked in the SCN, therefore, absolute confiscation of gold and gold jewellery is beyond the scope of the SCN. Hon'ble Madras High Court in 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 Honble Apex Court in the case of Sheikh Mohd. Omer V/s Collector of Customs, Calcutta and others, reported in 1970 (2) SCC 728 has laid down that the expression 'prohibition' used in section 111 (d) must be considered as a total prohibition. The Hon'ble Court ruled that "..... any goods which are imported or attempted to be imported contrary to "any prohibition imposed by any law for the time being in force in this country" is liable to be confiscated. "Any prohibition" referred to in that section applies to every type of "prohibition". That prohibition may be complete or partial. Any restriction on import or export is to an extent a prohibition. The expression "any prohibition" in Section 111(d) of the Customs Act, 1962 includes restrictions". 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, is deemed prohibited under section 111 (d) of the Customs Act, 1962.

8.6 Thus gold which is allowed to be imported by certain agencies / persons with conditions becomes prohibited only for not satisfying "any other law for the time being in force" as provided under Section 111(d) of the Customs Act, 1962. In absence of section 111(d) in the SCN, prohibition in relation to gold/ ornaments not declared by the passenger in baggage declaration form does not get attracted.

9.1 Government observes that department has submitted that the gold was not declared and therefore warrants absolute confiscation. In addressing this submission Government notes the Advocate of the applicant has submitted before the Original adjudicating authority that he is an eligible passenger to import gold as he fulfils the conditions required as per notification no. 12/2012 and therefore is eligible to bring one kilogram of gold on concessional rate of duty. Government however observes that a declaration is paramount in such situations so that the import suffers appropriate customs duty. A proper declaration was not submitted as required under section 77 of the Customs, Act, 1962, and the applicant as well as his wife were walking out through the green channel. Therefore, there was clear attempt to evade Customs Duty and hence the confiscation of the gold is justified. Considering the above facts and circumstances, confiscated gold and gold jewellery totally weighing 3640.400 grams and valued at Rs. 92,55,048/- is allowed to be redeemed on redemption fine of Rs. 25,00,000/- (Rupees Twenty five lakhs).



9.2 Applicant has requested for allowing reexport of goods. Government notes that applicant has already deposited duty in terms of order of the Hon'ble High Court, Gujrat. No case has been made out for reexport, therefore, the same cannot be considered.

9.3 Applicant has also requested to impose bare minimum penalty in the case. Considering facts & circumstances of the case, I find adjudicating authority has imposed reasonable penalty of Rs. 10 Lakh under Section 112(b) of the Customs Act, 1962. Therefore, I uphold penalty of Rs. 10 Lakh on applicant.

10. Revision application is partly allowed on the above terms.

*Shrawan*  
4/2/2021  
(SHRAWAN KUMAR)

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

ORDER No. 20/2021-CUS (WZ) /ASRA/MUMBAI

DATED 04.02.2021

To,

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Copy to:

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Rajkot 360 001.
2. Sr. P.S. to AS (RA), Mumbai.
3. Guard File. ,
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