

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. 371/49 & 49A/B/WZ/2018-RA | MS

Date of Issue : 22.01.23

ORDER NO. 252-253 /2023-CUS (WZ)/ASRA/MUMBAI DATED 20.02.2023 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.

Applicants (A1) : Shri. Mohammed Akram

(A2) : Shri. Sheikh Mohammed Tanweez Sheikh

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

Subject : Revision Application filed, under Section 129DD of the Customs Act, 1962 against the Orders-in-Appeal No. MUM-CUSTOM-PAX-APP-548 & 547/17-18 dated 28.09.2017 issued on 05.10.2017 through F.No. 2/49-343 & 342/2016AP passed by the Commissioner of Customs (Appeals), Mumbai -III.

ORDER

These revision applications have been filed by the (i). Shri. Mohammed Akram and (ii). Shri. Sheikh Mohammed Tanweez Sheikh [herein after referred to as the Applicants or alternately as Applicant no. 1 (A1) or Applicant No. 2 (A2)] against the Orders-in-Appeal No. MUM-CUSTOM-PAX-APP-548 & 547/17-18 dated 28.09.2017 issued on 05.10.2017 through F.No. 2/49-343 & 342/2016AP passed by the Commissioner of Customs (Appeals), Mumbai -III.

2(a). Brief facts of the case are that the Applicant no. 1, a domestic passenger who arrived from Goa onboard Air India Flight AI-330/09.08.2014 was intercepted on 09.08.2014 by Customs Officers near the exit gate of the Customs Arrival Hall, Terminal – 2, CSMI Airport, Mumbai after he had cleared himself through the green channel. It was ascertained that A1 had filed a nil customs declaration form showing that he did not possess any valuables. To query put forth to him for possession of any contraband / dutiable goods/ gold /foreign or Indian currency, A1 had replied in the negative. Examination of his hand bag led to the recovery of silver coloured assorted chains purported to be of gold which had been concealed in three heavy packets wrapped with brown cello tape. On being questioned, A1 revealed that the said 3 packets had been handed over to him by A2 near the duty free shop at the Customs Arrival Hall with instructions to handover the same to another person at his native village.

2(b). In quick follow up, A2 was intercepted at the exit gate, Arrival Hall, T2, CSMI Airport after he had cleared himself through the green channel. A2 was an International passenger having arrived at CSMI Airport, T2, Mumbai from Dubai onboard Jet Airways Flight No. 9W-537/08.08.2014. It was ascertained that A2 had left 'blank' the column 9 pertaining to possession of dutiable goods in the Customs declaration form filed by him. A2 was questioned about possession of any dutiable / contraband goods to which he had replied in the negative. To query about handing over any gold or gold jewellery to A1, A2 had replied in the negative. A2 upon being

confronted with A1 admitted that he had handed over 3 packets containing assorted jewellery to A1.

2(c). The total weight of the assorted yellow and silver coloured gold chains recovered from the 3 packets was 2465 grams and provisionally valued at Rs. 64,18,577/-. Later, these assorted chains were verified by the Government Approved Valuer who certified that the gold chains were of 18 carats with purity of 750%, totally weighing 2465 grams and valued at Rs. 48,13,923/-.

2(d). The applicants in their statements admitted knowledge, possession, concealment, carriage, non-declaration and recovery of the gold jewellery.

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/422/2015-16 dated 28.03.2016 issued on 31.03.2016 through F.No. S/14-5-563/2014-15 ADJN [SD/INT/AIU/559/2014 AP'B] ordered for the absolute confiscation of the 2465 grams of assorted gold chains, valued at Rs. 48,13,923/- under Section 111(d), 111(1) and 111 (m) of the Customs Act, 1962 and a penalty of Rs. 2,50,000/- each was also imposed on the applicants under Section of 112 (a) & (b) of the Customs Act, 1962.

4. Aggrieved by the said order, the applicants filed an appeal before the appellate authority viz, Commissioner of Customs (Appeals), Mumbai -III who vide Orders-In-Appeal No. MUM-CUSTM-PAX-APP-548 & 547/17-18 dated 28.09.2017 issued on 05.10.2017 through F.No. 2/49-343 & 342/2016/AP did not find any reason to interfere with the order passed by the OAA and accordingly, dismissed the appeals as being devoid of merit.

5. Aggrieved with the above order, the Applicant no. 1 has filed this revision application on the following grounds;

5.01. that A2 was his cousin brother; that A2 had requested him to keep the bag till he picked up his checked in bags; that while he was waiting, he had been intercepted and asked to proceed to the exit gate meant for domestic passengers; that he had no objection for gold items being released to A2 as he was its rightful owner.

A1 has prayed to set aside the penalty imposed on him or to grant any other relief as deemed fit and proper.

6. Aggrieved with the above order, the Applicant no. 2 has filed this revision application on the following grounds;

6.01. that the goods seized from A2 are not liable to be confiscated under Section 111(l), (d) and (m) of the Customs Act, 1962; that he was an NRI and is eligible to import 5 kgs of gold under Notification 12 of 2012 with 1 Kg of gold at concessional rate of duty; that statement had been retracted at first opportunity on 18.08.2014; that invoice dated 07.08.2014 had been submitted to the Customs; that said jewellery is of 18 carats; that A2 was the owner of the goods; that the goods brought by A2 was neither restricted nor prohibited; that the violation was out of ignorance and was technical in nature; that evasion of duty can be done only in respect of dutiable goods and not prohibited goods; that A2 ought to have been given an option under Section 125 of the Customs Act, 1962 to redeem the goods; that there are judgements of Apex Courts, High Courts, Tribunals wherein it is held that gold was not a prohibited item and the same was restricted and therefore it should not be confiscated absolutely but an option to redeem the same ought to be granted; 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.

6.02. to buttress his case, A2 has relied on the following case laws;
(a). UOI v/s. Dhanak M Ramji in W.P. No. 1397 with 1022 of 2009 dated 04.08.2009. Goods not prohibited but became prohibited due to violation of law, discretion to release on payment of redemption fine, is maintainable.

(b). 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.

(c). 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.*

(d). 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.

A2 has prayed to set aside the order passed by the OAA and gold jewellery may be released under Section 125 of the Customs Act, 1962 and under Notification 12/2012 Cus; to reduce penalty or to pass any other order as deemed fit and proper.

7. The applicants have filed applications for condonation of delay of 8 weeks and have expressed their apologies and have prayed that the delay may be condoned.

8. Personal hearing in the case was scheduled through the online video conferencing mode for 02.08.2022. Shri. N.J Heera, Advocate for the applicants attended the physical hearing and submitted copies of judgements in the case of Commr. Of Customs, New Delhi vs. Ashwini Kumar alias Amannullah (2021-376-ELT-321-Tri-Delhi) where tribunal allowed redemption of gold. He also submitted a copy of compounding order 2/2022-23 dated 28.04.2022 passed by Chief Commissioner, Zone – III, Customs, Mumbai allowing compounding of an offence in a case where over 1 kg gold was recovered. He requested to allow redemption of gold on nominal fine and penalty. None appeared for the respondent.

9. On the issue of condonation of delay, Government notes that the revision applications were filed on 14.03.2018. The OIA is issued on 05.10.2017. The

applicants have stated that they had received the OIA on 12.10.2017. Accordingly, the applicants were required to file the same by 10.01.2018 i.e. within 3 months. Further, an extension period of 3 months was available to the applicants which would have expired on 10.04.2018. Government notes that these revision applications were filed on 14.03.2018 which is within the extension period i.e. 3 months + 3 months and the prayer is accepted and delay is condoned.

10. The Government has gone through the facts of the case and notes that the applicant no. 2 who was an international passenger and was carrying a large quantity of gold jewellery while in transit through Mumbai and had handed over the same to applicant no. 1 who was a domestic passenger. The applicants had adopted a unique and ingenious method to smuggle the gold by exchanging the gold jewellery while in transit from an International flight to domestic flight to hoodwink the Customs and evade payment of Customs duty. The applicants had not declared the dutiable items. The applicants had both not filed a true declaration to the Customs and had clearly failed to declare the goods to the Customs at the first instance as required under Section 77 of the Customs Act, 1962. The method used by the respondent can be termed to be ingenious in more than one way i.e. (i). gold in the form of jewellery, (ii). handing over the packets in Customs arrival hall while in transit. It also reveals that the act committed by the applicants was conscious and pre-meditated. The applicants harboured no intention to declare the gold in their possession to Customs. Had they not been intercepted, the applicants would have gotten away with the gold jewellery. The Government finds that the confiscation of the gold is 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 ‘applicants’ 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 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. Government observes that the quantum of gold attempted to be smuggled was quite large and in commercial quantity. Even though the gold chains are of 18 karats, the quantum of gold in 2465 grams would be about 1850 grams. The manner adopted to smuggle the gold jewellery is required to be considered. The applicants, as stated above, had adopted an ingenious method to smuggle the gold jewellery and hoodwink the authorities and evade payment of Customs duty. The method adopted by the applicants was ingenious, clever, conscious and premeditated which reveals the clear intention of the applicants to evade duty and smuggle the gold into India. The circumstances of the case, as stated above probates that the applicants had no intention of declaring the gold to the Customs at the airport. All these have been properly considered by the Original Adjudicating Authority while absolutely confiscating the 2465 grams of gold jewellery.

15. The main issue in the case is the quantum of gold jewellery and the manner in which the impugned gold jewellery was being brought into the Country. The option to allow redemption of seized goods is the discretionary power of the adjudicating authority depending on the facts of each case and after examining the merits. In the present case, the manner of concealment being ingenious, clever with a conscious and firm intent, this being a clear attempt to smuggle large quantity of gold jewellery, is a fit case for absolute confiscation as a deterrent to such offenders. Thus, taking into account the facts on record and the gravity of offence, the

adjudicating authority had rightly ordered the absolute confiscation of the gold jewellery which has been upheld by the AA. But for the intuition and the diligence of the Customs Officer, the gold would have passed undetected. Hon'ble Delhi High Court in the case of Jain Exports Vs Union of India 1987(29) ELT753 has observed that, "*the resort to Section 125 of the C.A. 1962, to impose fine in lieu of confiscation cannot be so exercised as to give a bonanza or profit for an illegal transaction of imports.*". The redemption of the gold will encourage non bonafide and unscrupulous elements to resort to concealment and bring gold. If the gold is not detected by the Custom authorities, the passenger gets away with smuggling and if not, he has the option of redeeming the gold. Such acts of mis-using the liberalized facilitation process should be meted out with exemplary punishment and the deterrent side of law for which such provisions are made in law needs to be invoked. The absolute confiscation of the gold would act as a deterrent against such persons who indulge in such acts with impunity. Therefore, Government is in agreement with the order passed by the appellate authority which has upheld the OIO passed by the OAA.

16(a). During the personal hearing, the Advocate for the applicants cited the case passed by Hon'ble CESTAT, Delhi in the case of Ashwini Kumar alias Aammanullah (2021-376-ELT-321-Tri-Delhi). Government notes that this case has been stayed by the Hon'ble High Court, New Delhi vide its orders dated 27.09.2021 and 31.03.2022 in CUSAA 37/2021. Since, the order of CESTAT has been stayed, the same cannot be relied upon.

16(b). Also, during the personal hearing, the Advocate for the applicants mentioned about a compounding order no. 2/2022-23 dated 28.04.2022 passed by Chief Commissioner, Zone - III, Mumbai allowing compounding of an offence in a case where over 1 kg gold had been recovered. Government notes that the Compounding of offences pertains to waiver of launching of prosecution against an accused. This cannot be a precedent issue for this case.

17. The Government finds that the penalty of Rs. 2,50,000/-each imposed under section 112 (a) by the original adjudicating authority on the applicants which has

been upheld by the AA, is commensurate with the omissions and commissions committed. Government is not inclined to interfere in the same.

18. In view of the above, the Government upholds the OIA passed by the AA as the same is legal and proper. These two revision applications filed by the applicants fails.

19. For the aforesaid reasons, the Revision Applications are hereby, dismissed.

Shrawan
20/2/23
(SHRAWAN KUMAR)

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

ORDER No. /2023-CUS (WZ) /ASRA/MUMBAI DATED .02.2023

To,

1. Shri. Mohammed Akram, House No. 8-3-16, Yusuf Manzil, Kungbutu, Kadiyali, Near Bus Stop, Udipi – 576 115.
2. Shri. Sheikh Mohammed Tanweez Sheikh, 2-3, Near Jumma Masjid, Thimmanna Kudru, Paduthonse, Kemmanu, Udupi – 576 115.
3. Pr. Commissioner of Customs, CSMI Airport, Terminal – 2, Sahar, Mumbai – 400 099.

Copy To,

1. Shri. N.J Heera and others, Advocates, Nulwala Building, 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.