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SPEED POST



GOVERNMENT OF INDIA  
MINISTRY OF FINANCE  
(DEPARTMENT OF REVENUE)

8<sup>th</sup> Floor, World Trade Centre, Centre - I, Cuffe Parade,  
Mumbai-400 005

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F.No. 371/149A, B & C/B/WZ/2022-RA : Date of Issue : 13.09.2022  
3741

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ORDER NO. 257-259/2022-CUS (WZ)/ASRA/MUMBAI DATED 12.09.2022  
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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(i). F.No. 371/149A, B & C/B/WZ/2022-RA

Applicant : (i). Mr. Mohammad Derakhshaninia  
(ii). Ms. Mahsa Derakhshaninia  
(iii). Mrs. Masoumeh Sedaghati Koli.

Respondent : Principal Commissioner of Customs, CSMI Airport,  
Andheri East, Mumbai - 400 099.

Subject : Revision Application filed, under Section 129DD of the  
Customs Act, 1962 against the Orders-in-Appeal No. MUM-  
CUSTM-PAX-APP-1644/2021-22 dated 08.02.2022 issued  
through F.No. S/49-1002/2020 passed by the Commissioner  
of Customs (Appeals), Mumbai - III, Marol, Mumbai - 400 059.

**ORDER**

The revision applications have been filed by (i). Mr. Mohammad Derakhshaninia, (ii). Ms. Mahsa Derakhshaninia and (iii). Mrs. Masoumeh Sedaghati Kolli. (hereinafter referred to as the Applicants or as A1, A2 and A3 respectively) against the Order-in-Appeal No. MUM-CUSTOM-PAX-APP-1644/2021-22 dated 08.02.2022 issued through F.No. S/49-1002/2020 passed by the Commissioner of Customs (Appeals), Mumbai – III, Marol, Mumbai – 400 059.

2(a). Brief facts of the case are that the applicants who are all Iranian Nationals were intercepted on 17.05.2019 by Customs Officers at CSI airport, Mumbai where they had arrived from Tehran by Iran Air flight no. IR-810 / 17.05.2019. To query put forth to them whether they were in possession of any contraband, gold etc either in their baggage or person, the applicants had all replied in the negative. Personal search of the applicants, led to the recovery of assorted jewellery as per the details given below in Table No. 01. The Govt. Approved Valuer certified that all assorted gold jewellery as mentioned at Table No. 01 below were of 21 carats, its total gross weight was 1723 grams and its net weight was 1720 gms, totally valued at Rs. 44,75,975/-.

**TABLE No 01.**

Description	Qty recovered from Mr. Mohammed Derakhshaninia	Qty recovered from Ms. Mahsa Derakhshaninia	Qty recovered from Mrs. Masoumeh Sedaghatikolli	Total Qty.
Gold Chains	1		1	2
Gold Bracelet	1	1	2	4
Silver Coloured Gold Bangles	6	-	6	12
Silver Coloured Gold Rings	2	1	2	5
Silver Coloured Gold Chains	-	2	-	2
Silver Coloured Gold Bracelets	-	2	-	2
Gold earrings			2	2

2(b). In his statement, A1 informed that A2 was his daughter and that A3 was his wife. The applicants admitted to non-declaration, possession, carriage, ownership and recovery of the aforesaid gold jewellery found in their possession.

3. The Original Adjudicating Authority (OAA), viz, Addl. Commissioner of Customs, CSMI Airport, Mumbai vide Order-In-Original No. ADC/SKR/ADJN/92/2020-21 dated 06.08.2020 (DOI : 10.08.2020 ; DIN 20200879OB00003V827D ; S/14-5-256/2019-20/Adjn – SD/INT/AIU/ 194 /2019AP'A) ordered for the absolute confiscation of the impugned gold jewellery i.e. 12 gold bangles, 2 gold earrings, 5 gold rings, 4 gold chains and 6 gold bracelets all of 21 kt, totally weighing 1720 grams (gross wt. 1723 gms), and collectively valued at Rs. 44,75,975/- under Section 111(d), (l) and (m) of the Customs Act, 1962. Personal penalties of Rs. 4,50,000/- each were imposed on all the applicants under Section 112(a)(i) of the Customs Act, 1962.

4. Aggrieved by the said order, the applicants 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-1644/2021-22 dated 08.02.2022 (DIN : 20220267BB0000419309) did not find it necessary to interfere in the impugned OIO and upheld the order passed by OAA.

5. Aggrieved with the above order of the appellate authority, the Applicant have filed this revision application on the following grounds alongwith an exhaustive list of case citations;

5.01. they had been wearing / carrying the gold jewellery of 21Kt on their persons and the same had been purchased by them out of their own money..

5.02. the jewellery was for their personal use and had been in their possession for over 3 years.

- 5.03. the goods seized from them were only jewellery / accessories and not gold.
- 5.04. the 2 lady applicants had worn the jewellery and had not concealed it.
- 5.05. there was uncertainty and speculation of a war in their country just prior to their departure to India and therefore, had decided to carry all the jewellery with them during their travel for reason of security. Had they left the jewellery in Tehran, they feared that in the event of a war, the same would get destroyed.
- 5.06. that they relied on para 4 of the Circular no. 72/98-Customs dated 24.09.1998 issued from F.No. 520/136/92-CUS-VI issued by GOI, Ministry of Finance, Department of Revenue, New Delhi, which allows used personal effects of the tourist for duty free imports and that the personal jewellery possessed by them was 'personal effects'.
- 5.07. they relied on the Apex Court Order in respect of DRI vs Pushpa Lekhumal Tolani which had rebutted the presumption that the jewellery found in the baggage cannot be considered as personal effects owing to its high monetary value.
- 5.08. that the personal jewellery seized were not in original packing and that it was used personal jewellery / accessory which was not for sale.
- 5.09. that the jewellery had not been concealed and they were not involved in smuggling activity.
- 5.10. that the value of gold in Tehran was much higher than that in India and it was wrong to state that they had brought the same to India for sale.-
- 5.11. that gold was not a prohibited item and that gold jewellery was not liable for absolute confiscation.
- 5.12. that since gold was not a prohibited item, option to redeem the same in terms of Section 125 of the Customs Act, 1962 should have been granted to them.
- 5.13. that notification no. 50/2017 Customs dated 30.06.2017 cited in the SCN was applicable only to Indian citizens.
- 5.14. that on the issue of gold not being prohibited item, they have relied upon the following judgements,
  - (a). Apex Court Order in respect of Om Prakash Bhatia vs. Commr. Customs, Delhi [2003-155-ELT-423-SC]
  - (b). High Court's Order in respect of Shaikh Jamal Basha vs. GOI, [1997-91-ELT-277-AP].

(c). High Court, Bombay in respect of UOI v/s. Dhanak M Ramji in [2003-248-ELT-128-BOM].

(d). Apex Court Order in respect of Sapna Sanjiv Kohli vs Commr. Customs, Mumbai [2010-253-ELT-A52-SC].

(e). Punjab & Haryana High Court Order in respect Horizon Ferro Alloys Pvt. Ltd vs. UOI.

(f). etc.

5.15. that on the issue of prohibited goods, in the case of Commr. Of Customs Vs. Alfred Menezes, 2009-242-ELT-334-BOM, that Section 125(1) dealt with two situations, prohibited goods and other goods and it was held that in respect of prohibited goods on the issue of redemption the word used in Section 125 was 'may' redeem at the discretion of AA whereas, in respect of other goods, the expression used is 'shall' redeem.

5.16. that the applicants have referred to a plethora of case laws on the issue of redemption of gold.

5.17. the applicants have contended that the case laws cited by the AA was not applicable in their case.

5.18. the applicants have stated that the penalty of Rs. 4,50,000/- each, i.e. a total of Rs. 13,50,000/- was harsh and excessive and requested for reduction of the same.

5.19. they have stated that the penalty of Rs. 13,50,000/- was 30% of the value of the seized gold taken collectively and not individually and have prayed

Under the above facts and circumstances of the case, the Applicants have prayed that the Revision Authority be pleased to set aside the impugned OIA and permit to re-export the gold jewellery and drop proceedings.

6(a). Applicants came in person from Iran and requested for hearing. Hearing was conducted on 17.05.2022. During the hearing, they reiterated their earlier submissions and also submitted that they had brought their personal jewellery for safety purpose, that jewellery was old and used and it was worn on person and not secreted, that there is no offence against them. They requested for allowing re-export on nominal RF and penalty.

6(b). Personal hearing to the respondent via the online video conferencing mode was scheduled for 07.06.2022. However, neither anyone appeared nor any communication has been received in this regard.

6(c). The case is being taken up for a decision on the basis of evidence on record and submissions made by the applicants.

7. The Government has gone through the facts of the case and notes that the applicants had failed to declare the goods in their possession as required under Section 77 of the Customs Act, 1962. The applicants had not disclosed that they were carrying dutiable goods and had they not been intercepted they all would have walked away with the impugned gold jewellery without declaring the same to Customs. By their actions, it was clear that the applicants had no intention to declare the impugned gold to Customs and pay Customs duty on it. The Government finds that the confiscation of the gold jewellery 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 applicant thus, liable for penalty.

10. 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.*

11. The Government notes that the purity of the all gold jewellery recovered from the applicants are of 21 carats, duly certified as such by the Government Valuer. The records of the case reveal that most jewellery was worn . The gold jewellery had not been concealed. There are no allegations that the Applicants are habitual offenders and were involved in similar offences earlier. The facts of the case indicate that it is a case of non-declaration of gold jewellery being carried for safety by the family of three persons, 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 Customs Act, 1962 and while imposing quantum of penalty. Government notes that the applicants are foreign nationals and have prayed that they be allowed to re-export the gold jewellery and for reduction in the penalty amount which they have contended to be harsh and punitive.

12. Taken individually, the quantum of gold jewellery is small; that applicants are all foreign nationals, that gold jewellery was worn or had been found on their person; that gold jewellery had not been concealed, Government notes that as contended by applicants ratio of the order passed by the Hon'ble Kerala High Court in WP no. 6281 of 2014 in the case of Vigneswaran Sethuraman vs. U.O.I [2014 (308) ELT 394 (Ker.)] is broadly applicable to this case.

13. In a recent judgement passed by the Hon'ble High Court, Madras on 08.06.2022 in WP.no. 20249 of 2021 and WMP No. 21510 of 2021 in r/o. Shri. Chandrasegaram Vijayasundarm + 5 others in a similar matter of Sri. Lankans wearing 1594 gms of gold jewellery (i.e. around 300 gms worn by each person) upheld the Order no. 165 - 169/2021-Cus (SZ) ASRA, Mumbai dated 14.07.2021 in F.No. 380/59-63/B/SZ/2018-RA/3716, wherein Revisionary Authority had ordered for restoration of OIO wherein adjudicating authority



had ordered for the confiscation of the gold jewellery but had allowed the same to be released for re-export on payment of appropriate redemption fine and penalty.

14. In view of the foregoing paras, the Government finds that as the applicant had not declared the gold jewellery at the time of arrival, the confiscation of the same was justified. However, considering that all of the gold jewellery was of 21 carats, the same not being concealed and found on their person, the absolute confiscation of the same was harsh and not justified. In view of the aforesaid facts and considering that the applicants were all foreign nationals, option to re-export the impugned gold jewellery on payment of redemption fine should have been allowed. Considering the above facts, Government allows the impugned gold jewellery to be re-exported on payment of a redemption fine.

15. Government finds that the penalty of Rs. 4,50,000/- each imposed on the applicants under Section 112(a)(i) of the Customs Act, 1962 i.e. a total of Rs. 13,50,000/- collectively, constitutes nearly 30% of the value of the seized impugned gold jewellery. Government notes that the said penalty of Rs. 4,50,000/- imposed on each applicant is not commensurate with the value of gold jewellery seized from each of the applicants. It is noted that the bifurcated value of the gold jewellery recovered from individual applicant has not been provided by the respondent. Government finds that the said total penalty of Rs. 13,50,000/- imposed collectively on the 3 applicants is harsh and excessive and disproportionate to the omissions and commissions committed by them and the same deserves to be substantially reduced.

16. In view of the above, the Government sets aside the impugned order of the Appellate Authority in respect of the impugned gold jewellery detailed at Table No. 1 above, collectively weighing 1723 gms (gross wt) and valued at Rs. 44,75,975/-. The impugned gold jewellery mentioned at Table No. 1 above, all of 21 carats purity, having total gross weight of 1723 grams, and market value

of Rs. 44,75,975 is allowed to be re-exported on payment of a redemption fine of Rs. 8,50,000/- (Rupees Eight Lakhs Fifty Thousand only). The penalty of Rs. 4,50,000/- each imposed under Section 112(a)(i) of the Customs Act, 1962 is reduced to Rs. 1,50,000/- (Rupees One Lakh Fifty Thousand only) each on applicant A1, A2 & A3.

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

  
( SHRAWAN KUMAR )

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

ORDER NO. 257-259/2022-CUS (WZ)/ASRA/MUMBAI DATED 2.09.2022.

To,

1. Mr. Mohammad Derakhshaninia, Sadeghiyeh, East Ferdos Blvd., South Ramin Street, East Sonbol Alley No. 25, Unit - 2, Tehran - Iran.
2. Ms. Mahsa Derakhshaninia, Sadeghiyeh, East Ferdos Blvd., South Ramin Street, East Sonbol Alley No. 25, Unit - 2, Tehran - Iran.
3. Mrs. Masoumeh Sedaghati Kolli, Sadeghiyeh, East Ferdos Blvd., South Ramin Street, East Sonbol Alley No. 25, Unit - 2, Tehran - Iran.
4. Pr. Commissioner of Customs, Adjudication Cell, Chhatrapati Shivaji Maharaj International Airport, Sahar, Andheri East, Mumbai - 400 099.

Copy to:

1. Shri. Prakash Shingrani, Advocate, 12/334, New MIG Colony, Bandra East, Mumbai - 400 051.
2. Sr. P.S. to AS (RA), Mumbai.
3. File Copy.
4. Notice Board.