



GOVERNMENT OF INDIA
MINISTRY OF FINANCE
(DEPARTMENT OF REVENUE)

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

F.No. 371/416/B/2019-RA / 4686 : Date of Issue : 11/10/2022

ORDER NO. 286/2022-CUS (WZ)/ASRA/MUMBAI DATED 10.10.2022
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.

Applicant : (i). Shri. Mohammedali Kekepuram Mohammed.

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

Subject : Revision Application filed, under Section 129DD of the
Customs Act, 1962 against the Order-in-Appeal Nos.
MUM-CUSTM-PAX-APP-338/19-20 dated 30.07.2019
issued on 13.08.2019 through F.No. S/49-538/2018
passed by the Commissioner of Customs (Appeals),
Mumbai – III.

ORDER

This revision application has been filed by Shri. Mohammedali Kerepuram Mohammed (hereinafter referred to as the Applicant against the Orders in Appeal Nos. MUM-CUSTOM-PAX-APP-338/19-20 dated 30.07.2019 issued on 13.08.2019 through F.No. S/49-538/2018 passed by the Commissioner of Customs (Appeals), Mumbai – III.

2(a). Brief facts of the case are that on 21.07.2017, the Customs Officers of CSMI Airport, Mumbai had intercepted the applicant upon his arrival from Dubai by Emirates Airways Flight No. EK 0508 dated 20.07.2017, after he had cleared Customs through the Green Channel. On being asked whether he was carrying any contraband, gold, silver, Indian currency or foreign currency, either in his baggage or on person, he had replied in the negative. Thereafter, his personal search and detailed examination of his baggage were conducted and nothing incriminating in nature was recovered. On further enquiry, the applicant revealed that he had visited the gents toilet located near the Immigration Counter. Thereafter, the gents toilet located near the Immigration Counter and toilet cabin no. 4 was thoroughly searched and the flush faucet was found to be opened and a cavity in the toilet wall was also seen. Two plastic packets which were heavy were recovered. On opening the said two packets, 10 nos of yellow metal pieces i.e. 05 yellow metal pieces in each packet) purported to be gold were recovered. Government Approved Valuer, examined and assayed the ten (10) yellow coloured metal pieces and certified that the same were gold bars of 10 tolas each having purity of 24 karats, totally weighing 1165 grams and the valued at Rs. 30,07,937/-.

2(b). The applicant in his statement recorded under Section 108 of the Customs Act, 1962 admitted that the gold belonged to his cousin who resided at Dubai and had told him to carry the said 10 gold bars to the toilet cabin No. 3 of the gents toilet located next to the Immigration Counter of the CSI Airport and open the flush faucet and place the 10 gold bars wrapped in two

black plastic adhesive tapes in the cavity of the wall of the toilet; that he knew the import of gold in any form without declaration and payment of duty was an offence punishable under the Customs Act; that he carried the 10 gold bars totally weighing 1165 gms to evade Customs duty.

3. The Original Adjudicating Authority viz, Addl. Commissioner of Customs, CSMI Airport, Mumbai vide Order-In-Original No. ADC/AK/ADJN/207/2018-19 dated 16.08.2018 issued through S/14-5-152/2017-18 Adjn (SD/INT/AIU/167/2015 AP'C) ordered for the absolute confiscation of 10 gold bars of 10 tolas each, totally weighing 1165 grams, valued at Rs. 30,07,937/- under Section 111(d), (l) and (m) of the Customs Act, 1962 and imposed a personal penalty of Rs. 3,50,000/- on the applicant under Section 112(a) and (b) of the Customs Act, 1962; Further, a penalty of Rs. 1,00,000/- was also imposed on the applicant under Section 114AA of the Customs Act, 1962.

4. Aggrieved by the said order, applicant filed an appeal before the Appellate Authority (AA) viz, Commissioner of Customs (Appeals), Mumbai – III, who vide his Order-In-Appeal Nos. MUM-CUSTOM-PAX-APP-338/19-20 dated 30.07.2019 issued on 13.08.2019 through F.No. S/49-538/2018, did not find any reason to interfere in the impugned the OIO.

5. Aggrieved with the above order, the Applicant has filed this revision application and the grounds of appeal are as under;

5.01. that the impugned OIA is bad in law and unjust; has been passed without giving due consideration to the documents on record and facts of the case,

5.02. that the lower authorities ought to have appreciated that dutiable goods brought in by the Appellant are neither restricted nor prohibited,

5.03. that the applicant had brought this type of goods for first time and there was no previous case registered against him,

- 5.04. that the Show Cause Notice issued by the Respondent clearly revealed that the impugned goods/ gold were dutiable goods and not prohibited goods; that the acts and/or omissions on the part of the applicant to evade Customs duty could only be done in respect of dutiable goods and not prohibited goods; that once the department or respondent had accepted that the goods are dutiable, then the option to redeem the goods as provided under Section 125 of the Customs Act, 1962 should be granted to the applicant.
- 5.03. The applicant has relied upon the undermentioned cases to defend their case;
- (a). 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.
 - (b). 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.
 - (c). 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.
 - (d). 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.*
 - (e). 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.
 - (f). In Universal Traders vs. Commissioner [2009-240-ELT-A78-SC], the apex court allowed redemption of exported goods being not prohibited.
 - (g). 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.

- (h). 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.
- (i). 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.
- (j). 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.
- (k). 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.
- (l). 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.
- (m). 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.
- (n). In Vatakkal Moosa v. Collector of Customs, Cochin 1994 (72) ELT. 473 (G.O.I.); it was held that absolute confiscation is not warranted and redemption of gold should be allowed.
- (o). 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.
- (p). 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.
- (q). 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.

- (r). 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.
- (s). 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.

Under the circumstances, the applicant has prayed that in view of the aforesaid case laws, the gold be released on payment of nominal redemption fine as per Section 125 of the Customs Act, 1962; that the personal penalty may be reduced as the violation, if any, is of technical in nature; or-pass any other order as deemed fit and proper.

6.1. Personal hearings in the case through the video conferencing mode were scheduled for 15.09.2022 and 22.09.2022. Shri. N.J Heera, Advocate appeared for the personal hearing on 22.09.2022 and submitted that applicant is not habitual offender, quantity of gold is not commercial and therefore, he requested to allow redemption of goods on reasonable fine and penalty.

6.2. None appeared for hearing on behalf of the respondent.

6.3. The case is taken up for a decision based on the submissions, personal hearing and evidence on records.

7. The Government has gone through the facts of the case. The applicants in their grounds of appeal have relied on an exhaustive list of case laws to defend their case. Government observes that the applicant when he had been intercepted was not carrying any gold. However, on questioning, the applicant had admitted that he had carried gold bars and had concealed the same in a cavity in the wall of the gents toilet. The gold bars had not been declared in

the first instance, as required under Section 77 of the Customs Act, 1962. The 10 gold bars of 10 tolas each had been kept concealed inside the gents toilet and there was no intention to declare the gold and an attempt was made to evade payment of Customs Duty. Therefore, confiscation of the goods, was justified.

8. The relevant sections of the Customs Act are reproduced below :

Section 2(33)

“prohibited goods” means any goods the import or export of which is subject to any prohibition under this Act or any other law for the time being in force but does not include any such goods in respect of which the conditions subject to which the goods are permitted to be imported or exported have been complied with”

Section 125

Option to pay fine in lieu of confiscation. - (1) Whenever confiscation of any goods is authorised by this Act, the officer adjudging it *may, in the case of any goods, the importation or exportation whereof is prohibited under this Act or under any other law for the time being in force, and shall, in the case of any other goods, give to the owner of the goods or, where such owner is not known, the person from whose possession or custody such goods have been seized, an option to pay in lieu of confiscation such fine as the said officer thinks fit :*

Provided that where the proceedings are deemed to be concluded under the proviso to sub-section (2) of section 28 or under clause (i) of sub-section (6) of that section in respect of the goods which are not prohibited or restricted, the provisions of this section shall not apply :

Provided further that, without prejudice to the provisions of the proviso to sub-section (2) of section 115, such fine shall not exceed the market price of the goods confiscated, less in the case of imported goods the duty chargeable thereon.

(2) Where any fine in lieu of confiscation of goods is imposed under sub-section (1), the owner of such goods or the person referred to in sub-section (1), shall, in addition, be liable to any duty and charges payable in respect of such goods.

(3) Where the fine imposed under sub-section (1) is not paid within a period of one hundred and twenty days from the date of option given thereunder, such option shall become void, unless an appeal against such order is pending.

9. It is undisputed that as per the Foreign Trade Policy applicable during the period, gold was not freely importable and it could be imported only by the banks authorized by the RBI or by others authorized by DGFT and to some extent by passengers. Therefore, gold which is a restricted item for import but which was imported without fulfilling the conditions for import becomes a prohibited goods in terms of Section 2(33) and hence it is liable for confiscation under Section 111(d) of the Customs Act. It is clear that Section (l) and (m) are also applicable in this case as the gold was found concealed and it was not included in the declaration. Therefore, the gold was also liable for confiscation under these Sections.

10. A plain reading of the section 125 shows that the Adjudicating Authority is bound to give an option of redemption when goods are not subjected to any prohibition. There is no bar on the Adjudicating Authority allowing redemption of prohibited goods. This exercise of discretion will depend on the nature of the goods and the nature of the prohibition. For instance, spurious drugs, arms, ammunition, hazardous goods, contaminated flora or fauna, food which does not meet the food safety standards, etc. are harmful to the society if allowed to find their way into the domestic market. On the other hand, release of certain goods on redemption fine, even though the same becomes prohibited as conditions of import have not been satisfied, may not be harmful to the society at large. In case of goods, such as, gold which become prohibited for violation of certain conditions, the Adjudicating Authority may allow redemption

11. 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.

12. It is noted that quantity of the recovered gold was not large or commercial, applicant is not a habitual offender, applicant when confronted at the second instance, had admitted to keeping the gold bars in the toilet, applicant has produced invoice of gold showing ownership. When confronted by the investigating agency, the applicant had admitted to placing the gold in the gents toilet from where the recovery had been made. Considering the afore-stated facts, various judgements submitted by applicant, absolute confiscation is not warranted and allowing redemption of gold on fine would be judicious and reasonable.

13. Government finds that the penalty of Rs. 3,50,000/- imposed on the applicant under Section 112(a) and (b) of the Customs Act, 1962, is commensurate with the omissions and commissions committed. Therefore, Government does not interfere with this penalty.

14. Government finds that once a penalty has been imposed under Section 112 of the Customs Act, 1962 there is no necessity of imposing a penalty under Section 114AA of the Customs Act, 1962. Government is inclined to

set aside the penalty of Rs. 1,00,000/- imposed on the applicant under Section 114AA of the Customs Act, 1962.

15. For the aforesaid reasons, Government sets aside the absolute confiscation held in the OIA. The 10 nos of gold bars of 10 tolas each, totally weighing 1165 grams and valued at Rs. 30,07,937/- are allowed to be redeemed on payment of a redemption fine of Rs. 6,00,000/- (Rupees Six Lakhs only). The Government finds that the penalty of Rs. 3,50,000/- imposed on the applicant under Section 112(a) and (b) of the Customs Act, 1962 is appropriate. The penalty of Rs. 1,00,000/- imposed on the applicant under Section 114AA of the Customs Act, 1962 is set aside.

16. The Revision Application is decided on the above terms.

Shrawan
10/10/22
(SHRAWAN KUMAR)

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

ORDER NO. 286/2022-CUS (WZ)/ASRA/MUMBAI DATED 10.10.2022

To,

1. Shri. Mohammedali Kerepuram Mohammed, Mumtaz Manzil, Kekepuram, P.O. Thalagara, Kasargod, Kereal – Pin : 671 122.
2. Principal Commissioner of Customs, Chhatrapati Shivaji International Airport, Terminal – 2, Level – II, Sahar, Andheri (East), Mumbai – 400 099.

Copy to:

1. Sachwani / Advani / Heera / Shah, Advocates, Nulwalla 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.