



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. 371/215/B/2020-RA / 6162 : Date of Issue : 01/11/2022

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ORDER NO. 309/2022-CUS (WZ)/ASRA/MUMBAI DATED 31.10.2022 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.

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**(i). F.No. 373/215/B/2020-RA**

Applicant : Mr. Mohammadmahdi Hemati

Respondent : Pr. Commissioner of Customs, CSI Airport, Mumbai.

Subject : Revision Application filed, under Section 129DD of the Customs Act, 1962 against the Order-in-Appeal No.MUM-CUSTM-PAX-APP-229/2020-21 dated 31.07.2020 [(DOI:04.08.2020) (F.No.S/49-898/2019) passed by the Commissioner of Customs (Appeals), Mumbai Zone-III.

ORDER

This revision application has been filed by Shri. Mohammadmahdi Hemati (hereinafter referred to as the Applicant) against the Order-in-Appeal No. No.MUM-CUSTM-PAX-APP-229/2020-21 dated 31.07.2020[(DOI:04.08.2020) (F.No.S/49-898/2019) passed by the Commissioner of Customs (Appeals), Mumbai Zone-III.

2(a). Brief facts of the case are that the Applicant who is an Iranian national was intercepted by Customs Officers at CSI Airport, Mumbai on 20.09.2019, on arrival from Tehran onboard Iran Air Flight No. IR-810. The Applicant was found to be in possession of Crude Gold Watch dial (18 kt). The Crude Gold Watch dial (18 kt) weighed 160 grams and was valued at Rs. 4,22,803/-.

3. The case was adjudicated by the Original Adjudicating Authority (OAA), viz, Deputy Commissioner of Customs, CSI Airport, Mumbai vide Order-In-Original No. AirCus/49/T2/1128/2019 "B" dated 20.09.2019 who ordered for the absolute confiscation of the impugned Crude Gold Watch dial (18 kt) weighing 160 grams of 18 Carats purity and valued at Rs. 4,22,803/- under Section 111 (d), (l) & (m) of the Customs Act, 1962 and imposed a penalty of Rs. 20,000/- under Section 112 (a) & (b) of the Customs Act, 1962 on the Applicant.

4. Aggrieved by the said order, the Applicant preferred an appeal before the appellate authority (AA) viz, Commissioner of Customs (Appeals), Mumbai Customs-zone-III. The AA vide Order-In-Appeal MUM-CUSTM-PAX-APP-229/2020-21 dated 31.07.2020[(DOI:04.08.2020) (F.No.S/49-898/2019) upheld the OIO passed by the OAA. The penalty of Rs. 20,000/- imposed by the OAA under Section 112 of the Customs Act, 1962 was upheld.

5. Aggrieved with the above order of the appellate authority, the Applicant has filed this revision application on the following grounds;

5.01. that no valid seizure was made and no seizure order issued in the present case and therefore confiscation of the goods is not sustainable and no penalty can be imposed. The applicant has relied on instruction No 01/2017 dated 08.02.2017 issued by the Board. Further the applicant has relied upon the undermentioned case laws;

- (i) UOI vs. Md Mazid @Md Tufani by the Patna High Court
- (ii) Arvind Trading Company and Ors. vs. State of Maharashtra and Ors by the Bombay High Court
- (iii) Dina Baldev Pathak vs. Collector of Customs and Ors, by the Bombay High Court [ AIR 1962 Bom 290(1961) 63 BOMLR 873]
- (iv) Manilal Bhanabhai Patel vs. Kaul and Ors by the Gujarat High Court [AIR 1976 Guj 134]
- (v) L. Kashi Nath Seth vs. collector, Central Excise [1978 AIR All 128]

5.02. that there was a difference between the terms 'detention' and 'seizure' and any doubtful material/goods found with any person which is taken into custody through a panchanama or detention receipt is detention and if evidence/document in support of such goods/materials are produced the goods/material is released or otherwise the same are seized;

5.03 that as per Section 110 of the CA, 1962, seizure of goods which are liable to confiscation is a condition precedent to initiation of any proceeding for confiscation but in the instant case it was not the done.

- (i) Asst. Collector of Customs vs. Mukbulhusein Ibrahim [10GLR 662]
- (ii) Worldline Tradex Private Limited vs. the Commr. Of Customs

5.04. Gold is not a prohibited item for import and Section 125 of the Custom Act, 1962 provides that option of redemption can be given in case the seized goods are not prohibited and therefore absolute confiscation is not warranted in the instant case. Further authority has discretion to order release of prohibited goods on payment of fine in lieu of confiscation. The applicant has relied upon the undermentioned case laws;

- (i) Kusumbhai Dahyabhai Patel vs. CC (P) [1995 (79) E.L.T 292]
- (ii) Hargovind Das K Joshi vs. Collector of Customs [1992 (61) E.L.T. 172 (SC)]
- (iii) GOI order No 198/2010 dated 20.05.2010 in the case of Mukadam Rafique Ahmed
- (iv) Mohamed Ansar Abdul Gafoor vs. AC Chennai [2016(338) E.L.T. 585( Mad)]
- (v) Rajendra Thangam vs. CC, Chennai [2011(270) E.L.T. 37 (Mad)]
- (vi) Kannan Karuppusamy vs. CC Chennai [ 2011(269) E.L.T. 72 (Mad.)]
- (vii) Shaikh Jamal Basha vs. GOI [1992(91) E.L.T. 227 (AP)]
- (viii) Mohamed Ahmed Manu vs. CC, Chennai [2006(205) E.L.T 383(Tri-Chennai)]
- (ix) Mohd Zia Ul Haque vs. Addl. Commissioner of Customs, Hyderabad [2014(214) E.L.T 849 (GOI)]
- (x) CC vs. Elephanta Oil [2003(152) E.L.T. 257(SC)]
- (xi) Collector vs. N.Patel [1992(62) E.L.T. 674 (GOI)]
- (xii) UOI vs. Dhanak M Ramji [2003(248) E.L.T 128(Bom)]
- (xiv) Sapna Sanjiv Kohli vs. CC, Mumbai [2010(253) E.L.T A52(SC)]
- (xv) Horizon Ferro Alloys Pvt Ltd vs. UOI –judgement by the Division Bench of Punjab and Haryana High Court
- (xvi) Suresh Kumar Agarwal vs. Collector of Customs, madras [1998(103) E.L.T. 18(A.P)]
- (xvii) Etc.

5.05. that in common law legal systems 'precedent' is a principle or rule established in a previous legal case that is either binding or on persuasive for a court or other tribunal when deciding subsequent cases with similar issued or facts. Further, the applicant has relied upon the undermentioned case laws;

- (i) CCE, Calcutta vs. Alnoori Tobacco Products [2004(170) E.L.T. 135(SC)]
- (ii) Escorts Ltd vs. CCE, Delhi [2004 (173) E.L.T 113(SC)]
- (iii) CC (Port), Chennai vs. Toyota Kirloskar [2007(213) E.L.T. 4(SC)]
- (iv) etc...

5.06. that the applicant was the owner of the watch dial under absolute confiscation and was ignorant of the Indian Customs Law that the

had to declare the gold to Customs. Further that the gold is not a prohibited item and is a restricted item and consequently the person from whom it was recovered or the owner of the goods is entitled for release of the seized material under Section 125 of the Customs Act, 1962 and the applicant requested that the gold dial may be released to him for re-export. Further the applicant has relied upon the undermentioned case laws;

- (i) Siemens Lte vs. CC [1999(113) E.L.T 776(SC)
- (ii) HCL Hewlet Packard Lte [1997(92) E.L.T 367(T)]
- (iii) Padia Sales Corpn vs. CC [1992(61) E.L.T 90]
- (iv) Mukadam Rafique Ahmed [2011(270) E.L.T 447(GOI)]
- (v) Liaquat Ali Hameed vs. Commissioner of Customs [2003(156) E.L.t. 863(Tri Chennai)
- (vi) etc.

5.07. that the applicant is from a respectable family and law abiding citizen and had never come under any adverse remarks and had imported the small quantity of gods for making a small profit to meet his family expenses

Under the above facts and circumstances of the case, the Applicant has prayed that gold under confiscation may be ordered to be release to him on payment of reasonable fine for re-export and penalty.

6. The department filed their written submissions vide letter dated 23.12.2020 wherein the facts of the case were reiterated and prayed that the appeal be rejected and the OIA be upheld, relying on the following case laws

(i) Abdul Razak vs. Union of India [2012(275) E.L.T 300 (Ker) (DB)] wherein the Kerala High Court could not find any merit in the appellants case that he had the right to get the confiscated gold released on payment of redemption fine and duty under Section 125 of the Act;

(ii) Commissioner of Customs (Air) vs. P. Sinnasamy wherein it was held that when there is a violation of the statutory prohibitions, mentioned in Sections 11 and 11A of the Customs Act, 1962 or any other law, for the time

being in force or restrictions imposed, such restrictions would also encompass the expression, any prohibition;

(iii) *Om Prakash Bhatia vs. Commissioner of Customs Delhi* [2003 (6) SC 161] wherein the Apex Court held that non-fulfilment of conditions of imports tantamount to prohibition;

(iv) *Baburaya Narayan Nayak vs. Commissioner of Customs, Bangalore* [2018 (364) E.L.T 811 (Tri-Bang)] wherein the CESTAT upheld the order of absolute confiscation as the appellant had not produced any evidence regarding the licit possession of the said goods.

7. Personal hearing in the case was scheduled for 23.08.2022. Shri Prakash Shingrani, Advocate for the Applicant appeared for physical hearing on the scheduled date and submitted that the quantity of the gold was very small and the Applicant was a foreign national and was not aware of the law. He also submitted that the Applicant was not a habitual offender and requested for re-export of goods.

8. The Government has gone through the facts of the case and notes that the Applicant had failed to declare the goods in his possession as required under Section 77 of the Customs Act, 1962. The Applicant had not disclosed that he was carrying dutiable goods and had he not been intercepted would have walked away with the impugned 'Crude Gold Watch Dial' without declaring the same to Customs. By his actions, it was clear that the Applicant had no intention to declare the impugned 'Crude Gold Watch Dial' to Customs and pay Customs duty on it. The Government finds that the confiscation of the 'Crude Gold Watch Dial' is therefore justified.

9. 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”.

10. 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.

11. Section 125 of the Customs Act, 1962 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 even in prohibited goods. 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. The Government notes that the quantum of gold recovered from the Applicant is very small and is of 18 karat purity. The Government finds that this is a case of non-declaration of the gold. The facts of the case does not reveal that the 'Crude Gold Watch Dial' was ingeniously concealed. The impugned gold has been claimed by the Applicant and there is no other claimant. There are no previous offences registered against the Applicant. Gold is a restricted item and not prohibited. Thus, mere non-submission of the declaration cannot be held against the Applicant, more so because he is a foreign national. Government therefore, is inclined to allow the impugned gold to be re-exported on payment of a redemption fine as specifically prayed for by the Applicant. Government is inclined to modify the order passed by the Appellate Authority.

13. The Government finds that the personal penalty of Rs. 20,000/- imposed on the applicant under Section 112(a) of the Customs Act, 1962 is commensurate with the omissions / commissions committed.

14. In view of the above, the Government modifies the order passed by the Appellate Authority and allows the applicant to redeem the impugned gold for re-export as prayed for by the applicant, on payment of a redemption fine of Rs. 80,000/- (Rupees Eighty Thousand only). The penalty amount of Rs. 20,000/- is upheld.



15. The Revision application is disposed of on the above terms.

*Shrawan Kumar*  
21/10/22  
( SHRAWAN KUMAR )

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

ORDER NO. 309/2022-CUS (WZ)/ASRA/MUMBAI DATED 31.10.2022.

To,

1. Mr Mohammadmahdi Hemati, C/o Shri Prakash K. Shingrani, Advocate, 12/334, Vivek, New MIG Colony, Bandra (East), Mumbai 400 051
2. The Pr. Commissioner of Customs, Terminal-2, Level-II, Chhatrapati Shivaji International Airport, Mumbai 400 099.

Copy to:

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