



GOVERNMENT OF INDIA
MINISTRY OF FINANCE
(DEPARTMENT OF REVENUE)
8th Floor, World Trade Centre, Centre - I, Cuffe Parade,
Mumbai-400 005

F.No. 371/297/B/2022-RA/6526 : Date of Issue : 17.11.2022

ORDER NO. 322/2022-CUS (WZ/SZ)/ASRA/MUMBAI DATED 15.11.2022
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 : Kayvaan Vijaykumar Shah

Respondent: Commissioner of Customs (Appeals), Mumbai-III, Awas
Corporate Point (5th Floor), Makwana Lane, Behind
S.M.Centre, Andheri-Kurla Road, Marol, Mumbai-59.

Subject : Revision Application filed, under Section 129DD of the
Customs Act, 1962 against the Orders-in-Appeal No.
No. MUM-CUSTM-PAX-APP-2010/2021-22 dated
29.03.2022 [(DOI: 31.03.2022) passed by the
Commissioner of Customs (Appeals), Mumbai Zone-III

ORDER

This Revision application has been filed by Mr. Kayvaan Vijaykumar Shah (hereinafter referred to as the Applicant) against the Order-in-Appeal No. MUM-CUSTOM-PAX-APP-2010/2021-22 dated 29.03.2022 passed by the Commissioner of Customs (Appeals), Mumbai Zone -III.

2. Brief facts of the case are that the applicant was intercepted by Customs Officers on 09.10.2021, after he crossed the green channel at Chatrapati Shivaji Maharaj International Airport, Mumbai, having earlier arrived from Dubai onboard Flight No. AI 912/09.10.2021. A search of his person, led to the recovery of 1 crude gold chains weighing 104 grams valued at Rs.4,40,877/- and 1660 gms of Saffron valued at Rs. 5,03,708/-.

3. The Original Adjudicating Authority (OAA), viz, Deputy Commissioner of Customs CSI Airport, Mumbai, vide Order-In-Original No. Air/Cus/49/T2/1086/2021-UNI-B dated 09-10-2021 ordered for the absolute confiscation of one crude gold chain weighing 104 grams and saffron weighing 1660 grams collectively valued at Rs5,03,708/- under Sections 111(d), 111(l) & 111(m) of the Customs Act, 1962 and a personal penalty of Rs. 50,000/- was imposed under Section 112 (a) & (b) of the Customs Act, 1962.

4. Aggrieved by the said order, the applicant preferred an appeal before the appellate authority (AA) viz, Commissioner of Customs (Appeals), Mumbai Zone-III, who vide Order-In-Appeal No. MUM-CUSTOM-PAX-APP-2010/2021-22 dated 29.03.2022 decided as follows:

- (i) upheld the DC's Order regarding absolute confiscation of the gold viz one crude gold chain weighing 104 grams valued at Rs.4,40,877/-;
- (ii) In case of 1660 grams of Iranian Saffron valued at Rs.62,831/-, the Adjudicating authority gave an option under Section 125(2) to pay fine of Rs.10,000/-;

(iii) Upheld the DC's Order with respect to the penalty imposed on the applicant.

5. Aggrieved with the above order of the appellate authority with regards to the absolute confiscation of gold and also w.r.t the penalty imposed, the Applicant has filed this revision application on the following grounds;

5.01 that the decisions relied by the Commissioner Appeals cannot be equated with their case; Binding precedents were not followed by the Adjudicating Authority while adjudicating the case;

5.02 that the Circular No 495/5/92-CusVI dated 10-05-93 cannot prevail over the statute. Circulars are issued only to clarify the statutory provision and it cannot alter or prevail over the statutory provision; They relied on the following judgements:

a) Carista Herbal Products P Ltd. vs CCE, Pondicherry-2019(370)ELT223(Mad);

b) Union of India Vs Amalgamated Plantations P Ltd-2016(340)ELT310(Gau); etc.

5.03 that Gold imported by the petitioner was not liable for absolute confiscation.; that gold is not a prohibited item , but only 'restricted goods'. Import of gold is no longer prohibited and therefore, it is the duty on the part of the adjudicating authority, if he is of the view that it is liable for confiscation, to permit its redemption on appropriate fine. ; that to justify absolute confiscation of imported gold on the ground that gold is a 'prohibited' item;

5.04 that in terms of section 2(33) of Customs Act, 1962 "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;

5.05 that the intention behind the provisions of Section 125 is clear that import of such goods under any circumstances would cause danger to the health, welfare or morals of people as a whole. This would not apply to a case where import/export of goods is permitted subject to certain conditions or to a certain category of persons and which are ordered to be confiscated for the reason that the condition has not been complied with. In such a situation, the release of such goods confiscated would not cause any danger or detriment to public health. Admittedly, import of gold is permitted in case of certain category of persons, subject to certain conditions,

therefore, it would not fall under the prohibited category as envisaged under the said provisions.

They have relied upon the decision of the Hon'ble High Court of Calcutta in the case of Commissioner of Customs (Preventive), West Bengal Vs. India Sales International reported in 2009 (241) ELT 182 (Cal.) and other judgements.

5.06. In terms of clause (h) of Rule 3 of Foreign Trade (Exemption) from Application of Rules in Certain Cases) Order, 1993 import of gold is allowed in any form as part of baggage by passengers of Indian origin if the passenger satisfies the condition of six months stay abroad, quantity does not exceed kilograms and duty is paid in convertible foreign currency. Accordingly, the complexion of prohibition on import of gold has undergone a sea change.

They have relied on the following case laws;

- (a) In Yakub Ibrahim Yusuf vs CC, Mumbai 2011 (263) E.L.T. 685 (Tri. Mumbai),
- (b) In Neyveli Lignite Cor Ltd vs UOI 2009 (242) E.L.T. 487 (Mad.),
- (c) In Hargovind Das Joshi Vs Collector of customs 1992 (61) ELT 172(SC)
- (d) In Universal Traders Commissioner - 2009 (240) E.L.T. A78 (SC)
- (e) In Gauri Enterprises CC, Pune 2002 (145) ELT (705) (Tri Bangalore)
- (f) In CC (Airport), Mumbai Vs Alfred Menezes 2009 (242) ELT 334 (Bom.),
- (g) In Shaik Jamal Basha Vs Government of India 1997 (91) ELT 277(AP) 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 unauthorisedly can be redeemed.
- (h) In VP Hameed Vs Collector of Customs Mumbai 1994(73) ELT 425 (Tri)
- (i) In T. Elavarasan Vs Commissioner of Customs (Airport), Chennai 2011 (266) ELT 167 (Mad),
- (j) In Kadar Mydin v/s Commissioner of Customs (Preventive), West Bengal 2011 (136) ELT
- (k) In Sapna Sanjeeva Kolhi v/s Commissioner of Customs, Airport, Mumbai 2010(253)ELT A52(SC)
- (l) In Vatakkal Moosa v/s collector of Customs, Cochin 1994 (72) ELT (G.O.L.); Halithu Ibrahim vs CC [2002 TIOL 195-CESTAT-MAD.,
- (m) Krishna Kumari vs CC, Chennai 2008 (229) ELT 222 (Tri-Chennai);
- (n). S.Rajagopal vs CC, Trichy 2007 (219) ELT 435 (Tri-Chennai);

- (o). M. Arumugam Vs CC, Trichirapalli 2007 (220) ELT 311 (Tri-Chennai)
- (p). In the case of Union of India vs Dhanak M. Ramji 2009 (248) E.L.T. 127 (Bom.),
- (q). In the case of Peringatil Hamza Vs CC (Airport), Mumbai 2014 (309) ELT 259 (Tri Mumbai)
- (r). In the case of R. Mohandas Vs CC, Cochin 2016 (336) ELT 399 (Ker),
- (s). In the case of A. Rajkumari vs CC (Chennai) 2015 (321) E.L.T. 540 (Tri. - Chennai) wherein redemption of 70 gold bars concealed in an Air conditioner was allowed by the adjudicating authority against fine of almost 50% of value, the tribunal reduced the fine to almost 14% treating the same as excessive. The Appeal filed by the department was dismissed by Hon' ble Apex Court vide 2015 (321) ELT A 207 (SC) as 'time barred'.
- (t). In Shaik Mastani Bi vs Pr. CC, Chennai 2017 (345) E.L.T. 201 (Mad.), the Hon'ble High court of Madras affirmed redemption of gold.
- (u). In the case of Bhargav B. Patel vs CC, Mumbai (Appeal No. C/381/10)

5.07 Petitioner claim ownership of the crude gold chain valued at Rs.4,40,877/- under absolute confiscation and redemption of the goods on payment of duty and fine;

Under the above facts and circumstances of the case, the Applicant has requested the Revision Authority to return the confiscated one crude gold chain on payment of reasonable fine, penalty and applicable duty and further proceedings may be dropped; that penalty imposed may be reasonably reduced.

6. Personal hearing was scheduled for 6.10.2022. Shri. Prakash Shingarani, Advocate for the applicant and Shri K.V.K. Shah, the applicant appeared for physical hearing on 06.10.2022. They submitted that gold jewellery (One chain) was for personal use. The applicant is a CA student and there is no matter against the applicant. They requested to redeem the gold jewellery on nominal fine and penalty.

7. 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 1 crude gold chains without declaring the same to Customs. By his actions, it was clear that the applicant 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 chains 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 ‘Applicants’ thus, liable for penalty.

11. 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 the 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. The quantity of gold jewellery under import is small and is not of commercial quantity. There are no allegations that the applicant is a habitual offender and was involved in similar offence earlier. The facts of the case indicate that it is a case of non-declaration of gold, 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 the Customs Act, 1962 and while imposing quantum of penalty.

13. The absolute confiscation of the gold, leading to dispossession of the applicant of the gold in the instant case is therefore, harsh and not reasonable. Government therefore, sets aside the impugned order of the appellate authority. The impugned 1 crude gold chains, totally weighing 104 grams and valued at Rs. 4,40,877/- is allowed redemption on payment of fine of Rs.80,000/- (Rupees Eighty Thousand only). The Government finds that the penalty of Rs. 50,000/- (Rupees Fifteen thousand only) imposed on the applicant under Section 112(a) & (b) of the Customs Act, 1962 is appropriate and commensurate with the omission and commission committed and the same does not merit interference.

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


(SHRAWAN KUMAR)

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

ORDER NO. ~~322~~2022-CUS (WZ/SZ)/ASRA/MUMBAI DATED 15.11.2022.

To,

1. Shri Kayvaan Vijaykumar Shah, A/1 Vora Ashish Building, Pandit Solicitor Road, Opposite Anandpara Hospital, Malad(E), Mumbai-97.
2. Commissioner of Customs (Appeals), Mumbai-III, Awas Corporate Point, 5th Floor, Makwana Lane, Behind S.M.Road, Andheri-Kurla Road, Marol, Mumbai-59.
3. Deputy Commissioner of Customs, Uniform B batch, CSI Airport, Sahar, Mumbai-99.

Copy to:

1. Shri. Prakash K Shingrani (Adv), 12/334, Vivek, New MIG Colony, Bandra East, Mumbai-51.
2. Sr. P.S. to AS (RA), Mumbai.
3. File Copy.
4. Notice Board.