



GOVERNMENT OF INDIA
MINISTRY OF FINANCE
(DEPARTMENT OF REVENUE)

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

F.No. 371/326/B/2019-RA / 6624 : Date of Issue : 28/11/2022

ORDER NO. 325 /2022-CUS (WZ)/ASRA/MUMBAI DATED 22.11.2022 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 : Shri Krishan Kumar

Respondent : Commissioner of Customs (Appeals), Mumbai Zone-III

Subject : Revision Application filed, under Section 129DD of the
Customs Act, 1962 against the Orders-in-Appeal No.
No. MUM-CUSTOM-PAX-APP-148/19-20 dated
24.05.2019 passed by the Commissioner of Customs
(Appeals), Mumbai Zone - III.

ORDER

This revision application has been filed by Shri Krishan Kumar (hereinafter referred to as the Applicant) against the Order-in-Appeal No. MUM-CUSTOM-PAX-APP-148/19-20 dated 24.05.2019 passed by the Commissioner of Customs (Appeals), Mumbai Zone-III.

2. Brief facts of the case are that on 12.03.2018 the applicant, Shri Krishan Kumar holding Indian Passport No. J 4770860, arrived at CSI Airport, Mumbai from Dubai by Flight No. FZ-445 dated 11.08.2018. He was diverted to Red Channel by Customs officers of AIU after he had opted for Green Channel and some suspicious images were noticed in his baggage during the baggage screening. Personal search of the passenger and detail examination of his baggage resulted into the recovery of three gold bar of 172 gms concealed in his rectum, 30 gms gold in the form of black coloured coated rod from the belt and 54gms gold in the form of round shaped gold piece from the watch.

3. The Original Adjudicating Authority (OAA), viz, Addl. Commissioner, C.S.I, Airport, Mumbai vide Order-In-Original No. ADC/AK/ADJN/162/2018-19 dated 23.07.2018 ordered for absolute confiscation of the recovered gold (of 24 KT 999% purity) totally weighing 256 gms and valued at Rs. 7,22,552/- under Section 111 (d), (1)and(m) of Customs Act, 1962. A personal penalty of Rs. 75,000/- under section 112(a) & (b) of the Customs Act, 1962 was also imposed 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 - III, who vide Order-In-Appeal No. MUM-CUSTOM-PAX-APP-148/19-20 dated 24.05.2019 refrained from interfering in the order passed by OAA.

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

5.1. The impugned order passed by the Respondent is bad in law and unjust; that dutiable goods brought in by the Applicant are neither restricted nor prohibited; that the Applicant has brought this type of goods and there is no previous case registered against him.

5.2. The Adjudicating Authority ought to have appreciated that the evasion of Customs duty can be done only in respect of dutiable goods and not prohibited goods. The Adjudicating Authority ought to have appreciated that once the department or respondent accepts that the goods are dutiable, the option of redemption of goods as provided under section 125 of the Customs Act, 1962 will have to be given to the Applicant.

5.3. The Applicant submits that the allegation of Concealment in his rectum is totally incorrect as the alleged concealment in rectum is neither supported with any X-Ray report nor with a Doctor's examination report that whether it was possible for the Applicant to insert the gold of the size and weight (as seized) in his rectum or whether there was any injury mark etc., noticed in the rectum of the Applicant to establish that the gold was inserted and ejected from the rectum. This requirement is mandatory under Section 103 of the Customs Act, 1962. In absence of any supporting confirmation and in light of denial by the Applicant that the gold was ever concealed by him in his rectum, the said allegation even if leveled under a panchnama, loses its credibility and cannot withstand. However, the same was not considered by Adjudicating Authority and gold was absolutely confiscated.

a) The Hon'ble Revision Authority In case of Mr.Abdul Razack Abdul Bakki vide its Order No. 166/10-CUS Dated 15.04.2010 has allowed to release the

foreign currency which where concealed inside his body on payment of Redemption fine of Rs.6,50,000/- under section 125 of the Customs Act, 1962

b) The Hon'ble Revision Authority In case of Mr. Ameer Ali Sarpudeen vide its Order No. 167/10-CUS Dated 15.04.2010 has allowed to release the foreign currency which where concealed inside his body on payment of Redemption fine of Rs.6,00,000/- under Section 125 of the Customs Act, 1962.

c) Sub-section (1) of Section 125 of the Customs Act, 1962, was reproduced for appropriate interpretation / understanding / analysis of the same:

SECTION 125. Option to pay fine in lieu of confiscation. (1) Whenever confiscation of any goods is authorized 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....

The applicant submitted that the above sub-section (1) of Section 125 of the Customs Act, 1962, makes it crystal clear that the Respondent is required to give the Noticee an option to pay fine in lieu of confiscation in respect of the impugned goods, which even as per the Respondent are dutiable goods.

5.4. The Applicant submits that in the facts and circumstances of the present case, absolute confiscation of the impugned dutiable goods would only mean interpreting or giving a meaning to the said sub-section (1) of Section 125 of the Customs Act, 1962, in a manner neither authorized nor intended by the Act. Thus, redemption of dutiable goods on payment of fine in lieu of confiscation is what the Legislature in its collective wisdom has proposed vide sub-section (1) of Section 125 of the Customs Act, 1962, and the same is the

intent of the Legislature but inspite of the above observation the dutiable goods were absolute confiscated by the Respondent. The applicant relied on the following judgments of the Hon'ble Apex Court, the Hon'ble High Courts and the Hon'ble Tribunal, wherein it has been held that gold is not a prohibited item and the same is restricted and therefore it should not be confiscated absolutely and option to redeem the same on redemption fine ought to be given to the person from whom it is recovered.

a). The Hon'ble Supreme Court of India in Hargovind Das K. Joshi Versus Collector of Customs reported in 1992 (61) ELT. 172 (S.C.);

b). The Hon'ble Tribunal in the case of ALFRED MENEZES v/s COMMISSIONER OF CUSTOMS, MUMBAI reported in 2011 (236) E.L.T. 587 (Tri. - Mumbai);

c). The Hon'ble Tribunal in the case of T ELVARASAN v/s COMMISSIONER OF CUSTOMS (AIRPORT), reported in 2011 (266) ELT 167 (Mad);

d). The Hon'ble Tribunal in the case of YAKUB IBRAHIM YUSUF v/s COMMISSIONER OF CUSTOMS, MUMBAI reported in 2011 (263) EL.T. 685 (Tri. - Mumbai);

e). The Hon'ble Tribunal in the case of Mohini Bhatia Vs Commissioner of Customs reported in 1999 (106) E.L.T. 485 (Tri-Mumbai);

f). Universal Traders v. Commissioner - 2009 (240) ELT A78 (S.C.) also the Apex Court allowed redemption of exported goods being not prohibited;

g). Gauri Enterprises v. CC, Pune - 2002 (145) ELT. 706 (Tri-Bang.) the CESTAT;

h). Shaik Jamal Basha v. Government of India 1997 (91) ELT 277 (AP);

i). VP Hameed v. Collector of Customs, Mumbai - 1994 (73) E.L.T 425 (Tri.);

j). P. Sinnasamy v. Commissioner of Customs, Chennai 2007 (220) ELT. 308 (Tri-Chennai);

k). Union of India Vs Dhanak M. Ramji - 2009 (248) E.L.T. 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). A. Rajkumari v. CC (Chennai) 2015 (321) E.L.T. 540 (Tri-Chennai);

m). Kadar Mydin v. Commissioner of Customs (Preventive), West Bengal - 2001 (136) ELT. 758;

n). Sapna Sanjeev Kohli v. Commissioner of Customs, Airport, Mumbai - 2008(230) ELT 305;

o). In Vatakkal Moosa v. collector of Customs, Cochin 1994 (72) ELT 473 (G01), Halithu Ibrahim v. CC (2002-TIOL 195-CESTAT-MAD. 2002 (148) ELT 412 (Tribunal), Krishnakumari v. CC. Chennai - 2008 (229) ELT 222 (Tri-Chennai) :S. Rajagopal v. CC, Trichy-2007 (219) ELT. 435 (Tri-Chennai); M. Arumugam v. CC, Tiruchirappalli, 2007 (220) ELT 311 (Tri-Chennai) also it was held that absolute confiscation is not warranted and redemption of gold should be allowed;

p). The latest Judgement in reported in 2018 (359) ELT 265 (Tri-All) IN THE CESTAT, REGIONAL BENCH, ALLAHABAD COMMR. OF C. EX. & S.T.,

LUCKNOW Vis MOHD. HALIM MOHD. SHAMIM KHAN Final Order No. A/71054/2017-SM (BR), dated 13-9-2017 in Appeal No. C/70595/2016 SM.

5.5. Under the above facts and circumstances of the case, the Applicant requested that in view of the aforesaid submissions, the Customs department shall release the goods u/s 125 of Customs Act, 1962 on nominal redemption fine and personal penalty as the violation, if any, is of technical in nature.

6. Personal hearing was scheduled for 18.10.2022. Shri. N. J. Heera, Advocate appeared for the hearing on behalf of the applicant. He submitted that the quantity of gold is small and gold is not prohibited. He requested to release gold on reasonable redemption 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 gold (of 24KT 999% purity) totally weighing 256gms and valued at Rs. 7.22,552/ without declaring the same to Customs. The applicant had concealed 172 gms of gold in his rectum, 30gms in his belt and 54 gms in his watch. The applicants had adopted such a method to conceal the gold bars which reveals that they did not intend to declare the gold and thereby evade payment of Customs Duty. The Government finds that the confiscation of the gold was therefore justified.

8. Government observes that the applicant has submitted that the dutiable goods brought in by them are neither restricted nor prohibited. 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.

10. 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.

11. 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.

12. 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 absolute confiscation held vide the impugned order viz Commissioner of Customs (Appeals), Mumbai – III's Order-In-Appeal No. MUM-CUSTOM-PAX-APP-148/19-20 dated 24.05.2019.

13. In view of the above, the impugned gold (of 24KT 999% purity) totally weighing 256gms and valued at Rs. 7,22,552/ are allowed redemption on payment of fine of Rs. 1,40,000/- (Rupees One Lakh Forty Thousand only). The Government finds that the penalty of Rs. 75,000/- (Rupees Seventy-five 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
22/11/22

(SHRAWAN KUMAR)

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

ORDER NO. 325/2022-CUS (WZ/ASRA/MUMBAI DATED 22.11.2022.

To,

1. Shri Krishan Kumar, 1715, Gali Nageene Wali, Lalkuwa, Delhi-110006.
2. Commissioner of Customs, CSI Airport, Terminal, Level-II, Sahar, Andheri (East), Mumbai- 400099.
3. Addl. Commissioner of Customs, CSI Airport, Terminal, Level-II, Sahar, Andheri (East), Mumbai- 400099.

Copy to:

1. Advani Sachwani & Heera Associates, Nulwala Building, Ground Floor, 41, Mint Road, opposite GPO Fort, Mumbai 400.001.
2. Sr. P.S. to AS (RA), Mumbai.
3. File Copy.
4. Notice Board.