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GOVERNMENT OF INDIA  
MINISTRY OF FINANCE  
(DEPARTMENT OF REVENUE)

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Mumbai-400 005

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F.No. 371/328/B/WZ/2018-RA / 324: Date of Issue : 08/12/2022

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ORDER NO. 355/2022-CUS (WZ)/ASRA/MUMBAI DATED 07.12.2022  
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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Applicant : Shri. Balanadukkam Muhammed

Respondent : Pr. Commissioner of Customs, CSMIA, Mumbai

Subject : Revision Application filed, under Section 129DD of the  
Customs Act, 1962 against the Order-in-Appeal No. MUM-  
CUSTM-PAX-APP-220/18-19 dated 11.07.2018 issued on  
24.07.2018 through F.No. S/49-294/2016-17-AP passed  
by the Commissioner of Customs (Appeals), Mumbai - III.

**ORDER**

This revision application has been filed by Shri. Balanadukkam Muhammed (herein after referred to as the Applicant) against the Order-In-Appeal No. MUM-CUSTOM-PAX-APP-220/18-19 dated 11.07.2018 issued on 24.07.2018 through F.No. S/49-294/2016-17-AP passed by the Commissioner of Customs (Appeals), Mumbai - III.

2(a). Brief facts of the case are that on 28.08.2014, the applicant had been intercepted at the exit gate of CSMI Airport after he had cleared himself through the green channel. The applicant was not carrying any baggage and had arrived from Muscat onboard Oman Air Flight No. WY-201/28.08.2014. It was ascertained that in the Column no.9, of the Customs Declaration form pertaining to the "Total Value of Dutiable Goods being Imported", the applicant had left the details as "blank". The applicant had worn a blue coloured ribbon around his neck which bore a Resident Identity Card of UAE. Applicant had proceeded to the exit gate impersonating as an immigration staff, when he was intercepted. The applicant was questioned as to whether he was carrying any contraband/dutiable goods/gold or Foreign/Indian Currency in his baggage or on his person to which he had replied in the negative. The applicant was asked to pass through the door frame metal detector (DFMD) which beeped and gave positive signal for presence of some metal on his person. A personal search of the applicant led to the recovery of (02) two FM gold bars of 1 kg each and (02) two gold bars of 10 tolas each having foreign markings covered in three packets wrapped with self-adhesive white coloured masking tape and concealed in both the watch pockets of the black coloured trouser worn by the applicant. The (02) two FM gold bars of 1 kg each and two gold bars of 10 tolas each, totally weighed 2233.2 grams and valued at Rs.58,26,977/-.

2(b). The applicant admitted that he had carried the gold for a monetary consideration and was scheduled to hand over the same to a person waiting outside the airport.

2(c). During the investigations, it was revealed that the applicant alongwith another person was earlier involved in a case of non-declaration of Red Sanders, Omani Riyals and Indian Rupees, totally valued Rs. 1,70,000/-.

2(d). It was alleged that the applicant had attempted to impersonate the Immigration Staff posted at the CSMIA, Mumbai by donning a shirt and pant which resembled the immigration staff uniform, with an intention to hoodwink the Customs.

3. After due process of the law, the Original Adjudicating Authority (OAA), viz Additional Commissioner Of Customs, CSMIA, Mumbai vide Order-In-Original No. ADC/RR/ADJN/438/2015-16 dated 31.03.2016 issued on 15.04.2016 through F.No. S-14-5-611/2014-145 ADJN [SC/INT/AIU/627/2014-AP'C], ordered for the absolute confiscation of the (02) two FM gold bars of 1 kg each and two gold bars of 10 tolas each, totally weighed 2233.2 grams and was provisionally valued them at Rs.58,26,977/- under Section 111(d), 111(1) and 111 (m) of the Customs Act, 1962 and a penalty of Rs. 6,00,000/- was also imposed on the applicant under Section of 112 (a) of Customs Act, 1962.

4. Aggrieved by the said order, the applicant filed an appeal before the appellate authority (AA) viz, Commissioner of Customs (Appeals), Mumbai – III who vide Order-In-Appeal No. MUM-CUSTM-PAX-APP-220/18-19 dated

11.07.2018 issued on 24.07.2018 through F.No. S/49-294/2016-17-AP upheld the OIO passed by the OAA.

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

- 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 [ [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.
- (u). Commissioner of Customs, Kandla v/s. Deluxe Exports. Order nos. 2064-2076/2000-WBZ/C-II dated 25.07.2000 in Appeals No. C/368, 554 to 564/2000. Adjudication Authority not to decide or investigate as to who is the owner of the goods.

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; or pass any other order as deemed fit and proper.

6. Applicant has filed an application for condonation of delay stating that the filing of the revision application was delayed by 15 days. They have filed the revision application on 09.11.2018.

7. Personal hearings in the case was scheduled through the online video conferencing mode for 02.08.2022. Shri. N.J Heera, Advocate appeared for personal hearing and requested for an adjournment to 25.08.2022. Thereafter, on 25.08.2022, the said Advocate appeared for personal hearing and submitted that gold was not ingeniously concealed and quantity is not large. He requested to allow release of goods on nominal RF and penalty. He referred to another similar case during same time in which the Commissioner (Appeals) had allowed redemption, and accordingly requested for parity and fairness.

8. On the issue of condonation of delay, Government notes that the OIA was issued on 24.07.2018 and the applicant has stated that the same had been communicated to him on 26.07.2018. It is seen that the statutory 3 months period had expired on 24.10.2018. A further extension / condonable period of 3 months is available to the applicant. It is seen that the applicant has filed the revision application well within the further extension / condonable period of 90 days. Therefore, the Government accepts the COD application filed by the applicant and condones the delay.

9. The Government has gone through the facts of the case and notes that the applicant was carrying gold on his person which had been cleverly kept in the watch pockets of the trousers worn by him. Moreover, the applicant was dressed like an Immigration staff by wearing similar clothing and hanging a blue ribbon round his neck. The applicant had not declared the gold in his possession in the Customs declaration form submitted by him. The applicant had not filed a true declaration to the Customs and the applicant had clearly failed to declare the

goods to the Customs at the first instance as required under Section 77 of the Customs Act, 1962. It also reveals that the act committed by the applicant was conscious and pre-meditated and he did not harbor any intention to declare the gold in his possession and pay Customs duty. Had he not been intercepted, the applicant would have gotten away with the gold in his pockets. The Government finds that the confiscation of the gold is therefore, justified.

10.1. 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."*

10.2. 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 liable for confiscation under Section 111(d) of the Customs Act. It is evident that Section (l) and (m) are also applicable in this case as the gold was found wrapped in adhesive tape and recovered from the front pocket of the shirt worn by him and it was not included in the declaration. Therefore, the gold was also liable for confiscation under these Sections.

11. Government observes that during the personal hearing, the Advocate raised issue of judicial discipline and parity stating that in a similar case involving 2232gms of gold bars recovered from the pant pockets of the passenger, the same AA had allowed the redemption of the gold on payment of a fine and penalty. Government has pursued this case and notes that the issue of parity raised is justified.

12. In the extant case, Government notes that the lower authorities have observed that the applicant is a habitual offender. However, it is seen that in the earlier case, the applicant is involved with another person and the value is quite small i.e. Rs. 1,70,000/- only. This value included currency found with both persons. Considering, the same, Government finds that terming the applicant as a habitual offender would be inappropriate.

13. Further, Government observes that the lower authorities have noted that the applicant had resorted to clear the gold bars by impersonating as an

immigration officer. However, Government notes that the applicant was wearing a blue coloured ribbon around his neck bearing his Resident ID issued at UAE and a pant and shirt and it is alleged that this blue ribbon alongwith the pant and shirt worn by the applicant resembled to that worn by Immigration Officers at the airport. Government observes that it was not a case of the respondent that the applicant had identified himself as an Immigration Officer to clear the gold bars but that the blue coloured ribbon alongwith the pant / shirt worn by him which had a resemblance to those worn by Immigration Officers was construed to be an act of impersonation. Government finds that this analogy would be far-fetched and not appropriate. Government finds that this intention / plan of the applicant has been wrongly construed as impersonation by the respondent and lower authorities.

14. 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”.

15. 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.

16. 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 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.*

17.1. Government further observes that there are a catena of judgements, over a period of time, of the Hon'ble Apex / High Courts and other forums which have been categorical in the view that grant of the option of redemption under Section 125 of the Customs Act, 1962 can be exercised in the interest of justice. Government places reliance on some of the judgements as under:

- a) In the case of Commissioner of Customs, Aliganj, Lucknow vs. Rajesh Jhamatmal Bhat, [2022(382) E.L.T. 345 (All)], the Lucknow Bench of the Hon'ble High Court of Allahabad, has held at Para 22 that "*Customs Excise & Service Tax Appellate Tribunal Allahabad has not committed any error in upholding the order dated 27.08.2018 passed by the Commissioner (Appeals) holding that Gold is not a prohibited item and, therefore, it should be offered for redemption in terms of Section 125 of the Act.*"
- b) The Hon'ble High Court of Judicature at Madras, in the judgment in the case of Shik Mastani Bi vs. Principal Commissioner of Customs, Chennai-I [2017(345) E.L.T. 201 (Mad)] upheld the order of the Appellate Authority allowing re-export of gold on payment of redemption fine.
- c) The Hon'ble High Court of Kerala at Ernakulam in the case of R. Mohandas vs. Commissioner of Cochin [2016(336) E.L.T, 399 (Ker.)] has, observed at Para 8 that "*The intention of Section 125 is that, after adjudication, the Customs Authority is bound to release the goods to any such person from whom such custody has been seized...*"
- d) Also, in the case of Union of India vs Dhanak M Ramji [2010(252)E.L.T. A102(S.C)], the Hon'ble Apex Court vide its judgement dated 08.03.2010 upheld the decision of the Hon'ble High Court of Judicature at Bombay

[2009(248) E.L.T. 127 (Bom)], and approved redemption of absolutely confiscated goods to the passenger.

18.1. For the reasons cited above, Government finds that this is not a case of impersonation as construed by the lower authorities. Also, for the reasons cited above, it would be inappropriate to term the applicant as a habitual offender. In the instant case, the impugned gold bars were kept by the applicant on his person, i.e. in the pockets of the pants worn by him. Government observes that sometimes passengers resort to such innovative methods to keep their valuables / precious possessions safe. Also, considering the issue of parity and fairness as mentioned above, Government finds that this is a case of non-declaration of gold.

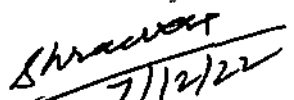
18.2. Government finds that all these facts have not been properly considered by the lower authorities while absolutely confiscating the (02) two FM gold bars of 1 kg each and two gold bars of 10 tolas each, totally weighed 2233.2 grams and valued at Rs.58,26,977/-. Also, observing the ratios of the judicial pronouncements cited above, Government arrives at the conclusion that decision to grant the option of redemption would be appropriate in the facts and circumstances of the instant case. Therefore, the Government maintains confiscation of gold bars but allows the impugned gold bars to be redeemed on payment of a redemption fine.

19. The Government finds that the penalty of Rs. 6,00,000/- imposed under Section 112 (a) & (b) by the original adjudicating authority and upheld by the AA is commensurate with the omissions and commissions committed. Government finds the quantum of the penalty as appropriate.

20. In view of the above, the Government modifies the OIA passed by the AA to the extent of absolute confiscation of the gold bars i.e. (02) two FM gold bars of

1 kg each and two gold bars of 10 tolas each, totally weighing 2233.2 grams and valued at Rs.58,26,977/- and grants an option to the applicant to redeem the same on payment of a redemption fine of Rs. 12,00,000/- (Rupees Twelve Lakhs only). The penalty of Rs. 6,00,000/- imposed by OAA and upheld by AA is sustained.

21. Accordingly, Revision Application is decided on the above terms.

  
( SHRAWAN KUMAR )

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

ORDER No. 355/2022-CUS (WZ) /ASRA/MUMBAI DATED 07.12.2022

To,

1. Shri. Balanadukkam Muhammed, Balanadukkam House, Bovikanam, Muliya Post, Kasargod, Kerala - 671 542.
2. Pr. Commissioner of Customs, Chhatrapati Shivaji Maharaj International Airport, Terminal - 2, Level - 2, Sahar, Andheri West, Mumbai - 400 099.

Copy to:

3. Shri. N.J Heera, Advocate, Nulwala Bldg, Ground Floor, 41, Mint Road, Opp. GPO, Fort, Mumbai - 400 001.
4. Sr. P.S. to AS (RA), Mumbai.
5. File Copy.
6. Noticeboard.