



GOVERNMENT OF INDIA  
MINISTRY OF FINANCE  
(DEPARTMENT OF REVENUE)

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Mumbai-400 005

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F.No. 371/36/B/2019-RA/2199 : Date of Issue : 08/12/2022

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ORDER NO. 358/2022-CUS (WZ/SZ)/ASRA/MUMBAI DATED 08.12.2022  
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 : Sunita Nanikram Sachdev

Respondent: Commissioner of Customs (Appeals), Mumbai-III, Awas  
Corporate Point (5<sup>th</sup> 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-782/2018-19 dated  
28.11.2018 [(DOI: 15.12.2019) passed by the  
Commissioner of Customs (Appeals), Mumbai Zone-III

**ORDER**

This revision application has been filed by Ms Sunita Nanikram Sachdev (hereinafter referred to as the Applicant) against the Order-in-Appeal No. MUM-CUSTOM-PAX-APP-782/2018-19 dated 28.11.2018 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 13.05.2015, after she crossed the green channel at Chatrapati Shivaji Maharaj International Airport, Mumbai, having earlier arrived from Bangkok by Air India Flight No. AI 331/12.05.2015. During personal search the passenger was found in possession of 5 cut piece of gold bar totally weighing 668 gms valued at Rs.16,98,342/- concealed in the sandals worn by her.

3. The Original Adjudicating Authority (OAA), viz, Additional Commissioner of Customs CSI Airport, Mumbai, vide Order-In-Original No. ADC/RR/ADJN/359/16-17 dated 28-10-2016 ordered for the absolute confiscation of 5 cut piece of gold bars weighing 668 grams valued at Rs16,89,342/- under Sections 111(d), 111(l) & 111(m) of the Customs Act, 1962 and a personal penalty of Rs. 1,70,000/- 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-782/2018-19 dated 28.11.2018 decided as follows:

- (i) upheld the ADC's Order regarding absolute confiscation of the gold viz 5 cut piece of gold bars weighing 668 grams valued at Rs16,89,342/-;
- (ii) Upheld the ADC'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 impugned order passed by the Respondent is bad in law and unjust; that this is the first time that the Applicant has brought this type of goods and there is no previous case registered against her.

5.02 that the adjudicating authority ought to have appreciated that dutiable goods brought in by the Applicant are neither restricted nor prohibited.

5.03 that the conclusion that the acts and / or omissions on the part of the Applicant was to evade Customs duty is not correct as the evasion of Customs duty can be done only in respect of dutiable goods and not prohibited goods.

5.04 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. 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 in spite of the above observation the dutiable goods were absolute confiscated by the Respondent.

5.05 that there are a number of 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. The judgments are listed below viz.

- a) Hon'ble Supreme Court of India in Hargovind Das K. Joshi Versus Collector of Customs reported in 1992 (61) E.LT. 172 (SC);
- b) 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) Hon'ble Tribunal in the case of T. ELVARASAN v/s COMMISSIONER OF CUSTOMS (AIRPORT), reported in 2011 (266) E.LT. 167 (Mad);
- d) Hon'ble Tribunal in the case of YAKUB IBRAHIM YUSUF v/s COMMISSIONER OF CUSTOMS, MUMBAI reported in 2011 (263) E.L.T. 685 (Tri. Mumbai);
- e) 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) E.LT. A78 (S.C.);
- g) Gauri Enterprises v. CC, Pune 2002 (145) ELT 706 (Tri-Bang);
- h) Shaik Jamal Basha v. Government of India 1997 (91) ELT 277 (A.P.)
- i) VP Hameed v. Collector of Customs, Mumbai - 1994 (73) E.LT. 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) ELT 127 (Bom) affirmed vide 2010 (252) ELT A102 (S C);
- l) A. Rajkumari v. CC (Chennai) 2015 (321) ELT 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) E.L.T. 305;
- o) Vatakkal Moosa v. collector of Customs, Cochin 1994 (72) E.LT. 473 (G.O.I.); Halithu Ibrahim v. CC [2002-TIOL 195-CESTAT-MAD = 2002 (148) E.LT. 412 (Tribunal); Krishnakumari v. CC, Chennai 2008 (229) E.LT 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);
- p) 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

5.06 In view of the above, The Applicant requested to 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 7.10.2022. Shri. M. J. Heera, Advocate for the applicant appeared for the hearing on 07.10.2022. He submitted that the applicant has expired and a copy of the death certificate was submitted. He submitted that the quantity of gold was small and for

personal use. The applicant was not a habitual offender. He requested to allow release of gold to legal heir of the applicant on nominal redemption fine. He further submitted that since applicant has expired, no penalty be imposed.

7. The Government has gone through the facts of the case and notes that the applicant had failed to declare the goods in her possession as required under Section 77 of the Customs Act, 1962. The applicant had not disclosed that she was carrying dutiable goods and had she not been intercepted would have walked away with the impugned 5 cut pieces of gold bars weighing 668gms without declaring the same to Customs. By her 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 impugned gold 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 Government finds that Shri. N. J. Heera, the Advocate has informed at the time of personal hearing that the applicant expired on 13.11.2016. He submitted the death certificate and requested to release gold to legal heir on nominal redemption fine. Hence the impugned 5 cut piece of gold bars weighing 668 grams valued at Rs16,89,342/- is allowed redemption on payment of fine of Rs. 3,50,000/- (Rupees Three Lakh Fifty Thousand only) to the legal heir of the applicant.

14. The Government finds that since the applicant has expired, the penalty of Rs. 1,70,000/- (Rupees Fifteen thousand only) imposed on the applicant under Section 112(a) & (b) of the Customs Act, 1962 stands abated. In this regard, following two judgements are relevant:

a) CESTAT judgement of the 2010 (20) S.T.R. 204 (Tri. - Ahmd.) in case of M/s ABHAY INTELLIGENCE & SECURITY SERVICE Versus COMMISSIONER OF CENTRAL EXCISE, VADODARA wherein it is held that:

*“Appeal to Appellate Tribunal - Maintainability of - Penalty contended as not recoverable on death of proprietor - Penalty being personal in case of proprietary firm, the same not recoverable from legal representative - Proprietor expired before filing of appeal - Proprietary firm gets dissolved with the death of proprietor - Appeal filed by legal representative on behalf of firm not maintainable - Sections 76 and 86 of Finance Act, 1994”.*

b) And also Apex Court in the case of Shabina Abraham v/s. Collector of C.Ex & Customs [2015(322) ELT 372 (S.C)].

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

  
( SHRAWAN KUMAR )

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

ORDER NO. 358/2022-CUS (WZ)/ASRA/MUMBAI DATED 07.12.2022.

To,

1. Sunita Nanikram Sachdev,  
Flat No. 102, Dhiraj Tower,  
Goal Maidan, Ulhasnagar-421001
2. Commissioner of Customs (Appeals), Mumbai-III, Awas Corporate Point, 5<sup>th</sup> Floor, Makwana Lane, Behind S.M.Road, Andheri-Kurla Road, Marol, Mumbai-59.
3. Commissioner of Customs, CSI Airport, Terminal-2, Level-2, Sahar, Andheri East, Mumbai-99.

Copy to:

1. Shri. Shri A.M sachwani (Advocate), Nulwala Bldg. Ground floor, 41, Mint Road, Opp G.P.O, Fort, Mumbai-1
2. Sr. P.S. to AS (RA), Mumbai.
3. File Copy.
4. Notice Board.