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SPEED POST



GOVERNMENT OF INDIA  
MINISTRY OF FINANCE  
(DEPARTMENT OF REVENUE)

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Mumbai-400 005

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F.No. 371/266/B/2018-RA | 1764 : Date of Issue: 27.03.2023

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ORDER NO. 373 /2023-CUS (WZ)/ASRA/MUMBAI DATED 23 .03.2023  
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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Applicants : Shri Azaz Nishar Shaikh.

Respondent : Commissioner of Customs, Ahmedabad.

Subject : Revision Application filed, under Section 129DD of the  
Customs Act, 1962 against the Order-in-Appeal No. AHM-  
CUSTM-000-APP-170-17-18 dated 06.03.2018 [F.No. S/49-  
12/CUS/AHD/2017-18] [DOI: 06.03.2018] passed by the  
Commissioner of Customs (Appeals), Ahmedabad.

**ORDER**

The Revision Application has been filed by Shri Azaz Nishar Shaikh (herein referred to as the "Applicant") against the Order-in-Appeal No. AHD-CUSTM-000-APP-170/18-19 dated 06.03.2018 [F.No. S/49-12/CUS/AHD/2017-188] [Date of issue: 06.03.2018] passed by the Commissioner of Customs (Appeals), Ahmedabad.

2. Brief facts of the case are that the applicant arrived at Sardar Vallabhbhai Patel International Airport, Ahmedabad by Kuwait Airways Flight No. KU-345 on 11-02-2017 and did not submit any Customs Declaration Form-1 to the Customs officials which was required to be filed by the passenger carrying the dutiable goods under the Customs Baggage Rules, 2016 read with Customs Baggage Declaration Regulation, 2013. As his movements appeared suspicious, the AIU officers intercepted him and was put through Door Frame Metal Detector. He was found wearing raw gold kada weighing 114.300 grams of pure gold of purity 995. Thereafter, he was diverted to counter. The baggage/personal search of the applicant resulted in further recovery of 6 pieces of I-phones and bills of 5 pieces of I-phones. The applicant, despite carrying dutiable goods did not declare the dutiable goods under the Custom Baggage Declaration Regulations, 2013. Hence, it appeared that the said goods were attempted to be smuggled into India by the applicant in contravention of provisions of Section 77 of the Customs Act, 1962 read with Customs Baggage Rules, 2015 and Regulation 3 of the Custom Baggage Declaration Regulations, 2013. The goods valued at Rs. 6,77,999.00 recovered from the appellant were placed under detention vide Detention Receipt No. 2579 dated 11-02-2011 under the reasonable belief that the said goods are liable to confiscation under Section 111(d) 111(1) and 111(m) of the Customs Act, 1962 read with Section 3(3) of the Foreign Trade Act, 1992 and liable for penal action under Section 112(a) & 112(b) of the Custom Act, 1962. The applicant was asked whether any written show cause was required to be issued in the matter. He stated that

he does not require any show cause notice and personal hearing in the matter. The Government Approved Valuer, vide his certificate dated 22-02-2017, certified that the said gold kada weighing 114.300 grams is having purity of 995.0% and tariff value is R 3,03,343/-.

3. The Original Adjudicating Authority (OAA) viz the Additional Commissioner of Customs, Ahmedabad, vide his OIO no. 74/ADC-ML/ICD-KHOD/O&A/2017 dated 06-03-2017 ordered (i) absolute confiscation of the Raw Gold Kada having gross weight of 114.300 grams having tariff value of Rs.3,03,343/- and market value of Rs.3,38,328/- under Section 111 (d), (l) and (m) of Customs Act, 1962, (ii) Confiscate 6 pieces of I Phone, however allowed the applicant to redeem the goods on payment of redemption fine of Rs. 50,000/- under section 125 of the Customs Act, 1962 and (iii) A penalty of Rs 50,000/- under section 112(a) & (b) of the Customs Act, 1962 was also imposed on the applicant.

4. Aggrieved, with this Order, the Applicant filed an appeal before the Appellate Authority (AA) viz, Commissioner of Customs (Appeals), Ahmedabad, who vide Order-in-Appeal No. AHD-CUSTM-000-APP-170/18-19 dated 06.03.2018 [F.No. S/49-12/CUS/ AHD/2017-188] [Date of issue: 06.03.2018] upheld the order passed by the OAA.

5. Aggrieved by this Order, the applicant has filed this revision application on the undermentioned grounds of revision;

5.1 That the impugned Order-in-Appeal has been passed by not considering the submissions and various decisions of the Government of India. The impugned order being unreasoned and non-speaking is thus violative of

principles of natural justice and the same deserves to be quashed and set aside.

5.2. That under Section 124 of the Customs Act, it was obligatory on the part of the adjudicating authority to issue a notice in writing to the owner of the goods, the ground on which the said goods under seizure are required to be confiscated. In the present proceeding, no valid show cause notice having been issued, as such, no action for confiscation could be taken against the applicant. The applicant submitted that even if there was a waiver of notice as recorded in the impugned order, it was obligatory on the part of the adjudicating authority to have called the applicant in person, explained to him the charges and then proceeded to adjudicate the case.

5.3. The applicant submitted that the entire case of the department is based on the allegation of non-declaration on the disembarkation slip. The applicant submits that mere non declaration of the goods, which were bonafide use, cannot be construed as non-declaration with an intention evade the payment of duty. The applicant submits that the said gold jewellery was worn by him, being for personal effect, no declaration was required to be made in respect of 114.3 Gms of old and used gold jewellery.

5.4. The provisions of Section 111 (d), (l) & (m) of the said Act has been invoked for confiscation. The said section for confiscation can be invoked only if the goods are prohibited/misdeclared. In the present case, the goods under seizure being personal effects are not prohibited/misdeclared and therefore not liable to confiscation under Section 111 (d) of the said Act.

5.5. The applicant submits that both adjudicating authority as well as appellate authority has erred in holding that the gold Kada worn by him was

raw gold; that the gold is classifiable in the market in two forms i.e. primary and other than primary. The primary form is of 999% purity. Thus, the gold kada being worn by the applicant was of purity of 995% and therefore the said could not be considered as a primary form of gold. The said gold kada therefore was not liable for absolute confiscation and it was obligatory on the part of the authorities to have allowed the same to be redeemed on payment of redemption fine.

5.6. The applicant submits that the appellate authority has negated the submissions of imposition of huge redemption fine without discussing the methodology adopted for arriving at the said amount of fine. The applicant submits that for imposing the quantum of redemption fine, the margin of profit earned is the basis for imposition of redemption fine. In the present case, the goods under seizure were for personal use and there being no profit motive, no redemption fine should have been imposed or in the alternative, a minimum redemption fine should have been imposed. In any case, imposition of redemption fine of 15% of value of the goods, when there is no profit motive is highly excessive.

5.7. The applicant submitted that the penalty has been imposed vide the impugned order on the applicant under section 112 (a) of the Customs Act, 1962. The said section 112 provides for penalty on any person for any act of omission or commission, which renders the goods liable for confiscation. There being no material evidence on record against the applicants, imposition of penalty is not justified

5.8. The applicant submits that the various Courts and Tribunals have consistently held that the penalty should not be imposed in an ordinary course, unless it can be shown that the applicant had acted deliberately in

defiance of Law. The applicant relied on Hon'ble Supreme Court in case of Hindustan Steel Ltd. Vs. State of Orissa reported in AIR 1970 SC (253) (1979 ELT (J402).

Under the above circumstances, the applicant has prayed to set aside the impugned order and also to hold that the used Gold jewellery worn and carried by the applicant is not liable for confiscation and that the applicant is not liable for any penalty.

6. Personal hearing in the matter was scheduled for 23.09.2022, 30-09-2022, 6.12.2022 and 20.12.2022. However, no one appeared before the Revisionary Authority for personal hearing on any of the appointed dates for hearing. Since sufficient opportunity for personal hearing has been given in the matter, the case is taken up for decision on the basis of the available records.

7. The Government has gone through the facts of the case, and observes that the applicant had failed to declare the impugned gold and the I-phones carried by him to the Customs at the first instance as required under Section 77 of the Customs Act, 1962. The applicant had not disclosed that he was carrying the dutiable goods. By not declaring the gold carried by him, the applicant clearly revealed his intention not to declare the goods and pay Customs duty on it. The Government finds that the confiscation of the impugned goods was therefore justified. However, the adjudicating authority redeemed the I-Phones on payment of redemption fine and absolutely confiscated the gold. The applicant has filed the Revision Application to release the gold.

7.1. 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.”*

7.2. 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.

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” in terms of Section 2(33) and hence it is liable for confiscation under Section 111(d) of the Customs Act, 1962.

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 ‘Applicant’ 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 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. A plain reading of the section 125 shows that the Adjudicating Authority is bound to give an option of redemption when goods are not subjected to any prohibition. In case of prohibited goods, such as, the gold, the Adjudicating Authority may allow redemption. There is no bar on the Adjudicating Authority allowing redemption of prohibited goods. This exercise of discretion will depend on the nature of the goods and the nature of the prohibition. For instance, spurious drugs, arms, ammunition, hazardous goods, contaminated flora or

fauna, food which does not meet the food safety standards, etc. are harmful to the society if allowed to find their way into the domestic market. On the other hand, release of certain goods on redemption fine, even though the same becomes prohibited as conditions of import have not been satisfied, may not be harmful to the society at large. Thus, Adjudicating authority can allow redemption under Section 125 of any goods which are prohibited either under the Customs Act or any other law on payment of fine.

12.1 Government further observes that there are a catena of judgements, over a period of time, of the Hon'ble 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.

12.2 Government, observing the ratios of the above judicial pronouncements, arrives at the conclusion that decision to grant the option of redemption would be appropriate in the facts and circumstances of the instant case.

13. In the instant case, the quantum of gold involved is small (only 114.3 grams) and is not of commercial quantity. The quantum of the same does not suggest the act to be one of organized smuggling by a syndicate. Government, notes that the impugned gold was in the form of jewellery (Kada), they were not ingeniously concealed, in fact the applicant was wearing in his hand. The applicant claimed that it was used jewellery. Further, there were no allegations that the Applicant is a habitual offender and was involved in similar offences 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. The absolute confiscation of the gold, is therefore harsh and disproportionate. Government considers granting an option to the Applicant to redeem the gold on payment of a suitable redemption fine, as the same would be more reasonable and fair.

14. The Applicant has also pleaded not to impose any penalty on him. Government observes that in this case the confiscated goods were 114.3 grams of gold of market value amounting to Rs.3,38,328/- and 6 pieces of I-phone valued at Rs.3,74,656/- and the penalty imposed of Rs.50,000/- was composite. Government therefore finds that the penalty of Rs. 50,000/-

imposed on the Applicant under Section 112(a) & (b) of the Customs Act, 1962 is appropriate and commensurate to the omissions and commissions of the Applicant.

15.1 In view of the above, the Government sets aside the impugned order of the Appellate authority in respect of the impugned gold kada. The impugned gold kada weighing 114.3 grams of gold of market value amounting to Rs.3,38,328/-are allowed redemption on payment of Rs.65,000/- ( Rupees Sixty-five Thousand Only ).

15.2 The penalty of Rs. 50,000/- imposed under Section 112(a) and (b) of the Customs Act, 1962 being appropriate and commensurate with the omissions and commissions of the Applicant, Government does not feel it necessary to interfere with the imposition of the same.

16. The Revision Application is disposed of on the above terms.

  
23/3/23  
( SHRAWAN KUMAR )

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

ORDER NO. 371 /2023-CUS (WZ)/ASRA/MUMBAI DATED 23.03.2023

To,

1. Mr. Azaz Nisharbhai Shaikh, Madhwas Gate, Lunawada, Panchmahal, Gujarat.
2. The Pr. Commissioner of Customs, Ahmedabad, "Custom House", Navrangpura, Ahmedabad-380009.

Copy to:

1. The Commissioner of Customs (Appeals), Ahmedabad, 7<sup>th</sup> Floor, Mrudul Towers, Behind Times of India, Ashram Road, Ahmedabad-380009.
2. File Copy.
3. Sr. P.S. to AS (RA), Mumbai.
4. Notice Board.