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SPEED POST



GOVERNMENT OF INDIA  
MINISTRY OF FINANCE  
(DEPARTMENT OF REVENUE)

8<sup>th</sup> Floor, World Trade Centre, Centre - I, Cuffe Parade,  
Mumbai-400 005

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**F.No. 371/352-353/B/2022-RA / 1886** : Date of Issue : 29.03.2023

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ORDER NO <sup>352-353</sup> /2023-CUS (WZ)/ASRA/MUMBAI DATED 28.03.2023 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 : (i). Shri. Tohid Wahid Motiwala,  
(ii). Smt. Saika Tohid Motiwala

Respondent : Pr. Commissioner of Customs, CSIA, Sahar, Mumbai.

Subject : Revision Application filed, under Section 129DD of the  
Customs Act, 1962 against the Order-in-Appeal No.  
MUM-CUSTOM-APSCAPP-140/2022-23 dated 05.05.2022  
[F.No. S/49-1456/2021; DIN-2022056BB000000B25B]  
passed by the Commissioner of Customs (Appeals),  
Mumbai - III.

**ORDER**

These two revision applications have been filed by (i). Shri. Tohid Wahid Motiwala and (ii). Smt. Saika Tohid Motiwala (herein referred to as the Applicants or alternately and more specifically, as Applicant No. 1 (A1) / Applicant No. 2 (A2) resp.) against the Orders-in-Appeal No. MUM-CUSTOM-APSCAPP-140/2022-23 dated 05.05.2022 [F.No. S/49-1456/2021; DIN-2022056BB000000B25B] passed by the Commissioner of Customs (Appeals), Mumbai – III.

2(a). Brief facts of the case are that on intervening night of 07/08.06.2019, the Customs Officers at the CSI Airport, Mumbai had intercepted the applicants who had arrived from Madinah, Saudi Arabia onboard Saudi Airlines Flight No. SV-772. The applicants were a married couple and had cleared themselves through the Customs Green Channel and had not declared possession of any dutiable goods. A personal search of the applicant no. 1 resulted in the recovery of 04 nos of metal bangles of gold which had been kept in the right side pocket of the Kurta worn by him. Personal search of applicant no. 2 had resulted in the recovery of 8 gold bangles which were worn by her on both her wrist. A Government Approved Valuer assayed the same and certified that the gold was of 24 kts purity i.e. 999, totally weighing 712 grams and valued at Rs. 20,62,208/-.

2(b). The applicants admitted to the ownership, possession, non-declaration, concealment and recovery of the 12 crude gold bangles from their possession; that they had purchased the gold by collecting money from their relatives and had attempted to clear the same through Customs without declaring the same.

3. The Original Adjudicating Authority (OAA) i.e. Addl. Commissioner of Customs, CSI Airport, Mumbai vide his Order-In-Original (OIO) no. ADC/VDJ/ADJN/116/2021-22 dated 09.07.2021 [(DOI : 13.07.2021),(S/14-5-

267/2019-20/Adjn)(SD/INT/AIU/216/2019-'C" had ordered for the confiscation of the impugned gold i.e. twelve (12) crude gold bangles, collectively weighing 712 and totally valued at Rs. 20,62,208/- under Section 111 (d), (l) & (m) of the Customs Act, 1962 with an option granted to the applicants to redeem the impugned gold bangles on payment of a fine of Rs. 4,00,000/- under section 125 of the Customs Act, 1962 alongwith applicable Customs duty as per not<sup>n</sup> 26/2016 dated 31.03.2016 as amended and any other Customs duty as applicable withing 60 days of the order. A penalty of Rs. 1,00,000/- each had been imposed on the applicants under Section 112(a) and (b) of the Customs Act, 1962.

4. Aggrieved, with this Order, the respondent (i.e. Addl. Commissioner of Customs (Review), CSI Airport, Mumbai) filed an appeal before the Appellate Authority (AA) viz, Commissioner of Customs (Appeals), Mumbai – III who vide Order-in-Appeal No. MUM-CUSTM-APSCAPP-140/2022-23 dated 5.05.2022 [F.No. S/49-1456/2021; DIN-2022056BB000000B25B] set aside the order passed by the OAA and ordered for the absolute confiscation of the impugned gold and maintained the personal penalty imposed on the applicants.

5. Aggrieved with the above order of the appellate authority, the Applicants have filed these revision applications on the following grounds;

5.01. that the case was adjudicated and the OAA had used his discretion in allowing an option to redeem the gold under Section 125 of the Customs Act. A redemption fine and penalty had been imposed; that on the issue of Section 125 of the Customs Act, 1962, they have relied Board's Circular no. 9/2001 dated 22.02.2001 which states that the redemption fine and personal penalties should be such that it not only wipes out the margin of profit but also acts as a strong deterrent against repeat offences; that on the issue of redemption and discretion used by OAA, they have relied upon the the following case laws;

(a). Commissioner of Customs (Preventive) Vs. Uma Shankar Verma (2000 (120) E.L.T. 322 Cal.), wherein it was held that where goods are not

prohibited, the authorities have no choice but to allow the option to redemptions of goods on payment of fine;

(b). Indian Petrochemicals Corporation vs. General Secretary, Gujarat High Court,

(c). Koshambh Multitred Pvt. Lrd vs. UOI 2018-361-ELT-604-Guj,

(d). NOCIL Ltd vs. Policy Relaxation Committee, 2018-359-ELT-316-Del,

(e). M.K. Govind Pillai vs. Collector of Customs, C.Ex, Cochin, 1994-71-ELT-881-Ker.

(f). Bharat Rice Mill vs. UOI, 2008-229-ELT-502.

(g). Kashish Silk Mills Pvt. Ltd vs. UOI passed by Gujarat High Court 2005-183-ELT-134.

(h). In Yakub Ibrahim Yusuf vs CC, Mumbai 2011 (263) E.L.T. 685 (Tri. Mumbai),

(i). In Neyveli Lignite Cor Ltd vs UOI 2009 (242) E.L.T. 487 (Mad.),

(j). In Hargovind Das Joshi Vs Collector of customs 1992 (61) ELT 172(SC)

(k). In Universal Traders Commissioner - 2009 (240) E.L.T. A78 (SC)

(l). In Gauri Enterprises CC, Pune 2002 (145) ELT (705) (Tri Bangalore)

(m). In CC (Airport), Mumbai Vs Alfred Menezes 2009 (242) ELT 334 (Bom.),

(n). 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.

(o). In VP Hameed Vs Collector of Customs Mumbai 1994(73) ELT 425 (Tri)

(p). In T. Elavarasan Vs Commissioner of Customs (Airport), Chennai 2011 (266) ELT 167 (Mad),

(q). In Kadar Mydin v/s Comnissioner of Customs (Preventive), West Bengal 2011 (136) ELT

(r). In Sapna Sanjeeva Kolhi v/s Commissioner of Customs, Airport, Mumbai 2010(253)ELT A52(SC)

(s). M. Arumugam Vs CC, Trichirapalli 2007 (220) ELT 311 (Tri-Chennai)

(t). In the case of Union of India vs Dhanak M. Ramji 2009 (248) E.L.T. 127 (Bom.),

(u). In the case of Peringatil Hamza Vs CC (Airport), Mumbai 2014 (309) ELT 259 (Tri Mumbai)

(v). In the case of R. Mohandas Vs CC, Cochin 2016 (336) ELT 399 (Ker),

(x). The Hon' ble Tribunal in its judgement in case of Bhargav B. Patel (also relied upon the Apex Court's Judgement in case of Asian Food Indust 2006 (204) ELT 8 (SC); wherein the Hon'ble Apex Court observed that meaning of word "prohibited" will have to be construed in regard to

the text context in which it is used and the words prohibition, restriction and regulation meant to be applied differently. The Apex Court also observed that, section 2(33), is with a rider 'unless the context otherwise requires'. If any goods are not expressly prohibited under Section 11 of the Customs Act, 1962 or by any other statutory notification, an option to redeem them on payment of fine in lieu of confiscation may be given. (y). In the case of: MOHD..ZIA UL HAQUE before Government of India Revision Order no. 443/12-Cus dated 8-8-12; [2014-(214)-ELT-849-(GO1)].

(z). etc.

- 5.02. that they rely upon the undermentioned case laws;
- (a). Collector of Custom vs. Elephanta Oil and Inds. Ltd [2003(152) ELT 02547 Supreme Court]; once imported article is re-exported as directed by the department, there is no question of levying any penalty or redemption fine.
- (b). Kusum Bhai DayaBhai vs. Commr. Of Customs 1995 (79) ELT 292 Tri-Mumbai; If goods are allowed re-export on redemption, fine can be on the lower side and need not relate to margin of profit.
- (c). K.K Gems vs. CC 1998-100-ELT-70-CEGAT.
- (d). Etc.
- 5.03. that discretionary power of quasi judicial authority cannot be lightly interfered with. They have relied upon some case laws which have been referred above at (b) to (g).
- 5.04. that gold was freely importable on the date of import by the applicants as per not<sup>a</sup> dated 18.12.2019 is by DGFT, hence, gold was not liable for absolute confiscation; that they have relied upon (a) Rajesh Exports Ltd vs. CC, Bangalore in Customs Appeal no. 20459 of 2020 (Tri-Bang), (b). Sri. Exports vs. CC, Bang - 2019-368-ELT-985-Tri-Bang.
- 5.05. that gold is not a prohibited item for import, hence absolute confiscation was not warranted; that the authorities have relied upon some case laws such as Om Prakash Bhatia vs. Commissioner of Customs, Delhi 2003-155-ELT-423-S.C, Abdul Razak vs. UOI 2012-275-ELT-300-Ker , Commr. of Customs vs. P. Sinnasamy etc, which are not applicable to them.
- 5.06. that they have made an exhaustive submission on what is prohibited goods and what are restricted goods.
- 5.07. that Board's Circular No. 495/5/92-Cus-VI dated 10.05.1993 was only advisory in nature; that this advisory cannot be made a rule; that various judicial forums have allowed redemption of the goods; the AA had erroneously relied upon this circular; that they have submitted an exhaustive list of case laws wherein the various tribunals, High Courts, Apex Court have allowed gold to be redeemed. Some of these cases have already been cited above.

- 5.08. that GOI's Orders relied upon by the OAA were rejected by the AA; that this was non application of mind; that the OIA was not an order on merits; and not a speaking order; judicial on the issue of no option to redeem if the goods had not been declared.
- 5.09. that due process of law had not been followed by the AA; they have relied on the following judgements;
- (a). M/s Sahara India TV Network Vs CCE, Noida.
  - (b). CESTAT, New Delhi M/s. Vikas Enterprises vs CCE, Allahabad.
  - (c). M/S Sharp Carbon India Vs Commissioner of Central Excise, Kanpur
  - (d). Gujarat High Court -Union of India vs Sri Kumar Agencies reported
  - (e). Apex Court's Order in M/s.International Woolen Mills Ltd Vs. M/s. Standard Wool (UK) Ltd;
  - (d). etc

Under the circumstances, the applicants have prayed to set aside the impugned order passed by the AA and have prayed that the OIO passed by the OAA be restored and to drop proceedings.

6. Personal hearings in the case was scheduled for 12.12.2022, 19.12.2022. Shri. Prakash Shingrani, Advocate for the applicants, appeared for physical hearing on 12.12.2022 and submitted that applicants are family, had brought some gold jewellery for personal use, jewellery was not concealed and applicants are not habitual offenders. He requested to set aside OIA and uphold Order of Original Authority.

7. Government notes that the Applicants had both opted for the green channel and were intercepted thereafter, while attempting to carry the 12 crude gold bangles without declaring the same to Customs. Applicants had admitted that they had not declared the gold ornaments. An option to declare the gold in their possession was available to them but they chose not to avail the same. A declaration as required under section 77 of the Customs Act, 1962 was not submitted, therefore, confiscation of the gold was justified.

8. There is no doubt that gold brought by non-eligible person without fulfilling required conditions becomes 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. Even when 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. Government notes that the gold ornaments were not ingeniously concealed and had been worn by the applicant no 2 and had been kept in his pocket by applicant no. 1. The quantity of gold ornaments under import were not commercial in nature. The applicants have claimed ownership of the gold and in the OIO it is observed that they had produced the invoice evidencing the purchase of the gold by A1. Also, a case of the applicants being habitual offenders had not been made out. The facts of the case indicate that it is a case of non-declaration of gold ornaments/jewellery, 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 Customs Act, 1962 and while imposing quantum of penalty.

12. The absolute confiscation of the gold, leading to dispossession of the applicants of the gold ornaments in the instant case is harsh and not justified. Government finds that the original adjudicating authority had passed a reasonable order and had used his discretionary power quite judiciously to allow to redeem the 12 gold bangles, collectively weighing 712 grams and valued at Rs. 20,62,208/- on a redemption fine. The Government finds that the personal penalty imposed on the applicants by the lower adjudicating authority is reasonable. The Government finds that the Order of the lower adjudicating authority is well balanced and judicious and is therefore, inclined to restore the same.

13. Government therefore, sets aside the impugned order of the Appellate Authority and restores the Order-in-Original passed by the original adjudicating authority.

14. These two Revision Applications are disposed of on the above terms.

*Shrawan*  
28/3/23  
( SHRAWAN KUMAR )

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

ORDER NO. 395396 /2023-CUS (WZ)/ASRA/MUMBAI DATED 28/03.2023

To,

1. Shri. Tohid Wahid Motiwala, Flat No. 11,1<sup>st</sup> Floor, Potia Building No. 2, 292, Bellasis Road, Mumbai – 400 008.
2. Saika Tohid Motiwala, (**Address same as above**) i.e. Flat No. 11,1<sup>st</sup> Floor, Potia Building No. 2, 292, Bellasis Road, Mumbai – 400 008.
3. The Pr. Commissioner of Customs, Chhatrapati Shivaji International Airport, Level – II, Terminal – 2, Sahar, Andheri West, Mumbai – 400 099.

Copy to:

1. Shri. Prakash Shingrani, Advocate, 123, Himalaya House, 79, Palton Road, Next to Haj House, C.S.T., Mumbai - 400 001.
2. Sr. P.S. to AS (RA), Mumbai.
3. File copy,
4. Notice Board.