



GOVERNMENT OF INDIA  
MINISTRY OF FINANCE  
(DEPARTMENT OF REVENUE)

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**F.No. 371/167/B/2021-RA** 37688 : **Date of Issue** : 16.12.2022

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ORDER NO. 402 /2022-CUS (WZ)/ASRA/MUMBAI DATED 16.12.2022 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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**(i). F.No. 373/167/B/2021-RA**

Applicant : Mr. Taheri

Respondent : Pr. Commissioner of Customs, CSI Airport, Mumbai.

Subject : Revision Application filed, under Section 129DD of the Customs Act, 1962 against the Order-in-Appeal No.MUM-CUSTOM-PAX-APP-30/2021-22 dated 05.04.2021 [(DOI:15.04.2021) (F.No.S/49-79/2020) passed by the Commissioner of Customs (Appeals), Mumbai Zone-III.

**ORDER**

This revision application has been filed by Mr. Taheri (hereinafter referred to as the 'Applicant') against the Order-in-Appeal No. MUM-CUSTOM-PAX-APP-30/2021-22 dated 05.04.2021 [(Date of issue: 15.04.2021) (F.No. S/49-79/2020) passed by the Commissioner of Customs (Appeals), Mumbai Zone-III.

2. Brief facts of the case are that the Applicant who is a Non Resident Indian, was intercepted by Customs Officers at CSI Airport, Mumbai on 20.01.2020, on arrival from Kuwait on board Flight No 6E-1767. The Applicant was found to be in possession of 01 cut piece of crude/raw Gold bar, weighing 195 grams and valued at Rs. 7,02,827/-, which was hidden in clothing and which he had not declared to Customs

3. The case was adjudicated by the Original Adjudicating Authority (OAA), viz, Deputy Commissioner of Customs, CSI Airport, Mumbai vide Order-In-Original No. AirCus/T2/49/1540/2020 UNI "D" dated 20.01.2020 who ordered for the absolute confiscation of the impugned 01 cut piece of crude/raw Gold bar, weighing 195 grams and valued at Rs. 7,02,827/- under Section 111 (d) of the Customs Act, 1962 and imposed a penalty of Rs. 75,000/- under Section 112 of the Customs Act, 1962 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 Customs-Zone-III. The AA vide Order-In-Appeal No. MUM-CUSTOM-PAX-APP-30/2021-22 dated 05.04.2021 [(Date of issue: 15.04.2021) (F.No. S/49-79/2020) upheld the OIO passed by the OAA. The penalty of Rs. 75,000/- imposed by the OAA under Section 112 of the Customs Act, 1962 was upheld.

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

5.01. Gold is not a prohibited item and is not liable for absolute confiscation. Gold is not a prohibited item for import and Section 125 of the Custom Act, 1962 provides that option of redemption can be given in case the seized goods are not prohibited and therefore absolute confiscation is not warranted in the instant case. Section 125 of the Customs Act, 1962 provides that the goods should be redeemed to the owner of the goods or the person from whose possession the goods were seized if the owner is not known. Further authority has discretion to order release of prohibited goods on payment of fine in lieu of confiscation. The Applicant has relied upon the undermentioned case laws;

- (i) Commr. Of Customs (Prev) vs. India Sales International [2009 (241) E.L.T. 182(Cal)].
- (ii) Om Prakash Bhatia vs. Commr. Of Customs Delhi [2003(155) E.L.T.423(SC)]
- (iii) Shaikh Jamal Basha vs. GOI [1992(91) E.L.T. 227 (AP)]
- (iv) Mohamed Ahmed Manu vs. CC, Chennai [2006(205) E.L.T 383(Tri-Chennai)].
- (v) Mohd Zia Ul Haque vs. Addl. Commissioner of Customs, Hyderabad [2014(214) E.L.T 849 (GOI)]
- (vi) UOI vs. Dhanak M Ramji [2003(248) E.L.T 128(Bom)]
- (vii) Sapna Sanjiv Kohli vs. CC, Mumbai [2010(253) E.L.T A52(SC)]
- (viii) Horizon Ferro Alloys Pvt Ltd vs. UOI –judgement by the Division Bench of Punjab and Haryana High Court.
- (ix) Suresh Kumar Agarwal vs. Collector of Customs, Madras [1998(103) E.L.T. 18(A.P)].
- (x) CESTAT order in the case of appeal by Bhargav B Patel [2015-TIOL-1951-CESTAT-Mum].
- (xi) A Rajkumari vs. Commr. of Customs (Airport-Air cargo) Chennai [2015(321) E.L.T. 540].
- (xii) Ramesh Mehta vs. Sanwal Chand Singhvi [(2004) 5 SCC 409].
- (xiii) Commr of Customs (AP) vs. Alfred Menezes [2009(242 )E.L.T. 334 Bom].
- (xiv) Commr of Customs Delhi IV vs. Achiever International [2012(286) E.L.T. 180(Del)].

(xv) Etc..

5.02 That decisions relied upon by the Commissioner (Appeals) are not applicable to the instant case;

5.03. that in common law legal systems 'precedent' is a principle or rule established in a previous legal case that is either binding or on persuasive for a court or other tribunal when deciding subsequent cases with similar issued or facts. Further, the Applicant has relied upon the undermentioned case laws;

- (i) CCE, Calcutta vs. Alnoori Tobacco Products [2004(170) E.L.T. 135(SC)]
- (ii) Escorts Ltd vs. CCE, Delhi [2004 (173) E.L.T 113(SC)]
- (iii) CC (Port), Chennai vs. Toyota Kirloskar [2007(213) E.L.T. 4(SC)]
- (iv) etc...

5.04. That Section 125 of Customs Act provides that option of redemption can be given in case the seized goods are not prohibited and gold as such is not a prohibited item and can be imported and such import is subject to certain conditions and restrictions including the necessity to declare the goods on arrival at the Customs Station and make payment of duty at the rate prescribed. The Applicant has relied upon the following case laws in support of their contention that confiscated gold can be redeemed on payment of redemption fine;

- (i) Shaikh Jamal Basha vs. Government of India – [1992 (91) ELT 227(AP)]
- (ii) Mohamed Ahmed Manu vs. Commr. of Customs, Chennai [2006 (205) ELT 383 (Tri-Chennai)]
- (iii) Mohd Zia Ul Haque vs. Addl Commr. of Customs, Hyderabad [ 2014 (214) ELT 849 (GOI)]

5.05. The Applicant has relied upon the following case laws in support of the contention that when goods are not eligible for import as per the import policy, re-export of such goods is permitted on payment of penalty and redemption fine:

- i) CC vs. Elephanta Oil [2003(152) ELT 257 (SC)]
- ii) Collector vs. N Patel [1992 (62) ELT 674 (GO1)]
- iii) Kusumbhai Dahyabhai Patel vs. CC (P) [1995 (79) ELT 292 (CEGAT)]
- iv) K&K Gems vs. CC [1998(100) ELT 70 (CEGAT)]

5.06 Provisions of Notification No 50/2017 dated 30.06.2017 cannot be made applicable to the instant case;

5.07. Penalty of Rs. 75,000/- imposed in the instant case is disproportionate to the value of the gold confiscated.

Under the above facts and circumstances of the case, the Applicant has prayed that gold under confiscation may be ordered to be release to him on payment of reasonable fine for re-export and penalty.

6. Personal hearing in the case was scheduled for 22.09.2022. Shri Prakash Shingrani, Advocate for the Applicant appeared for hearing on the scheduled date and submitted that the Applicant was an NRI and had brought small quantity of gold for personal use. He requested that since the Applicant stays abroad, he should be allowed re-export of the goods on payment of nominal 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 'Cut piece of crude/raw Gold bar' without declaring the same to Customs. By his actions, it was clear that the Applicant had no intention to declare the impugned 'Cut piece of crude/raw Gold bar' to Customs and pay Customs duty on it. The Government finds that the confiscation of the 'Cut piece of crude/raw Gold bar' is therefore justified.

8.1. 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.”*

8.2. 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.

9. 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”.

10. 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.

11. Section 125 of the Customs Act, 1962 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 even in prohibited goods. 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.*

12.1. 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. The Government notes that the quantum of gold recovered from the Applicant is very small. The Government finds that this is a case of non-declaration of the gold. The facts of the case does not reveal that the 'cut piece of crude/raw Gold bar' was ingeniously concealed. The impugned gold has been claimed by the Applicant and there is no other claimant. There are no previous offences registered against the Applicant. Further Applicant is a Non Resident Indian. Government therefore, is inclined to allow the impugned gold to be re-exported on payment of a redemption fine as specifically prayed for by the Applicant. Government is inclined to modify the order passed by the Appellate Authority.

14. The Government finds that the personal penalty of Rs. 75,000/- imposed on the Applicant under Section 112(a) of the Customs Act, 1962 is commensurate with the omissions / commissions committed and does not feel it necessary to interfere with the same.

15. In view of the above, the Government modifies the order passed by the Appellate Authority and allows the Applicant to redeem the '01 cut piece of crude/raw Gold bar' weighing 195 grams and valued at Rs. 7,02,827/-, for re-export as prayed for by the Applicant, on payment of a redemption fine of Rs. 1,40,000/- (Rupees One Lakh Forty Thousand only). The penalty amount of Rs. 75,000/- is upheld.

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

  
( SHRAWAN KUMAR )

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

ORDER NO. 402/2022-CUS (WZ)/ASRA/MUMBAI DATED 16.12.2022.

To,

1. Mr Taheri, Nai Abadi, Banswara, Rajasthan  
**Address No 2:** Mr Taheri, c/o Shri Prakash K. Shingrani, Advocate, 12/334, Vivek, New MIG Colony, Bandra (East), Mumbai 400 051
2. The Pr. Commissioner of Customs, Terminal-2, Level-II, Chhatrapati Shivaji International Airport, Mumbai 400 099.
3. The 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 - 400 059

Copy to:

1. Shri Prakash K. Shingrani, Advocate, 12/334, Vivek, New MIG Colony, Bandra (East), Mumbai 400 051
2. Sr. P.S. to AS (RA), Mumbai.
3. File Copy.
4. Notice Board.