

REGISTERED
SPEED POST



GOVERNMENT OF INDIA
MINISTRY OF FINANCE
(DEPARTMENT OF REVENUE)

8th Floor, World Trade Centre, Centre - I, Cuffe Parade,
Mumbai-400 005

(i). F.No. 371/101/B/WZ/2021-RA/2023 Date of Issue 05.04.2023

ORDER NO. 247/2023 CUS (WZ)/ASRA/MUMBAI DATED 31.03.2023 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.

(i). F.No. 371/101/B/WZ/2021-RA

Applicant : Shri. Parmeshwar Abhangrao Bhosale

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

Subject : Revision Applications filed respectively, under Section 129DD
of the Customs Act, 1962 against the Order-in-Appeal No. MUM-
CUSTM-PAX-APP-705/2020-21 dated 28.01.2021 issued on
08.02.2021 through F.No. S/49-968/2019 passed by the
Commissioner of Customs (Appeals), Mumbai - III.

ORDER

This revision application has been filed by Shri. Parmeshwar Abhangrao Bhosale (hereinafter referred to as the Applicant) against the Order-in-Appeal No. MUM-CUSTM-PAX-APP-705/2020-21 dated 28.01.2021 issued on 08.02.2021 through F.No. S/49-968/2019 passed by the Commissioner of Customs (Appeals), Mumbai – III.

2. Brief facts of the case are that the applicant on arrival at CSMI Airport, Mumbai from Dubai on 29.03.2019 by Spice Jet Flight No. SG-014 / 29.03.2019 was intercepted by the Customs Officers near the exit gate after having cleared himself through the green channel. Personal search conducted resulted in the recovery of 4 gold kadas, totally weighing 864 grams and valued at Rs. 25,22,016/- . The same were assayed by a Government Approved Valuer who certified the weight and value given was correct and confirmed that the gold was of 24 kt purity. The applicant in his statement recorded under Section 108 of the Customs Act, 1962 informed that he had a business abroad and that he was the owner of the gold kadas.

3. After due process of the law, the Original Adjudicating Authority, viz Addl. Commissioner of Customs, CSI Airport, Mumbai vide Order-in-Original No. ADC/AK/ADJN/159/2019-20 dated 20.09.2019 issued from F.No. S/14-5-136/2019-20-ADJN (SD/INT/AIU/148/2019-AP'A)] ordered for the absolute confiscation of the 4 gold kadas, totally weighing 864 grams and valued 25,22,016/- under Section 111(d), 111(l) & 111(m) of the Customs Act, 1962 and a penalty of Rs. 2,30,000/- was also imposed on the applicant under Section of 112 (a) and (b) 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-705/2020-21 dated 28.01.2021

issued on 08.02.2021 through F.No. S/49-968/2019 held that the OAA had rightly confiscated the gold absolutely and declined to interfere in the OIO passed by the OAA.

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

5.01. that notification no. 50/2017-Cus dated 30.06.2017 cannot be made applicable in the present case; that this notification was only an exemption notification and did not stipulate that gold was prohibited and the eligibility of the applicant for concessional rate of duty was never an issue claimed by the applicant.; that even the Baggage Rules does not prohibit the importation of gold.

(a). Madras High Court in, Commissioner Of Customs (Air) vs Samynathan Murugesan on 27 April, 2009., and

(b). Madras High Court Aiyakannu vs Joint Commissioner Of Customs on 2nd March, 2012

(c). Om Prakash Bhatia vs Commissioner of Customs, Delhi 2003(155) ELT 423 (S.C).

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

(e). Hon'ble Andhra Pradesh High Court in the case of Shaikh Jamal Basha vs Government of India - 1997 (91) ELT 227(AP),

(f). In the the case of U.O.I vs. Dhanak Madhusudan Ramji Versus [2003(248) ELT 128 (Bom)],

(g). Sapna Sanjeev Kohli Vs Commissioner of Customs, Airport, Mumbai [2010(253) ELT A52(SC)].

5.02. that gold was not a prohibited item; that the gold imported by the applicant was not liable for absolute confiscation.

5.03. In terms of clause (h) of Rule 3 of Foreign Trade (Exemption) from Application of Rules in Certain Cases) Order, 1993 import of gold is allowed in any form as part of baggage by passengers of Indian origin if the passenger satisfies the condition of six months stay abroad, quantity does not exceed kilograms and duty is paid in convertible foreign currency. Accordingly, the complexion of prohibition on import of gold has undergone a sea change.

5.04. Applicant has relied on the following case laws;

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

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

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

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

- (e) In Gauri Enterprises CC, Pune 2002 (145) ELT (705) (Tri Bangalore)
- (f) In CC (Airport), Mumbai Vs Alfred Menezes 2009 (242) ELT 334 (Bom.),
- (g) 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.
- (h) In VP Hameed Vs Collector of Customs Mumbai 1994(73) ELT 425 (Tri)
- (i) In T. Elavarasan Vs Commissioner of Customs (Airport), Chennai 2011 (266) ELT 167 (Mad),
- (j) In Kadar Mydin v/s Commnissioner of Customs (Preventive), West Bengal 2011 (136) ELT
- (k) In Sapna Sanjeeva Kolhi v/s Commissioner of Customs, Airport, Mumbai 2010(253)ELT A52(SC)
- (l) In Vatakkal Moosa v/s collector of Customs, Cochin 1994 (72) ELT (G.O.L.); Halithu Ibrahim vs CC [2002 TIOL 195-CESTAT-MAD.,
- (m) Krishna Kumari vs CC, Chennai 2008 (229) ELT 222 (Tri-Chennai);
- (n). S.Rajagopal vs CC, Trichy 2007 (219) ELT 435 (Tri-Chennai);
- (o). M. Arumugam Vs CC, Trichirapalli 2007 (220) ELT 311 (Tri-Chennai)
- (p). In the case of Union of India vs Dhanak M. Ramji 2009 (248) E.L.T. 127 (Bom.),
- (q). In the case of Peringatil Hamza Vs CC (Airport), Mumbai 2014 (309) ELT 259 (Tri Mumbai)
- (r). In the case of R. Mohandas Vs CC, Cochin 2016 (336) ELT 399 (Ker),
- (s). In the case of A. Rajkumari vs CC (Chennai) 2015 (321) E.L.T. 540 (Tri - Chennai) wherein redemption of 70 gold bars concealed in an Air conditioner was allowed by the adjudicating authority against fine of almost 50% of value, the tribunal reduced the fine to almost 14% treating the same as excessive. The Appeal filed by the department was dismissed by Hon' ble Apex Court vide 2015 (321) ELT A 207 (SC) as 'time barred'.
- (t). In Shaik Mastani Bi vs Pr. CC, Chennai 2017 (345) E.L.T. 201 (Mad.), the Hon'ble High court of Madras affirmed redemption of gold.
- (u). In the case of Bhargav B. Patel vs CC, Mumbai (Appeal No. C/381/10)

5.04. that the decisions of the Tribunals, High Courts etc relied upon by the applicant were rejected by the AA without proper application of mind. Factual situation of the case fits with the decisions on which the reliance was placed. The OIA was vitiated on account of bias violations of principles of natural justice and fair play and therefore, the OIA was not sustainable. that they have relied upon the following case laws,

- (a). the Apex Court's Order in the case of CCE, Calcutta Vs Alnoori Tobacco Products 12004 (170) ELT 135 (SC)] where it has been stressed that the facts of decision relied upon should actually fit factual situation of a given case and to exercise caution while applying the ratio of one case to another; this was also reiterated by the Apex Court in the case of Escorts Ltd. Vs CCE,

Delhi [2004 (173) ELT 113 (SC)], wherein it has been observed that one additional or different fact may make difference between conclusion in two cases; and so, disposal of cases by blindly placing reliance on a decision is not proper; that further in the case of CC (Port), Chennai Vs Toyota Kirloskar [2007 (213) ELT 4 (SC)], it has been observed by the Hon'ble Supreme Court that the ratio of a decision has to be understood in factual matrix involved therein and that the ratio of decision has to be culled out from facts of given case; etc

- 5.05. that the decisions relied upon by the AA were not applicable to the case of the applicant.
- 5.06. that the applicant claims ownership of the goods and redemption of the gold on reasonable fine and penalty for re-export.
- 5.07. the penalty of Rs. 2,30,000/- imposed on the applicant was disproportionate to the value of the gold and imposition of such a high penalty was not sustainable.
- 5.08. that the applicant has relied upon an exhaustive list of case laws.

Under the circumstance, the applicant has prayed to the revisionary authority to set aside the OIA and to release the gold under absolute confiscation on payment of reasonable fine and penalty for re-export and to drop further proceedings.

6. Personal hearing in the case was scheduled for 06.12.2022, 20.12.2022 Shri. Prakash Shingrani appeared in the office on 20.12.2022 for the personal hearing and submitted that applicant brought gold jewellery for personal use, quantity is small, jewellery was worn and not concealed. He submitted that this is a fit case for allowing redemption on nominal RF and penalty.

7. The Government has gone through the facts of the case and notes that the applicant had passed through the green channel and was proceeding towards the exit gate when he was intercepted. The applicant had attempted to exit from the CSMI Airport, without declaring the gold and had attempted to evade payment of Customs duty. The gold was of very high purity and the quantity was substantial. The applicant clearly had failed to declare the goods to the Customs at the first instance as required under Section 77 of the Customs Act, 1962. The applicant, admittedly was a businessman and a frequent traveller and was aware of the law and procedure. The pure gold had been converted into kadas which reveals the mindset of the applicant to not only evade duty but smuggle the gold. It also reveals that the act committed by

the applicant was conscious and pre-meditated. The applicant was given an opportunity to declare the dutiable goods in his possession but he chose not to avail the same. Had he not been intercepted, the applicant would have gotten away with the gold. Therefore, the confiscation of the gold was justified. concealed in the juicer.

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 '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. From the records available maintained at the RA Office, it is seen that the applicant was earlier involved in a case of smuggling of foreign currency out of the country. The name and role of the applicant has surfaced in two revision application viz, F.No. 371/369 to 372/B/WZ/2022 and 371/373 to 375 /B/WZ/2022. It is seen that the applicant is a habitual offender and shows contumacious behaviour towards the law.

12. Government observes that the fact that the applicant is a repeat offender, his extant attempt reveals his criminal bent of mind and a clear intention to evade duty

and smuggle the gold into India. The involvement in the past in a Customs related offence probates that the applicant had no intention of declaring the gold to the Customs at the airport. The applicant is a habitual offender and had indulged in smuggling activity in the past. All these when considered, the Government is not inclined to take a lenient view and is inclined to uphold the OIA passed by the AA.

13. Government finds that the penalty of Rs. 2,30,000/- imposed on the applicant by the OAA under Section 112(a) & (b) of the Customs Act, 1962 and upheld by the AA is commensurate with the omissions and commissions committed and is not inclined to interfere in the same.

14. For the aforesaid reasons, the Government finds that the OIA passed by the AA is legal and proper and does not find it necessary to interfere in the same. The Revision Application filed by the applicant, fails. .

15. Accordingly, for the reasons stated above, the Revision Application filed by the applicant is dismissed.


(SHRAWAN KUMAR)

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

ORDER No. 117/2023-CUS (WZ) /ASRA/MUMBAI DATED 31.03.2023.

To,

1. Shri. Parmeshwar Abhangrao Bhosale, S/o. Abhangrao Kadaji Bhosale, C.No. 79, Jai Bhawani Nagar, Banker Garden, Hadapsar, Pune – 411 028.
2. Pr. Commissioner of Customs, CSI Airport, Terminal – 2, Level – 2, Sahar, Andheri East, Mumbai – 400 099.

Copy to:

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