

REGISTERED
SPEED POST



GOVERNMENT OF INDIA
MINISTRY OF FINANCE
(DEPARTMENT OF REVENUE)
8th Floor, World Trade Centre, Centre – I, Cuffe Parade,
Mumbai-400 005

F.No. 371/148/B/WZ/2022-RA . Date of Issue 18.01.2024
1598

ORDER NO. 45/2024-CUS (WZ)/ASRA/MUMBAI DATED 17.01.2024
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. 371/148/B/WZ/2022-RA

Applicant : Shri. Mohammed Ilyas Nadaf

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

Subject : Revision Applications filed, under Section 129DD of the
Customs Act, 1962 against the Order-in-Appeal F.No.
MUM-CUSTM-PAX-APP-1564/2021-22 dated
31.01.2022 and issued on 02.02.2022 through F.Nos.
S/49-1733/2020 passed by the Commissioner of Customs
(Appeals), Mumbai-III.

ORDER

This revision application has been filed by Shri. Mohammed Iliyas Nadaf [herein after referred to as the Applicant; against the Order-in-Appeal F.No. MUM-CUSTM-PAX-APP-1564/2021-22 dated 31.01.2022 and issued on 02.02.2022 through F.Nos. S/49-1733/2020, passed by the Commissioner of Customs (Appeals), Mumbai-III

2. Briefly stated facts of the case are that the Applicant who had arrived from Dubai onboard Vistara Flight No. UK-202 / 20.09.2020 was intercepted on 20.09.2020 by the Officers of Customs at CSMI Airport, Mumbai after he had crossed the green channel. Two cartons of Marlboro cigarettes not bearing pictorial warning valued at Rs. 4000/- and one crude gold chain with ring, weighing 137 grams, valued at Rs. 6,44,895/- were found in the possession of the applicant which he had not declared to the Customs. The applicant admitted that he did not have an intention to pay the Customs duty on the same.

3. The Original Adjudicating Authority i.e. Addl. Commissioner of Customs, CSMI Airport, Mumbai vide his Order-In-Original i.e. OIO No. AirCus/T2/49/1711/2020-UNI-C dated 21.09.2020' ordered for the absolute confiscation of the impugned gold jewellery i.e. one gold chain with ring, together weighing 137 grams valued at Rs. 6,44,895/- and 2 cartons of Marlboro cigarettes without pictorial warning, valued at Rs. 4000/- under Section 111(d), (l) and (m) of the Customs Act, 1962 recovered and seized from the applicant. Also, a penalty of Rs. 65,000/- was imposed on the applicant under Section 112 of the Customs Act, 1962.

4. Aggrieved by the said order, the applicant filed an appeal before the Appellate Authority (AA) i.e Commissioner of Customs (Appeals), Mumbai - III who vide his Order-in-Appeal F.No. MUM-CUSTOM-PAX-APP-1564/2021-22 dated 31.01.2022 and issued on 02.02.2022 through F.Nos. S/49-1733/2020 upheld in toto the OIO dated 21.09.2020 passed by the OAA.

5. Aggrieved with the above order, the Applicant has filed this revision application before the Revisionary Authority, Mumbai inter alia on the following grounds of revision;

5.01. that Gold is not prohibited goods It is submitted that gold is not a prohibited item and is only a restricted item. Prohibition relates to goods which cannot be imported or exported by any one, such as arms, ammunition, drugs etc. The intention behind the provisions of Section 125 is that import/export of such goods under any circumstances would cause danger to the health, welfare or morals of people as a whole. This would not apply to a case where import/export of goods is permitted subject to certain conditions or to a certain category of persons and which are ordered to be confiscated for the reason that the condition has not been complied with. In such a situation, the release of such goods confiscated would not cause any danger or detriment to public health. Admittedly, import/export of gold is permitted subject to certain conditions, therefore, it would not fall under the prohibited category as envisaged under the said of Section 125 of the Customs Act, 1962. They have relied upon the case of Commissioner of Customs (Preventive), West Bengal Vs. India Sales International reported in 2009 (241) ELT 182 (Cal.); that the AA erred in holding that gold is prohibited goods; that the OAA ought not have confiscated the gold absolutely, as gold is not prohibited goods; that in a catena of decisions, Tribunals, Courts and the Government of India in its orders in revision have directed that confiscated gold have to be allowed to be redeemed on payment of appropriate fines by the persons from whom they were seized and confiscated; that they have relied on the following case laws where goods had been released;

- (a). Apex Court in Hargovind Das K. Joshi Vs Collector of customs 1992 (61) ELT 172(SC);
- (b). Apex Court in Universal Traders v. Commissioner - 2009 (240) E.L.T. A78 (SC)
- (c). Tribunal in Gauri Enterprises Vs CC, Pune 2002 (145) ELT (705) (Tri Bangalore,

- (d). Bombay High Court in CC (Airport), Mumbai Vs Alfred Menezes 2009 (242) ELT 334 (Bom)
- (e). Tribunal in Yakub Ibrahim Yusuf 2011 (263) EL. T. 685 (Tri. — Mumbai)
- (f). Andhra High Court in Shaik Jamal Basha Vs Government of India 1997 (91) ELT 277(AP)
- (g). Tribunal in VP Hameed Vs Collector of Customs Mumbai 1994(73) ELT 425 (Tri)
- (h). Madras High Court in T. Elavarasan Vs Commissioner of Customs (Airport), Chennai 2011 (266) ELT 167 (Mad),
- (i). Kadar Mydin vs Commissioner of Customs (Preventive), West Bengal 2011 (136) ELT 758
- (j). Sapna Sanjeeva Kohli vs Commissioner of Customs Airport, Mumbai 2008 (23) ELT 305
- (k). Vattakkal Moosa vs Collector of Customs, Cochin 1994 (72) ELT (GOI)
- (l). Halithu Ibrahim vs CC 2002-TIOL 195-CESTAT-MAD
- (m). Krishna Kumara 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). etc.

5.02. that the decisions relied upon by the Appellate Authority were not applicable to their case; that they relied on an exhaustive list of case laws on this issue; viz,

- (a). Uttam Chand Sawal Chand Jain vs. UOI [2013-42-GST-11-BOM-HC-DB];
- (b). Ranwolf Charles Luka vs. UOI, [1996-83-ELT-274-BOM-HC-DB];
- (c). Rafal Fawl, a Syrian National in [1992-59-ELT-338];
- (d). Hsui Ringg Chang vs. CC, [1992-62-ELT-225(CEGAT)];
- (e). CCE, Calcutta Vs Alnoori Tobacco Products [2004 (170) ELT 135 (SC)];
- (f). Escorts Ltd. Vs CCE, Delhi [2004 (173) ELT 113 (SC)];
- (g). CC (Port), Chennai Vs Toyota Kirloskar [2007 (213) ELT 4 (SC)];
- (h). etc.

5.03. that Circular no. 495/5/92-Cus VI dated 10.05.93 issued by Board cannot prevail over the statute. Circulars are issued only to clarify the statutory provision and it cannot alter or prevail over the statutory provision; that Board's Circular no. 495/5/92-Cus VI dated 10.05.1993 specified that in r/o gold seized for non-declaration, no option to redeem the same on redemption fine under Section 125 of the Customs Act, 1962, should be given, except in very trivial cases where the adjudicating

authority was satisfied that there was no concealment of the gold in question. Reliance is placed on an exhaustive list of case laws;

- 5.04. that the imported semi-precious stones etc were prohibited goods and for ordering the absolute confiscation, the AA had relied on the case law of Om Prakash Bhatia which had been over-ruled by Larger Bench of Apex Court; that Hon'ble Supreme Court in the case of Atul Automations Pvt Ltd. while deciding on the question of allowing redemption of imported used Multi-Functional Digital Copiers, drew a distinction between goods whose import was completely prohibited and those whose import was restricted and allowed redemption of MFDs, etc
- 5.05. that cigarettes were for personal use of the petitioner; therefore, absolute confiscation of the cigarettes was not sustainable;
- 5.06. that the applicant claimed ownership of the goods and that redemption of the gold on reasonable fine and penalty ought to be allowed.

Under the circumstances, the applicant has prayed to the Revision Authority that the goods under absolute confiscation may be ordered to be released on payment of a reasonable fine and penalty; and further proceeding against him may be dropped.

6. Personal hearing in the case was scheduled for 18.10.2023, 25.10.2023. Shri. Prakash Shingrani, Advocate appeared for personal hearing on 18.10.2023 and submitted that applicant brought one gold chain for personal use. He further submitted that the gold chain was not concealed and applicant has no past record of any offence. He requested to allow redemption of the gold chain on nominal fine and penalty.

7. **Cigarettes :-** The Government observes that the applicant was carrying 2 cartons of cigarettes in his baggage. The quantum of cigarettes carried is not important. The Government observes that the applicant had not declared the impugned goods as required under Section 77 of the Customs Act, 1962. Cigarettes are restricted items as they are hazardous to health. It was incumbent on the applicant to have declared the same upon arrival. The facts

of the case reveal that a proper written declaration of the impugned goods was required to be made by the Applicant as required under Section 77 of the Customs Act, 1962. However, the applicant had failed to do so. Also, none of the cigarette cartons bear the pictorial health warning as required under the Cigarettes and Other Tobacco Products (Prohibition of Advertisement and Regulation of Trade and Commerce, Production, Supply and Distribution) Act, 2003 read with Cigarettes and Other Tobacco Products (Packing and Labelling) Rules, 2008. Such cigarette packets which do not bear the pictorial health warning are proscribed to be sold / consumed in India. Hence, such cigarettes are prohibited for sale or consumption. The cigarettes did not bear the pictorial warning which was mandatory and applicant had not declared the same, thus warranting absolute confiscation of the goods. In view of the aforesaid facts, the Government finds that the absolute confiscation of the cigarettes is justified and therefore liable to be upheld.

8. **GOLD CHAIN ALONGWITH RING:-** The Government has gone through the facts of the case, and notes that the applicant was attempting to pass through the green channel and had failed to declare the gold in his possession to the Customs at the first instance as required under Section 77 of the Customs Act, 1962. The applicant had been granted an opportunity to declare the goods in his possession. However, he chose not to do so. It is recorded that the applicant did not have any intention to declare the gold jewellery and pay Customs duty on it. Thus, it was clearly evident that the applicant had no intention to declare the same to Customs. The Government finds that the confiscation of the gold is therefore, justified.

9.1. The Hon'ble High Court Of Madras, in the case of Commissioner Of Customs (Air), Chennai-I V/s P. Simnasamy 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”.

9.2. 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. 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 quantity of gold is small and the same was for personal use. The action and demeanor of the applicant indicates that the act of the applicant was to evade duty. Had it not been due to the alertness and diligence of the officers manning the exit gate, the applicant would have gotten away with the impugned gold without discharging the duty. Considering the quantity of gold, no allegation that the gold was concealed ingeniously, applicant not being a habitual offender, allowing redemption of said gold jewellery / articles would be reasonable and fair.

12. Further, the plea made by the applicant that the cigarettes had been brought for his personal consumption is just an attempt to somehow obtain a favourable order. Since, pictorial health warnings are not depicted on the cartons / packets which is mandated under the law, the question of allowing its release cannot be entertained. The Government finds no merit in these

averments with regard to the cigarettes made by the applicant and dismisses the same.

13. Government finds that the penalty imposed on the applicant is commensurate with the acts of omission and commissions committed and is not inclined to interfere in the same.

14. For the aforesaid reasons, the Government modifies the impugned OIA only to the extent of allowing the gold jewellery i.e. one crude gold chain alongwith ring, weighing 137 grams, valued at Rs. 6,44,895/- to be redeemed on payment of a redemption fine of Rs. 1,25,000/- (Rupees One lakh Twenty five thousand only.) The remaining part of the impugned OIA i.e., the absolute confiscation of the 2 cartons of Marlboro Cigarettes and the penalty of Rs. 65,000/- passed / imposed by the OAA and upheld by the AA are sustained.

15. Accordingly, the Revision application is decided on the above terms.


(SHRAWAN KUMAR)

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

ORDER No. 45/2024-CUS (WZ) /ASRA/MUMBAI DATED 17.01.2024

To,

1. Shri. Mohammed Ilyas Nadaf, 01, L&T Heights, S.No. 16/1/B/1, Saswad Road, Kondhwa Budruk, Pune - 411 048.
2. The Pr. Commissioner of Customs, Chhatrapati Shivaji Maharaj International Airport, Level - II, Terminal - 2, Sahar, Andheri East, Mumbai - 400 099.

Copy to:

3. Shri. Prakash Shingrani, Advocate, 12/334, Vivek New MIG Colony, Bandra East, Mumbai - 400 051.

- 4 Sr. P.S. to AS (RA), Mumbai.
- 5 File Copy.
6. Notice Board.