

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. 371/217/B/2020-RA

:

Date of Issue: 15.05.2023

ORDER NO. 455/2023-CUS (WZ)/ASRA/MUMBAI DATED 15.05.2023
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.

Applicants : Shri Ramesh Shamji Patel.

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-CUSTM-PAX-APP-220/2020-21 dated 31.07.2020
[F.No. S/49-813/2019] [Date of issue: 07.08.2020]
passed by the Commissioner of Customs (Appeals),
Mumbai-III.

ORDER

This Revision Application has been filed by Shri Ramesh Shamji Patel (herein referred to as the "Applicant") against the Order-in-Appeal No. MUM-CUSTOM-PAX-APP-220/2020-21 dated 31.07.2020 [F.No. S/49-813/2019] [Date of issue: 07.08.2020] passed by the Commissioner of Customs (Appeals), Mumbai-III.

2. Brief facts of the case are that on 16.08.2019, the Officers of CSMI Airport Mumbai, intercepted one passenger Ramesh Shamji Patel, the applicant, holding Indian passport who had arrived from Bangkok by Flight No. TG-317 after passing through Green Channel. The applicant cleared himself without any declaration of dutiable goods to Customs. During personal search the Officers recovered two gold kadas of 24 KT weighing 212 grams painted with black colour and valued at Rs.6,81,156/-. The same were seized by the officers in the reasonable belief that the same was smuggled into India in a clandestine manner in contravention of the provisions of the Customs Act, 1962.

3. The case was adjudicated by the Original Adjudicating Authority (OAA) viz the A.C./D.C. of Customs, C.S.I. Airport, Mumbai, vide his OIO No. AirCus/T2/49/1038/2019 Batch 'C' dated 18.08.2019 who ordered absolute confiscation of the recovered two gold kadas of 24 KT weighing 212 grams painted with black colour and valued at Rs.6,81,156/- under Section 111 (d), (l) and (m) of Customs Act, 1962. A personal penalty of Rs 70,000/- under section 112 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), Mumbai-III,

who vide Order-in-Appeal No. MUM-CUSTOM-PAX-APP-220/2020-21 dated 31.07.2020 [F.No. S/49-813/2019] [Date of issue: 07.08.2020] 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 Gold is not a prohibited item for import and absolute confiscation is not warranted in this case. The applicant has relied on various case laws.

5.2 That the applicant claimed ownership of the gold under absolute confiscation and prayed for redemption on payment of reasonable fine and penalty.

5.3 That the applicant does not dispute the concealment and his attempt to clear the impugned gold without declaring to Customs by opting green channel. That no other person claimed ownership of the gold and there is nothing in the impugned OIO to suggest that he is a professional smuggler or carrier.

5.4 That the analysis of various judgements on the issue of redemption of gold under Section 125 of the Customs Act, 1962 make it clear that the discretion has to be exercised based on merits of each case and there cannot be any straight jacket formula to decide such case.

5.5 That the Applicant is from a respectable family and a law abiding citizen/businessman and he has never come under any adverse remarks.

5.6 Therefore, in view of above submission and the judgments/case laws relied upon, the applicant submitted that the absolute confiscation of the gold jewellery seized from the Applicant is not warranted and redemption of gold should be allowed on payment of reasonable fine and penalty.

6. Personal hearing in the matter was scheduled for 18.04.2023. Shri Vimalchand Jain, Consultant and Shri Ramesh Shamji Patel, appeared for the hearing and submitted a written submission on the matter. They submitted that the applicant brought a small quantity of gold jewellery for personal use. They further submitted that the applicant is not a habitual offender. They requested to release the goods on nominal redemption fine and penalty.

In their written submission the applicant emphasized that he is not a smuggler and that he had crossed the green channel unknowingly. Further he requested to not impose a heavy redemption fine on the confiscated goods as he would not be able to pay it and that he is ready to pay the duty with interest.

7. The Government has gone through the facts of the case, and observes that the applicant had failed to declare the impugned gold 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 gold and pay Customs duty on it. The Government finds that the confiscation of the impugned gold was 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" in terms of Section 2(33) and hence it is liable for confiscation under Section 111(d) of the Customs Act, 1962.

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. 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 pretense. 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. In the instant case, the quantum of gold involved is small (i.e. only 212 grams and in the form of jewellery i.e 2 kadas), found on person, which indicates that the same was not for commercial purpose. It also does not suggest the act to be one of organized smuggling by a syndicate. Government, notes that the impugned gold kadas though painted in black, were worn by the applicant. The applicant has claimed ownership of the gold for personal use. Government, notes that there were no allegations that the Applicant is a habitual offender or that it was involved in similar offences earlier. Considering the quantity of gold, the absolute confiscation of the same was harsh and not justified. Government therefore considers granting an option to the Applicant to redeem the gold on payment of a suitable redemption fine only.

13.1 In view of the above facts, Government is inclined to modify the absolute confiscation upheld by the AA and allow the impugned gold viz two gold kadas of 24 KT weighing 212 grams valued at Rs.6,81,156/-, redemption on payment of redemption fine.

13.2 Government finds that the penalty of Rs. 70,000/- 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.

14.1 In view of the above, the Government modifies the impugned order passed by the Appellate authority and allows the applicant to redeem the impugned gold viz two gold kadas of 24 KT weighing 212 grams and valued at Rs.6,81,156/- on payment of redemption fine of Rs. 1,25,000/- (Rupees One Lakh Twenty-five Thousand Only).

14.2 The penalty of Rs. 70,000/- 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 and is sustained.

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


(SHRAWAN KUMAR)

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

ORDER NO. 455 /2023-CUS (WZ)/ASRA/MUMBAI DATED 15.05.2023

To,

1. Mr. Ramesh Shamji Patel, F/339, Surya Kund CHS Ltd, Gun Powder Road, Mazgaon, Mumba-400010.
2. The Pr. Commissioner of Customs, C.S.I Airport, Terminal 2, Level-II, Sahar, Andheri (East), Mumbai 400 099.
3. The Commissioner of Customs (Appeals), Mumbai-III, 5th Floor, Avas Corporate Point, Makwana Lane, Behind S. M. Centre, Andheri Kurla Road, Andheri (East), Mumbai 400 059.

Copy to:

1. Mr. Vimalchand M. Jain, 18-B, Nav Shantinagar Bldg., 98 Nepean Sea Road, Mumbai-400006
2. Sr. P.S. to AS (RA), Mumbai.
3. File Copy.
4. Notice Board.