

REGISTERED  
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. 371/30/B/WZ/2019-RA/319 : Date of Issue 13.01.2023

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ORDER NO. H8/2023-CUS (WZ) /ASRA/MUMBAI DATED 17.01.2023  
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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Applicant : Shri. Mohammad Asif

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

Subject : Revision Application filed, under Section 129DD of the  
Customs Act, 1962 against the Order-in-Appeal No.  
MUM-CUSTM-PAX-APP-1071/18-19 dated 31.01.2019  
issued on 06.02.2019 through S/49-114/2018/AP passed by  
the Commissioner of Customs (Appeals), Mumbai - III.

**ORDER**

This revision application has been filed by Shri. Mohammad Asif (herein referred to as Applicant) against the Order-in-Appeal No. MUM-CUSTOM-PAX-APP-1071/18-19 dated 31.01.2019 issued on 06.02.2019 through S/49-114/2018/AP passed by the Commissioner of Customs (Appeals), Mumbai – III.

2. Brief facts of the case are that on 07.03.2018, the Officers of Customs had intercepted the Applicant at Chhatrapati Shivaj Maharaj International Airport [CSMIA], Mumbai where he had arrived from Dubai by Indigo Flight no. 06E-62 /07.03.2018 after staying abroad for 4 days. Cut pieces of gold concealed in the (i). hollow wheel axle of the baggage trolley, (ii). inside of refill of pen and (iii). pocket of trouser kept in the bag were found. The recovered gold cut pieces collectively weighed 114 gms, valued at Rs. 3,21,762/-. The applicant waived of the show cause notice.

3. After due process of investigations and the law, the Original Adjudicating Authority i.e. the Asstt. Commissioner of Customs, CSMIA, Mumbai vide Order-In-Original No. Air Cus/49/T2/2157/2018'C' dated 07.03.2018, ordered for the absolute confiscation of the cut pieces of gold, collectively weighing 114 grams, valued at Rs. 3,21,762/- under Section 111 (d) of the Customs Act, 1962. Further, a penalty of Rs. 80,000/- was imposed on the applicant under Section 112 (a) and (b) of the Customs Act, 1962.

4. Aggrieved by this Order, the applicant preferred an appeal before the appellate authority i.e. Commissioner of Customs (Appeals), Mumbai – III who vide Order-in-Appeal No. MUM-CUSTOM-PAX-APP-1071/18-19 dated 31.01.2019 issued on 06.02.2019 through S/49-114/2018/AP did not find it necessary to interfere in the OIO passed by the OAA.

5. Aggrieved by this Order, the applicant has filed this revision application on the undermentioned grounds of revision;

- 5.01. that his Uncle who is residing at Dubai had given him the cut pieces of gold for his sister's marriage; that the gold was not for sale in market to earn profit out it.
- 5.02. that the Commissioner (Appeals) confirmed the order passed by the Deputy Commissioner of Customs on the grounds that the petitioners intention to avoid payment of duty is not correct due to the fact that gold was not prohibited.
- 5.03. that they rely on the following case laws, in the following cases passed by the Hon'ble CESTAT/Government of India it has been held that import gold is not prohibited and allow to redeem the gold on payment of redemption fine under the similar circumstances:
- (a). COMMISSIONER OF CUSTOMS (PREVENTIVE) VERSUS. .UMA SHANKAR VERMA, 2000 (120) ELT 322 (CAL) Wherein it had been held that, as per the provisions of Section 125 of the Customs Act, 1962, if the goods are prohibited the option to confiscate, without giving an option to the assessee to pay the fine in lieu thereof, is with the customs authorities. However, when the goods are not prohibited' then the customs authorities have no option but to allow the assessee to pay the fine, in lieu of the confiscation.
- (b). SHAIK JAMAL BASHA VERSUS. GOVERNMENT OF INDIA 1997 (91) E.L.T. 277 (A.P.); wherein it had been held that an option to pay the fine, in lieu of the confiscation of the goods, is to be given to the importer, in terms of the Second Part of Section 125 (1) of the Customs Act, 1962, read with Rule 9 of the Baggage Rules, 1978, framed under Section 79 (2) of the Customs Act, 1962.
- (c). MOHINI BHATIA VERSUS COMMISSIONER OF CUSTOMS, SAHAR, MUMBAI, 1999 (106) E.L.T. 485 (TRIBUNAL); passenger not eligible to bring gold legally; Gold liable to confiscation; Manner of concealment and non-declaration of gold do not justify grant of re-export option. However, gold being only a restricted item and not prohibited goods, option to pay redemption fine granted.
- (d). that in the case PARVEZ AHMED ZARGAR of GOI; ORDER NO. 14/18 CUS DATED: 05.01.2018, Government of India held that the import of gold is not prohibited & allowed to redeem the gold on payment of redemption fine; It was held that as per section 125 (I) of the CA 1962, it is obligatory on the part of the customs officer to give the owner of goods an option to pay in lieu of confiscation such fine as the said officer thing fit and proper.

5.04. that the personal penalty imposed was on the very higher side and as held in case cited above, nominal penalty had been imposed.

In view of the above submissions, the applicant has prayed to the revisionary authority to allow the redemption of the gold in terms of Section 125 of the Customs Act, 1962 or to grant any other relief as deemed fit.

6. Personal hearing in the case was scheduled through the online video conferencing mode for 13.09.2022 or 27.09.2022. Shri. S.S Arora, Advocate for the applicant appeared for personal hearing on 13.09.2022 and submitted that applicant is requesting for reducing penalty as Section 112(b) is not applicable as gold was seized within Customs area. Penalty under Section 112(a) is very high. He prayed for reducing the same.

7. The Government has gone through the facts of the case and notes that the applicant had not declared the gold while availing the green channel facility. The impugned cut pieces of gold had been concealed in the hollow of the axle of wheel of trolley bag, refills of pens, pocket of trouser kept in bag with the express intention of hoodwinking the Customs and evading payment of Customs duty. The quantity of gold is small and not in commercial quantity. 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 act committed by the applicant reveals that it was conscious and pre-meditated. Had he not been intercepted; the applicant would have gotten away with the gold which had been cleverly concealed. Therefore, the confiscation of the gold was justified.

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. The quantity of the gold under import is small and is not of commercial quantity. The cut pieces of gold had been kept hidden inside hollow wheel axle of the baggage trolley, inside of refill of pen and pocket of trouser kept in the bag. There are no allegations that the applicant is a habitual offender and was involved in similar offence earlier. The quantity of gold and the facts of the case indicate that it is a case of non-declaration of gold, 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 the Customs Act, 1962 and while imposing quantum of penalty.

12. The absolute confiscation of the gold, leading to dispossession of the applicant of the gold in the instant case is therefore, harsh and not reasonable. Government for the aforesaid reasons, is inclined to set aside the absolute confiscation held in the OIA and grant option to release the impugned gold on payment of a redemption fine.

13. Government notes that the penalty of Rs. 80,000/- imposed on the applicant under Section 112(a) and (b) of the Customs Act, 1962 is a bit harsh and unreasonable and not commensurate with the omissions and commissions committed and is inclined to reduce the same.

14. Accordingly, the Government sets aside the impugned order of the appellate authority. The cut pieces of gold weighing 114 grams and valued at Rs. 3,21,762/- are allowed redemption on payment of fine of Rs. 65,000/- (Rupees Sixty Five Thousand only). Also, the penalty of Rs. 80,000/- (Rupees Eighty thousand) imposed on the applicant under Section 112(a) & (b) of the Customs Act, 1962 imposed by the OAA and upheld by the AA is reduced to Rs. 50,000/- (Rupees Five Thousand only).

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

  
( SHRAWAN KUMAR )

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

**ORDER No.**      **48/2023-CUS (WZ) /ASRA/MUMBAI DATED 17.01.2023**

To,

1. Shri. Mohammad Asif, House No. 7974, Gali Shamsuddin Mohalla, Shai Khan Bora, Hindu Rao, Delhi.
2. Pr. Commissioner of Customs, Chhatrapati Shivaji Maharaj International Airport, T2, L2, Sahar, Andheri (E), Mumbai – 400 099.

Copy to:

1. S.S. ARORA & ASSOCIATES, B1/71, Safdarjung Enclave, New Delhi – 110 029.
2. Sr. P.S. to AS (RA), Mumbai.
3. File Copy.
4. Notice Board.