



GOVERNMENT OF INDIA
MINISTRY OF FINANCE
(DEPARTMENT OF REVENUE)

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

F.No. 371/185/B/WZ/2021-RA /4931 : Date of Issue : 03.08.23

ORDER NO. 569 /2023-CUS (WZ)/ASRA/MUMBAI DATED 31.07.2023 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. 371/185/B/WZ/2021-RA

Applicant : Manish Suresh Kumar Jain

Respondent : Pr. Commissioner of Customs, Chhatrapati Shivaji
Maharaj International Airport (CSMIA), Mumbai.

Subject : Revision Application filed, under Section 129DD of the Customs Act, 1962 against the Order-in-Appeal No. No. MUM-CUSTM-PAX-APP/76/2021-22 dated 05.04.2021 [(DOI : 26.04.2021] issued through F.No. S/49-634/2020 passed by the Commissioner of Customs (Appeals), Mumbai – III.

ORDER

This revision application has been filed by Shri. Manish Suresh Kumar Jain (hereinafter referred to as the Applicant) against the Order-in-Appeal No. MUM-CUSTM-PAX-APP/76/2021-22 dated 05.04.2021 [(DOI : 26.04.2021] issued through F.No. S/49-634/2020 passed by the Commissioner of Customs (Appeals), Mumbai – III.

2. Brief facts of the case are that the applicant was intercepted by Customs Officers on 21.02.2020 at CSMI Airport, Mumbai, having earlier arrived from Dubai onboard Indigo Flight No. 6E-62. The applicant was found in possession of a jacket. Examination of the jacket resulted in the recovery of 9 gold buttons of crude gold each of purity of 24 KTs, collectively weighing 234 grams and valued at Rs. 8,55,974/-. The applicant revealed that the jacket did not belong to him and belonged to Mukesh Jain who stayed at Dubai and was owner of a gold shop. Mukesh Jain had given him the bag to be given to his father at Mumbai. The applicant had not declared the gold and was returning back to India after a stay of 7 days at Dubai.

3. The Original Adjudicating Authority (OAA), viz, Dy. Commissioner, Air Customs, CSMI Airport, Mumbai vide Order-In-Original No. AirCus/49/T2/1614/2020/UNI-B dated 21.02.2020 ordered for the absolute confiscation of the 9 crude gold buttons of 24KTs each, collectively weighing 234 grams and valued at Rs. 8,55,974/- under Sections 111(d) of the Customs Act, 1962 and a penalty of Rs. 15,000/- under Section 112 (b) of the Customs Act, 1962 was imposed 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 -III, vide Order-In-Appeal No. MUM-CUSTM-PAX-APP/76/2021-22 dated 05.04.2021 [(DOI : 26.04.2021] issued through F.No. S/49-634/2020 upheld the absolute confiscation of the said 9 crude gold buttons held by the OAA in his OIO and did not find any reason to interfere in the penalty imposed on the applicant.

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

5.01. that the OAA had failed to appreciate that the applicant was not aware that the gold buttons were fixed on the jacket; that the same had to be declared; that he had informed the true facts to the OAA; that the jacket with the 9 crude gold buttons belonged to Mukesh Jain and was to be handed over to his father viz, Mukesh Mehta; that upon learning that the gold buttons had been seized, Mukesh Mehta had immediately approached the OAA and had claimed the ownership of the same; that Mukesh Mehta had been informed that since the order had already been passed, the same could not be changed; that these facts had been reiterated before the AA, that Mukesh Mehta had filed his say before the AA and had furnished the Gold Bills and salary slips and claimed the gold buttons which had not been considered by the AA; that the lower authorities had failed to appreciate that the gold buttons were claimed by the actual owner as per law under section 123(1) of the Customs Act, 1962, that the burden of proving the gold was not smuggled was on the owner or the owner of the gold; that the actual owner had voluntarily appeared before the OAA; that the applicant possessed foreign currency; that applicant was ready to pay the duty on behalf of his friend; that the applicant was not acting as a carrier; that there was no foreign markings on the gold buttons; that on assumptions and presumptions the same was considered as smuggled; that the jacket had not been concealed; that the gold was not in commercial quantity; that gold buttons were meant for personal use; that the gold buttons could be allowed to be reshipped on payment of reshipment fine and penalty; that the lower authorities had not appreciated the facts with true spirit; that the lower authorities had decided the case on presumptions and assumptions only and not on real and true facts; the impugned order was illegal and bad in law.

Under the above facts and circumstances of the case, the Applicant has prayed that the Revision Authority be pleased to quash the OIA passed by the AA and to allow the reshipment of the gold buttons on payment of a nominal reshipment fine or allow the gold to be redeemed on payment of duty instead of absolute confiscation and to waive off the penalty or pass any other order as deemed fit.

6. Personal hearing of the case was scheduled on 06.07.2023. Smt. Shivangi Kherajani, Advocate appeared on 06.07.2023 on behalf of the applicant and submitted that applicant brought small quantity of gold for personal use. She further submitted

that goods was supported by bills and applicant is not a habitual offender. She requested to allow option to redeem the goods on 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 9 crude gold buttons of 24KT, collectively weighing 234 grams and valued at Rs. 8,55,974/-. By his actions, it was clear that the applicant had no intention to declare the impugned gold to Customs and pay Customs duty on it. The Government finds that the confiscation of the gold buttons was therefore, 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 ‘Applicants’ 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 the 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 gold jewellery under import is small and is not of commercial quantity. The applicant had when intercepted disclosed the facts. In fact, the actual owner had approached the lower authorities claiming the gold. There are no allegations that the applicant is a habitual offender and was involved in similar offence earlier. There are a catena of judgements wherein the Apex Court, High Courts, CESTAT etc have released the gold to the person from whose possession the same had been seized. 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 therefore, sets aside the impugned order of the appellate authority. The impugned 9 crude gold buttons of 24 KTs each, totally weighing 234 grams and valued at Rs. 8,55,974/- is allowed to be redeemed on payment of a redemption fine of Rs. 1,75,000/- (Rupees One Lakh Seventy Five Thousand only). The Government finds that the penalty of Rs. 15,000/- imposed on the applicant under Section 112(b) of the Customs Act, 1962 is appropriate and commensurate with the omission and commission committed and the same does not merit interference.

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


(SHRAWAN KUMAR)

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

ORDER NO. 569/2023-CUS (WZ)/ASRA/MUMBAI DATED 31.07.2023.

To,

1. Manish Suresh Kumar Jain, R/o. 113, Saraswati Sadan, 3rd Floor, R.No. 51, Chinch Bunder, Mumbai
2. Pr. Commissioner of Customs, Level - II, Terminal - 2, Chhatrapati Shivaji Maharaj International Airport, Sahar, Andheri (East), Mumbai - 400 099.

Copy to:

3. Smt. Shivangi Kherajani, Advocates, 501, Savitri Navbahar CHS, 19th Road, Khar West, Mumbai - 400 052.
4. Sr. P.S. to AS (RA), Mumbai.
5. File Copy.
6. Notice Board.