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GOVERNMENT OF INDIA  
MINISTRY OF FINANCE  
(DEPARTMENT OF REVENUE)

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Mumbai-400 005

F.No. 371/246/B/WZ/2020-RA

Date of Issue 04.08.23

ORDER NO. 573 /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.

Applicant : Shri. Raj Kamlesh Shah

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-214/2020-21 dated 31.07.2020 issued on  
06-08-2020 [F.No. S/49-678/2019] passed by the  
Commissioner of Customs (Appeals), Mumbai-III.

**ORDER**

This Revision Application has been filed by Shri. Raj Kamlesh Shah (herein referred to as Applicant) against the Order-in-Appeal No. MUM-CUSTOM-PAX-APP-214/2020-21 dated 31.07.2020 issued on 06.08.2020 through F.No. S/49-678/2019 passed by the Commissioner of Customs (Appeals), Mumbai-III.

2. Brief facts of the case are that on 06-09-2018, Shri Raj Kamlesh Shah, the applicant, holding Indian Passport No. N 2198362 had arrived from Hongkong by Jet Airways Flight No. 9W-75. During the screening of the checked-in baggage by the officers of the customs, suspicious black ring shaped images were noticed in the bags. The Officers of CSMI Airport Mumbai, intercepted the applicant after he had collected the said bags and had opted for Green Channel at Customs arrival hall. Personal search of the applicant resulted in recovery of two kadas worn on the wrists of both the hands, purported to be gold and examination of his baggage resulted in recovery of four button shaped objects purported to be gold. The Government Approved Valuer examined the said objects and certified them to be Crude gold of 24KT having 999% purity, totally weighing 524 grams and valued at Rs.14,35,371/-. 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) i.e. the Additional Commissioner of Customs, Airport, Mumbai vide Order-In-Original No. ADC/AK/ADJN/52/2019-20 dated 20-05-2019 ordered for the absolute confiscation of the impugned gold viz 2 Crude gold kadas and four gold buttons, totally weighing 524 grams of 24KT having 999% purity and valued at Rs.14,35,371/- under under Section 111 (d), (l) & (m) of the Customs Act, 1962. Further, a penalty of Rs. 1,60,000/- 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 (AA) viz, Commissioner of Customs (Appeals), Mumbai-III, who vide Order-in-Appeal No. MUM-CUSTOM-PAX-APP-214/2020-21 dated 31-07-2020 [F.No. S/49-678/ 2019] upheld the order passed by the OAA.

5. Aggrieved with the above order, the Applicants have made an exhaustive submission of case laws and have submitted copies including their submissions made before the lower authorities etc. They have filed these revision applications on the following main points:

5.01. That Gold is not prohibited item for import. Therefore absolute confiscation is not warranted in this case.

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

5.03. The applicant concluded by submitting that he did not commit any act of omission or commission which can be termed as crime or manifesting of an organized smuggling activity. He submitted that imported the gold for meeting his personal and family needs. He submitted that he is from a respectable family and a law abiding citizen/businessman and has never come under any adverse remarks and therefore the absolute confiscation and penalty imposed of Rs.1,60,000/- is too harsh.

Under the circumstances, the applicant has prayed to the Revision Authority to release the gold on payment of a reasonable redemption fine and penalty.

6. Personal hearing in the case was scheduled on 07.07.2023. Shri. Prakash Shingrani, Advocate for the applicant appeared for personal hearing and submitted that the applicant is a NRI and brought small quantity of jewellery for

personal use. He further submitted that was not ingeniously concealed and applicant is not a habitual offender. He requested to give option to redeem the goods on nominal fine and penalty for re-export as applicant is normally resident of Hongkong.

7. The Government has gone through the facts of the case and notes that the applicant had not declared the gold to the customs while availing the green channel facility as required under Section 77 of the Customs Act, 1962. A part of the gold recovered weighing 150 grams was in the form of buttons. It reveals that the act committed by the applicant was conscious and pre-meditated. Had he not been intercepted, the applicant would have gotten away with the gold. 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.

11.1 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. A plain reading of the section 125 shows that the Adjudicating Authority is bound to give an option of redemption when goods are not subjected to any prohibition. In case of prohibited goods, such as, the gold, the Adjudicating Authority may allow redemption. There is no bar on the Adjudicating Authority allowing redemption of prohibited goods. This exercise of discretion will depend on the nature of the goods and the nature of the prohibition. For instance, spurious drugs, arms, ammunition, hazardous goods, contaminated flora or fauna, food which does not meet the food safety standards, etc. are harmful to the society if allowed to find their way into the domestic market. On the other hand, release of certain goods on redemption fine, even though the same becomes prohibited as conditions of import have not been satisfied, may not be harmful to the society at large. Thus, Adjudicating authority can allow redemption under Section 125 of any goods which are prohibited either under the Customs Act or any other law on payment of fine.

13.1 Government further observes that there are a catena of judgements, over a period of time, of the Hon'ble Courts and other forums which have been categorical in the view that grant of the option of redemption under Section 125 of the Customs Act, 1962 can be exercised in the interest of justice. Government places reliance on some of the judgements as under:

- a) In the case of Commissioner of Customs, Aliganj, Lucknow vs. Rajesh Jhamatmal Bhat, [2022(382) E.L.T. 345 (All)], the Lucknow Bench of the Hon'ble High Court of Allahabad, has held at Para 22 that *“Customs Excise & Service Tax Appellate Tribunal Allahabad has not committed any error in upholding the order dated 27.08.2018 passed by the Commissioner (Appeals) holding that Gold is not a prohibited item and, therefore, it should be offered for redemption in terms of Section 125 of the Act.”*

- b) The Hon'ble High Court of Judicature at Madras, in the judgment in the case of Shik Mastani Bi vs. Principal Commissioner of Customs, Chennai-I [2017(345) E.L.T. 201 ( Mad)] upheld the order of the Appellate Authority allowing re-export of gold on payment of redemption fine.
- c) The Hon'ble High Court of Kerala at Ernakulam in the case of R. Mohandas vs. Commissioner of Cochin [2016(336) E.L.T, 399 (Ker.)] has, observed at Para 8 that "*The intention of Section 125 is that, after adjudication, the Customs Authority is bound to release the goods to any such person from whom such custody has been seized...*"
- d) Also, in the case of Union of India vs Dhanak M Ramji [2010(252)E.L.T. A102(S.C)], the Hon'ble Apex Court vide its judgement dated 08.03.2010 upheld the decision of the Hon'ble High Court of Judicature at Bombay [2009(248) E.L.T. 127 (Bom)], and approved redemption of absolutely confiscated goods to the passenger.

14. Government, observing the ratios of all the above judicial pronouncements, arrives at the conclusion that decision to grant the option of redemption would be appropriate in the facts and circumstances of the instant case.

15. Government observes that the quantity of gold was not substantial, which indicates that the same was not for commercial use. The Applicant claimed ownership of the impugned gold. Government, notes that the 2 gold kadas were not ingeniously concealed, in fact the applicant had worn on his wrists. There are no other claimants of the said gold. There is no allegation that the applicant is a habitual offender and was involved in similar offence earlier. 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. Considering the afore-stated facts, various judgements submitted by applicant, absolute confiscation is not warranted and allowing redemption of gold on fine would be judicious and reasonable. Government observes that the applicant has made a request of re-



export at the time of personal hearing. Considering the quantity of gold, the same not being concealed in an ingenious manner, the absolute confiscation of the same was harsh and not justified. Government for the aforesaid reasons, is inclined to set aside the absolute confiscation held in the OIA and considers granting an option to the Applicant to redeem the Gold on payment of a suitable redemption fine, as the same would be more reasonable and judicious.

16.1 In view of the above facts, Government is inclined to modify the absolute confiscation upheld by the AA and allow the impugned gold viz 2 Crude gold kadas and four gold buttons, totally weighing 524 grams of 24KT having 999% purity and valued at Rs.14,35,371/- to be redeemed on payment of redemption fine.

16.2 Government finds that the penalty of Rs.1,60,000/- imposed on the Applicant for the gold valued at Rs. 14,35,371/- under Section 112(a) & (b) of the Customs Act, 1962 is appropriate and commensurate to the omissions and commissions of the Applicant.

17.1 In view of the above, the Government sets aside the impugned order of the Appellate authority and allows the applicant to redeem the impugned gold viz 2 Crude gold kadas and four gold buttons, totally weighing 524 grams of 24KT having 999% purity and valued at Rs.14,35,371/- on payment of redemption fine of Rs.3,00,000/- (Rupees Three Lakh Only ).

17.2 The penalty of Rs. 1,60,000/- imposed under Section 112(a) and (b) of the Customs Act, 1962 is 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.

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

*Shrawan*  
31/7/23  
( SHRAWAN KUMAR )

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

ORDER No. 573 /2023-CUS (WZ) /ASRA/MUMBAI DATED 31.07.2023

To,

1. Shri Raj Kamlesh Shah, F.No.501, Vijay Chambers Bldg., Opp. Dreamland Cinema, Prarthan Samaj, Grant Road, Mumbai-400004.
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. Shri. Prakash K. Shingrani, Advocate, 12/334, Vivek, New MIG Colony, Bandra (East), Mumbai - 400 051.
2. Sr. P.S. to AS (RA), Mumbai.
3. File Copy.
4. Notice Board.