

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. 371/74/B/WZ/2021-RA / 6154 Date of Issue 14.08.2023

ORDER NO. 582/2023-CUS(WZ) /ASRA/MUMBAI DATED 14.08.2023
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. Deval Indravadan Khokhani

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-1440/2020-21 dated 28.01.2021
issued on 12.02.2021 through S/49-781/2019 passed by
the Commissioner of Customs (Appeals), Mumbai - III.

ORDER

This revision application has been filed by Shri. Deval Indravadan Khokhani (herein referred to as Applicant) against the Order-in-Appeal No. MUM-CUSTM-PAX-APP-1440/2020-21 dated 28.01.2021 issued on 12.02.2021 through S/49-781/2019 passed by the Commissioner of Customs (Appeals), Mumbai – III.

2. Brief facts of the case are that on 03.08.2019, the Officers of Customs had intercepted the Applicant at Chhatrapati Shivaji Maharaj International Airport [CSMIA], Mumbai where he had arrived onboard Indio Airlines Flight No. 6E-62. Applicant is an Indian national. The applicant had opted for the green channel and had failed to declare the goods in his possession. Applicant was found with a gold chain weighing 60 grams and valued at ₹ 1,92,780/-.

3(a). Here, it may be mentioned that the applicant in the statement of facts submitted of their revision application have mentioned that the OAA had ordered the absolute confiscation of the gold chain weighing 60 grams and valued at ₹ 1,92,780/- under Sections 111(d), 111(l) and 111(m) of the Customs Act, 1962 and alongwith a penalty of ₹ 20,000/- under Section 112(a)(i) of the Customs Act, 1962.

3(b). In the Order-in-Appeal No. MUM-CUSTM-PAX-APP-1440/2020-21 dated 28.01.2021 issued on 12.02.2021 through S/49-781/2019 passed by the Commissioner of Customs (Appeals), Mumbai – III at para 2, it is mentioned that the case was adjudicated and the impugned goods were absolutely confiscated under Section 111(d), (l) and (m) of the Customs Act, 1962 alongwith a penalty of ₹ 20,000/- was imposed on the applicant under Section 112(a)(i) of the Customs Act, 1962.

3(c). However, while perusing the matter, Government notes that in the Order-in-Original (OIO) no. Air Cus/T2/49/1001/2019 Unit-C dated 03.08.2019, the Original Adjudicating Authority (OAA) viz, Deputy Commissioner of Customs, CSMI Airport, Mumbai had (i). allowed the impugned gold chain to be charged to duty and (ii). confiscated the impugned gold chain weighing 60 gms valued at ₹ 1,92,780/- under Section 111(d) of the Customs Act, 1962 but allowed the applicant an option to pay fine of ₹ 20,000/- duty extra, in lieu of confiscation under Section 125 of the Customs Act, 1962... A penalty of ₹ 20,000/- was imposed on the applicant under Section 112 of the Customs Act, 1962.

3(d). In the said OIO passed by the OAA, a sheet containing the payment details is attached wherein it is shown as follows,

PAYMENT DETAILS

Customs Duty	: ₹74,220/-
Redemption Fine	: ₹20,000/-
Personal Penalty	: ₹20,000/-
Warehouse rent	: ₹20,000/-

Total	: ₹1,14,220/-

3(d). Government notes that in the OIA passed by the Appellate Authority, i.e. Commissioner of Customs (Appeals), Mumbai - III, the absolute confiscation of the impugned gold chain weighing 60 grams and valued at ₹ 1,92,780/- was upheld alongwith the penalty amount of ₹ 20,000/- imposed on the applicant by the OAA. Nowhere in the OIA, it is seen that the applicant or his advocate have stated or pointed out to the AA, that the gold chain had been allowed to be redeemed by the OAA on payment of a fine, penalty and duty.

3(e). Government also notes that in the revision application filed by the applicant before the Revisionary Authority, the applicant in their exhaustive submission of the grounds of revision have nowhere stated or mentioned that the OAA had allowed the gold chain to be redeemed on payment of a redemption fine. Neither, have they pointed out that the AA had erred in considering that the gold chain had been absolutely confiscated by the OAA.

4. Government further observes that spot adjudication on 03.08.2019 had been done by the OAA and hence, the applicant was aware that the gold chain had been allowed to be redeemed on payment of duty and a redemption fine of ₹20,000/- .

5(a). Further, Government notes that during the personal hearing conducted by the Revisionary Authority on 25.07.2023, Shri. Prakash Shingrani, the Advocate for the applicant had failed to point out that the gold chain had not been confiscated, absolutely and had been allowed to be redeemed on payment of duty and fine of ₹ 20,000/-. The Advocate infact had prayed that the gold jewellery be allowed to be redeemed for re-export on nominal fine and penalty.

5(b). However, upon perusal of the OIA, it is noted that in para 5 and 7 of the OIA passed by the AA, there is an obvious error. Hence, Government finds it imperative to set aside the OIA.

6. In the interest of natural justice, the personal hearing was scheduled on 25.07.2023. Shri. Prakash Shingrani, Advocate appeared on 25.07.2023 and submitted that applicant is NRI and usually stays in the U.S.A. He further submitted that applicant brought jewellery for personal use and is not a habitual offender. He requested to allow redemption of gold jewellery on nominal fine and penalty for re-export.

7. Government notes that applicant in his FORM CA-1 filed before the AA had prayed that they be allowed to re-ship the gold chain weighing 60 grams and valued at ₹ 1,92,780/- on payment of a redemption fine.
8. Under the aforesaid circumstance, without going into the exhaustive submissions and grounds of revision made by the Applicant, Government finds merit in the submissions made by the applicant and proceeds to decide the case.
9. 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, he would have walked away with the impugned gold chain weighing 60 grams and valued at ₹ 1,92,780/- without declaring the same to Customs. By his actions, it was clear that the applicant had no intention to declare the impugned gold to Customs and pay duty on it. The Government finds that the confiscation of the gold was therefore, justified.
10. 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".

11. 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.

12. 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.

13. The Government notes that the quantity of gold was small, the applicant has claimed ownership of the gold. There are no allegations that the Applicant is a habitual offender and was involved in similar offences 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. Under the circumstances, the seriousness of the misdemeanor is required to be kept in mind when using discretion under Section 125 of Customs Act, 1962 and while imposing quantum of penalty. Though redemption of the gold chain had been allowed by the OAA on payment of a redemption fine, the applicant had filed an appeal before the AA and had prayed that he be allowed to re-ship the gold on payment of a redemption fine. The Advocate for the applicant during the personal hearing held on 25.07.2023 has stated that the applicant is NRI and usually stays in USA. A copy of the applicant's visa has been made available during the course of the personal hearing. During the personal hearing, the applicant has prayed that the absolute confiscation of the gold chain be set aside and the same be allowed for re-export on the basis that he is a NRI and normally resides in USA. It is observed that in his prayer before the AA, the applicant had sought and prayed for re-shipment of the gold which was denied.

14. In a recent judgement passed by the Hon'ble High Court, Madras on 08.06.2022 in WP no. 20249 of 2021 and WMP No. 21510 of 2021 in r/o. Shri. Chandrasegaram Vijayasundarm + 5 others in a similar matter of Sri. Lankans wearing 1594 gms of gold jewellery (i.e. around 300 gms worn by each person) upheld the Order no. 165 – 169/2021-Cus (SZ) ASRA, Mumbai dated 14.07.2021 in F.No. 380/59-63/B/SZ/2018-RA/3716, wherein Revisionary Authority had ordered for restoration of OIO wherein adjudicating authority had ordered for the confiscation of the gold jewellery but had allowed the same to be released for re-export on payment of appropriate redemption fine and penalty.

15. In view of the foregoing paras, the Government finds that as the applicant had not declared the gold chain at the time of arrival, the confiscation of the same was justified. However, considering the quantity of gold, no past history, applicant being NRI, the absolute confiscation of the same was harsh and not justified. Also, Government notes that at the first instance the OAA had allowed the applicant to redeem the gold and had used his discretion. Considering the above facts and considering the error in the OIA, Government is inclined to set aside the OIA passed by the AA and to partly restore the OIO passed by the OAA with a modification that the same is allowed to be re-shipped on payment of a redemption fine as consistently prayed for by the applicant.

16. Government finds that the penalty of ₹ 20,000/- imposed on the applicant under Section 112 of the Customs Act, 1962 by the OAA is commensurate with the omissions and commissions committed and is not inclined to interfere in the same.

17. In view of the above, the Government sets aside the order passed by the appellate authority and partly restores the OIO passed by the OAA to the extent of upholding the penalty of ₹ 20,000/- imposed on the applicant under Section 112 of the Customs Act, 1962 and the gold chain is allowed to be redeemed for re-export on payment of a fine of ₹ 30,000/- (Rupees Thirty Thousand only).

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


(SHRAWAN KUMAR)
Principal Commissioner & ex-officio
Additional Secretary to Government of India

ORDER No. 582/2023-CUS (WZ) /ASRA/MUMBAI DATED 11.08.2023

To,

1. Shri. Deval Indravadan Khokhani, 1/85, Padmasana Garodia Nagar, Ghatkopar (East), Mumbai – 400 077.
2. Pr. Commissioner of Customs, Level – II, Terminal – 2, Chhatrapati Shivaji Maharaj International Airport, Sahar, Andheri (E), Mumbai – 400 099.

Copy to:

1. Shri. Prakash K. Shingrani, Advocate, 12/334, Vivek Bldg, New MIG Colony, Bandra (East), Mumbai – 400 051.
2. Sr. P.S. to AS (RA), Mumbai.
3. File Copy.
4. Notice Board.

