



GOVERNMENT OF INDIA
MINISTRY OF FINANCE
(DEPARTMENT OF REVENUE)

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

F.No. 371/160/B/WZ/2021/6262 : Date of Issue : 21.08.2023

ORDER NO. 598/2023-CUS (WZ) / ASRA / MUMBAI/ DATED 18.08.2023
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. Chandrawadan Dheerajlal

Respondent : Pr. Commissioner of Customs, 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-131/2021-22 dated 05.04.2021 issued on
05.04.2021 through F.No. S/49-642/2020 passed by the
Commissioner of Customs (Appeals) Mumbai-III.

ORDER

This revision application has been filed by Shri. Chandrawadan Dheerajlal (hereinafter referred to as the Applicant) against the Order-In-Appeal no. MUM-CUSTM-PAX-APP-131/2021-22 dated 05.04.2021 issued on 05.04.2021 through F.No. S/49-642/2020 passed by the Commissioner of Customs (Appeals) Mumbai-III.

2. Briefly stated facts of the case are that the applicant had arrived at CSMI Airport, Mumbai from Singapore on 13.03.2020 and was intercepted by Customs Officers after he had cleared himself through the Green channel facility. Applicant had failed to declare the dutiable goods in his possession. A gold chain weighing 100 grams, valued at ₹ 3,95,010/- was recovered from the possession of the applicant. Earlier, the applicant had arrived on board Indigo Flight No. 6E-29/13.03.2020 and the duration of his stay abroad was for 7 days. Applicant could not produce any invoice for the purchase of the gold chain.

3. The Original adjudicating authority (OAA) viz. Dy. Commr, CSMI Airport, Mumbai vide Order-In-Original no. Air Cus/49/T2/678/2020' dated 13.03.2020, ordered for the absolute confiscation the gold chain, weighing 100 grams and valued at ₹ 3,95,010/- under Section 111(d) of the Customs Act, 1962. A penalty of Rs 10,000 under Section 112(b)(ii) of the Customs Act, 1962 was imposed on the applicant.

4. Aggrieved by this order, the applicant filed an appeal before the Appellate Authority viz, Commissioner of Customs (Appeals) Mumbai-III, who vide his Order-In-Appeal no. MUM-CUSTM-PAX-APP-131/2021-22 dated 05.04.2021 issued on 05.04.2021 through F.No. S/49-642/2020 held that the OAA had

rightly confiscated the seized gold absolutely and did not find any reason to interfere in the OIO passed by the OAA and accordingly, dismissed the appeal.

5. The Applicant has filed this Revision Application inter alia on the following grounds of revision, that;

5.01. that Gold is not prohibited goods. It is submitted that gold is not a prohibited item and is only a restricted item. Prohibition relates to goods which cannot be imported or exported by any one, such as arms, ammunition, drugs etc. The intention behind the provisions of Section 125 is that import/export of such goods under any circumstances would cause danger to the health, welfare or morals of people as a whole. This would not apply to a case where import/export of goods is permitted subject to certain conditions or to a certain category of persons and which are ordered to be confiscated for the reason that the condition has not been complied with. In such a situation, the release of such goods confiscated would not cause any danger or detriment to public health. Admittedly, import/export of gold is permitted subject to certain conditions, therefore, it would not fall under the prohibited category as envisaged under the said of Section 125 of the Customs Act, 1962. that they have relied on the undermentioned case laws;

(a). Hon'ble High Court of Calcutta decision in the case of Commissioner of Customs (Preventive), West Bengal Vs. India Sales International reported in 2009 (241) ELT 182 (Cal.);

(b). Notification 50/2017- Customs dated 30-6-2017 does not prohibit the importation of goods in any manner and it only specifies the eligibility criteria only for the purpose of exemption from Custom duty in respect of the imported goods which is not the issue in the instant case.;

(c). Hon'ble Supreme Court of India in the case of Om Prakash Bhatia vs Commissioner of Customs, Delhi 2003(155) ELT 423 (S.C);

(d). In Shaikh Jamal Basha Vs Government of India 1997 (91) ELT 277(AP) the Hon'ble High Court held that Gold is allowed for import on payment of duty and therefore Gold in the form other than ornaments imported unauthorisedly can be redeemed

(e). Apex Court in the case of Sapna Sanjiv Kohli Vs Commissioner of Customs, Mumbai [2010(253) ELT A52 (SC)] has also held that gold is not prohibited goods and accordingly the gold dust was allowed to be redeemed on payment of fine and duties;

(f). in the case of Horizon Ferro Alloys Pvt. Ltd. & others vs Union of India, the division bench of Punjab and Haryana High Court has held that, If the goods are not expressly “prohibited” for importation, the petitioner company who is owner, as well as importer, would be entitled to an option to redeem the goods even upon adjudication. ;

(g). In Suresh Kumar Agarwal V. Collector of Customs, Madras (1998 (103) E.L.T. 18 (A.P.) held that Discretion given by the statute is for the purpose of exercising it unless there are good grounds for not exercising it - In that case, the authority ought to state the said reason(s) very briefly in his order - Sections 122 and 125 of Customs Act, 1962.

(h). Further reliance is placed on the Order dated 4.8.2015 of the Customs Excise and Service Tax Appellate Tribunal in the matter of Bhargav B. Patel in Appeal No. C/381/10-Mum reported in 2015-TIOL-1951-CESTAT-Mum, which is in the context of Section 125 of the Act. In para 11 thereof, it was held that under Section 125 of the Customs Act, unless the importation or exportation of goods is expressly “prohibited”, the Adjudication Authority is obliged to offer to the owner of the goods an option to pay fine in lieu of confiscation.

(i). In CC (Airport), Mumbai Vs Alfred Menezes 2009 (242) ELT 334 (Bom.), the Hon'ble High Court held that Section 125(1) ibid clearly mandates that it is within the power of adjudicating authority to offer redemption of goods even respect of prohibited goods.

(j). In the case of: MOHD..ZIA UL HAOUUE before Government of India T2014/314)849 GoI) redemption of the goods was allowed on payment of fine

(k). In Yakub Ibrahim Yusuf 2011 (263) EL. T. 685 (Tri. — Mumbai) the Tribunal held that option of redemption has to be given to person from whose possession impugned goods are recovered, even though he had not claimed its ownership.

(l). etc.

5.02. that the two decisions viz, Samynathan Murugesan vs Commr. of Customs -2010 (254) ELT A15 (Supreme Court) and Abdul Razak vs UOI -2012 (275) ELT 300 (Kerala) relied upon by the AA was not applicable to the case of the applicant. In this regard, they have relied upon the undermentioned case laws;

(a). Hon'ble Supreme Court in the case of CCE, Calcutta Vs Alnoori Tobacco Products [2004 (170) ELT 135 (SC)];

(b). Apex Court in the case of Sri Kumar Agency vs CCE, Bangalore 2008 (232) E.L.T. 577 (S.C.),

(c). Hon'ble Supreme Court in its judgment in the case of Escorts Ltd. Vs CCE, Delhi [2004 (173) ELT 113 (SC)];

(d). In CC v. Elephanta Oil 2003(152) ELT 257 (SC), it was held that even if goods are confiscated and goods are allowed to be re-exported, penalty can be levied.

(e). etc.

5.03. that the decision relied upon by the AA were not applicable to the case of the applicant; that the AA had failed to discuss as to how the facts of the cases relied upon by him, factually fit the case of the applicant.

5.04. that the provisions of notification no 50/2017 dated 30-6-17 could not be made applicable to the case of the applicant;

5.05. that the applicant claimed ownership of the goods and that redemption of the gold on reasonable fine and penalty ought to be allowed.

5.06. that the applicant has placed reliance on a wide gamut of case laws some of which are mentioned below where redemption of gold had been allowed;

(a). In T. Elavarasan Vs Commissioner of Customs (Airport), Chennai 2011 (266) ELT 167 (Mad), the Hon'ble High Court held that Gold is not a prohibited item and option is available to owner of goods or person from whom goods seized to pay -fine in lieu of confiscation

(b). etc.

In view of the above submissions, the applicant has prayed to the revisionary authority to allow the redemption of the gold on payment of a reasonable fine and penalty.

6. A personal hearing in the case was scheduled for 18.07.2023, 25.07.2023. Shri. Prakash Shingrani, Advocate for the applicant appeared on 25.07.2023 and submitted that applicant brought small quantity of gold jewellery for personal use. He further stated that the applicant is not a habitual offender. He requested to allow redemption of goods on nominal 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 chain made of gold 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 Customs duty on it. The Government finds that the confiscation of the gold chain 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 ‘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 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 under import is small and is not of commercial quantity. There are no allegations 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. 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. Absolute confiscation of the gold is harsh and unreasonable. Government is therefore, inclined to set aside the OIA and allow the gold to be redeemed on payment of a fine.

12. The penalty of ₹ 10,000/- imposed by the OAA under Section 112(b)(ii) of the Customs Act, 1962 is commensurate to the omissions and commissions committed by the applicant. Government is not inclined to interfere in the same.

13. For the aforesaid reasons, the Government modifies the OIA to the extent of allowing the redemption of the gold chain, weighing 100 grams and valued at ₹ 3,95,010/- on payment of a fine of ₹ 75,000/- (Rupees Seventy-Five Thousand only). The personal penalty of ₹ 10,000/- imposed by the OAA and upheld by the AA is found to be appropriate.

14. Revision Application filed by the applicant is decided on the above terms.


(SHRAWAN KUMAR)

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

ORDER No. 598/2023-CUS (WZ) /ASRA/MUMBAI DATED 18.08.2023

To,

1. Shri. Chandrawadan Dheerajlal, Chembur (West), Mumbai. (As address is incomplete and full address is not available on the records, service through Noticeboard and to his Counsel).
2. Pr. Commissioner of Customs, Chhatrapati Shivaji Maharaj International Airport, Terminal 2, Level – II. Sahar, Mumbai 400 099.

Copy to:

1. Shri Chandrawadan Dheerajlal, C/o. 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.