

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. 371/155/B/WZ/2021-RA / 6314 : Date of Issue : 23.08.2023

ORDER NO. 605 /2023-CUS (WZ)/ASRA/MUMBAI DATED 22.08.2023
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. Hitesh Laxmichand Gagnani.

Respondent : Pr. Commissioner of Customs, Custom House,
Near Akashwani, Navrangpura, Ahmedabad 380 009.

Subject : Revision Application filed, under Section 129DD of the
Customs Act, 1962 against the Order-in-Appeal No.
AHD-CUSTM-000-APP-764/20-21 dated 08.02.2021
issued on 08.02.2021 through F.No.
S/49-535/CUS/AHD/19-20 passed by the
Commissioner of Customs (Appeals), Ahmedabad.

ORDER

This revision application has been filed by Shri. Hitesh Laxmichand Gagnani (herein referred to as Applicant) against the Order-in-Appeal No. AHD-CUSTOM-000-APP-764/20-21 dated 08.02.2021 issued on 08.02.2021 through F.No. S/49-535/CUS/AHD/19-20 passed by the Commissioner of Customs (Appeals), Ahmedabad.

2. Brief facts of the case are that the applicant arrived from Dubai at the Sardar Vallabhai Patel International (SVPI) Airport, Mumbai on 21.08.2018 by SpiceJet flight no. SG-16 / 21.08.2018 and was intercepted by the Customs Officers after he had cleared himself alongwith his baggage through the green channel. The two bags were put through the baggage screening machine, however, nothing objectional was indicated. Thereafter, after keeping aside his personal effects which were on his person, the applicant was requested to pass through the door frame metal detector (DFMD) which detected the presence of metal. At this, the applicant revealed that he was wearing a gold chain on his neck hidden under the collar and a gold kada on his right hand hidden under the sleeve of his shirt. The details of the gold jewellery found on the person of the applicant is as given at Table No. 01 below and both these articles together had a totally weight of 350.890 grams and was valued at ₹ 9,63,004/- Tariff value and ₹ 10,68,811/- Market value.

TABLE No. 01.

Sl. No.	Details of the items with purity	Nos. of gold items seized	Weight of the gold in grams	Market value of gold as per Govt. Valuer's Certificate in ₹
1.	24Kt Gold Kada with purity of 999,	One piece	174.810	5,32,471/-
2.	24Kt Gold Kadiwali Chain purity of 999	One piece	176.080	5,36,340/-
	TOTAL		350.890	10,68,811/-

3. After due process of investigations and the law, the Original Adjudicating Authority i.e. the Asstt. Commissioner of Customs, SVPIA, Ahmedabad Mumbai vide Order-In-Original No. 05/AP/MM-AC/SVPIA/2019 dated 29.10.2019 issued through F.No. VIII/10-11/SVPIA/O&A/2019, ordered for the absolute confiscation of the gold jewellery i.e. one gold kada and one gold chain, totally weighing 350.890 grams, valued at ₹ 9,63,004/- (T.V) and ₹ 10,68,811/-(M.V) under Section 111 (d), (i), (l) and (m) of the Customs Act, 1962. Further, a penalty of ₹ 2,00,000/- was imposed on the applicant under Section 112 (a) and (b) of the Customs Act, 1962.

4. Aggrieved with this order, the applicant preferred an appeal before the appellate authority (AA) viz, Commissioner of Customs (Appeals), Ahmedabad who vide Order-in-Appeal No. AHD-CUSTOM-000-APP-764/20-21 dated 08.02.2021 issued on 08.02.2021 through F.No. S/49-535/CUS/AHD/19-20, rejected the appeal.

5. Aggrieved with the above order of the appellate authority, the Applicant has filed this revision application and while stating that the gold was worn on person and was meant for family use form making jewellery, that gold was not a prohibited item, has prayed to set aside the absolute confiscation and to reduce the penalty or to grant any other relief as deemed fit and proper.

6. Personal hearing in the matter was scheduled for 18.07.2023, 25.07.2023. Shri. Prakash K. Shingrani, Advocate for the applicant appeared on 25.07.2023 and submitted that applicant is NRI and stays in UAE. He further submitted that applicant brought small quantity of jewellery for personal use. He requested to allow re-export of goods on nominal fine and penalty.

7. Government has gone through the facts of the case. The Government notes that the Applicant had opted for the green channel and was intercepted thereafter, while attempting to clear the assorted gold jewellery i.e. 1 gold kada and one gold chain, totally weighing 350.890 grams valued at ₹ 9,63,004/- (T.V) and ₹ 10,68,811/-(M.V) without declaring the same to Customs. Applicant had admitted that he had not declared the gold to evade Customs duty. A declaration as required under section 77 of the Customs Act, 1962 was not submitted and 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. 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(a). Government notes that applicant in his averments made before the OAA had claimed that he was an eligible passenger allowed to import gold to India on payment of duty at 10% as his stay in India had not been more than 30 days in the previous year. However, this claim had not been allowed by the OAA holding that as per Section 79 of the Customs Act, 1962 read with Baggage Rules, 2016, a male passenger with a minimum stay of one year abroad could bring 20 grams jewellery while coming to India and in the case of the applicant he had not completed the stay of one year abroad and had 350.890 grams of gold which was almost 17 times higher than the permissible limit for an eligible passenger.

11(b). Government notes that the AA had agreed with the aforesaid findings of the OAA.

11(c). Government notes that the OAA had erred in holding that an eligible passenger was allowed to bring only 20 grams of gold. Considering the conditions laid in notification no. 50/2017-Cus dated 30.06.2017, if it is found that the passenger has stayed for a continuous period of 6 months excluding short visits of 30 days, then the passenger is eligible to bring upto 1 kg gold at concessional rate of duty provided he is holding an Indian passport or is of Indian origin, makes a declaration of possession of gold and the duty is paid in foreign currency. Government observes that gold brought by such eligible persons is not prohibited provided that payment of the concessional duty is made through foreign currency. Contention, if any, that currency was not sufficient to meet requirement of duty payment, will not alter the eligibility based on period of stay abroad, as currency can be arranged subsequently to pay applicable duty for claiming of goods.

12. In the averments made during the personal hearing, the applicant has prayed to allow reshipment of the gold jewellery on payment of a nominal fine

and penalty. Government notes that at para 4(v) and 4(vi) of the SCN F.No. VIII/10-56/AIU/D/2018-19/14386 dated 30.01.2019 issued by Dy. Commr of Customs (AIU), SVPIA, Ahmedabad, it is recorded that at the time of interception, the applicant was found in possession of copy of (i). resident identity of UAE having ID No. 784-1989-5481325-3 valid upto 23.10.2018 and (ii) purchase invoice for gold bought at Dubai bearing nos. 16377 & 16379 both dated 19.08.2018.

13. 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 jewellery i.e. 1 gold kada and one gold chain, totally weighing 350.890 grams valued at ₹ 9,63,004/- (T.V) and ₹ 10,68,811/-(M.V) 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.

14. 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. Government notes that the OAA should have allowed the gold to be redeemed considering that the applicant was an eligible passenger by virtue of his continuous stay abroad. 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 UAE. A copy of the applicant's visa has been made available during the course of the personal hearing having validity from 14.06.2021 to 13.06.2024. During the personal hearing, the applicant has prayed that the absolute confiscation of the impugned gold jewellery be set aside and the same be allowed for re-export on the basis that he is a NRI and normally resides in UAE.

15. 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.

16. In view of the foregoing paras, the Government finds that as the applicant had not declared the gold jewellery 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. Considering the above facts, Government is inclined to set aside the OIA passed by the AA and to allow the applicant to re-export the impugned assorted gold jewellery on payment of a redemption fine as now prayed for by the applicant.

17. Government finds that the penalty of ₹ 2,00,000/- imposed on the applicant under Section 112(a) and (b) of the Customs Act, 1962 by the OAA is harsh and too steep considering that at the first instance, the applicant by virtue of his stay abroad was an eligible passenger and should have been extended the benefit of concessional duty. Therefore, Government is inclined to reduce the penalty.

18. In view of the above, the Government sets aside the order passed by the appellate authority and allows the applicant to redeem the impugned gold jewellery i.e. one gold kada and one gold chain, totally weighing 350.890 grams valued at ₹ 9,63,004/- (T.V) and ₹ 10,68,811/-(M.V) for re-export on payment of a redemption fine of ₹ 1,90,000/- (Rupees One Lakh Ninety Thousand only). Further, the penalty of ₹ 2,00,000/- imposed on the applicant under Section 112(a) and (b) of the Customs Act, 1962 is reduced to ₹ 1,00,000/- (Rupees One Lakh only)

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

Shrawan
22/8/23
(SHRAWAN KUMAR)

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

ORDER No. 605/2023-CUS (WZ) /ASRA/Mumbai DATED 22.08.2023

To,

1. Shri. Hitesh Laxmichand Gagnani, G-302, Karnavati Enclave, Parallel to Express Highway, Near Doon School, New Maninagar, Ramol, Ahmedabad – 382 449.
2. Pr. Commissioner of Customs, Custom House, Near Akashwani, Navrangpura, Ahmedabad 380 009.

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. Noticeboard.