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GOVERNMENT OF INDIA  
MINISTRY OF FINANCE  
(DEPARTMENT OF REVENUE)  
8<sup>th</sup> Floor, World Trade Centre, Centre - I, Cuffe Parade,  
Mumbai-400 005

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F.No. 371/306/B/WZ/2022-RA/612      Date of Issue 29.01.2024

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ORDER NO. 68/2024-CUS (WZ)/ASRA/MUMBAI DATED 24.01.2024  
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.

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Applicant : Mr Kasmani Asif Abdul Aziz

Respondent : Pr. Commissioner of Customs, Ahmedabad.

Subject : Revision Application filed under Section 129DD of the  
Customs Act, 1962 against the Order-in-Appeal No.  
AHD- CUSTM-000-APP-1606-21-22 dated 22.03.2022  
[Date of issue: 22.03.2022] passed by the Commissioner  
of Customs (Appeals), Ahmedabad.

**ORDER**

This Revision Application have been filed by Mr Kasmani Asif Abdul Aziz (herein referred to as the 'Applicant') against the Order-in-Appeal No. AHD-CUSTM-000-APP-1606-21-22 dated 22.03.2022 [Date of issue: 22.02.2022] passed by the Commissioner of Customs (Appeals), Ahmedabad.

2. Brief facts of the case are that on 20.04.2019, the officers of AIU Customs, Ahmedabad intercepted the Applicant, holding an Indian passport, and had arrived from Dubai (via Kuwait) by Jazeera Flight No. J 9407 after he had cleared himself through the green channel of Customs. The baggage of the Applicant were screened in the X-Ray machine but nothing objectionable was noticed. On being asked whether he was having any goods to be declared he replied in the negative. The Applicant was asked to pass through the Door Metal Frame Detector (DFMD) after removing all the metallic objects that he was wearing on his body, on which the DFMD generated a loud beep sound. On being asked to remove metallic objects on his person, the Applicant removed on transparent plastic pouch containing one yellow coloured chain and one yellow coloured pendant alongwith two new I-Phone mobiles from his pant pocket. The Applicant was once again asked to pass through the DFMD and again a loud beep sound was heard. The Applicant, then removed another transparent plastic pouch containing two yellow coloured chains and one yellow coloured pendant from the secret pocket of his pants.

3. Pursuant to being assayed, the three gold kadiwali chains, 02 gold pendants of 24K purity, totally weighing 1200 grams and having a tariff value of Rs. 35,22,816/- and market value of Rs. 39,02,400/- and the two new Apple I-Phones valued at Rs 1,87,290/- were seized under the reasonable belief that the goods were smuggled into India by way of concealment in his pant pockets, with an intention to evade payment of Customs duty in violation of the provisions of the Customs Act, 1962.

4. The Applicant in his statement admitted that the gold belonged to him and that for the purchase of the gold he was in possession of invoices; that he was in the hardware business in Dubai, UAE; that he earned around 5000-6000 Dirhams per month; that for the purchase of the gold he had accumulated the amount from his savings during the last four to five years; that he was residing in UAE since 12 years; that he had deliberately not declared the same to evade customs duty and that the gold was purchased from his savings during the last 04-05 years and that the goods were attempted to be got into India with an intent to sell in the local market and for earning profit.

5. After following the due process of law, the Original Adjudicating Authority (OAA) i.e. Joint Commissioner of Customs, Ahmedabad vide Order-In-Original (OIO) No. 34/JC/SM/ O&A/2020-21 dated 31.08.2020 [Date of issue: 03.09.2020] order the absolute confiscation of the impugned gold weighing 1200 grams and valued at Rs. 39,02,400/-, under Section 111 (d), (l) & (m) of the Customs Act, 1962. The two Apple I-Phones having a total value of Rs. 1,87,290/- were confiscated under Section 111 (d), (l) & (m) of the Customs Act, 1962 but the Applicant was given an option to redeem the same under Section 125 of the Customs Act, 1962 on payment of a redemption fine of Rs. 15,000/-. Penalty of Rs. 3,00,000/- was imposed on the Applicant under Section 112(a) and (b) of the Customs Act, 1962.

6. Aggrieved, with this Order, the Applicant filed an appeal before the Appellate Authority (AA) viz, Commissioner of Customs (Appeals), Ahmedabad who vide Order-in-Appeal No. AHD- CUSTM-000-APP-1606-21-22 dated 22.03.2022 [Date of issue. 22.02.2022] passed by the upheld the order passed by the OAA.

7. Aggrieved with the above order of the Appellate Authority, the Applicant has filed the Revision Application on the following grounds:

7.01. That the impugned Order-In-Appeal passed by the AA is illegal, illogical, bad in law and without due consideration of the facts and circumstances of the case due regards to the guidelines issued by the different appellate authorities.

7.02. That the Applicant in his statement only accepted for the possession of Gold and never accept for smuggling of the same as the impression made by the OAA; that the gold jewellery which were in possession of the Applicant was legally purchased by him and invoice of which was produced at the time of investigation of the matter and hence, it cannot be termed as smuggled goods.

7.03. That the statement of the Applicant was taken under the coercion and threat and there is no such corroborative evidence has been produced by the department by which it can be proved that the goods seized from the Applicant are smuggled goods and that the Applicant produced the bills on the goods seized by the department, which proves that the goods were legally under possession of the Applicant.

7.04. That the initial burden to prove that goods are smuggled is on Department and the Department has a responsibility to come out with positive evidence and establish source of procurement of gold, especially when explanation of Applicants is not accepted and if department failed to discharge its onus, confiscation does not warranted and hence, redemption is also not imposable. The Applicant relied upon the following judgment:

- (i) E. Eswari Reddy Vs. Commissioner of Customs Hyderabad-II [2006 (196)ELT 410 (Tri -Bang)]
- (ii) Mahesh B. Mali Vs Commissioner of Central Excise, Pune [2012(286) ELT 375 (Tri-Mum)]
- (iii) Ms. Nirmala Mitra Vs Commissioner of Customs, Patna [2001(138) ELT 1037 (Tri-Kol)],

7 05 That the cases relied upon by the OAA and AA are not applicable in the present case as they pertain to gold carried by the passenger in concealed manner and the passengers did not produce the proof of legal

acquisition of gold but in the present case the Applicant has produced the proof of legal acquisition by way of Original Invoice.

7.06. That the AA has confirmed the action of the confiscation of the OAA as legal and proper without considering that questioning the proceeding of Panchnama nor reiterated the statement under which it was admitted

7.07. That the copy of the panchnama which is a vital document was not provided and obtained the panchnama after issuance of OIO and during pendency of Appeal

7.08. That the gold seized from the Applicant was legally procured by the Applicant as purchased from a shop abroad for which he has produced original invoice;

7.09. That the gold Jewellery is also not a prohibited goods and is allowed to be imported of payment of duty with certain condition and hence, the same should be released to the Applicant on nominal redemption fine in terms of Section 125 of Customs Act, 1962. The Applicant has relied on the following case laws in support of his contention:

- (i) Commissioner of Customs, Lucknow vs. Islahuddin Khan [2018(364)ELT 168(Tri.-All)]
- (ii) Shaik Jamal Basha Vs. Govt of India [1997(91) ELT 277(A.P.)]
- (iii) Ashok Kumar Verma [2019(369)ELT 1677(GOI)]

7.10. That in the instant case the gold ornaments was kept in the baggage in and the ornaments belonged to the Applicant and his family members and he had the legitimate bill for the purchase from authorised dealers and the instant case it cannot be said that the gold ornaments seized/recovered from the Applicant is smuggled goods. Hence, the confiscation, redemption fine and penalty should be set aside. The Applicant relied upon the following decision in support of their averments above:

- (i) Kapildeo Prasad vs. Commissioner of Customs (Prev) Patna [2002(142) ELT 668 (Tri.-Kol)], which been upheld by the Hon'ble High Court of Patna [2011(272)ELT 31(Pat.)]

7.11. That as the Applicant does not have any past record and being a bonafide passenger, OAA should have taken a lenient view and the quantum of redemption fine and penalty should be reduced.

7.12. That without giving a fair chance to explain the case by the Applicant, deciding the same vide impugned OIA was also a violation of principle of natural justice and should be set aside.

7.13. That a spare copy of the panchanama has not been supplied or the proof of the supply at an earlier date has not been provided which raises a doubt about the seizure proceeding adopted by the Department. Hence, in the absence of the copy of Panchnama which is vital document in the present proceedings, the adjudication proceeding could not be consider to be fair and partial

7.14. That the OAA has erred in rejecting the cross-examination of the witness sought by the Applicant for establishing the facts of the recovering of the gold and mobile from his possession and allegation of concealment  
That the Applicant is a simple business man and is not familiar with the law and did not know about the retraction of the statement and it cannot be expected from each and every citizen that he knows all legal procedures/remedies.

7.15. That only confessional statement, which is a weak evidence cannot be a sole basis to proceed against the Applicant unless it is supported by corroborative evidences

7.16. That the Applicant is a frequent flyer and knows that he has to declare the gold and all belongings with him before the Customs officer before leaving the Airport; that when the Panchnama is not supplied to the Applicant till date, the fact of seizure is still not established by the department in the present case and the witness in the Panchnama is not

tested with the tool of cross-examination; that the OAA has erred to hold that the Applicant had not declared the possession of Gold and Mobile Phone and that the Applicant was intercepted when he was passing and was about to exit the green channel

7.17. That the Applicant was not allowed to declare and before its declaration, the allegation has been framed for smuggling; that in the present case the seized goods were found from the pant of the Applicant which is not a place to conceal but it could be considered as a safe carrying place which generally a human being uses for the carrying of money, precious belongings; that there is no such provision made by the Govt. that for the re-export permission, option should only be exercised at the time of seizure; that thus the OAA has erred to reject the request of the Applicant for re-export of the seized goods

7.18. That the absolute confiscation is only warranted in the case where the goods were prohibited and in the instant case, the Gold Jewellery in not a prohibited goods and hence option to pay fine in lieu of confiscation shall be exercised under Section 125 of Customs Act, 1962, for the Gold Jewellery and the mobile phones. The Applicant has relied and quoted from the judgment in the case of Mr. Ashok Kumar Verma [2019 (369) ELT 1677 (GOI)]

7 19. That the OAA has confiscated the 2 nos. I-phones of the Applicant as the two i-phones recovered erroneously from the Applicant are old and used phones which is used by the Applicant for their personal and business use and the same are not new one as the phones are not found in its original packing or with their Accessories like Chargers, headphones, catalogue etc. which means these are not new one and in the market also no one purchase such type of old models when new models are available.

Under the circumstances the Applicant prayed that OIA and OIO may be set aside and the it may be held that the Gold Jewellery seized from the

Applicant was not smuggled gold and that the confiscation of gold jewellery seized from the Applicant was legally in possession of the Applicant and does not warrant absolute confiscation or confiscation under Section 111(d), (1) (1) & (m) of Customs Act, 1962 and its should be allowed to clear on redemption fine and payment of appropriate duty or allow re-export as per the law; hold that the I-Phones recovered from the Applicant were also not liable for confiscation and redemption fine as well as duty thereon as the same are old phones and for Applicant's personal use and eligible for free baggage allowance; hold that Applicant is also not liable for penalty under Section 112 of Customs Act, 1962; Hold that the quantum of redemption fine and penalty imposed should be reduced; Permit the Applicant to furnish additional grounds / submissions/documents or amend any or all the grounds set out herein above as may be necessary to buttress the same or such other order as he may deem fit and proper in the facts and circumstances of the case and in the interest of justice;

8. Personal hearing in the case was scheduled for 06.09.2023 or 13.09.2023. Shri D.K.Singh and Shir J.K. Bhatt, both Advocates appeared online for the hearing on 06.09 2023 on behalf of the Applicant. They submitted that the Applicant is a businessman who brought some gold jewellery for personal use. They further submitted that the gold was purchased out of Applicant's fund and purchase invoice was produced. They further submitted used mobile phones were confiscated and were not allowed as personal baggage. They submitted that there was no concealment and Applicant has no past record of any offence. They requested to allow redemption of gold on reasonable fine and penalty and allow release of phones unconditionally. No one appeared for the personal hearing on behalf of the Respondent.

9. The Government has gone through the facts of the case and observes that the Applicant, after he had cleared himself through the green channel of Customs, despite being asked whether he had any goods to be declared. replied in the negative. It was only when the Applicant was asked to pass



through the DFMD twice that the three gold kadiwali chains, 02 gold pendants of 24K, collectively weighing 1200 grams and having a market value of Rs. 39,02,400/- and the two new Apple I- Phones valued to Rs. 1,87,290/- were recovered from the pocket/secret pocket of the pants worn by the Applicant. But for the alertness of the staff of Customs, the gold would have escaped detection. The Applicant had failed to declare the goods to the Customs at the first instance as required under Section 77 of the Customs Act, 1962. The Applicants had not disclose that he was carrying dutiable goods. It was only when he was asked to pass through the DFMD twice and beep sounds were heard, and the Applicant was asked to remove metallic substances with him, which he did reluctantly one at a time, and the impugned gold jewellery and I-phones, which was concealed in a plastic pouch and kept in the pocket/secret pocket of the pants, was recovered from the Applicant and the method of carrying the gold adopted by the Applicant clearly revealed his intention not to declare the impugned gold and thereby evade payment of Customs Duty. The confiscation of the gold jewellery and I-Phones, was therefore justified and thus, the Applicant had rendered himself liable for penal action.

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, 1962.

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".

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. 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.

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;

quantity. The impugned gold jewellery and I-Phones were recovered from the pockets of the trouser worn by the Applicant which does not amount to concealment in an ingenious manner. The Applicant is a businessman in UAE and is well placed financially to purchase the gold jewellery and I-phones. It is also on record on the day of the seizure, the Applicant had produced the invoices for the purchase of the gold jewellery. There are no allegations that the Applicant is a habitual offender and was involved in similar offence earlier or there is nothing on record to prove that the Applicant was part of an organized smuggling syndicate.

15. The Government finds that the quantum of gold jewellery in question not being of commercial quantity, the Applicant being in possession of the invoices of the purchase of the gold jewellery and being a person of decent means as a businessman in Dubai, UAE and not a habitual offender, suggests that this case is a case of non-declaration of gold jewellery and I-phones by the Applicant. The absolute confiscation of the impugned three gold kadiwali chains, 02 gold pendants of 24K, collectively weighing 1200 grams and having a market value of Rs. 39,02,400/- and the two new Apple I- Phones valued to Rs. 1,87,290/- leading to dispossession of the Applicant of the same is therefore harsh and not reasonable. 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. In view of the aforesaid facts, while the option to redeem the I-phone has already been given by the OAA, the option to redeem the gold jewellery on payment of redemption fine should have been allowed. Considering the above facts, Government is inclined to modify the order of absolute confiscation and allow the impugned gold jewellery to be redeemed on payment of a redemption fine.

16. Applicant has also pleaded for reduction of the penalty imposed on him. The market value of the gold jewellery, in the instant case is Rs.39,02,400/- and the I-phones have been valued at Rs. 1,87,290/-. From the facts of the case as discussed above, Government opines that the

penalty of Rs. 3,00,000/- imposed on the Applicant under Section 112 (a) and (b) of the Customs Act, 1962 is commensurate to the omissions and commissions of the Applicant and needs to be maintained.

17. In view of the above, the Government modifies the Order-in-Appeal No. AHD-CUSTOM-000-APP-1606-21-22 dated 22.03.2022 [Date of issue: 22.03.2022] passed by the Appellate Authority and allows the Applicant to redeem the three gold kadiwali chains, 02 gold pendants of 24K purity totally weighing 1200 grams and having a tariff value of Rs. 35,22,816/- and market value of Rs. 39,02,400/-, on payment of a redemption fine of Rs. 7,00,000/- (Rupees Seven Lakhs only). The penalty of Rs. 3,00,000/- imposed on the Applicant under Section 112 (a) & (b) of the Customs Act, 1962 by the OAA is upheld. The option of redemption of the two I-phones given by the Appellate/Original Adjudicating Authority is sustained.

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

( SHRAWAN KUMAR )

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

ORDER NO. 68/2024-CUS (WZ)/ASRA/MUMBAI DATED 24.01.2024

To,

- 1) Mr. Kasmani Asif Abdul Aziz, 133, Duvagiri Society, Nr. Somnath Cinema, Talala road, Veraval-74, Veraval-Patan 362265, Ta Veraval, Distt: Gir Somnath Gujarat, India
- 2) The Principal Commissioner of Customs, Ahmedabad, 1st Floor, Custom House, Near All India Radio, Income Tax Circle, Navrangpura Ahmedabad 380 009

Copy to:

- 1) The Commissioner of Customs (Appeals), Ahmedabad, 7th Floor, Mrudul Tower, B/H Times of India, Ashram Road, Ahmedabad 380 009
- 2) Shri J.K Bhatt, Advocate, 601-602, Harikrupa Tower, Near Chirag Motors, Gujarat College Road, Elise Bridge, Ahmedabad 380 006
- 3) Sr. P.S. to AS (RA), Mumbai.
- 4) File copy.
- 5) Notice Board.

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