

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. 371/97/B/WZ/2021-RA / 2031 Date of Issue 26 .09.2023

ORDER NO. 681/2023-CUS (WZ) /ASRA/MUMBAI DATED 25 .09.2023
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. Kamlesh Kantilal Jain

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-1426/2020-21 dated 28.01.2021 issued
on 10-02-2021 [F.No. S/49-412/2019] passed by the
Commissioner of Customs (Appeals), Mumbai-III.

ORDER

This revision application has been filed by Shri. Kamlesh Kantilal Jain (herein referred to as Applicant) against the Order-in-Appeal No. MUM-CUSTOM-PAX-APP-1425/2020-21 dated 28.01.2021 issued on 10.02.2021 through F.No. S/49-412/2019 passed by the Commissioner of Customs (Appeals), Mumbai-III.

2. Brief facts of the case are that on 26-06-2018, the Officers of CSMI Airport Mumbai, intercepted one passenger Shri Kamlesh Kantilal Jain, the applicant, holding Indian Passport No. P8505250 and his wife Mrs Dipika Kamlesh Jain holding Indian Passport No. H8869361, accompanied by their son Master Arham Kamlesh Jain, who had arrived from Dubai by Air India Flight No. AI 984 dated 26.06.2018. They were intercepted near the Exit Gate after they had cleared themselves through Customs Green Channel. To the query put forth to the applicant regarding anything to declare, he had replied in the negative. Personal search of the applicant resulted in recovery of 02 pieces of chrome coloured chains of heavy metal worn around his neck, 01 piece of chrome coloured kada of heavy metal worn around his right hand wrist and 02 bangles of yellow metal kept in his right hand pant-pocket, weighing 816 grams collectively. Nothing incriminating was recovered from his wife and son. The recovered 816 grams of jewellery purported to be gold was examined and assayed by Government Approved Valuer who certified that the 02 pieces of chrome coloured chains of heavy metal, 01 piece of chrome coloured kada and 02 bangles of yellow metal collectively weighing 816 grams were made of Gold having purity of 999% (24KT) and valued at Rs.23,51,279/-. 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. On conclusion of the investigation Show Cause Notice was issued on 20-12-2018.

3. The case was adjudicated by the Original Adjudicating Authority (OAA) i.e. the Addl. Commissioner of Customs, Airport, Mumbai vide Order-In-Original No. ADC/AK/ADJN/470/2018-19 dated 28-02-2019 ordered for the absolute confiscation of the impugned gold i.e 02 pieces of gold chains, 01 piece of gold kada and 02 gold bangles collectively weighing 816 grams having purity of 999% (24KT) and valued at Rs.23,51,279/- under under Section 111 (d), (1) and (m) of the Customs Act, 1962. Further, a penalty of Rs. 2,50,000/- 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-1426/2020-21 dated 28-01-2021 issued on 10.02.2021 through F.No. S/49-412/2019 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 Notification No.50/2017 dated 30-06-2017 is only an exemption notification and that they did not claim the said exemption;

5.02. That Gold is not prohibited item for import and the gold imported by them was not liable for absolute confiscation;

5.03. That the decisions of Tribunals, High Court etc relied upon by the petitioner were rejected by the Adjudicating authority without proper application of mind; that factual situation of the case of the applicant fits in with the decisions on which reliance was placed; that the order of the Appellate Authority is not sustainable on account of bias violations of principles of natural justice and fair play;

- 5.04. That the decisions relied upon by the Commissioner of Customs (Appeals) are not applicable in their case;
- 5.05. That the Petitioner claimed ownership of the goods and redemption of the gold on reasonable fine and penalty;
- 5.06. That the penalty of Rs.2,50,000/- imposed on the applicant is disproportionate to the value of the gold imported by him and imposition of heavy penalty is not sustainable
- 5.07. The applicant concluded by submitting that it was a single and solitary incident of an alleged act of smuggling and can never be justifiable ground for absolute confiscation of the goods; that the act of the applicant cannot be termed as crime or manifesting of an organized smuggling activity; that he committed the mistake only with an intention to save little money and for making a small profit and that he was not a habitual offender. The applicant submitted that he is from a respectable family and a law abiding citizen and has never come under any adverse remarks

Under the above circumstances of the case, the applicants prayed to Revision Authority for a reasonable order for refund of the sale proceeds and drop further proceedings against the applicant.

6. Personal hearing in the case was scheduled on 02.08.2023. Shri. Prakash Shingrani, Advocate for the applicant appeared for personal hearing and submitted that the applicant came along with his family and brought small quantity of gold for use of family. He further submitted that applicant is not a habitual offender and jewellery was not concealed. He requested to release the same on reasonable redemption fine and penalty.

7. The Government has gone through the facts of the case and notes that the applicant had not declared the gold while availing the green channel facility. Thereafter, on interception he had been asked whether he was carrying any dutiable items to which he had replied in the negative. This reveals the intention of the applicant for evading payment of Customs duty. The applicant clearly had failed to declare the goods to the Customs as required under Section 77 of the Customs Act, 1962. 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 quantity of gold recovered is quite large, of commercial quantity and of 999% purity (24KT). The confiscation of the impugned gold is therefore justified and thus, the Applicant had rendered himself liable for penal action.

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 Applicants 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 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. Government observes that the manner in which the gold was attempted to be brought in by the applicant, reveals the clear intention and a systematic attempt to evade duty and smuggle the gold into India. The circumstances of the case probates that he did not have any intention of declaring the gold to the Customs at the airport. These facts have been properly considered by the Appellate Authority and the lower adjudicating authority while absolutely confiscating the gold jewellery.

12. The main issue in the case is the manner in which the impugned gold was being brought into the Country. The option to allow redemption of seized goods is the discretionary power of the adjudicating authority depending on the facts of each case and after examining the merits. In the present case, the applicant did not give the declaration of the gold carried by him as required under Section 77 of the Customs Act, 1962, moreover when he was asked by the officers about carrying any dutiable goods, he replied in negative. The manner of concealment was clever and ingenious. This method adopted to smuggle gold is a fit case for absolute confiscation as a deterrent to such offenders. Thus, taking into account the facts on record and the gravity of offence, the adjudicating authority had rightly ordered the absolute confiscation of gold. The redemption of the gold will encourage non-bonafide and unscrupulous elements to resort to concealment and bring gold. Such acts of mis-using the liberalized facilitation process should be meted out with exemplary punishment and the deterrent side of law for which such provisions are made in law needs to be invoked. The order of the Appellate authority upholding the order of the adjudicating authority is therefore liable to be upheld and the Revision Application is liable to be dismissed.

13. The Government, keeping in mind the facts of the case is in agreement with the observations of the Appellate authority and finds that absolute confiscation is proper, legal and judicious. The penalty of Rs.2,50,000/- imposed under Section 112 (a) and (b) of the Customs Act 1962 on the seized gold valued at Rs 23,51,279/- is appropriate and commensurate with the omission and

commission committed by the applicant. In view of the above Government does not find it necessary to interfere in the OIA passed by the AA.

14. Accordingly, the Revision Applications filed by the applicants is dismissed.


(SHRAWAN KUMAR)

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

ORDER NO. 681/2023-CUS (WZ)/ASRA/MUMBAI DATED 25.09.2023

To,

1. Shri Kamlesh Kantilal Jain, House No. 562, Jeevan Colony, Jain Colony, TIBA Place, Ratnagiri-415612.
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.