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. 371/355/B/2022-RA/7135 Date of Issue 05.09.2023

ORDER No. 699 /2023-CUS (WZ)/ASRA/MUMBAI DATED 23.09.2023.
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 : Mr. Dhruval Navin Gala

Respondent : Pr. Commissioner of Customs, C.S.I Airport, Mumbai

Subject : Revision Application filed, under Section 129DD of the Customs Act, 1962 against the Order-in-Appeal No. MUM-CUSTM-PAX-APP-350/2022-23 dated 26.05.2022 [Date of issue: 30.05.2022] [F. No S/49-1161/2021] passed by the Commissioner of Customs (Appeals), Mumbai Zone-III.

ORDER

This Revision Application has been filed by Mr. Dhruval Navin Gala (herein referred to as 'Applicant)' against the Order-in-Appeal No. MUM-CUSTM-PAX-APP-350/2022-23 dated 26.05.2022 [Date of issue: 30.05.2022] [F. No S/49-1161/2021] passed by the Commissioner of Customs (Appeals), Mumbai Zone-III.

2. Brief facts of the case are that on profiling and suspicion, the Applicant, who had arrived from Dubai by Spice Jet Flight No. SG006, was intercepted by the officers of Customs at the Chatrapati Shivaji Maharaj International Airport, after he had cleared himself through the Customs Green Channel. Personal search of the Applicant led to the recovery of one yellow coloured metallic kada and one yellow coloured metallic chain, both purported to be of gold, which were worn by the Applicant and which were cleverly concealed by clothes worn by him. Pursuant to being assayed, the said one crude gold chain of 24K purity and one crude gold kada of 24K purity, collectively weighing 324 grams and valued at Rs. 11,12,551/- were seized under the reasonable belief that the same were being smuggled into India and hence liable for confiscation under the provisions of the Customs Act, 1962. The Applicant stated that the said gold was purchased from a shop in Dubai out of his savings and some money given by his friend in Dubai and that he was aware that import of gold without declaration and payment of duty is an offence punishable under the Customs Act, 1962. The Applicant admitted to ownership, possession, non-declaration, concealment and recovery of the seized gold.

3. After following the due process of law, the Original Adjudicating Authority (OAA) viz, Additional Commissioner of Customs, Chhatrapati Shivaji International (C.S.I) Airport, Mumbai vide Order-In-Original No. ADC/VDJ/ADJN/78/2021-22 dated 22.06.2021 [Date of issue: 24.06.2021] ordered the confiscation of the said one crude gold chain of 24K purity and

one crude gold kada of 24K purity, collectively weighing 324 grams and valued at Rs. 11,12,551/- under Section 111 (d), (l), and (m) of the Customs Act, 1962. The OAA gave the Applicant the option to redeem the said seized gold under Section 125 of the Customs Act, 1962 on payment of redemption fine of Rs. 2,20,000/- in lieu of confiscation in addition to payment of the applicable customs duty. Personal penalty of Rs. 1,00,000/- was imposed on the Applicant under Section 112(a) and (b) of the Customs Act, 1962.

4. Aggrieved by this order, the Respondent filed an appeal with the Appellate Authority viz, Commissioner of Customs (Appeals), Mumbai Zone-III, who vide her Order-in-Appeal No. MUM-CUSTM-PAX-APP-350/2022-23 dated 26.05.2022 [Date of issue: 30.05.2022] [F. No S/49-1161/2021] set aside the Order-in-Original and ordered the absolute confiscation of the impugned gold. The personal penalty imposed by the OAA was not interfered with by the AA.

5. Aggrieved with the aforesaid Order passed by the AA, the Applicant has preferred this revision application inter alia on the following ground:

5.01. That under Section 125 of the Customs Act, 1962, a discretion has been conferred on the AA to give the option to the importer/exporter/owner of the goods to pay fine in lieu of confiscation in cases of goods, the importation or exportation whereof is prohibited under the Act or any other law for the time being in force and where the goods are not prohibited the authorities have no choice but to allow redemption. The Applicant has relied on the following case laws in support of his contention:

(i) CC(Prev) vs. Uma Shankar Verma
(ii) Gauri Enterprises vs. Commr. of Customs (Prev) [2002(145)ELT 706 (Tri-Bang)]

5.02. That while exercising his discretionary power under the provisions of Section 125 of the Customs Act, 1962 the OAA considered and found that the Applicant was the rightful owner of seized gold and also held that gold is not

a prohibited item is not dangerous or harmful item and in the light of judgements allowed redemption of seized gold on a fine;

5.03. That Board vide Circular No. 9/2001-Customs dated 22.02.2001 stated that the redemption fine and personal penalties should be such that it not only wipes out the margin of profit but also acts as a strong deterrent against repeat offences;

5.04. That the AA failed to take into consideration the decisions relied upon by the OAA and also the Applicant;

5.05. That while exercising the power of judicial review against the lower authority being supervisory, the AA would be justified in interfering with the decision of the OAA only when the AA should record a finding that the decision of the OAA is based upon exclusion of some admissible evidence or consideration of some inadmissible evidences or the lower authority has no jurisdiction at all;

5.06. That discretionary power conferred on an OAA under Section 125 of CA, 1962 is a special power and not an ordinary power and such a special power cannot be lightly interfered by a higher authority or Court in appeal or writ proceedings. The Applicant has relied upon the following case laws in support of his contention:

(i) Order of the Gujarat High Court dated 19.03.2008 in the case of Foreign Petrochemical Corpn vs. General Secretary
(ii) Nocil Ltd vs. Policy Relaxation Committee [2018(359) ELT 316(Del)]
(iii) New Bharat Rice Mill vs. UOI [2008(229) ELT 502]
(iv) Binani Zinc Ltd vs. AC,CEx. Cochin [1995(77) ELT 514(Ker)]
(v) Navsari Oil Products vs AC.CEx [1992 (60) ELT 550(Guj)]
(vi) Koshambh Multired Pvt Lte vs. UOI [2018(361) ELT 604(Guj)]
(vii) M.K.Govinda Pillai vs Collector of Customs and C.Excise, Cochin [1994(71) ELT 881(Ker)]
(viii) Kashish Silk Mills Pvt Ltd vsl UOI [2005(183) ELT 134)]
(ix) Corporation of Calcutta vs. Mulchand Agarwal
(x) UOI vs. Raj Grow Impex & ors

5.07. Gold is not 'prohibited goods' but only a 'restricted goods' and is not liable for absolute confiscation. Import of gold is no longer prohibited and therefore it is the duty of the adjudicating authority, if he is of the view that it is liable to confiscation, to permit its redemption on appropriate fine. That if the goods are restricted to import, the Government fixes some sort of barrier to import and the importer has to overcome such procedures which have to be completed. That restriction to import any goods is decided by the government under foreign trade policy amended from time to time.

5.08. That Gold is not a prohibited item for import and Section 125 of the Custom Act, 1962 provides that option of redemption can be given in case the seized goods are not prohibited and therefore absolute confiscation is not warranted in the instant case. Section 125 of the Customs Act, 1962 provides that the goods should be redeemed to the owner of the goods or the person from whose possession the goods were seized if the owner is not known. Further authority has discretion to order release of prohibited goods on payment of fine in lieu of confiscation. The Applicant has relied upon the undermentioned case laws;

(i) Commr. Of Customs (Prev) vs. India Sales International [2009 (241) E.L.T. 182(Cal)].
(ii) Yakub Ibrahim Yusf vs. CC, Mumbai [2011(263) ELT 685(Tri. Mumbai)
(iii) Neyveli Lignite Corporation Ltd vs. UOI [2019(242) ELT 487(Mad)]

5.09. That there are series of judgements where redemption of absolutely confiscated gold has been allowed The Applicant has relied on the following case laws:

(i) Hargovind Das K. Joshi vs. Collector of customs [1992 (61) ELT 172(SC)]
(ii) Universal Traders vs. Commissioner [2009 (240) E.L.T. A78 (SC)]
(iii) Gauri Enterprises vs. CC, Pune [2002 (145) ELT (705) (Tri Bangalore)]
(iv) CC (Airport), Mumbai vs. Alfred Menezes [2009 (242) ELT 334 (Bom)]
(v) Shaik Jamal Basha vs. Government of India [1997 (91) ELT 277(AP)]
(vi) VP Hameed vs. Collector of Customs Mumbai 1994(73) ELT 425 (Tri)
(vii) T. Elavarasan Vs Commissioner of Customs (Airport), Chennai [2011 (266) ELT 167 (Mad)]

(viii) Kadar Mydin vs. Commnissioner of Customs (Preventive), West Bengal [2011 (136) ELT 758]

(ix) Sapna Sanjeeva Kolhi v/s Commissioner of Customs, Airport, Mumbai

(x) Vatakkal Moosa vs. Collector of Customs, Cochin [1994 (72) ELT (G.O.I)]

(xi) Halithu Ibrahim vs. CC [2002-TIOL 195 CESTAT-MAD]

(xii) Krishnakumari vs. CC, Chennai [2008 (229) ELT 222 (Tri Chennai)]

(xiii) S.Rajagopal vs. CC, Trichy [2007 (219) ELT 435 (Tri-Chennai)]

(xiv) M. Arumugam vs. CC, Trichirapalli [2007 (220) ELT 311 (Tri-Chennai)]

(xv) Union of India vs. Dhanak M. Ramji [2009 (248) E.L.T. 127 (Bom.)]

(xvi) Peringatil Hamza vs CC (Airport), Mumbai [2014 (309) ELT 259 (Tri Mumbai)]

(xvii) R. Mohandas vs. CC, Cochin [2016 (336) ELT 399 (Ker)]

(xviii) A Rajkumari vs. Commr. of Customs (Airport-Air cargo) Chennai [2015(321) E.L.T. 540].

(xix) Shaik Mastani Bi vs. CC, Chennai [2017(345) E.L.T 201(Mad)]

(xx) Bhargav Patel vs CC, Mumbai (Appeals NO C/381/10)

(xxi) Gauri Enterprises vs. CC, Pune [2002(145) E.L.T 705 (Tri-Bang)]

(xxii) Om Prakash Bhatia vs. Commr. Of Customs Delhi [2003(155) E.L.T.423(SC)]

(xxiii) Commr. Of Customs (Prev) vs. Rajesh pawar [2020(372) ELT 999(Cal)]

(xxiv) Commr of CEx. & ST, Lucknow vs. Islahuddin Khan [2018(364) ELT 168 (Tri-All)]

(xxv) Barakathnisa vs. Pr. Commr of Customs Chennai I [2018(361) ELT 418(Mad)]

(xxvi) Commr. Of CEx & ST vs. Mohd. Halim MOhd Shamim Khan [2018(359) ELT 265(Tri All)]

5.10. That there should be consistency in favour of 'formal' justice i.e that two cases are the med (in relevant respects) should be treated in the same way and it would be inconsistent to treat them differently;

5.11. That concerns of consistency provide some justification for treating earlier decisions as sources of law rather than approaching each question anew when it arises again;

5.12. That if the earlier decision was wrong, then the person subject to it may have been treated or less favourable than they should have been treated and

if they were treated more favourable then clearly that should have been corrected;

5.13. That a lower court should honour findings of law made by the higher court that is within the appeals path of case the court hears and precedent is a legal principle or rule that is created by a court decision and is binding on or persuasive for a court or tribunal when deciding subsequent cases with similar issues or facts;

5.14. That as regards allowing redemption of the seized goods, Section 125 of the Customs Act, 1962 provides the option of redemption can be given in the case of seized goods are not prohibited and gold is not a prohibited item and can be imported and such imports are subject to certain conditions and restrictions including the necessity to declare the goods on arrival at the Customs station and make payment at the rate prescribed. Reliance has been placed on the following case laws:

(i) Shaik Jamal Basha vs. Government of India [1992(91) ELT 277(AP)]
(ii) Mohd Zia Ul Haque vs. Addl. Commissioner of Customs, Hyderabad [2014(214) E.L.T 849 (GOI)]
(iii) Mohammed Ahmed Manu vs. CC, Chennai [2006(205) E.L.T 383(Tri-Chennai)

5.15. That the Applicant has relied upon the following case laws in support of the contention that when goods are not eligible for import as per the import policy, re-export of such goods is permitted on payment of penalty and redemption fine. The Applicant has relied on the following case laws in support of their contention:

i) CC vs. Elephanta Oil [2003(152) ELT 257 (SC)]
ii) Collector vs. N Patel [1992 (62) ELT 674 (GOI)]
iii) Kusumbhai Dahyabhai Patel vs. CC (P) [1995 (79) ELT 292 (CEGAT)]
(iv) K&K Gems vs. CC [1998(100) ELT 70 (CEGAT)]

5.16. That there appears to be no error in the order of the Additional Commissioner of Customs, neither his finding is based upon exclusion of some admissible evidence or consideration of some inadmissible evidence

5.17. That in a common law system, judges are obliged to make their rulings as consistent as reasonably possible with previous judicial decisions on the same subject. Under the doctrine of stare decisis, a lower court must honour findings of law made by a higher courts and it binds courts to follow legal precedents set by previous decisions;

5.18. That under the doctrine of stare decisis, a lower court should honour findings of law made by the higher court that is within the appeals path of case the court hears and precedent is a legal principle or rule that is created by a court decision. This decision becomes an example, or authority for judges deciding similar issues later. That while applying the ratio of one case to that of the other, the decisions of the Hon'ble Supreme Court are always required to be borne in mind;

5.19. That in the present case there has been a total lack of application of mind on the part of the AA and is should be appropriate for the atuthority to have examined the said judgements/decisions legal issues involvedin the case, legal reasoning that is relevant to resolve those issues, judicial opinion given by the Courts, rulings of the court on questions of law, the result of the case , the courts order and which party was successful and the applicability of the ratio of the said judgements to the case. The Applciant has relied upom the following case laws in support of his contention:

(i) Supreme Courts decision in Bombay Dyeing and Mfg Co vs BEAG

5.20. That in terms of Section 125 of the Customs Act, 1962, re-export permission has been granted in many more cases by the Additional Commissioner/Commissioner of Customs (Appeals), GOI and CESTAT The Applicant has relied on the following case laws in support of his contention:

(i) Liaquat Ali Hameed vs. Commr. Of Customs [2003(156) ELT 863 Tri Chennai)]
(ii) Order No MP (196) AIR/2009 in the case of Jasvinder Singh
(iii) Order No 2107 dated 13.02.2002 in the case of Satuty Sharma
(iv) Order No. 1995(75) ELT 207 (GOI) in the case of Mohd. Ramzan
(v) GOI order No. 34/08 dated 24.04.2008 in the case of Pradeep Kumar Bhavarpal [2003(153) ELT 226]
(vi) Dhanak Madhusudan Ramji vs. Commr. of Customs (Airport), Mumbai [2009(237) ELT 280(Tri-Mum)]
(vii) A. Rajkumari vs. Commr of Customs (Airport), Chennai [2015(321) ELT 540]
(viii) GOI order in the case of Mohd. Zia Ul Haque [T2014/314)849 GOI]

5.21. That the order of the Appellate Authority is not on merits and not a speaking order and is thus not maintainable and in the instant case the Appellate Authority has conveniently avoided to discuss and counter the points raised by the Applicant and has failed to take congnizance of all the submissions of the applicant without giving a reason;

5.22. That the Adjudicating/Appellate Authority is bound to follow the principles of natural justice and the law requires that to determine the issue involved, the material evidence touching the issue to be tested, the pleadings of the accused to be examined on the light of the evidence and law and conclusion has to be reached after that. The Applicant has relied upon the following case laws in support of their contention:

(i) State of Punjab vs. K.R.Erry
(ii) Liberty Oil Mills vs UOI
(iii) C.L.Tripathi vs. SBI
(iv) A.K. Kraipak vs. UOI
(v) Chintamoni Pradhan vs. Paika Samal
(vi) Sahara India TV Network vs. CCE, Noida
(vii) JC, Income Tax vs. Saheli leasing and Ind [2010(253) E.L.T. 705(SC)]
(viii) Vikas Enterprises vs. CCE, Allahabad

(ix) Sharp Carbon India vs. CCE, Kanpur
(x) UOI vs. Sri Kumar Agencies [Guj HC]
(xi) International Woolen Mills vs. Standard Wool (UK) Ltd
(xii) Kranti Associates Pvt Ltd vs. Masood Ahmed Khan [2011(273) E.L.T 345(SC)]
(xiii) Mahabir Prasad Santosh Kumar vs. State of UP [AIR 1970 SC 1302]
(xiv) Travancore Rayons Ltd vs. UOI [AIR 1971 SC 862]
(xv) Woolcombers of India Ltd vs. Woolcombers Workers Union [AIR 1973 SC 2758]
(xvi) Siemens Engineering and Mfg. Co of India Ltd vs UOI [AIR 1973 SC 1785]
(xvii) Testeels Ltd vs. Desai (N.M)
(xviii) SSE Hari Nagar Sugar Mills vs. Shyam Sundar Jhunjhunwala [AIR 1961 SC 1669]
(xix) Bhagat Raja case [AIR 1957 SC 1606]

5.23. That the submissions regarding the following made by the Applicant before the AA were neither discussed nor countered

5.24. That Discretionary power of the Quasi Judicial Authority cannot be lightly interfered. That the power of judicial review is a supervisory power and not a normal Appellate power against the decision of the administrative authorities

5.25. That the recurring theme of the apex courts decision relating to nature and scope of judicial review is that it is limited to consideration of legality of decision making process and not legality of order per se and that mere possibility of another view cannot be a ground of interference. The Applciant has relied upon the case of Sahdeo vs, Satya Ranjan Ghosh and Corportaion of Calcutta vs. Mulchand Agarwal in support of his contention

5.26. That Circular No 495/5/92-Cus-IV dated 10.05.1993 is only advisory in nature and the advisory cannot be made a rule for ordering confiscation of gold The Applicant has relied on the following case laws in support of their contention:

(i) Carista Herbal Products (P) Ltd vs. Commr. of C.Ex, Pondicherry [2019(370) ELT 223(Mad)]

(ii) UOI vs. Amalgamated Plantations Pvt Ltd [2016(340) ELT 310(Gau)]

5.27. That perusal of Section 125 leaves no manner of doubt that if the goods are prohibited, then the option is with the Customs Authority to confiscate without giving any option to pay fine in lieu thereof but when the goods are not prohibited then the customs authority has no other option but to grant an option to pay a fine in lieu of confiscation and Section 125 does not distinguish between declared and undeclared gold. The Applicant has relied upon the following case laws in support of their contention:

(i) Mafatlal Industries [1997(89) E.L.T 247 (SC)]

5.28. That circulars issued by CBEC and CBIT do not bind the assesse and the assesse has a right to challenge the correctness of the circular before a quasi-judicial authority constituted under the relevant statute;

5.29. That the fight between the assessees' and the revenue department regarding the applicability and precedential value of the circulars issued by the Board has been put to an end by issuing a clarification vide Circular No. 1006/13/2015-CX dated 21.09.2015. Also that clarificatory circulars cannot amend or substitute statutory rules. The Applicant has relied upon the following case laws in support of their contention:

(i) Bengal Iron Corporation vs. Commercial Tax Officer
(ii) Bhagwati Developers vs. Peerless General Finance & Investment Co.
(iii) Cases pertaining to Paper Products, Hindustan Aeronautics Ltd, Dhiren Chemicals, Indian Oil
(iv) Kalyani Packaging Industry vs. UOI [1164(5) TMI 78 (SC)]
(v) Commr of CEx, Bolpur vs. Ratan Melting and Wire Industries [1168(10) TMI SC]
(vi) Bhuwalka Steel Industries vs. Bombay Iron and Steel Ltd
(vii) Harrison and Crossfield (India) Ltd vs. Registrar of Companies
(viii) Etc...

5.30. That there are several judgements of the Tribunals, High Courts and Supreme Court wherein goods imported/smuggled into India by way of concealment were

allowed to be redeemed by the importer/owner of the goods. The Applicant reiterated the case laws cited earlier in support of his contention

5.31. Ratio of the cases relied upon by the Department cannot be made applicable in the instant case

5.32. That as held in the case of Commissioner of Customs vs. Atul Automation Pvt Ltd, wherein the Hon'ble Supreme Court clearly distinguished between what is prohibited and what is restricted and held that restricted goods can be redeemed on payment of fine, in the instant case gold should not be considered as prohibited goods and order of absolute confiscation is not sustainable;

5.33. That the decisions of the Supreme Court, Tribunals and GOI relied upon by the OAA for ordering redemption of gold were not taken into consideration by the AA without giving any reasons and such a cryptic review is not sustainable in law and thus the appeals is liable to be dismissed

5.34. That in common law legal systems, 'precedent' is a principle or rule established in a previous legal case that is either binding on or persuasive for a court or other tribunal when deciding subsequent cases with similar issues or facts. And common-law legal systems place great value on deciding cases;

5.35. That in a common law system, judges are obliged to make their rulings as consistent as reasonably possible with previous judicial decisions on the same subject. Under the doctrine of stare decisis, a lower court must honour findings of law made by a higher courts. Simply put, it binds courts to follow legal precedents set by previous decisions;

5.36. That while applying the ratio of one case to that of the other, the decisions of the Hon'ble Supreme Court are always required to be borne in

mind. The applicant has relied upon the following case laws in support of their contention:

(i) E.I. Dupont India Private Limited vs. UOI – [2014 (5) TMI 128]
(ii) Clari's Life Sciences Limited vs. Union of India-[2014 (1) TMI 1467]
(iii) Supreme Court decision on 06.10.2015 in the case of Satya pal Singh vs. state of M.P and ors
(iv) Supreme Courts decision on 03.01.2001 in the case of Smt Kaushnuma Begum and ors vs. The New India Assurance Co Ltd
(v) Supreme Courts decision on 09.05.1986 in the case of Harminder Singh Arora vs, UOI and ors

5.37. That GOI orders relied upon by the OAA were rejected by the AA without proper application of mind;

5.38. That decisions relied upon by the AA cannot be made applicable to the instant case;

5.39. That the AA relied upon selective portions of the decision of Raj Grow Impex to conclude that prohibited goods cannot be redeemed on payment of fine;

5.40. That Gold is not a prohibited item and therefore absolute confiscation is not warranted in this case;

Under the circumstances the Applicant prayed for setting aside the Order-in-Appeal, release the gold jewellery under absolute confiscation on payment of reasonable fine and penalty and drop further proceedings against him

The Advocate for the Applicant, vide letter dated 25.05.2023 requested for early hearing in the matter.

6. Personal hearing in the case was scheduled for 28.07.2023. Shri Prakash Shingrani, Advocate appeared for the hearing on behalf of the Applicant on the scheduled date and submitted that the Applicant brought small quantity of gold jewellery for personal use. He requested to allow redemption of jewellery by restoring the Order-in-Original which is legal and proper.

7. The Government has gone through the facts of the case and observes that the Applicant had brought said one crude gold chain of 24K purity and one crude gold kada of 24K purity, collectively weighing 324 grams and valued at Rs. 11,12,551/- and had failed to declare the goods to the Customs at the first instance as required under Section 77 of the Customs Act, 1962. The Applicant had not disclosed that he was carrying dutiable goods. However, on being intercepted, said one crude gold chain of 24K purity and one crude gold kada of 24K purity, collectively weighing 324 grams and valued at Rs. 11,12,551/- were recovered from the Applicant and it revealed his intention not to declare the said gold and thereby evade payment of Customs Duty. The confiscation of the gold 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; 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."*

13.1. Government further observes that there are catena of judgements, over a period of time, of the Hon'ble Courts and other forums which have been categorical in the view that grant of the option of redemption under Section 125 of the Customs Act, 1962 can be exercised in the interest of justice. Government places reliance on some of the judgements as under:

a) In the case of Commissioner of Customs, Aliganj, Lucknow vs. Rajesh Jhamatmal Bhat, [2022(382) E.L.T. 345 (All)], the Lucknow Bench of the Hon'ble High Court of Allahabad, has held at Para 22 that *"Customs Excise & Service Tax Appellate Tribunal Allahabad has not committed any error in upholding the order dated 27.08.2018 passed by the Commissioner (Appeals) holding that Gold is not a prohibited item and, therefore, it should be offered for redemption in terms of Section 125 of the Act."*

b) The Hon'ble High Court of Judicature at Madras, in the judgment in the case of Shaik Mastani Bi vs. Principal Commissioner of Customs, Chennai-I [2017(345) E.L.T. 201 (Mad)] upheld the order of the Appellate Authority allowing re-export of gold on payment of redemption fine.

c) The Hon'ble High Court of Kerala at Ernakulam in the case of R. Mohandas vs. Commissioner of Cochin [2016(336) E.L.T. 399 (Ker.)] has observed at Para 8 that *"The intention of Section 125 is that, after adjudication, the Customs Authority is bound to release the goods to any such person from whom such custody has been seized..."*

d) Also, in the case of Union of India vs Dhanak M Ramji [2010(252)E.L.T. A102(S.C)], the Hon'ble Apex Court vide its judgement dated 08.03.2010 upheld the decision of the Hon'ble High Court of Judicature at Bombay [2009(248) E.L.T. 127 (Bom)], and approved redemption of absolutely confiscated goods to the passenger.

e) Judgement dated 17.02.2022 passed by the Hon'ble High Court, Rajasthan (Jaipur Bench) in D.B. Civil Writ Petition no. 12001 / 2020, in the case of Manoj Kumar Sharma vs. UOI and others.

13.2. Government, observing the ratios of the above judicial pronouncements, arrives at the conclusion that decision to grant the option of redemption would be appropriate in the facts and circumstances of the instant case.

14. In view of the foregoing paras, the Government finds that as the Applicant had not declared said one crude gold chain of 24K purity and one crude gold kada of 24K purity, collectively weighing 324 grams and valued at Rs. 11,12,551/- at the time of arrival, the confiscation of the same was justified. However, though the quantum of gold under import is not substantial and is not of commercial quantity. The impugned gold jewellery recovered from the Applicant were worn by the Applicant and recovered from his trouser pocket and was not concealed in an ingenious manner. The Applicant provided the source of funds and has claimed to be for personal use and nothing contrary has been proved. 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 involved in this case is not substantial and the Applicant has claimed ownership of the impugned gold jewellery after explaining the purpose of getting the gold into the country. 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. This case is at best a case of mis-declaration rather than smuggling. Government finds that the discretion to allow the redemption of the impugned gold jewellery under Section 125 of the Customs Act, 1962 by the Original Adjudicating Authority is judicious and fair and the order absolute confiscation by the Appellate Authority is excessive and is therefore liable to be modified and the impugned gold jewellery is liable to be allowed redemption on suitable redemption fine.

16. The Original Adjudicating Authority while allowing redemption of the seized gold has at Para 21 of the Order-in-Original has discussed the issue in detail and has ruled as under

> *"21. I find from the panchanama dated 24.11.2019 that the seized one crude gold kada and one gold chain weighing 324 grams and valued at Rs 11,12,551/- were recovered from passenger worn on his body. I find that this is not an ingenious mode of concealment as per letter F No SD/Adjn/Misc-23/2013-14 Adjn though the case of non-declaration of the seized gold is established against the passenger. I further find that the passenger in his statement recorded under section 108 of the Customs Act 1962 has stated that he is working in OHM Stock Broker Private Ltd and his monthly income is Rs 1,50,000/- per month plus incentives. He further claimed the ownership of the seized gold jewellery and also submitted that he will submit the purchase invoice for said old jewellery. The passenger accepted that he has not brought gold in his earlier visit and this was the first time he brought the gold. Looking at the financial status of the passenger as well as keeping in mind that this is not a case of an ingenious concealment, I am of the considered opinion that under section 125 of the Customs Act 1962, the option for redemption can be granted. I therefore, find this case fit for redemption. I find that the option to redemption has been granted and absolute confiscation is set aside vide Order No 12/2021-CUS (WZ)/ASRA dated 18.01.2021 by the Revision Authority, Government of India under F No 371/44/B/2015-RA/785 dated 29.01.2021. Similar view on re-demption of seized gold was taken by Revision authority vide Order no 41/2021-CUS (WZ)/ASRA dated 26.02.2021 issued under F No 371/41/B/15-RA/1635 dated 03.03.2021. I place my reliance on the said case laws. I hold it accordingly under the powers vested with me under Section 125(1) of the Customs Act, 1962."*

17. Applicant has also pleaded for setting aside the penalty imposed on him. The market value of the impugned said one crude gold chain of 24K purity and one crude gold kada of 24K purity, collectively weighing 324 grams and valued at Rs. 11,12,551/-. From the facts of the case as discussed above, Government finds that the penalty of Rs. 1,00,000/- imposed on the Applicant under Section 112(a) and (b) of the Customs Act, 1962 is commensurate to the ommissions and commissions of the Applicant.

18. In view of the above, the Government is in agreement with the OAA and restores the Order-in-Original passed by the OAA and modifies the impugned order of the Appellate authority in respect of the absolute confiscation of the impugned gold jewellery and allows the same to be redeemed on payment of redemption fine. The said one crude gold chain of 24K purity and one crude gold kada of 24K purity, collectively weighing 324 grams and valued at Rs. 11,12,551/- is allowed redemption on payment of a fine of Rs. 2,20,000/- (Rupees Two Lakh Twenty Thousand only). The penalty of Rs. 1,00,000/- imposed under Section 112(a) and (b) of the Customs Act, 1962 by the Original Adjudicating Authority and upheld by the Appellate Authority is sustained.

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

Shrawan 28/9/23

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

ORDER No. 699 /2023-CUS (WZ)/ASRA/MUMBAI DATED 28.09.2023.

To,

1. Mr. Dhruval Navin Gala, B-1, Jayshree Apartments, 666, Prathna Samaj Road, Vile Parle (East), Mumbai 400 057.

2 The Pr. Commissioner of Customs, Chhatrapati Shivaji International Airport, Terminal 2, Level-II, Sahar, Andheri (East), Mumbai 400 099.

Copy to:

1. The Commissioner of Customs (Appeals), Mumbai–III, Awas Corporate Point, 5th Floor, Makwana Lane, Behind S.M.Centre, Andheri-Kurla Road, Marol, Mumbai – 400 059.
2. Shri Prakash K. Shingrani, Advocate, 12/334, Vivek, New MIG Colony, Bandra (East), Mumbai-400 051
3. Sr. P.S. to AS (RA), Mumbai.
4. File Copy.
5. Noticeboard.