

REGISTERED
SPEED POST



सत्यमेव जयते

GOVERNMENT OF INDIA
MINISTRY OF FINANCE
(DEPARTMENT OF REVENUE)

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

F.No. 371/294/B/WZ/2022-RA / 599 : Date of Issue 29.01.2024

ORDER NO. 70/2024-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.

Applicant : Shri. Gautam Inderjeet Chainani

Respondent : Pr. Commissioner of Customs, CSMI Airport, Mumbai.

Subject : Revision Application filed, under Section 129DD of the
Customs Act, 1962 against the Order-in-Appeal No.
MUM-CUSTM-000-APP-1646/2021-22 dated
08.02.2022 DOI: 10.02.2022 issued through F.No. S/49-
886/2021 passed by the Commissioner of Customs
(Appeals), Mumbai - III.

ORDER

This revision application has been filed by Shri. Gautam Inderjeet Chainani (herein referred to as Applicant) against the Order-in-Appeal No. MUM-CUSTOM-000-APP-1646/2021-22 dated 08.02.2022, DOI: 10.02.2022 issued through F.No. S/49-886/2021 passed by the Commissioner of Customs (Appeals), Mumbai - III.

2(a). Brief facts of the case are that on 28.02.2019, the Officers of Customs had intercepted the Applicant at Chhatrapati Shivaji Maharaj International Airport (CSMIA), Mumbai where he had arrived from Dubai by Indigo Airlines Flight No. 6E / 28.02.2019. The Applicant had been intercepted after he had cleared himself through the green channel of Customs. The search of the applicant led to the recovery of (i). 01 (one) chrome coated crude gold kada worn under the shirt sleeves and (ii). a circular shaped crude gold article kept in his pant pocket. The Government Approved Valuer certified that the gold was of 24 Kts (999) purity, totally weighing 367 grams, and valued at Rs. 11,15,093/-.

3. After due process of investigations and the law, the Original Adjudicating Authority i.e. the Addl. Commissioner of Customs, CSMIA, Mumbai vide Order-In-Original No. ADC/VDJ/ADJN/13/2021-22 dated 12.05.2021 ordered for the confiscation of the impugned gold under Section 111 (d), (1) and (m) of the Customs Act, 1962 and granted the applicant an option to redeem the same on payment of a fine of Rs. 2,50,000/-. Further, a 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 preferred an appeal before the appellate authority viz, i.e. Commissioner of Customs (Appeals), Mumbai - III

who vide his Order-in-Appeal no. MUM-CUSTOM-000-APP-1646/2021-22 dated 08.02.2022 DOI: 10.02.2022 issued through F.No. S/49-886/2021, set aside the impugned Order-in-Original dated 12.05.2021 and ordered for the absolute confiscation of the impugned gold. The quantum of penalty imposed on the applicant by the OAA was upheld.

5. Aggrieved by this Order, the applicant has filed this revision application on the undermentioned grounds of revision;

5.01. that the OIA is not on merits and not a speaking order. Principles of natural justice had not been followed. On these issues, to buttress their defense, they have relied upon the undermentioned case laws;

- (a) Apex Court's Order in the case of State of Punjab vs. K.R Erry,
- (b) Liberty Oil Mills vs. Union of India,
- (c) C. L Tripathi vs. State Bank of India
- (d) Pitchaiah vs. Andhra University
- (e) A.K Kraipak vs. UOI
- (f) Chintamoni Pradhan vs. PaikaSamal
- (g) CESTAT, New Delhi's order in Sahara India TV Network vs. CCE, Noida, relying upon the Apex Court's Order in the case of JT. Commr. IT, Surat vs. Saheli Leasing & Industries Ltd [2010-253-ELT-705-SC ; CESTAT, New Delhi order M/s. Vikas Enterprises vs. CCE, Allahabad ; M/s. Sharp Carbon India vs. Commr. Of C.Ex, Kanpur,
- (h) M/s. International Woollen Mills Ltd. Vs. Standard Wool (UK) Ltd
- (i) Master Circular on Show Cause Notice, Adjudication and Recovery' issued by the Board under F.NO 96/1/2017-CX.1 dated 19-1-2017,
- (j) Decision of Cestat, New Delhi in M/s. Sahara India TV Network vs. CCE, Noida,
- (k) Kranti Assoicates Pvt. Ltd vs. Masood Ahmed Khan {2011-273-ELT-345-SC},
- (l) M/s. Mahabir Prasad Santosh Kumar vs. State of Up and otrs, reported in AIR-1970-SC-1302,
- (m) M/s. Travancore Rayons Ltd vs. UOI and otrs AIR-1971-SC-862,
- (n) Woolcombers of India Ltd. Vs. Woolcombers Workers Union and anr {AIR-1973-SC-2758},
- (o) Siemens Engg. & Mfg. Co. India Ltd vs. UOI and anr {AIR-1976-SC-1785},
- (p) Etc.

5.02. that submissions made by the applicant were neither discussed nor countered in the impugned O-I-A:

that applicant relies under following case laws;

- (a). Yakub Ibrahim Yusuf vs CC, Mumbai 2011 (263) ELT 685
- (b). Neyveli Lignite Corpn Ltd vs UOI 2009 (242) E.L.T. 487 (Mad.)
- (c). Universal Traders v. Commissioner – 2009 (240) ELT A78 (SC)
- (d). Gauri Enterprises vs CC, Pune 2002 (145) ELT (705) (Tri-Bangalore)
- (e). CC (Airport), Mumbai vs Alfred Menezes 2009 (242) ELT 334 (Bom)
- (f). Shaikh Jamal Basha vs Government of India 1997 (91) ELT 277 (AP)
- (g). VP Hameed vs Collector of Customs, Mumbai 1994 (73) ELT 425 (Tri)
- (h). T. Elavarasan vs Commissioner of Customs (Airport), Chennai 2011 (266) ELT 167 (Mad)
- (i). Kadar Mydin vs Commissioner of Customs (Preventive), West Bengal 2011 (136) ELT 758
- (j). Sapna Sanjeeva Kohli vs Commissioner of Customs Airport, Mumbai 2008 (23) ELT 305
- (k). Vattakkal Moosa vs Collector of Customs, Cochin 1994 (72) ELT (GOI)
- (l). Halithu Ibrahim vs CC 2002-TIOL 195-CESTAT-MAD
- (m). Krishna Kumara vs CC, Chennai 2008 (229) ELT 222 (Tri-Chennai)
- (n). S.Rajagopal vs CC, Trichy 2007 (219) ELT 435 (Tri-Chennai)
- (o). M.Arumugam vs CC, Trichirapalli, 2007 (220) ELT 311 (Tri-Chennai)
- (p). R.Mohandas vs CC, Cochin 2016 (336) ELT 399 (Ker)
- (q). A.Rajkumari vs CC, Chennai 2015 (321) ELT 540 (Tri-Chennai)
- (r). Mastani Bi vs Pr. CC, Chennai, 2017 (345) ELT 201 (Mad)
- (s). UOI vs. Dhanak M. Ramji; 2009(248) ELT 127 (BOM) which has been upheld by the Apex Court – 2010-252-ELTA102(SC).

5.03. that the discretionary power of a quasi judicial authority should not have been inferred lightly;

5.04. that decisions relied upon by Appellate Authority were not applicable to their case;

that they have cited the undermentioned case laws;

- (a). CCE, Calcutta Vs Alnoori Tobacco Products [2004 (170) ELT 135 (SC)];
- (b). Escorts Ltd. Vs CCE, Delhi [2004 (173) ELT 113 (SC)];
- (c). CC (Port), Chennai Vs Toyota Kirloskar [2007 (213) ELT 4 (SC)];
- (d). Sri Kumar Agency vs CCE, Bangalore 2008 (232) E.L.T. 577 (S.C.),
- (e). etc.

- 5.05. that Circular no. 495/5/92-Cus VI dated 10.05.93 issued by Board cannot prevail over the statute. Circulars are issued only to clarify the statutory provision and it cannot alter or prevail over the statutory provision; that Board's Circular no. 495/5/92-Cus.VI dated 10.05.1993 specified that in r/o gold seized for non-declaration, no option to redeem the same on redemption fine under Section 125 of the Customs Act, 1962, should be given, except in very trivial cases where the adjudicating authority was satisfied that there was no concealment of the gold in question. Reliance is placed on an exhaustive list of case laws;
- 5.06. that the decisions of the Apex Court, Tribunals and GOI relied upon by the OAA for ordering redemption of the gold had not been taken into consideration by the Appellate Authority without assigning any reasons.
- 5.07. that Gold was not prohibited goods. It was submitted that gold was not a prohibited item and was only a restricted item. Prohibition relates to goods which cannot be imported or exported by any one, such as arms, ammunition, drugs etc. The intention behind the provisions of Section 125 is that import/export of such goods under any circumstances would cause danger to the health, welfare or morals of people as a whole. This would not apply to a case where import/export of goods is permitted subject to certain conditions or to a certain category of persons and which are ordered to be confiscated for the reason that the condition has not been complied with. In such a situation, the release of such goods confiscated would not cause any danger or detriment to public health. Admittedly, import/export of gold is permitted subject to certain conditions, therefore, it would not fall under the prohibited category as envisaged under the said of Section 125 of the Customs Act, 1962. They have relied upon the case of Commissioner of Customs (Preventive), West Bengal Vs. India Sales International reported in 2009 (241) ELT 182 (Cal.); that the AA erred in holding that gold is prohibited goods; that the OAA ought not have confiscated the gold absolutely, as gold is not prohibited goods; that in a catena of decisions, Tribunals, Courts and the Government of India in its orders in revision have directed that confiscated gold have to be allowed to be redeemed on payment of appropriate fines by the persons from whom they were seized and confiscated.
- 5.07. that the applicant had claimed ownership of the goods and therefore the goods should have been redeemed to him. In this case it was argued that goods may not be redeemed to the person in the light of provisions of section 125 of the Customs Act 1962.; that in Section 125(1) provides for offer of redemption to the owner of the goods or where such owner is not known to the person from whose possession or custody such goods have been seized.

- 5.09. that the Hon'ble Andhra Pradesh High Court in the case of Shaikh Jamal Basha vs Government of India - 1992 (91) ELT 227(AP) has held that option to pay fine in lieu of confiscation has to be given to imported gold as the same is otherwise entitled to be imported on payment of duty.
- 5.10. that the Government of India in the case of Mohd Zia Ul Haque Vs Addl Commissioner of Customs, Hyderabad vide revision order no 443/12-Cus dated 8-8-12, 2014 (214) ELT 849 (GOI) allowed the confiscated gold to be redeemed on payment of redemption fine.
- 5.11. that Hon'ble CESTAT in the matter of Yaqub Ibrahim Yusuf Vs Commr. of Customs [2011(263) ELT 685] that prohibition relates to goods which cannot be imported by any one, such as arms, ammuniton, addictive substance viz. drugs.
- 5.12. that the absolute confiscation was not warranted in this case; that the issue of absolute confiscation of goods and option of redemption came up in the case of CC (Prev) vs Uma Shankar Verma where it was held that where the goods are not prohibited, the authorities have no choice but to allow the option of redemption of goods on payment of fine. On the other hand, when the goods are prohibited, allowing redemption on payment of fine is wholly within the discretion of the adjudicating authority.

Under the circumstances, the applicant has prayed to the Revision Authority to set aside the Order-in-Appeal and the Order-in-Original dated 12.05.2021 passed by OAA may be ordered to be implemented i.e. the gold may be ordered to be released on payment of redemption fine and penalty.

6. The applicant has filed an application for condonation of delay and has attributed the same to the extraordinary situation at that time due to Covid pandemic.
7. Personal hearing in the case was scheduled for 31.10.2023, 16.11.2023. Shri. Prakash Shingrani, Advocate for the applicant appeared for personal hearing on 31.10.2023 and submitted that Order-in-Original has correctly analysed facts and legal position and was correct and legal. He requested to set aside Order-in-Appeal and restore Order-in-Original.

8. On the issue of condonation of delay, Government notes that the revision application has been filed on 10.06.2022. The OIA was issued on 10.02.2022. The applicant has not stated the specific date on which they had received the OIA (concerned sr. no. 5 of their FORM No. CA-8 has been left blank). Government notes that during the appealable period of 3 months, the restrictions due to Covid pandemic had been imposed in the country. Due to the prevalent Covid conditions, Government observes that the Apex Court had granted a moratorium for filing appeals etc from 15.03.2020 to 28.02.2022 [Misc. Appln. No. 21/2022]. The applicant has filed the Revision Application on 10.06.2022. Considering the said moratorium period granted by the Apex Court and the statutory period of 3 months, the applicant was required to file the revision application by 30.05.2022. Thereafter, a condonable period of 90 days is available to the applicant for requesting condonation of delay. Government notes that the applicant has filed the revision application during this condonable period available to him. Hence, Government condones the delay.

9. The Government has gone through the facts of the case and notes that the applicant had not declared the gold. The applicant had clearly failed to declare the goods to the Customs at the first instance as required under Section 77 of the Customs Act, 1962. The gold had been kept hidden to avoid detection which reveals the mindset of the applicant to evade the payment of duty. 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 hidden on his person. Therefore, the confiscation of the gold was justified.

10. 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”.

11. 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.

12. 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.

13. Government observes that the quantity of gold was small. The impugned gold had been found on the person. A case that the applicant is a habitual offender has not been made out. The facts of the case indicate that it is a case of non-declaration of gold, rather than a case of smuggling for commercial considerations. Under the circumstances, the seriousness of the misdemeanour is required to be kept in mind when using discretion under Section 125 of the Customs Act, 1962 and while imposing quantum of penalty.

14. The absolute confiscation of the gold, leading to dispossession of the applicant of the gold in the instant case is therefore, harsh and not reasonable. Government notes that all these had been considered by the OAA while granting an option to the applicant to release the impugned gold on payment of a redemption fine. Government finds that under such circumstances, the OAA had rightly used discretion to release the foreign currency under the provisions of Section 125 of the Customs Act, 1962. The OIO passed by the OAA is legal and proper. The order of the Appellate authority is therefore liable to be set aside and the Government is inclined to restore the OIO passed by the OAA.

15. Government notes 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 with the omissions and commissions committed and therefore, is not inclined to interfere in the same.

16. Accordingly, the Government modifies the impugned order of the appellate authority only to the extent that the absolute confiscation of the impugned gold, i.e. one gold kada and one circular gold article, totally weighing 367 grams, and valued at Rs. 11,15,093/- is set aside and release of the same on payment of a redemption fine of Rs. 2,50,000/- under Section 125 of the Customs Act, 1962 held by the OAA in the Order-in-Original is restored. The penalty of Rs. 1,00,000/- imposed by the OAA under Section 112(a) and (b) of the Customs Act, 1962 and upheld by the AA, is sustained.

17. Revision Application is allowed on the above terms.

(SHRAWAN KUMAR)

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

ORDER No. 70/2024-CUS (WZ) /ASRA/MUMBAI **DATED** 24.01.2024

To,

1. Shri. Gautam Inderjeet Chainani, S/o. Inderjeet Hirachand Chainani, Bldg. No. 15B/8, Navjivan Society, R.C Marg, Chembur, Mumbai – 400 074.
2. Pr. Commissioner of Customs, Adjudication Cell, Chhatrapati Shivaji Maharaj International Airport, Sahar, Andheri (East), Mumbai – 400 099.

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.