

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. 371/154/B/WZ/2021-RA /7520 : Date of Issue : 10.10.2023

ORDER NO. 767/2023-CUS (WZ) /ASRA/MUMBAI DATED 17.10.2023
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 : Ms Ruchika Mukesh Budharani

Respondent : Pr. Commissioner of Customs (Airport), CSI, Mumbai.

Subject : Revision Application filed, under Section 129DD of the
Customs Act, 1962 against the Orders-in-Appeal No. MUM-
CUSTM PAX-APP-1820-1821/2020-21 dated 18.03.2021
issued on 22.03.2021 through [F.No. S/49-1400/2019 &
S/49-135/2020] passed by the Commissioner of Customs
(Appeals), Mumbai – III.

ORDER

This Revision application has been filed by Ms Ruchika Mukesh Budharani (*herein referred to as Applicant*) against the Order-in-Appeal No. MUM-CUSTOM-PAX-APP-1820-1821/2020-21 dated 18.03.2021 issued on 22.03.2021 through F. No. S/49-1400/2019 & S/49-135/2020 passed by the Commissioner of Customs (Appeals), Mumbai ~ III.

2 *Brief facts of the case* are that on 17.11.2019, the Officers of Customs Airport, CSMI Mumbai, had intercepted Ms Ruchika Mukesh Budharani, the Applicant having Indian Passport No. T-2900398, who had arrived from Indonesia by Flight No. OD-215, while she was attempting to clear herself through the green channel of Customs. The personal search of the applicant resulted in the recovery of 04 crude gold Bangles and 02 Gold Ankles collectively weighing 230 grams and valued at Rs.7,61,808/-. The applicant had not filed any Customs declaration for the same. 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.

3. After due process of investigations and the law, the Original Adjudicating Authority (OAA) i.e. the Assistant Commissioner of Customs, CSI Airport, Mumbai, vide Order-In-Original No. Aircus/T2/49/1349/2019-20'D' dated 17-11-2019 ordered for the confiscation of the 04 crude gold Bangles and 02 Gold Ankles collectively weighing 230 grams and valued at Rs.7,61,808/- under Section 111 (d), (l) and (m) of the Customs Act, 1962. However, the applicant was given an option to redeem the goods on payment of a fine of Rs.1,00,000/- under Section 125 of the Customs Act, 1962. Further, a penalty of Rs. 70,000/- was imposed on the applicant under Section 112 (a) and (b) of the Customs Act, 1962.

4. Aggrieved by this Order, the Department and the applicant preferred an appeal before the Appellate Authority (AA) i.e. Commissioner of Customs (Appeal), Mumbai – III. The department filed the appeal against the redemption given to the applicant and the applicant filed appeal on the grounds that the amount of redemption fine is high and not justified and also to reduce the penalty imposed. The AA vide Orders-in-Appeal No. MUM-CUSTOM-PAX-APP-1820-1821/2020-21 dated 18.03.2021 issued on 22.03.2021 through F.No. S/49-1400/2019 & S/49-135/2020. allowed the appeal filed by the Department and ordered for the absolute confiscation of the impugned gold and hence waiving off the payment of redemption fine as it becomes redundant due to absolute confiscation. The Penal action under Section 112(a) and (b) imposed by the OAA was upheld.

5. Aggrieved with the above Orders in Appeal the Applicant has filed this revision application requesting to set aside the absolute confiscation and to reduce the Redemption fine and Personal penalty

6. Personal hearing in the case was scheduled on 17.08.2023. Shri. Prakash Shingrani, Advocate for the applicant appeared for personal hearing and submitted that the applicant brought small quantity of jewellery for personal use. He requested to allow redemption of gold jewellery by restoring Order in Original which was reasonable and legal.

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. The impugned gold had been detected on her person. The applicant clearly had failed to declare the goods to the Customs at the first instance as required under Section 77 of the Customs Act, 1962. Had she not been intercepted, the applicant would have gotten away with the gold ornaments. Therefore, the confiscation of the gold was justified.

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 and gold jewellery 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. Therefore, the gold was also liable for confiscation under these Sections.

9.1. 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".

9.2 Further, in para 47 of the said case the Hon'ble High Court has observed "*Smuggling in relation to any goods is forbidden and totally prohibited. Failure to check the goods on the arrival at the customs station and payment of duty at the rate prescribed, would fall under the second limb of section 112(a) of the Act, which states omission to do any act, which act or omission, would render such goods liable for confiscation.....*". Thus, failure to declare the goods and failure to comply with the prescribed conditions has made the impugned gold "prohibited" and therefore liable for confiscation and the 'applicant' thus, liable for penalty.

10. 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. Thus, adjudicating authority can allow redemption under Section 125 of any goods which are prohibited either under the Customs Act or any other law on payment of fine but he is not bound to so release the goods.

11. 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."*

12. In the instant case, it is noted that quantity of gold is small and was not for commercial purpose, it was not a case that she was a habitual offender, the gold was not concealed and it was found on person. In these circumstances, absolute confiscation of gold leading to dispossession of applicants is harsh and excessive.

13. Government notes that the applicant, at the first instance, had crossed the green channel and had not declared the dutiable goods in their possession. However, the gold was not ingeniously concealed and the ownership of the gold is not claimed by anyone else. Government notes that the Order of OAA granting redemption to clear the gold on payment of a redemption fine of Rs. 1,00,000/- is proper and legal. Hence, Government is inclined to restore the same.

14. Government finds that the penalty of Rs. 70,000/- imposed on the applicant for the goods valued at Rs.7,61,808/- under Section 112(a) and (b) of

the Customs Act, 1962, commensurate with the omissions and commissions committed.

15. For the aforesaid reasons, Government sets aside the absolute confiscation held in the OIA and restores in to-to, the OIO passed by the Adjudicating Authority.

16. Accordingly, the OIO passed by the OAA is restored and the Revision Application is allowed.

Shrawan Kumar
7/10/23
(SHRAWAN KUMAR)

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

ORDER No. 767/2023-CUS (WZ) /ASRA/ DATED 7.10.2023

To,

1. Ms Ruchika Mukesh Budharani, 2nd Floor, Tilak Niwas, Section-24, Ulhasnagar, Thane-421003.
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. Prakash K. Shingarani (Advocate), 12/334, Vivek, New MIG Colony, Bandra East, Mumbai-400051
2. Sr. P.S. to AS (RA), Mumbai.
3. File Copy.
4. Notice Board