



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

F.No. 371/395/B/WZ/2022-RA : Date of Issue : 30.01.2024
371/396/B/WZ/2022-RA /GSD
371/397/B/WZ/2022-RA

ORDER NO. 83-85/2024-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 : 1) Mr. Mohammadnoor A. Fazalwala;
2) Mr. Fazalwala Abubakkar Abdulsattar;
3) Ms Fazalwala Aimen Noor

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-151/2022-23 dated 16.05.2022 issued on
18.05.2022 through [F.No. S/49-489/2021] passed by the
Commissioner of Customs (Appeals), Mumbai - III.

ORDER

These three Revision applications have been filed by Ms Fazalwala Aimen Noor, Mr Mohammadnoor A. Fazalwala and Mr. Fazalwala Abubakkar Abdulsattar (herein referred to as Applicant 1, Applicant 2 and Applicant 3 respectively or as the Applicants) against the Order-in-Appeal No. MUM-CUSTOM-PAX-APP-151/2022-23 dated 16.05.2022 issued on 18 05 2022 through F. No. S/49-489/2021 passed by the Commissioner of Customs (Appeals), Mumbai - III.

2 Brief facts of the case are that on 28-06-2018, the officers of AIU, CSI Airport intercepted one lady passenger viz Ms Fazalwala Aimen Noor, Applicant 1 and her husband Mr. Mohammadnoor A. Fazalwala, Applicant 2, near the exit gate of arrival hall, who arrived from Dubai by Indigo Airlines Flight No. 6E 62. On being asked by the Officers in the presence of Punchas, whether they were carrying any contraband or gold either in their baggage or in person, the applicants replied in negative. Personal search of the Applicant 1 resulted in the recovery of one big yellow coloured metallic bar purported to be gold marked "REPUBLIC METALS COPORATION 1 KILO FINE GOLD 999.9" and three yellow coloured metallic bars purported to be gold marked "IPMR 10 TOLAS 999.0 GOLD" which were cleverly concealed in the left pocket with closed zip of her black trouser worn by her under the Burkha. Nothing incriminating was found from the personal search of the Applicant 2. The Government Approved Valuer examined and certified that the recovered four yellow metallic bars to be gold of 24KT totally weighing 1349 grams and collectively valued at Rs.38,87,103/-. The AIU officers took over and seized the recovered gold bars under the reasonable belief that the same were being smuggled into India and hence liable for confiscation under the Customs Act, 1962. In the statements recorded: a) Applicant 1 stated that the gold bars belonged to her husband (Applicant 2) and was purchased by him from M/s ED Gold at Dubai; b) Applicant 2 stated that the impugned gold bars were

purchased by him using the money he got after selling the property owned by his father (Applicant 3). He exchanged the said money into US\$ 55000 and took the same to Dubai and bought the impugned gold, c) Applicant 3 stated that he told his son to bring gold in concealed manner and was aware that his son was bringing the gold. Based on the investigation a Show Cause notice was issued on 14-12-2018.

3. After due process of investigations and the law, the Original Adjudicating Authority (OAA) i.e. the Additional Commissioner of Customs, CSI Airport, Mumbai, vide Order-In-Original No ADC/VDJ/ADJN/41/2020-21 dated 18-02-2021 ordered for the confiscation of the 04 crude gold bars totally weighing 1349 grams and valued at Rs 38,87,103/- 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.8,00,000/- under Section 125 of the Customs Act, 1962, along with applicable Customs duty as per Notification No. 26/2016-Cus dated 31-03-2016. Further, a penalty of Rs. 2,00,000/- was imposed on the Applicant 1 and 2 and a penalty of Rs.1,00,000/- was imposed on the Applicant 3 under Section 112 (a) and (b) of the Customs Act, 1962. A personal penalty of Rs.1,00,000/- was also imposed on the Applicant 2 under Section 114 of the Customs Act, 1962.

4. Aggrieved by this Order, the Department filed an appeal before the Appellate Authority (AA) i.e. Commissioner of Customs (Appeal), Mumbai - III, against the redemption given to the applicant. The AA vide Orders-in-Appeal No. MUM-CUSTOM-PAX-APP-151/2022-23 dated 16.05.2022 issued on 18.05.2022 through F.No. S/49-489/2021 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 Order in Appeal the Applicants have filed this revision application requesting to set aside the absolute confiscation and to restore the Order in Original passed by the Adjudicating Authority They reiterated the replies and submissions made against the departmental appeal before the appellate authority.

6. Personal hearing in the case was scheduled on 12.12 2023 Shri. N. J. Heera, Advocate for the applicant appeared for personal hearing and reiterated the earlier points. He submitted that the Applicant 1 & 2 had brought some gold for personal use. They did not declare the same. He further stated that gold was not concealed and Applicants have no past record of any offence. He also submitted that the Applicant 3 has been unnecessary penalized as he came to receive (Applicant 1 & 2) his son and daughter in law at the airport. He requested to allow redemption on reasonable redemption fine and penalty. He also requested to set aside penalty on applicant 3.

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 that the applicants are not habitual offender, the gold was not ingeniously concealed and it was found from the pocket of the trousers worn by Applicant 1. Further the Applicant 2 has submitted that the gold belonged to him and was purchased by him from, after selling some property owned by Applicant 3. The applicants have also submitted that the same was bought for their personal use. The ownership of the gold is not claimed by anyone else. 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. In these circumstances, absolute confiscation of gold leading to dispossession of applicants is harsh and excessive. Government notes that the Order of OAA granting redemption to clear the gold on payment of a redemption fine of Rs. 8,00,000/- along with applicable Customs duty is proper and legal. Hence, Government is inclined to restore the same.

14. Government finds that the penalty of Rs. 2,00,000/- imposed on the Applicant 1 & 2 and Rs.1,00,000/- imposed on Applicant 3 under Section 112(a) and (b) of the Customs Act, 1962, is commensurate with the omissions and commissions committed. Government also finds the penalty of Rs. 1,00,000/- imposed on Applicant 2 under Section 114 of the Customs Act, 1962 is appropriate.

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

16. Accordingly, the Order in Appeal is modified and the OIO passed by the OAA is restored and the Revision Application is decided on the above terms.

(SHRAWAN KUMAR)

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

ORDER No. Q3-85 /2024-CUS (WZ) /ASRA/ DATED

24.01.2024

To.

1. Ms Faizalwala Aimen Noor, 10/2498-99, 3rd Floor, Flat No.301, Nalbandh Gali, Bhagatalao, Surat City, Gujarat 395003.
2. Mr. Mohammadnoor Abubakkar Abdulsattar, 10/2498-99, 3rd Floor, Flat No.301, Nalbandh Gali, Bhagatalao, Surat City, Gujarat 395003.
3. Mr. Fazalwala Abubakkar Abdulsattar, 10/2498-99, 3rd Floor, Flat No.301, Nalbandh Gali, Bhagatalao, Surat City, Gujarat 395003.
4. The Pr Commissioner of Customs, C.S.I Airport, Terminal 2, Level-II, Sahar, Andheri (East), Mumbai 400 099.
5. 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.

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