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GOVERNMENT OF INDIA  
MINISTRY OF FINANCE  
(DEPARTMENT OF REVENUE)

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

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F.No. 371/437/B/WZ/2022-RA / 211 Date of Issue 06.12.2023

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ORDER NO. 883/2023-CUS (WZ) /ASRA/MUMBAI DATED 05.12.2023  
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.

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Applicant : Shri Shankarlal Nayak

Respondent : Pr. Commissioner of Customs, Ahmedabad.

Subject : Revision Application filed, under Section 129DD of the  
Customs Act, 1962 against the Order-in-Appeal No. AHD-  
CUSTM-000-APP-377/2022-23 dated and issued on  
02.08.2022 [F.No. S/49-736/CUS/AHD/21-22] passed by  
the Commissioner of Customs (Appeals), Ahmedabad.

**ORDER**

This Revision application has been filed by Shri Shankarlal Nayak (herein referred to as Applicant) against the Order-in-Appeal No. AHD- CUSTM-000-APP-377/2022-23 dated 02.08.2022 through F.No. S/49-736/CUS/AHD/21-22 passed by the Commissioner of Customs (Appeals), Ahmedabad.

2. Brief facts of the case are that on 08.02.2020, the Officers of SVPI Airport Ahmedabad, intercepted one passenger Shri Shankarlal Nayak, the applicant, holding Indian Passport No. K 5167747 who had arrived from Kuwait by Kuwait Airways Flight No. KU-345, after he opted for clearance through green channel. To the query put forth to him regarding any dutiable/restricted item to declare, he had replied in negative. The officers checked his checked-in baggage along with the back pack bag, but nothing objectionable was found. The applicant was then asked to pass through the Door Frame Metal Detector which indicated that there was a presence of metallic substance in the middle part of his body. The applicant was again asked if he was carrying any metallic objects. Then he removed a packet wrapped in plastic cover from pocket of his jeans pant and confessed that it was 3 cut pieces of gold. The Government Approved Valuer certified that the three cut pieces are three cut gold bars totally weighing 485.850 grams having purity 999.9 (24Kt) and totally valued at Rs.17,80,737/- (Tariff value) and Rs.20,43,971/- (Market value). 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 22-07-2020.

3. The case was adjudicated by the Original Adjudicating Authority (OAA) i.e. the Joint Commissioner of Customs, Airport, Ahmedabad vide Order-In-Original No. 01/JC/AKM/O&A/2021-22 dated 18-03-2021 ordered for the absolute confiscation of the recovered gold viz three gold bars totally weighing 485.850 grams having purity 999.9 (24Kt) and totally valued at Rs.17,80,737/- (Tariff value) and Rs.20,43,971/- (Market value) under Section 111 (d), (1) and (m) of the Customs Act, 1962. Further, a penalty of Rs. 2,00,000/- 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), Ahmedabad, who vide Order-in-Appeal No. AHD-CUSTOM-000-APP-377-22-23 dated 02-08-2022 [F.No. S/49-736/CUS/AHD/21-22] upheld the order passed by the OAA.

5. Aggrieved with the above order of the appellate authority, the Applicant has filed this revision application on the following grounds;

5.1 That the Applicant on asking denied to have dutiable goods can be attributed to the fact that Applicant was traveling carrying gold for the very first time in her life and did not know that the gold carried into India came under the purview of dutiable goods and it was an honest mistake and had no malafide intention to clear the gold illicitly.

5.2 That the Applicant was under a bonafide belief/impression that any passenger of Indian Origin or a passenger holding a valid passport, issued under the Passport Act, 1967, coming to India after a period exceeding six months of stay abroad can carry upto 1 kg of gold to India. However, Applicant was unaware that the notification No.12/2012-Customs, dated the 17th March, 2012 states

duty is applicable for gold to Indian Passport holders and persons of Indian origin if they stay for more than 6 months.

5.3 That it was a bona fide mistake on his part and that there was no malafide intention in opting for the clearance through the green channel.

5.4 That Applicant was frightened and was under duress, had never been through much of a bureaucratic process and was unable to react or respond properly under such pressure.

5.5 That the authorities obtained involuntary statements from him by way of coercion and intimidation. Hence they are not voluntary statements given by Applicant and it is not acceptable to Applicant for any matter / proceedings which are against her interests.

5.6 That the Gold is not prohibited goods under customs law, it is only an controlled and dutiable good. That gold was never concealed by the Applicant as given in the statement and panchnama, the gold was kept in jacket. That the gold ought to be treated as any other dutiable goods.

5.7 That the invoice was alleged to be fake in the impugned order as there was no signature of the Applicant but no notice was taken of the fact that it was duly signed and stamped by the seller. That the department was focussing on proving that the Applicant is working with some kind of syndicate and was having modus operandi with some co-passengers for smuggling.

5.8 The applicant had no objection if cross verification of veracity of the invoice is conducted. Therefore, the contention that the invoice is a fake cannot be held proven.

5.9 That the applicant was carrying the three cut gold bars in his pocket and since the human body cannot be termed as baggage, confiscation under Section 111(l) and 111(m) cannot be held valid.

5.10 That the gold belongs to him and the applicant has produced the invoice too. Opting for a green channel without declaring the gold was a bonafide mistake.

5.11 That the release of gold is not against the policy and not against Section 125 of the Customs Act, 1962. In several similar cases the Hon'ble Supreme Court, Revisional Authority, and Commissioner of Customs (Appeals) have ordered the redemption of goods. There is no provision for absolute confiscation of goods. The option should be given under Sec. 125 of the Customs Act. The applicant relied on several case laws wherein absolute confiscation is not upheld, in cases of alleged non-declaration under section 77 of Customs Act, 1962. The Applicant submitted that it was never his attempt not to declare the seized gold or attempt to import the gold illicitly.

5.12 The Applicant also submitted that this is neither a big case of large scale smuggling nor any organized smuggling and rather a case of an ignorant labour passenger who improperly (without following textbook provision of procedural aspects) brought into India gold purchased out of his earnings in Kuwait for financial security and the allegations made in this order about smuggling cannot be held reliable. The Applicant requested to permit to pay the necessary duty

and redemption fine (if any) and be permitted to re-export if at all the goods cannot be brought into India.

Under the circumstances, the applicant has prayed to the Revision Authority to allow re-export or release the gold on payment of a reasonable redemption fine and penalty.

6. Personal hearing in the case was scheduled on 14.09.2023. Shri Aaditya Bhatt, Advocate for the applicant appeared online for personal hearing and reiterated earlier submissions. He further submitted that applicant brought small quantity of gold and failed to declare. He further submitted that there was no concealment and applicant is not a habitual offender. He requested to take lenient view and allow redemption of gold on reasonable 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. The impugned cut gold bars was detected only after the applicant was asked to walk through DFMD and the beep sound was heard. After this the applicant removed the gold from the pocket of his jeans wrapped in plastic cover. The applicant clearly had failed to declare the goods to the Customs as required under Section 77 of the Customs Act, 1962. Had he not been intercepted, the applicant would have gotten away with the gold concealed in his jean's pocket. The Government finds that the confiscation of the impugned gold was therefore 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 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 is liable for confiscation under Section 111(d) of the Customs Act.

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" in terms of Section 2(33) and hence it is liable for confiscation under Section 111(d) of the Customs Act, 1962.



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.

9.3 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.*

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.

11.1 Government further observes that there are a 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 Shik 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.

11.2 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.

12. In the instant case, the quantum of gold involved is not of commercial quantity. The quantum of the same does not suggest the act to be one of organized smuggling by a syndicate. Government observes that 3 other cases were detected on the same day having similar alibi and similar invoice and hence it has been alleged that the applicant and three other passengers are part of organized smuggling racket. However substantive evidence linking the applicant and the three passengers have not been brought out to prove the same. The applicant claimed that the gold was for his personal use and has bought the same from his savings and also borrowing some amount from his friends. The gold was also not ingeniously concealed, it was just kept in the pocket of his jeans. The applicant claimed that he was under the belief that he can bring upto 1Kg of gold as he had a Indian passport and was coming to India after a period exceeding six months and was unaware that duty has to be paid on the same. It was a mistake on his part and not a malafide intention. Further, there were no allegations that the Applicant is a habitual offender and was involved in similar offences earlier. 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.

13. 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. Hence Government is inclined to allow the impugned gold cut bars to be redeemed on payment of redemption fine.

14.1 In view of the above Government sets aside the impugned order of the appellate authority and allows the applicant to redeem the impugned gold i.e

three cut gold bars totally weighing 485.850 grams having purity 999.9 (24Kt) and totally valued at Rs.17,80,737/- (Tariff value) and Rs.20,43,971/- (Market value), on payment of redemption fine of Rs. 4,00,000/- (Rupees Four Lakh Only).

14.2 The Government finds that the penalty of Rs. 2,00,000/- imposed on the applicant under Section 112(a) & (b) of the Customs Act, 1962 for the goods valued at Rs. Rs.17,80,737/- (Tariff value) and Rs.20,43,971/- (Market value) being appropriate and commensurate with the omissions and commissions of the Applicant, Government does not feel it necessary to interfere with the imposition of the same and is sustained

15. Revision Application is disposed of on the above terms.

  
(SHRAWAN KUMAR)

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

ORDER NO. **883/2023-CUS (WZ)/ASRA/MUMBAI DATED 05.12.2023**

To,

1. Mr Shankarlal Nayak, Village Mor, Post Mor, The Garhi, Dist- Banskara-372022.
2. The Principal Commissioner of Customs, 1<sup>st</sup> Floor, Customs House, Near All India Radio, Income tax Circle, Navrangpura, Ahmedabad-380009.
3. The Commissioner of Customs (Appeals), Ahmedabad, 4<sup>th</sup> Floor, HUDCO Building, Ishwar Bhuvan Road, Navrangpura, Ahmedabad-380009

Copy to:

1. Shri. Shri Aaditya D. Bhatt, A-603, Shapath Hexa Near Sola Bridge, Sarkhej-Gandhinagar Highway, Sola, Ahmedabad, Gujarat-380060.
2. Sr. P.S. to AS (RA), Mumbai.
3. File Copy.
4. Notice Board.

