

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. 371/162/B/2022-RA / 8256

Date of issue: 08.12.23

ORDER NO. **886** /2023-CUS (WZ)/ASRA/MUMBAI DATED **07-12-2023**
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.

Applicant : Mr. Mohammed Azeem Mohammed Yusuf Dalvi
Respondent : Pr. Commissioner of Customs, CSMI, Mumbai
Subject : Revision Application filed under Section 129DD of the
Customs Act, 1962 against the Order-in-Appeal No. MUM-
CUSTM-PAX-APP-1532/2021-22 dated 18.01.2022 [Date of
issue: 19.01.2022] [F. No. S/49-05/2021] passed by the
Commissioner of Customs (Appeals), Mumbai Zone-III.

ORDER

This Revision Application is filed by Mr. Mohammed Azeem Mohammed Yusuf Dalvi (herein referred to as the 'Applicant') against the Order-in-Appeal (OIA) No. MUM-CUSTOM-PAX-APP-1532/2021-22 dated 18.01.2022 passed by the Commissioner of Customs (Appeals), Mumbai Zone-III.

2. Brief facts of the case are that on 09.12.2020, the officers of AIU, Customs, Chhatrapati Shivaji Maharaj International Airport, Mumbai, intercepted the Applicant, who had arrived by Flight No. EK-500 from Bahrain, after he had cleared himself through the Customs Green Channel. A personal search of the Applicant resulted in recovery of crude gold chain weighing 200 grams and valued at Rs.8,69,508/-.
3. The case was adjudicated after waiver of show cause notice and the Original Adjudicating Authority (OAA) i.e., Assistant Commissioner of Customs 'C' Batch, CSMI Airport, Mumbai, vide Order-in-Original (OIO) dated 09.12.2020 ordered absolute confiscation of the seized crude gold chain totally weighing 200 grams and valued at Rs.8,69,508/- under Section 111 (d) of the Customs Act, 1962. A penalty of Rs.85,000/- was imposed on the Applicant under Section 112 of the Customs Act, 1962.
4. Aggrieved, the Applicant filed an appeal before the Appellate Authority (AA) who vide impugned OIA upheld the order of the OAA and rejected the appeal.
5. Hence, the Applicant has filed the instant revision application on the following grounds:
 - i. that the Applicant informed the Dy./Asst. Commissioner at the time of hearing that, the said 2 Gold Chains, totally weighing 200 gms valued at Rs.8,69,508/- belonged to him and were his personal Gold which was purchased by him and he also produced the bill of the said purchase of Gold Chains dated 06.12.2020 from Sarthar Jewellery Co. WLL vide Bill Nos.48580, 48581 and also the Officer who had intercepted him, the

Applicant informed him that, he was wearing the 2 Gold Chains which he had purchased for the marriage of his daughter in INDIA, but yet the officer did not appreciate that.

- ii. that the said 2 Gold Chains, totally weighing 200 gms valued at Rs.8,69,508/- was his personal Gold and the same was purchased by him from his earnings. Thereafter he told the officers that if it is required, his declaration be recorded, but his submissions were not considered and penal action was taken. Though as per law, u/s.77 of the Customs Act, even oral declaration is considered as declaration and need not be always in writing.
 - iii. that the Applicant was also holding foreign currency to pay if he was asked to pay duty on it and was ready and willing to pay the same and even if he had less money for payment of duty, he could have arranged and called from his family members.
 - iv. that the Applicant had also informed to the Custom Officers that he was wearing the Gold Chains. The said fact was also mentioned by him. Further the Applicant had also good financial status as he was working in Bahrain and he also produced his bank statement & his identity card showing that he was working in Bahrain. Thus, it has been wrongly considered that the Applicant was involved into smuggling activities and hence tried to evade customs duty.
 - v. that the Appellate Authority as well as Adjudicating Authority have passed the orders which are contrary in nature with earlier decisions taken by them wherein such quantity of said Gold used to be released on payment of reshipment fine and personal penalty i.e. the said Gold were allowed to be released instead of absolute confiscation.
 - vi. that imposing penalty of Rs.85,000/-, without any clinching and cogent evidence is illegal and the Order requires to be quashed and set aside.
6. Personal hearing in the case was held on 29.08.2023. Ms. Shivangi Kherajani, Advocate appeared for the personal hearing on behalf of the applicant and submitted that the applicant had brought small quantity of gold

for personal use. She requested to allow redemption of same on nominal fine and penalty. No one appeared for the personal hearing on behalf of the Respondent.

7. Government has gone through the facts of the case and observes that the Applicant had brought crude gold chain weighing 200 grams but 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, after clearing himself through the green channel of Customs and on being intercepted, crude gold chains weighing 200 grams and valued at Rs.8,69,508/- were recovered from the Applicant and revealed his intention of 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. Government observes that the applicant holds an Indian passport, and is working in Oman since last 18 years and had returned back after a continuous stay of 10 months and therefore was eligible to bring upto 1 kg gold at concessional duty in terms of Notification No. 50/2017-Cus dated 30.06.2017. Government observes that gold brought by such eligible persons is not prohibited provided that payment of the concessional duty is made through foreign currency. Further, considering that the Applicant was gainfully employed as Driver with Embassy of USA at Bahrain since 16.08.2021, as apparent from GCC Smart Card submitted by him, his claim that he had bought the impugned gold chains for his daughter's wedding, appears feasible. In addition, the applicant has claimed that the relevant invoices and bank statements were submitted by him with AA. However, the lower authorities had not allowed redemption of the impugned gold.

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. However, Government observes that once goods are held to be prohibited, Section 125 of the Customs Act, 1962 still provides discretion to consider release of goods on redemption fine. A plain reading of this section denotes that the Adjudicating Authority is bound to give an option of redemption when goods are not subjected to any prohibition. However, in case of prohibited goods also there is no bar on the Adjudicating Authority to allow 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.

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 view of the foregoing paras, the Government finds that as the applicant had not declared the gold at the time of arrival, the confiscation of the gold was justified. However, the absolute confiscation of the same was not justified in view of the aforesaid facts and option to redeem the same on payment of redemption fine should have been allowed.

13. Government finds that the applicant by virtue of his continuous stay abroad, was eligible to bring upto 1 kg of gold at concessional rate of duty to be paid in foreign currency and the import of gold for such person had not been prohibited. Having held that the confiscation was justified and that the applicant was eligible to bring gold at concessional rate of duty, Government allows the impugned gold to be redeemed on payment of appropriate redemption fine.

14. Applicant has also pleaded for setting aside the penalty imposed on him. The market value of the gold in this case is Rs. 8,69,508/-. From the facts of the case as discussed above, Government finds that the penalty of Rs.85,000/- imposed on the Applicant under Section 112 of the Customs Act, 1962 commensurate with the omissions and commissions of the Applicant.

15. In view of the above, the Government modifies the impugned OIA and allows the Applicant to redeem the impugned crude gold chains weighing 200 grams and valued at Rs.8,69,508/-, on payment of a redemption fine of Rs.1,65,000/-. The impugned gold will be allowed to be cleared at concessional rate of duty as per the conditions therein, if the applicant is found to be eligible person. The penalty of Rs.85,000/- imposed on the Applicant under Section 112 of the Customs Act, 1962 by the OAA and upheld by the AA is sustained.


(SHRAWAN KUMAR)

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

ORDER NO. **886/2023-CUS (WZ)/ASRA/MUMBAI DATED 07-12-23**

To,

1. Mr. Mohammed Azeem Mohammed Yusuf Dalvi,
H.No. 168, At PO Barapada,
Panvel, Dist. Raigad - 410 221.
2. The Pr. Commissioner of Customs,
Terminal-2, Level-II,
Chhatrapati Shivaji Maharaj International Airport,
Sahar, Mumbai - 400 099.

Copy to:

1. Adv. Mrs. Kiran Kanal,
Satyam, 2/5, R.C.Marg,
Opp. Vijaya Bank, Chembur,
Mumbai - 400 071.
2. Sr. P.S. to AS (RA), Mumbai.
3. Guard file.

