

REGISTERED  
SPEED POST



GOVERNMENT OF INDIA  
MINISTRY OF FINANCE  
(DEPARTMENT OF REVENUE)  
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Mumbai-400 005

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F.No. 371/383/WZ/B/2022-RA /42 Date of Issue : ~~12.2023~~  
04.01.2024

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ORDER NO. 960/2023-CUS (WZ)/ASRA/MUMBAI DATED 29.12.2023  
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 : Ms Farzana Anjum Khan

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

Subject : Revision Application filed, under Section 129DD of the  
Customs Act, 1962 against the Orders-in-Appeal Nos.  
MUM-CUSTM-PAX-APP-1891/2021-22 dated 07.03.2022  
issued on 10.03.2022 through F.No. S/49-938/2020  
passed by the Commissioner of Customs (Appeals),  
Mumbai - III.

ORDER

This revision applications have been filed by Ms Farzana Anjum Khan (hereinafter referred to as the Applicant) against the Order-In-Appeal Nos. MUM-CUSTOM-PAX-APP-1891/2021-22 dated 07.03.2022 issued on 10.03.2022 through F.No. S/49-938/2020 passed by the Commissioner of Customs (Appeals), Mumbai - III.

2. Brief facts of the case are that on 28.04.2019, the officers of Customs, CSMI Airport, Mumbai, intercepted Ms Farzana Anjum Khan, holding Indian Passport No. J 1683406, on arrival from Sharjah by Air India Express Flight No. IX 252, after she cleared through Customs Green Channel without declaring anything dutiable at the Red Channel. On noticing suspicious images in her baggage while screening, she was sked in front of the punchas whether she had carried any dutiable/prohibited goods and the applicant replied in negative. Personal search of the applicant resulted in recovery of 04 heavy packets of paste purported to be wet gold dust cleverly concealed inside the brassiere worn by her and 50 grams of gold bar concealed in the left pocket of the jeans worn by her. The Government Approved Valuer examined and certified that the goods recovered were i) 1 gold bar having purity of 24KT and weighing 50 grams and valued at Rs1,46,784/- & ii) Wet gold dust provisionally weighing 1123 grams and provisionally valued at Rs.32,96,769/-. After due process of investigation Show cause Notice was issued to the Applicants on 06.03.2019. The Out Turn Certificate issued by the India Government Mint showed the final weight of the gold dust as 1171.772 having purity of 995.0. Thus the weight of the gold dust and 1 gold bar recovered totalled to 1221.772 grams and totally valued to Rs.35,86,732/- After due process of investigation Show cause Notice was issued on 24.10.2019.

3. The Original Adjudicating Authority viz, Addl. Commissioner of Customs, CSMI Airport, Mumbai vide Order-In-Original No. ADC/SKR/ADJN/50/2020-21 dated 27.07.2020 ordered for the absolute confiscation of the seized gold viz the gold dust and 1 gold bar recovered weighing totally 1221.772 grams and totally valued to Rs.35,86,732/- under Section 111(d), (l) and (m) of the Customs Act, 1962 and imposed a personal penalty of Rs. 4,0,000/- on the applicant under Section 112(a)(i) of the Customs Act, 1962.

4. Aggrieved by the said order, applicants filed appeals before the Appellate Authority (AA) viz, Commissioner of Customs (Appeals), Mumbai - III, who vide his Orders-In-Appeal Nos. MUM-CUSTOM-PAX-APP-1891/2021-22 dated 07.03.2022 issued on 10.03. 2022 through F.No. S/49-938/2020, did not find any reason to interfere in the impugned OIO passed by the OAA.

5. Aggrieved with the above order, the Applicants have made an exhaustive submission of case laws and have submitted copies including their submissions made before the lower authorities etc. They have filed these revision applications on the following main points:

5.1 That the retracted statement of the applicant in the absence of any corroborative evidence from an independent source outside the confession cannot be relied upon;

5.2 That the Order in Original and the Order in Appeal are liable to be quashed as the adjudicating authority yielded to the prejudged SCN;

5.3 That the decisions relied upon by the Commissioner (Appeals) cannot be made applicable in this case; That for concluding the imported gold was prohibited goods and for ordering absolute confiscation of the gold, the OAA relied upon the judgement in the case of Om Prakash Bhatia which has been overruled by a larger Bench of Supreme Court;

- 5.4 That Gold is not a prohibited item and hence the *seized gold was not liable for absolute confiscation;*
- 5.5 *That the applicant was not a carrier and the allegation was based on assumption;*
- 5.6 That Penalty imposed on the applicant was disproportionate to the value of the gold imported by individual International passenger and that imposition of heavy penalty on the applicant is not sustainable;
- 5.7 The applicant concluded by submitting that she did not commit any act of omission or commission which can be termed as crime or manifesting of an organized smuggling activity. The applicants submitted that they are from a respectable family and law abiding citizens and has never come under any adverse remarks and that she has been *falsely implicated in the case of smuggling as a carrier.*

Under the circumstances, the applicants have prayed that the gold under absolute confiscation may be ordered to be released to them on payment of reasonable fine and penalty. She further submitted that further proceedings against her may be dropped since she was in no way concerned with smuggling activity.

6. Personal hearings in the case was scheduled on 5.10.2023. Shri. Prakash Shingarani, Advocate appeared for personal hearing and submitted that the applicant had brought small quantity of *gold for personal use, gold was not ingeniously concealed and applicant has no past record of any offence. He requested to allow redemption of the same on nominal fine and penalty.*

7. The Government has gone through the facts of the case. The Applicant was intercepted when she had cleared herself through the green channel. The

impugned gold was in the form of wet gold dust which were kept in packets in her upper inner-ware. Only when she was searched, the impugned gold was detected. The Applicant had not declared the impugned gold as required under section 77 of the Customs Act, 1962. By this action, it is clear that applicants had no intention to pay the Customs duty. The applicant tried to conceal the gold to avoid detection of the gold carried and thereby to evade Customs duty. The confiscation of the gold is therefore justified and thus, the Applicant had rendered themselves liable for penal action.

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 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, quantum of gold is not large, it does not suggest to be *one of organized smuggling* by a syndicate or of commercial quantity. Government further notes that there is no allegation that the Applicant is a habitual offender and was involved in similar offences earlier. Further the *applicant had claimed ownership* of the gold. 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.

13.1 The absolute confiscation of the gold, leading to dispossession of the gold in the instant case is *therefore not reasonable*. Government for the aforesaid reasons, is inclined to set aside the absolute confiscation held in the OIA and considers granting an option to the Applicant to redeem the Gold on payment of a suitable redemption fine, as *the same would be more reasonable and judicious*.

13.2 Government finds that the penalty imposed of Rs.4,00,000/- on the applicant for the gold totally valued at Rs.35,86,732/- under Section 112(a) & (b) of the Customs Act, 1962 is appropriate and commensurate to the omissions and commissions of the Applicant.

14.1 In view of the above, the Government modifies the impugned order passed by the Appellate authority and allows the applicant to redeem the impugned gold weighing 1221.772 grams and collectively valued at

Rs.35,86,732/- on payment of redemption fine of Rs.7,00,000/- (Rupees Seven Lakhs Only).

14.2 The penalty of Rs.4,00,000/- imposed under Section 112(a) and (b) of the Customs Act, 1962, for the gold valued at Rs.35,86,732/- is 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. The Revision Application is disposed of on the above terms.

  
(SHRAWAN KUMAR)

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

ORDER NO. 960/2023-CUS (WZ)/ASRA/MUMBAI DATED 29.12.2023

To,

1. Ms Farzana Anjum Khan, 43/53,1st Floor, Room No. 7, Lotwala Building, Bapu Khote Street, Jamil Mohalla, Mumbai-400003.
2. Principal Commissioner of Customs, Chhatrapati Shivaji International 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. 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.