



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

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F.No. 371/54/B/2021-RA | 139 Date of Issue : 08.01.2024

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ORDER NO. 964/2023-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. Farhiya Mohamud Ali.

**Respondent** : Principal Commissioner of Customs, CSMI  
Airport, Sahar, Andheri East, Mumbai - 400 099

**Subject** : Revision Application filed, under Section 129DD  
of the Customs Act, 1962 against the Order-in-  
Appeal No. MUM-CUSTM-PAX-APP-542/2020-21  
dated 09.11.2020 issued on 11.11.2020 through  
F.No. S/49-461/2019 passed by the  
Commissioner of Customs (Appeals), Mumbai -  
III, Marol, Mumbai - 400 059.

**ORDER**

This revision application has been filed by Ms. Farhiya Mohamud Ali (hereinafter referred to as the Applicant) against the Order-in-Appeal No. MUM-CUSTM-PAX-APP-542/2020-21 dated 09.11.2020 issued on 11.11.2020 through F.No. S/49-461/2019 passed by the Commissioner of Customs (Appeals), Mumbai – III, Marol, Mumbai – 400 059.

2. Brief facts of the case are that on 06.03.2019, Customs Officers at the CSMI Airport, Mumbai had intercepted the applicant, who is a Kenyan national and had arrived from Muscat by Flight no. WY 0203. The applicant had opted for the green channel. The applicant was found in possession of one gold cut piece and gold dust (pure) totally weighing 172 gms and collectively valued at ₹ 5,27,558/- which she had failed to declare to Customs. The gold dust was wrapped in the packet and one gold cut piece was hidden inside the garment.

3. The Original Adjudicating Authority (OAA), viz, Addl. Commissioner of Customs, CSMI Airport, Mumbai who vide his Order-In-Original No. AirCus/T2/49/479/2019 dated 06.03.2019, ordered for the absolute confiscation of the one gold cut piece and gold dust (pure), totally weighing 172 gms and collectively valued at ₹ 5,27,558/- under Section 111(d), (l) and (m) of the Customs Act, 1962. Personal penalty of ₹ 50,000/- was imposed on the applicant under Section 112(a)(i) of the Customs Act, 1962.

4. Aggrieved by the said order, the applicant preferred an appeal before the appellate authority (AA) viz, Commissioner of Customs (Appeals), Mumbai-III who vide Order-In-Appeal No. MUM-CUSTM-PAX-APP-542/2020-21 dated 09.11.2020 through F.No. S/49-461/2019 did not find any reason to interfere in the impugned OIO and upheld the order passed by OAA.

5. Aggrieved by this Order, the applicant has filed this revision application on the undermentioned grounds of revision;

5.1 That the Applicant is a Foreign National and does not know to read and write English Language & understands only her mother tongue.

5.2 That the Applicant when arrived at Airport was asked by the officer in plain clothing whether Applicant was carrying any Gold, to which the Applicant

answered in affirmative. The Applicant submits that the officer had taken the charge of Gold and prepared some papers in English Language & obtained her signature on those papers.

5.3 The Statement of the applicant was also recorded by the Customs u/s. 108 of the Customs Act, which was typed in English Language which is not known to the Applicant and the customs dept. made out the case of non-declaration.

5.4 That the Applicant is the owner of the goods and ready to pay the customs dues and she was not aware that being a Foreign National, she was not supposed to import Gold.

5.5 That the Gold brought by the Applicant is neither restricted nor prohibited and can be released for Re-export under section 125 of the Customs Act, 1962.

5.6 That the violation if any occurred, was out of ignorance, technical in nature and due to language problem.

5.7 That the Respondent has come to the conclusion that the acts and/ or omissions on the part of the Applicant were to evade Customs duty. The evasion of Customs duty can be done only in respect of dutiable goods and not prohibited goods. The Applicant humbly submits that once the department or respondent accepts that the goods are dutiable, the option of redemption of goods as provided under section 125 of the Customs Act, 1962 will have to be given to the Applicant. A bare perusal of the above sub-section (1) of Section 125 of the Customs Act, 1962, makes it crystal clear that the Respondent is required to give the Noticee an option to pay fine in lieu of confiscation in respect of the impugned goods, which even as per the Respondent are dutiable goods.

5.8 The Applicant relied on various judgments passed by various authorities, wherein re-export of goods have been granted even when the goods were not declared which are as follows:

1. Collector of Customs vs. Elephanta Oil and Inds. Ltd.; 2003-(152)-ELT-0257-Supreme Court.
2. Kusum Bhai Daya Bhai Patel Vs. Commissioner of Customs 1995 (79) ELT 292 Tri Mumbai
3. A.K. Jewellers vs. Commissioner of Customs Mumbai: 2003 (155) E.L.T. 585 (Tri- Larger Bench)
4. Patel vs. Commissioner of Customs Citation: 2003 (153) ELT 226 Tr
5. M.V. Marketing and Supplies vs. Commr. of Customs (Import), Chennai; 2004 (178) E.LT. 1034 (Tri-Chennai).

5.9 The Applicant also listed the cases wherein re-export has been granted by the Government of India, New Delhi:

1. Revision order no.38/2008 in case Mrs. Majeeda Mohammed Yonus
2. Revision order no.178 /2008 in case Mr. Ravinder Sadhuram Dulari
3. Revision order no.33/2008 in case Shri Deepak Hiralal Parekh
4. In Revision order no.34/2008 in case Shri Pradeep Kumar Bhanwarlal
5. In Revision order no.392/2002 in case Shri Nasir Asgar Mirab

5.10 That in view of the aforesaid submissions, the Customs department shall release the goods u/s. 125 of Customs Act, 1962 for Re-export on nominal redemption fine and reduce the personal penalty as the violation, if any, is of technical in nature.

In view of the above the applicant prayed that the Gold may kindly be released for re-export on nominal fine and personal penalty may kindly be reduced substantially.

6. Personal hearing in the matter was scheduled for 04-08-2023. Shri N. J. Heera, Advocate of the applicant, appeared for the hearing and submitted that the applicant is a foreign national and brought small quantity of gold for personal use. He requested to allow re-export of the same on nominal fine and penalty.

7. At the outset, the Government notes that the Applicant has filed for condonation of delay. The Revision Application was filed on 26.02.2021. The date of issue of the Order of the Appellate Authority is 09.11.2020 which was communicated to the applicant on 17.11.2020. Based on the date of communication of the said Order of the Appellate Authority, the Applicant was required to file the Revision Application by 17.02.2021 (i.e. taking the first 3 months into consideration) and by 17.05.2021 (i.e. taking into consideration a further extension period of 3 months). The Applicant has accepted that there was a delay in filing the Revision Application from the date of receipt of the order. Thus it is seen that the Revision Application has been filed within the date, after considering the extended period.

7.2. The Applicant in her application for condonation of delay has stated that the revision application could not be filed due to reasons beyond applicants control and requested that the delay be condoned.

7.3. For understanding the relevant legal provisions, the relevant section is reproduced below :

**SECTION 129DD. Revision by Central Government.-**

(1) *The Central Government may, on the application of any person aggrieved by any order passed under section 128A, where the order is of the nature referred to in the first proviso to sub-section (1) of section 129A, annul or modify such order.*

.....

.....

(2) *An application under sub-section (1) shall be made within three months from the date of the communication to the Applicant of the order against which the application is being made :*

*Provided that the Central Government may, if it is satisfied that the Applicant was prevented by sufficient cause from presenting the application within the aforesaid period of three months, allow it to be presented within a further period of three months.*

.....

7.4. From above, it is clear that the Applicant was required to file the Revision Application within 3 months from the communication of the Appellate Order. The delay thereafter, upto 3 months can be condoned. Since, the Revision Application is filed within the condonation period of three months, and the reason also being genuine, Government condones the delay on the part of the Applicant in filing the application and proceeds to examine the case on merits.

8. The Government has gone through the facts of the case and notes that the applicant had failed to declare the goods in his possession as required under Section 77 of the Customs Act, 1962. The applicant had not disclosed that she was carrying dutiable goods and had she not been intercepted, she would have walked away with the impugned one gold cut piece and gold dust (pure), totally weighing 172 gms and collectively valued at ₹ 5,27,558/-, without declaring the same to Customs. By her actions, it was clear that the applicant had no intention to declare the impugned gold to Customs and pay duty on it. The Government finds that the confiscation of the gold was therefore, justified.

9.1 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.”*

9.2 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 to confiscation under Section 111(d) of the Customs Act.

10. 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 to confiscation under Section 111(d) of the Customs Act, 1962.

11. 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 to confiscation and the 'applicant' thus, liable to penalty.

12. 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.*

13. In the instant case, the quantum of gold involved is small and 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, notes that there is neither any allegation that the impugned gold was ingeniously concealed nor that the Applicant is a habitual offender and was involved in similar offences earlier. The applicant has claimed ownership of the gold and her desire to take it back. 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 misdemeanor is required to be kept in mind when using discretion under Section 125 of the Customs Act, 1962 and while imposing quantum of penalty. Government notes that the applicant who is a foreign national has prayed that the absolute confiscation be set aside and he be allowed to re-export the gold.

14. 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 Shaik 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.
- e) Judgement dated 17.02.2022 passed by the Hon'ble High Court, Rajasthan (Jaipur Bench) in D.B. Civil Writ Petition no. 12001 / 2020, in the case of Manoj Kumar Sharma vs. UOI and others.

15. In a recent judgement passed by the Hon'ble High Court, Madras on 08.06.2022 in WP no. 20249 of 2021 and WMP No. 21510 of 2021 in r/o. Shri. Chandrasegaram Vijayasundarm + 5 others in a similar matter of Sri. Lankans wearing 1594 gms of gold jewellery (i.e. around 300 gms worn by each person) upheld the Order no. 165 - 169/2021-Cus (SZ) ASRA, Mumbai dated 14.07.2021 in F.No. 380/59-63/B/SZ/2018-RA/3716, wherein Revisionary Authority had ordered for restoration of OIO wherein adjudicating authority had ordered for the confiscation of the gold jewellery but had allowed the same to be released for re-export on payment of appropriate redemption fine and penalty.

16. 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.


17.1 In view of the foregoing paras, the Government finds that as the applicant had not declared the one gold cut piece and gold dust (pure), totally weighing 172 gms and collectively valued at ₹ 5,27,558/-, at the time of arrival, the confiscation of the same was justified. However, considering the quantity of gold cut piece and gold dust, no past history the same not being concealed in an ingenious manner, applicant being a foreign national, the absolute confiscation of the same was harsh and not justified. In view of the aforesaid facts, option to re-export the impugned gold on payment of redemption fine should have been allowed. Considering the above facts, Government is inclined to modify the absolute confiscation upheld by the AA and allow the impugned one gold cut piece and gold dust (pure), totally

weighing 172 gms and collectively valued at ₹ 5,27,558/ to be re-exported on payment of a reasonable redemption fine.

17.2 The Applicant has also pleaded for reduction of the penalty imposed on him. The value of the gold in this case is ₹ 5,27,558/-. Government finds that the penalty of ₹ 50,000/- imposed on the applicant under Section 112 of the Customs Act, 1962 is commensurate with the omissions and commissions committed and is not inclined to interfere in the same.

18. In view of the above, the Government modifies the order passed by the appellate authority and allows the applicant to redeem the impugned one gold cut piece and gold dust (pure), totally weighing 172 gms and collectively valued at ₹ 5,27,558/- for re-export on payment of a redemption fine of ₹ 1,00,000/- (Rupees One Lakh only). The penalty of ₹ 50,000/- imposed on applicant under Section 112 of the Customs Act, 1962 by the OAA and upheld by the AA is sustained.

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

  
( SHRAWAN KUMAR )  
Principal Commissioner & ex-officio  
Additional Secretary to Government of India

**ORDER NO. 964/2023-CUS (WZ)/ASRA/MUMBAI DATED 29.12.2023.**

To,

1. Mr. Farhiya Mohamud Ali, Sudan. C/o Advocate N. J. Heera, Nulwala Building, Ground Floor, 41, Mint Road, Opp. G.P.O. Fort, Mumbai-400001
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. Advocate N. J. Heera, Nulwala Building, Ground Floor, 41, Mint Road, Opp. G.P.O. Fort, Mumbai-400001
2. Sr. P.S. to AS (RA), Mumbai.
3. File Copy.
4. Notice Board.