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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. 371/21/B/WZ/2021-RA / 272      Date of Issue : 11.01.2024

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ORDER NO            02/2024-CUS (WZ)/ASRA/MUMBAI DATED    5.1.24 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        : Mr. Baisul Rahuman Shahul Hameed  
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-550/2020-21 dated 26.11.2020 [Date of  
issue: 10.12.2020] [F No. S/49-402/2019] passed by the  
Commissioner of Customs (Appeals), Mumbai Zone-III

ORDER

This revision application has been filed by Mr Baisul Rahuman Shahul Hameed (herein referred to as Applicant) against the Order-in-Appeal (OIA) No. MUM-CUSTOM-PAX-APP-550/2020-21 dated 26 11 2020 passed by the Commissioner of Customs (Appeals), Mumbai – III

2 Briefly stated the facts of the case are that the Applicant was intercepted by the Customs Officers near the exit gate of CSMI Airport, Mumbai on 16 10 2017 after he had cleared himself through the green channel Applicant had arrived from Dubai via Flight No 9W-543. He was found carrying 01 cut piece of gold bar concealed in his rectum and 201 pieces of gold beads concealed in ladies gowns, totally weighing 296 gms and valued at Rs 8,10,130/-.

3. After, due process of law, the Original Adjudicating Authority (OAA) viz., the Addl Commissioner of Customs, CSMI Airport, Mumbai vide Order-in-Original (OIO) No. ADC/AK/ADJN/479/2018-19 dated 08 03 2019 ordered for the absolute confiscation of the seized gold totally weighing 296 gms and valued at Rs 8,10,130/- under Section 111(d), 111(l) and 111(m) of the Customs Act, 1962 A Penalty of Rs 95,000/- was also imposed on the applicant under Section 112(a) & (b) of the Customs Act, 1962

4 Aggrieved by the said order, the applicant filed an appeal before the Appellate Authority (AA) who vide the impugned OIA disposed of the appeal holding that he did not find it necessary to interfere in the OIO passed by OAA which was legal and proper

5 Aggrieved with the above order, the Applicant has filed this revision application mainly on the following grounds:

- (i) Order of the respondent is against law, weight of evidence and circumstances and probabilities of the case The gold is not prohibited item and according to the liberalized policy the gold can be released on payment of redemption fine and baggage duty
- (ii) that the allegations are unsustainable and the seized gold belong to him and had purchased the same out of his own fund in abroad and he never

received the gold from anybody and he did know anybody in the name of Ibrahim Further the seized gold is admittedly recovered from his possession and hence he requests the authority to return the same.

- (iii) that no declaration card was provided by neither by the customs authority nor by any other authority and hence question of filling up the declaration card does not arise Further he orally declared that he brought the gold for his family use and also he expressed his willingness to pay the customs duty (Oral declaration is permitted under the baggage rule)
- (iv) that simply because of not declaring the gold, the department cannot become the owner of the goods and hence option can be exercised under section 125 of the customs act 1962 with appropriate duty
- (v) that the department has not made any efforts to find out who is supposed to receive the gold outside the airport, and no enquiry was conducted by the officers of customs or finding by the adjudication authority but the adjudication authority simply glossed over this point in this aspect. Thus, it is clear that the passenger brought the gold for someone else is not correct Except the bald statement no other corroborative evidence is available.
- (vi) that the suspicion however grave cannot be taken as leading evidence to investigate the case but the authority cannot give any binding on the basis of suspicion. Since the suspicion is the weak piece of evidence and hence it cannot be accepted under evidence act.
- (vii) that under section 125 of the customs Act, when even confiscation of any good is authorized 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 been such good have seized
- (viii) that the authority one way stated that the passenger has not declared the contents of the baggage as per section 77 of the said act, other it is stated that he is not the owner of the goods If authority had taken the

stand that the passenger had not declared, then he cannot take the stand that he is not the owner of the baggage or goods. Since the passenger has not declared the gold, the authority stated that the goods are liable to confiscation under section 113 of the customs act 1962. If it is so then the passenger only can declare the goods under section 77 of the customs act 1962 not any other person (Even assuming without admitting that the passenger is not the owner of the goods then question of declaration does not arise, therefore non declaration by the passenger is non application of mind. If so, the owner is liable to declare the contents of the baggage for the purpose of clearing the same even if he is not the passenger, it not traceable under law).

- (ix) that the goods must be prohibited before export or import, simply because of non-declaration of the goods cannot become prohibited after import. Therefore, the authority has come to the conclusion that the gold is prohibited because of non-declaration is nothing but clear non application of mind
- (x) that as per condition of the Central government liberalized policy, if any passenger being an Indian origin or Indian passport holder stayed abroad more than required period and is an eligible to bring 10 Kg of gold under concessional rate of duty. In the context of Exim Policy gold falls under restricted list and is not a prohibited item and hence the absolute confiscation of gold is unwarranted. Therefore, the Government may order to redeem the gold under section 125 ibid on payment of customs duty
- (xi) that the Apex court in the case of Hargovind Dash Vs Collector of Customs 1992 (61) ELT 172 (SC) and the several other cases has pronounced that a quasi judicial authority must exercise discretionary powers in a judicious manner and not in arbitrary manner. As per the provisions of section 125 of the customs act, 1962 in case of goods which are prohibited the option of redemption is left to the discretionary power of the authority who is functioning as a quasi judicial authority and in cases of others goods option to allow redemption is mandatory. Considering the facts and the circumstances and various precedent

orders passed by the CESTAT/Government of India (order No. 135/2003 (GOT) CESTAT 2451/99) The seized gold ornaments should be release on the payment of nominal redemption fine. Further there are no provisions for absolute confiscation of the goods

- (xii) The hon'ble High court Andhrapradesh judgment reported in 1997 (91) ELT 277 (AP) Sheik Jamal Basha Vs Government of India held that under section 125 of the of the act is mandatory duty to give option to the person found guilty to pay in lieu of confiscation. (Gold was concealed) Further section 125 of the act leaves option to the officer to grant the benefit or not so far as goods whose impose is prohibited but no such option is available in respect of goods which can be imported, but because of the method of importation adopted become liable for confiscation A perusal of the order of the deputy collector of customs shows him to have not kept this discretion in mind and to have straightaway proceeded to confiscate the gold without grant of opportunity to the petitioner to pay in lieu of confiscation finally the high court direct the deputy collector of customs to allow opportunity to the petitioner to pay in lieu of confiscation such sum as he decides fit and decide the matter according to law
- (xiii) The Revisional authority has passed order reported in 2011 (270) ELT 447 (601) Mukuadam Rafique Ahmed order no. 198/2010-CUS dated 20 05 2010 in F NO. 375/14/B/2010-RA-CUS permitted the appellatant to re shipment the goods on payment of lesser redemption fine even if not declared are required under section 77 of the customs act 1962.
- (xiv) that the hon'ble Supreme Court (full bench) has delivered a judgment on 30.09.2011 in Om Prakash's case Vs union of India wherein it is categorically stated that the main object of the enactment of the said act was the recovery of excise duties and not really to punish for infringement of its provisions Further held that the offences are compoundable under section 137 of the said act and summary proceedings under section 138 of the customs act 1962
- (xv) that though the foreign currencies were found concealed in rectum, still Revisional authority held the foreign currencies are restricted not

prohibited one The Joint secretary to the government of India in the case of Shri Aribu Thippu Sulthan, Abdulla Kader Gani, Ameer Ali Sarupudeen & Abdul Razack Abdul Bakki ordered to release the foreign currencies on payment of nominal redemption fine and personal penalty

(xvi) that in a similar case of gold concealed in rectum, the Commissioner of customs (appeals) Chennai has passed an order C4/686/O/O/2010 AIR- C CUS. NO 25 of 2011 -Air- dtd 19.01.2011- to uphold the order of the adjudication authority i.e. Additional Commissioner of customs permitted re-exports of the gold in O S No 31 of 2010 Ismail Basheer Ahamed vide order dated 17.05.2010

On the above grounds, the applicant has prayed to set aside the impugned OIA and to permit him to re-export or release the gold and also reduce the personal penalty of Rs 95,000/- imposed on the applicant

6 Personal hearing in the matter was fixed on 09.08.2023/23.08.2023. However, no one either from the applicant's side or respondent's side attended the meeting. Subsequently, on 28.08.2023, a letter dated 23.08.2023 was received from Advocate Shri Kamalamalar Palani Kumar, on behalf of the applicant, informing that due to internet connection problem, he could not attend the hearing on either of the dates. He further requested to decide the matter on available records and to show leniency while passing order. No one appeared for the personal hearing on behalf of the Respondent. The matter is therefore taken up for decision based on available records

7 The Government has gone through the facts of the case. The Applicant was intercepted near exit gate after he had passed through the green channel. The applicant had not declared the gold bar/gold beads and only when upon passing through the Door Frame Metal Detector and the hand-held metal detector, gave positive indication about presence of some metal object on his body or within the body, did he admit to having concealed gold bar in his body cavity. The 201 pieces of gold beads were coated with silver colour and were cleverly stitched in between the sequins design on the ladies gowns recovered

from his checked-in baggage. It is clear that the applicant had resorted to concealment to smuggle gold and evade duty. This action manifests that applicant had no intention to pay the Customs duty. The Applicant had not declared the impugned gold as required under section 77 of the Customs Act, 1962. The method of concealment adopted to evade duty is important here. The applicant had pre-planned and selected an ingenious and risky method that he had used to avoid detection and thereby to evade payment of Customs duty. The confiscation of the gold is therefore, justified and thus, the Applicant had rendered himself liable for penal action.

8 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. 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, is liable for penalty

10 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.

11. Government observes that the manner in which the gold was concealed i.e. inside his own body and stitched as silver coated beads in the sequins design on ladies gowns found in his baggage, reveal the intention of the Applicant. It also reveals his criminal bent of mind and a clear intention to evade duty and smuggle the gold into India. Quantity of gold seized is not important, the method adopted is of relevance. Also, the gold was in primary form which indicates that the same was for commercial use. Government notes that applicant did not make himself available for the investigations. The circumstances of the case especially the ingenious concealment which could be risky to the applicant’s life, adopted by him, probates that the Applicant had no intention of declaring the gold to the Customs at the airport. The method of concealment indicates and the same was

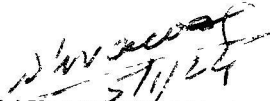


conscious and pre-meditated All these have been properly considered by the Appellate Authority and the lower adjudicating authority while absolutely confiscating the gold bars

12 The main issue in the case is the manner in which the impugned gold was being brought into the Country. The option to allow redemption of seized goods is the discretionary power of the adjudicating authority depending on the facts of each case and after examining the merits. In the present case, the manner of concealment being clever, ingenious and risky with a clear attempt to smuggle gold, it is a fit case for absolute confiscation which would also be a deterrent to such offenders. Thus, taking into account the facts on record and the gravity of the offence, the adjudicating authority had rightly ordered the absolute confiscation of gold But for the intuition and the diligence of the Customs Officers, the gold would have passed undetected The redemption of the gold will encourage non-bonafide and unscrupulous elements to resort to concealment and bring gold. Such acts of mis-using the liberalized facilitation process should be meted out with exemplary punishment and the deterrent side of law for which such provisions are made in law needs to be invoked. The order of the Appellate authority upholding the order of the adjudicating authority is therefore liable to be upheld.

13. The Government finds that the penalty of Rs. 95,000/- imposed on the applicant under Section 112(a) & (b) of the Customs Act, 1962 is appropriate and commensurate with the omission and commission committed by the applicant The Government does not find it necessary to interfere in the penalty imposed by the appellate authority

14. In view of above, the Government upholds the impugned OIA and rejects the instant Revision Application

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

ORDER NO. 02/2021-CUS (WZ)/ASRA/MUMBAI DATED 05.01.24

To,

- 1 Mr. Baisul Rahuman Shahul Hameed,  
c/o Adv. Kamalamalar Palani Kumar,  
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- 2 The Pr. Commissioner of Customs,  
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Copy to

1. Sr P.S to AS (RA), Mumbai
- ~~2~~ Guard file