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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

F.Nos. 380/70 - 71/B/WZ/2018-RA/129: Date of Issue : 12.01.2023

ORDER NO. 05-06/2023-CUS (WZ) /ASRA/MUMBAI DATED 09.01.2023
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 : Pr. Commissioner of Customs (Airport), CSI,
Mumbai.

Respondents : (i). Shri. Ansar Ibrahim,
(ii). Shri. Mohammed Nawaz Kodijal.

Subject : Revision Application filed, under Section 129DD of the
Customs Act, 1962 against the Order-in-Appeal No.
MUM-CUSTM-PAX-APP-198 & 199/18-19 dated
28.06.2018 [F.No. S/49-483/2015] passed by the
Commissioner of Customs (Appeals), Mumbai - III.

ORDER

These two revision applications have been filed by Pr. Commissioner of Customs (Airport), CSI, Mumbai (herein referred to as Applicant) against the Order-in-Appeal No. MUM-CUSTOM-PAX-APP-198 & 199/18-19 dated 28.06.2018 [F.No. S/49-483/2015] passed by the Commissioner of Customs (Appeals), Mumbai – III in respect of (i). Shri. Ansar Ibrahim and (ii). Shri. Mohammed Nawaz Kodijal (hereinafter referred to as Respondent No. 1 (R1)/ Respondent No. 2 (R2), respectively or alternatively both also referred to as Respondents).

2. Brief facts of the case are that on 03.02.2014, the Officers of Customs had intercepted the Respondents at CSI Airport when they had arrived from Sharjah by Air Arabia Flight No. G9-405 dated 02.02.2014. The Respondents had cleared themselves through the green channel of Customs and to the query put forth to them regarding possession of any dutiable goods, the Respondents had replied in the negative. The Respondents had a corrugated box each which upon screening indicated numerous pieces of metal. On examination of the both the corrugated boxes carried by the Respondents, 92 pieces and 76 pieces of metal strips made of gold were recovered. The respondents had concealed these pieces of metal strips in the bed sheets which had been then placed in the two corrugated boxes. 92 pieces of gold strips, totally weighing 1490 grams and valued at Rs. 44,77,450/- (LMV) were recovered from the corrugated box belonging to Respondent No. 1 and 76 pieces of gold strips, totally weighing 1080 grams, and valued at Rs. 32,45,400/- (LMV) were recovered from the corrugated box belonging to Respondent No. 2. The Government Approved valuer had certified that the gold strips were of 24 karats. The Respondents had admitted that the gold did not belong to them and that they had carried the same to India for a monetary

consideration and free travel. The gold strips were seized under the reasonable belief that the same had been smuggled to India in a clandestine manner and in contravention of the provisions of the Customs Act, 1962.

3. After due process of investigations and the law, the Original Adjudicating Authority i.e. the Jt. Commissioner of Customs, CSI Airport, Mumbai, vide Order-In-Original No. JC/RR/ADJN/018/2015-16 dated 13.04.2015 {DOI : 15.04.2015, [S/14-5-103/2014-Adjn] (SD/INT/AIU/89/2014 AP D)} ordered for the absolute confiscation of the gold strips, i.e. 92 pieces, totally weighing 1490 grams and valued at Rs. 44,77,450/- (LMV) seized from Respondent No. 1 and 76 pieces, totally weighing 1080 grams and valued at Rs. 32,45,450/- (LMV) seized from Respondent No. 2 under Section 111 (d), (1) and (m) of the Customs Act, 1962. Further a penalty of Rs. 4,50,000/- and Rs. 3,25,000/- were imposed on the respondents under Section 112 (a) and (b) of the Customs Act, 1962 on Respondent No. 1 & 2, respectively.

4. Aggrieved by this Order, the Respondents preferred an appeal before the appellate authority i.e. Commissioner of Customs (Appeal), Mumbai - III, who vide Orders-in-Appeal Nos. MUM-CUSTM-PAX-APP-198 & 199/18-19 dated 28.06.2018 [F.No. S/49-483/2015] allowed;

(i) Respondent No. 1 to redeem the impugned gold on payment of redemption fine of (i). Rs. 8,00,000/- (Rupees Eight Lakhs only) and

(ii). Respondent No. 2 to redeem the impugned gold on payment of a redemption fine of Rs. 6,00,000/- (Rupees Six Lakhs only), respectively.

The penalty of Rs. 4,50,000/- and Rs. 3,25,000/- imposed on the Respondent No. 1 & 2, resp., under Section 112 (a) and (b) of the Customs Act, 1962 was however, upheld.

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

5.1. that the order passed by the appellate authority was not legal and proper.

5.2. that the adjudicating authority had observed that the impugned gold had been concealed in a very planned and deceptive manner indicating concerted efforts on part of the Respondents and others involved in the smuggling; that the concealment was difficult to detect and had taken a lot of effort on part of the Customs Officers to recover the gold hidden in the checked-in corrugated box; that the manner of concealment had not been considered by the appellate authority.

5.3. that the Respondents in their statements recorded under Section 108 of the Customs Act, 1962, had admitted that the gold did not belong to them and that they carried the same for monetary consideration; that the manner in which the impugned gold had been concealed displayed their criminal bent of mind.

5.3. that redemption of the gold on payment of fine was the discretionary power of the adjudicating authority depending on facts of the case and examining the merits; that the circumstances of the case and the intention of the Respondents were not at all considered by the Appellate Authority while giving the respondents an option to redeem the seized goods on payment of a fine.

5.4. that the retraction filed by the Respondents had been rebutted by the Applicant and that the retraction was an afterthought.

5.5. that taking into account the facts on record and the gravity of the offence, the lower adjudicating authority had rightly ordered the absolute confiscation of the impugned gold. The Respondents had concealed the gold pieces in a very planned and deceptive manner which clearly showed their intention to evade duty and to smuggle the impugned gold into India. Had the Respondents not been

intercepted, they would have made got away with the impugned goods.

5.6. that to buttress their case, reliance is placed on decision of Hon'ble Supreme Court in the case of Samyanthan Murugesan v/s Commissioner of Customs (AIR), Chennai-1 as reported in 2010(254) ELT A15 (SC) and on some other cases also.

5.7. that to buttress their case, reliance is placed on the decision of the Apex Court in the case of Om Prakash Bhatia V/s. Commissioner of Customs, Delhi [2003 (155) E.L.T 423(SC)], that in matter of quasi-judicial discretion, interference by the Appellate Authority would be justified only if the lower authority's decision was illogical or suffered from procedural impropriety.

The applicant has alleged that the order passed by the appellate authority was not proper and hence prayed that the same may be set aside and that the Order-In-Original may be upheld or pass any other order as deemed fit.

6. Personal hearing in the matter was scheduled for 29.08.2019. After the change in the revisionary authority, online personal hearings in the case through the video conferencing mode were scheduled for 22.10.2021, 29.10.2021, 22.10.2021, 29.10.2021, 02.12.2021 and 08.12.2021. No one appeared for the Applicant and Respondents. Sufficient opportunity of personal hearings have been accorded to the Applicant and Respondents. The case is taken up for a decision based on the evidence on record.

7. The Government has gone through the facts of the case. The Respondents were intercepted after they had crossed through the green channel. The impugned gold pieces were discovered only when the baggages i.e. corrugated boxes of Respondents were screened. The Respondents, had gold which was in the form of strips the same had been consciously kept hidden in the contents placed in the corrugated boxes. The Respondents had

not declared the gold strips as required under section 77 of the Customs Act, 1962. The confiscation of the gold is therefore justified and thus, the Respondents 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. It is undisputed that Section (l) and (m) are also applicable in this case as the respondent had adopted innovative method and it was not included in the declaration. Therefore, the gold was also liable for confiscation under these Sections.

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".

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 respondents thus, 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. 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. 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. In case of goods, such as, gold which become prohibited for violation of certain conditions, the Adjudicating Authority may allow redemption

12. Government notes that while allowing the redemption of the goods, the AA at para 7 of his OIA has observed as under;

“7. I find that in terms of Section 2(33) of Customs Act, 1962, “prohibited goods” means any goods the import 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. I find that the prohibition relates to two types of goods, one which cannot be imported by any one, such as arms, ammunition, addictive substance viz. Narcotic Drugs, wild life products etc, which are categorised as ‘prohibited goods’. The other category includes the goods

the import / export of which is allowed subject to fulfilment of certain condition and if the conditions are complied with, such goods will not fall in the category of 'Prohibited Goods'. Accordingly, the intention behind the provisions of Section 125 is clear that import of such goods (which are prohibited in absolute terms) under any circumstances would cause danger to the health, welfare or morals of people as a whole and therefore the discretion should not be exercised. Second category includes the goods, the import/ export of which is permitted subject to certain conditions or to a certain category of persons and which are ordered to be confiscated for the reason that the condition has not been complied with. In this situation, the release of these goods would not cause any danger or harm to the public as a whole and though it is not mandatory for the adjudicating authority to allow redemption yet such cases may be considered positively for redemption. It is an admitted fact that the import of gold is allowed in case of certain category of persons, subject to certain conditions. No permission or license from any Govt. agency or Reserve Bank of India is required now for entitled persons to bring in gold. Therefore, the relaxation is very liberal for such persons. Accordingly, the goods falling under this category may be considered for release on redemption fine. To put it differently, if the goods are unconditionally prohibited from importation, the importer/owner will not be entitled for claiming redemption. On the other hand, if the goods are conditionally prohibited from importation (i.e subject to some conditions), importer/owner may claim redemption. Nevertheless, as per Section 125 of the Customs Act, 1962 framed under the statute, an option of redemption can be given in his discretion by an adjudicating/appellate authority, even in respect of prohibited goods".

13. Government finds that the AA has used his discretion in releasing the gold. The option to allow redemption of seized goods is the discretionary power of the adjudicating / appellate authority depending on the facts of each case and after examining the merits. Government observes that while allowing the goods to be redeemed, the AA has relied upon a host of cases where the adjudicating authority had released the gold of varying quantities and the same were accepted by the Department. Further, in the extant revision application, the applicant have not controverted the same. A case of parity and fairness was made out by the respondent before the AA.

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. Some of these cases have been cited in the OIA.

15. Government finds that the AA has relied upon the precedent case laws on the subject and have applied the case laws judiciously while granting release of the gold. A case that the respondents were habitual offenders had not been made out. Basic contention of the applicant is that the gold had been converted into strips . It is a fact that travelers / passengers resort to innovative methods to hoodwink the Customs and bring gold by evading Customs duty. All these have been taken into account while imposing fine and penalty. Government finds that the AA has rightly held that the respondents had claimed ownership of gold and investigations also failed to substantiate that the respondents were acting on behalf of somebody else. The AA has used discretion available under Section 125 of the Customs Act, 1962 and allowed the respondents to redeem the gold on payment of fine of Rs. 8,00,000/- and Rs. 6,00,000/- respectively.

Penalty imposed is also appropriate. Government finds the OIA passed by the AA to be legal and proper and is not inclined to interfere in the same.

16. Revision Application filed by the applicant is disposed of on above terms.

Shrawan
21/1/23
(SHRAWAN KUMAR)

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

ORDER NO. 05-06/2023-CUS (WZ) /ASRA/MUMBAI DATED 09.01.2023

To,

1. Pr. Commissioner of Customs, CSI Airport, Terminal - 2, Mumbai : 400 099.
2. Shri. Ansar Ibrahim, No. 4, 9th Cross Main Al Hilal - Madrisa, 1st block Padrayanpura, Bangalore - 560 026.
3. Shri. Mohammed Nawaz Kodijal, No. 1 - 44, Kodijal House, Konaje Post, Mangalore City, Karnataka - 574 199.
4. Office of the Principal Commissioner of Customs (Airport), Review Cell, 1st Floor, Avas Corporate Point, Andheri-Kurla Road, Marol, Andheri (E), Mumbai : 400 059.

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