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GOVERNMENT OF INDIA
MINISTRY OF FINANCE
(DEPARTMENT OF REVENUE)

8th Floor, World Trade Centre, Centre – I, Cuffe Parade,
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F.No. 380/98/B/WZ/2018-RA/123 : Date of Issue 12.01.2023

ORDER NO. 07/2023 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.

F.No. 380/98/B/2018-RA

Applicant : Pr. Commissioner of Customs, CSI Airport, Mumbai.

Respondent : Shri. Shaikh Shamshad Ahmed Fahimuddin

Subject : Revision Applications filed respectively, under Section 129DD
of the Customs Act, 1962 against the Order-in-Appeal No. MUM-
CUSTM-PAX-APP-541/2018-19 dated 18.09.2018 [F.No. S/49-
528/2016] issued on 24.09.2018 passed by the Commissioner of
Customs (Appeals), Mumbai – III.

ORDER

This revision application has been filed by Pr. Commissioner of Customs, CSI Airport, Mumbai (hereinafter referred to as the Applicant) against the Order-in-Appeal Nos. MUM-CUSTOM-PAX-APP-541/2018-19 dated 18.09.2018 [F.No. S/49-528/2016] issued on 24.09.2018 passed by the Commissioner of Customs (Appeals), Mumbai – III.

2. Brief facts of the case are that the respondent on arrival at CSI Airport, Mumbai from Dubai on 15.04.2015 by Spice Jet Flight No. SG-014 /15.04.2015 was intercepted by the Customs Officers after he had cleared himself through the green channel. It was noticed that the respondent was returning back from Dubai within one day, having left for Dubai on 14.04.2015. In col. 9 of the Customs declaration form, the respondent had shown the 'Total value of dutiable goods being imported' as Nil. On screening of his checked-in baggage, some unusually dark image in the electric voltage convertor was seen, indicating presence of some heavy metal having been concealed in it. Examination of the electric voltage stabiliser led to the recovery of 3 cut pieces of gold cleverly concealed in it, totally weighing 1048 gms of gold of 999.9% purity and valued at Rs 25,49,994/-. The same had been wrapped in in silver coated foil. The respondent admitted to possession, carriage, non-declaration and recovery of the gold.

3. After due process of the law, the Original Adjudicating Authority (OAA), viz Addl. Commissioner of Customs, CSI Airport, Mumbai vide Order-in-Original No. ADC/RR/ADJN/335/2016-17 dated 14.10.2016 [(S/14-5-272/2015-16-ADJN)(SD/INT/AIU/172/2015-AP'C)] ordered for the absolute confiscation of the 3 cut pieces of gold, totally weighing 1048 grams, valued at Rs. 25,49,994/- under Section 111(d), 111(l) & 111(m) of the Customs Act, 1962 and a penalty of Rs. 2,50,000/- was also imposed on the respondent under Section of 112 (a) and (b) of Customs Act, 1962.

4. Aggrieved by the said order, the respondent filed an appeal before the appellate authority viz, Commissioner of Customs (Appeals), Mumbai – III who vide Order-In-Appeal No. MUM-CUSTOM-PAX-APP-541/2018-19 dated 18.09.2018 [F.No. S/49-528/2016 issued on 24.09.2018 allowed the impugned gold to be redeemed on payment of a fine of Rs. 4,75,000/-. However, the penalty of Rs. 2,50,000/- imposed on the respondent by the OAA was upheld.

5. Aggrieved with the above Order-in-Appeal, the Applicant has filed this revision application on the following grounds;

5.01. that the respondent was returning from Dubai after one day as he had departed to Dubai on 14.04.2015; that "Total value of dutiable goods being imported "at column no 9 of the declaration form was declared by respondent as Nil.; that the respondent had failed to make a true declaration of the contents of his baggage to Customs as required under Section 77 of the Customs Act, 1962; that the goods had been rendered as prohibited goods in terms of Section 2(33) of the Customs Act, 1962 and therefore the goods under seizure were liable to confiscation under Section 111(d), (1) & (m) of the Customs Act, 1962.

5.02. the respondent had admitted that he was aware that import of gold without declaration and payment of Customs duty was an offence punishable under Customs Act and admitted possession, concealment, carriage, non-declaration and recovery of the seized gold.

5.03. that the gold never belonged to the respondent and he was acting as a carrier for monetary consideration.

5.04. that the OAA while confiscating the goods absolutely had specifically held that the nature of concealment was such that detection was not possible by routine method of examination and it required special and extra efforts by the Customs Officers to first screen all the baggage and then retrieve the impugned gold concealed in the electric voltage convertor; that such concealment is nothing but ingenious concealment and merits absolute confiscation. Adjudicating authority relied upon the judgment of Hon'ble Supreme Court in S. Murugesan Vs. Commissioner-2010 (254) ELT A 15 (SC) and ordered absolute confiscation

- 5.05. that the option to allow redemption of seized goods was the discretionary power of the adjudicating authority depending on the facts of each case and after examining the merits; that in the present case, the respondent had not declared the said goods to Customs with an intent to avoid payment of Customs duty; that this was an ingenious concealment and the circumstances of the case and the intention of the respondent had not been considered by the Appellate Authority while giving him option to redeem the seized goods on payment of fine and penalty.
- 5.06. that the appellate authority had relied upon order of CESTAT, Chennai in the case of A. Rajkumari Vs CC (Chennai) 2015 (321) ELT 540 (Tri.-Chennai) for drawing the conclusion for release of the impugned gold on redemption fine and also held that the Hon'ble Apex Court vide order in the case as reported in 2015 (321) ELT A 207 (SC) had affirmed the said CESTAT Order; that this Order had been dismissed by the Apex Court on the grounds of delay and not on merits; that citing this case by the appellate authority was not proper in view of the fact that the Hon'ble Apex Court in case of Samynathan Murugesan vs. Commissioner (2010 (254) E.L.T. AIS (S.C.)), upheld the decision of Madras High Court's Judgment as reported in 2009 (247) E.L.T. 21 (Mad) of absolute confiscation of gold by the lower adjudicating authority for ingenious concealment of gold inside a T.V. Set without declaring to Customs in violation of provisions under Section 11 & 77 of Customs Act, 1962; that in the present case manner of concealment was ingenious and the adjudicating authority had rightly ordered for its absolute confiscation.
- 5.07. that the redemption on payment of fine and penalty would depend on the facts and circumstances of the case and other cases cannot be binding as a precedent; that judgment of Hon'ble Delhi High Court in the case of Jain Exports Vs Union of India 1987(29) ELT753 would be squarely applicable in this case.
- 5.08. the applicant has relied upon the case of Commissioner of Customs, Tuticorin V/s Sai Copiers (2008 (226) E.L.T. 486 (Mad)) of High Court, Madras wherein it was held that any order of the lower authority could be interfered with only in circumstances in which it was demonstrated that such an order was purely arbitrary, whimsical and resulting in miscarriage of justice.
- 5.09. the applicant has relied on the Hon'ble Supreme Court case of Om Prakash Bhatia Vs 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 suffers from procedural impropriety

5.10. that in the instant case, the goods was attempted to be smuggled by concealing in electric voltage convertor and being high value, the appellate authority had erred in allowing the redemption of the goods.

Applicant has prayed to the revisionary authority to set aside the order of the appellate authority and to restore the OIO or pass any order as deemed fit.

6(a). Personal hearings in the case was scheduled on 06.09.2019. Thereafter, upon the change of the revisionary authority personal hearing through the online video conferencing mode were scheduled for 22.10.2021, 29.10.2021, 02.12.2021 and 08.12.2021. None appeared for the applicant or the respondent. Sufficient opportunities have been given to both the applicant and the respondent to put forth their case. As none appeared, the case is being taken up for a decision on the basis of evidence on record.

6(b). The Advocate for the respondent vide his letter dated 17.09.2019 has informed that the impugned gold was disposed off and that the respondent had received the sales proceed. They have prayed that the revision application filed by the department be rejected.

6(c). The applicant vide their letter no. AirCus/39R/Misc-38/2018-19 dated 25.06.2019 have forwarded copies of the surety bond, indemnity bond, PAN card, driving licence etc of the persons who have executed bond and surety, for reference in further proceedings. It is also stated that the refund has been sanctioned to the respondent.

7. The Government has gone through the facts of the case and notes that the respondent had not declared the gold while availing the green channel facility. Thereafter, on interception he had been asked whether he was carrying any dutiable items to which he had replied in the negative. The impugned gold was

innovatively concealed inside the electric voltage converter. The respondent clearly 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 was given an opportunity to declare the dutiable goods in his possession. Had he not been intercepted, the respondent would have gotten away with the gold concealed in the electric voltage converter. The Government finds that the confiscation of the gold is therefore, justified.

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 gold was found concealed and it was not included in the declaration. Therefore, the gold was also liable for confiscation under these Sections.

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. 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 respondent thus, liable for penalty.

11. 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.

12. 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

13. Government notes that while allowing the redemption of the goods, the AA at para 6 & 7 of his OIA has observed as under;

*“6. Regarding exercising the discretion of redemption, I find that Section 125 of Customs Act, 1962 provides that in case of **prohibited goods** the adjudicating authority **may** give an option of redemption and in this way he has discretionary power but for other than prohibited goods the adjudicating authority has to give option to pay fine in lieu of confiscation and in this way the adjudicating authority **shall** allow redemption to the offender:*

*"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"*

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”.

14.. 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.

15. 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.

16. 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. Quantity of gold was not large. A case that the respondent is a habitual

offender had not been made out. Basic contention of the applicant is that the gold had been concealed ingeniously inside electric voltage converter that the respondent had not declared the same. 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 there was nothing to suggest that the gold was brought by professional carriers for somebody else i.e. in other words this is a case of misdeclaration of gold rather than of brazen smuggling. The AA has used discretion available under Section 125 of the Customs Act, 1962 and allowed the respondent to redeem the gold on payment of a fine of Rs. 4,75,000/-. Government finds the OIA passed by the AA to be legal and proper and is not inclined to interfere in the same.

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


(SHRAWAN KUMAR)

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

ORDER No. 07/2023-CUS (WZ) /ASRA/MUMBAI DATED 01.01.2023

To,

1. Shri. Shaikh Shamshad Ahmed Fahimuddin, Kismat Colony, Goodwill Apartment, B-Wing, Room No. 2, Kausa, Mumbra, Thane - 400 612.
2. Shri. Shaikh Shamshad Ahmed Fahimuddin, Ahmed Manor Palace CHS, R.No. 303, B-Wing, Dilima Street, Mazgaon, Mumbai - 400 010.
3. Pr. Commissioner of Customs, CSI Airport, Terminal - 2, Level - 2, Andheri East, Mumbai - 400 099 Anna International Airport, Meenambakkam, Chennai - 600 027.

Copy to:

1. Shri. Prakash Shingrani, Advocate, New MIG Golony, 12/334, 6th Floor, Viyek, Behind P.F Office, Bandra East, Mumbai -400 051.
2. Sr. P.S. to AS (RA), Mumbai.
3. File Copy.
4. Notice Board.