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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. 371/68/B/14-RA
F. No. 380/96/B/14-RA

Date of Issue 13/12/2018

ORDER NO. ¹⁰²⁶⁻¹⁰²⁷ /2018-CUS (WZ) / ASRA / MUMBAI/ DATED 30.11.2018
OF THE GOVERNMENT OF INDIA PASSED BY SHRI ASHOK KUMAR
MEHTA, PRINCIPAL COMMISSIONER & EX-OFFICIO ADDITIONAL
SECRETARY TO THE GOVERNMENT OF INDIA, UNDER SECTION 129DD
OF THE CUSTOMS ACT, 1962.

Applicant : Shri Alicherry U. Mohammedbuhari

Respondent : Commissioner of Customs, CSI Airport, Mumbai

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Respondent : Shri Alicherry U. Mohammedbuhari

Subject : Revision Applications filed under Section 129DD of the
Customs Act, 1962 against the Order-in-Appeal No. MUM-
CUSTM-PAX-APP-242&243-14-15 dated 7.07.2014 passed
by the Commissioner of Customs(Appeals), Mumbai Zone-
III.

ORDER

A Revision Application has been filed by Shri Alicherry U. Mohammedbuhari (herein referred to as the "passenger") against the Order-in-Appeal No. MUM-CUSTOM-PAX-APP-242&243-14-15 dated 7.07.2014 passed by the Commissioner of Customs(Appeals), Mumbai Zone-III. The Department has also filed Revision Application against the Order-in-Appeal No. MUM-CUSTOM-PAX-APP-242&243-14-15 dated 7.07.2014 passed by the Commissioner of Customs(Appeals), Mumbai Zone-III.

2.1 On 13.01.2014, the passenger arrived from Dubai by flight no. 6E64 and opted for clearance through the Green Channel. On suspicion, the Officers of Air Intelligence Unit diverted him to the Red Channel for detailed examination of his baggage. The detailed personal search resulted in the recovery and seizure of 1kg gold bar valued at Rs. 24,44,120/-(Rupees Twenty Four Lakhs Forty Four Thousand One Hundred Twenty Only) which was found in the pocket of the black colour pant worn by the said passenger. The said gold bar had been concealed with the intention of smuggling the same into India. The passenger admitted to have carried the gold on behalf of his brother.

2.2 The passenger in his statement dated 13.01.2014 stated that the gold was purchased in his name by his brother, Shri Nizamuddin who was working in Dubai and that it was to be handed over to somebody in his native place. He further stated that his brother had asked him to pay customs duty on the same. However, he could not find the counter to declare the gold and pay duty. The passenger had accepted possession, carriage, recovery of the seized gold carried by him.

2.3 The case was adjudicated by the Additional Commissioner of Customs, CSI Airport, Mumbai vide Order-in-Original No. ADC/ML/ADJN/10/2014-15 dated 9.05.2014. He found that the passenger had failed to make mandatory declaration about dutiable goods and he admitted that the impugned goods

were to be handed over to some person specified by his brother. Reliance was placed on the judgment of the Hon'ble High Court in the case of Abdul Razak vs. UOI. The Additional Commissioner of Customs ordered absolute confiscation of the gold valued at Rs. 24,44,120/- under Section 111(d), (l) & (m) of the Customs Act, 1962 and imposed penalty of Rs. 2,50,000/- on the passenger under Section 112(a) & (b) of the Customs Act, 1962.

3. Aggrieved by the Order-in-Original, the passenger filed appeal alongwith stay application before the Commissioner(Appeals) on the grounds that the impugned goods were purchased by him; that he could not declare the gold as he was unable to locate the counter to declare the goods and due to language problem; that he being an NRI was eligible to import gold at concessional rate of duty and requested to set aside the order of absolute confiscation and penalty imposed.

4. The case was decided by the Commissioner(Appeals) vide Order-in-Appeal No. MUM-CUSTM-PAX-APP-242&243/2014-15 dated 7.07.2014 by placing reliance on the judgment of the Tribunal in the case of Dhanak Madhusudan Ramji vs. Commissioner of Customs(AP), Mumbai[2009(237)ELT 280(Tri-Mum)] and of the Hon'ble Supreme Court[2010(252)ELT A102(SC)]. He modified the Order-in-Original by holding that the passenger could not be called a carrier; allowed the goods to be redeemed on payment of fine of Rs. 5,00,000/-(Rupees Five Lakhs Only) under Section 125 of the Customs Act, 1962, upheld the penalty imposed by the adjudicating authority as reasonable and allowed the benefit of concessional rate of duty in respect of eligible quantity.

5. Aggrieved by the order of the Commissioner(Appeals), the passenger filed for revision on the following grounds:

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- (i) The passenger was an NRI and was eligible to import 1 kg gold in terms of Notification No.12/2012. Moreover, he was carrying the exact amount of foreign currency to pay the duty on the impugned goods on arrival.
- (ii) The only fault of the passenger was that he was not able to converse properly in any language other than Malayalam and therefore could not inform the customs officers about the duty payable.
- (iii) The passenger had not crossed the customs area. He could have been properly guided by the customs officers to the proper channel to pay duty on the impugned goods.
- (iv) The passenger could have derived a maximum benefit of Rs. 2,50,000/- (i.e. 10% of the value of gold) whereas a redemption fine of Rs. 5,00,000/- and personal penalty of Rs. 2,50,000/- had been imposed which was very harsh.
- (v) It was prayed that the redemption fine and penalty be reduced since it is very much on the higher side.
- (vi) It was prayed that the Order-in-Appeal be set aside, that the redemption fine of Rs. 5,00,000/- be reduced and that the personal penalty of Rs. 2,50,000/- be set aside or reduced.

6. On the other hand, the Department found that the Order-in-Appeal passed by the Commissioner(Appeals) was not legal and proper for the following reasons:

- (i) The passenger had concealed in his trouser pockets and had opted for the green channel without declaring the gold to the customs authorities.
- (ii) The passenger had failed to make a true declaration as required under Section 77 of the Customs Act, 1962.
- (iii) As per the passengers statement recorded on 13.01.2014, the gold had been purchased by his brother in his name. His brother had told

him to pay the customs duty but the passenger could not find the counter to declare the goods and pay the duty. He had accepted possession, carriage and recovery of the seized gold carried by him. Therefore, it was clear that the passenger was acting as a carrier for his brother Shri Nizamuddin.

- (iv) The adjudicating authority had relied upon the judgment of the High Court of Kerala in the case of Abdul Rasak vs. UOI wherein it had specifically been held that the petitioner was only a carrier smuggling goods on behalf of others for consideration and therefore the goods were required to be confiscated absolutely.
- (v) The option to allow redemption of goods on payment of fine was a discretionary power. The manner in which the goods had been concealed showed a criminal bent of mind, intent to evade payment of customs duty and smuggle the gold into the country. The appellate authority has failed to consider these facts while allowing the redemption of the impugned goods on payment of fine.
- (vi) The adjudicating authority had taken an informed decision to absolutely confiscate the goods and impose penalty on the passenger and therefore the Commissioner(Appeals) should not have allowed redemption of the goods. The Commissioner(Appeals) has allowed redemption of the goods on payment of fine without pointing out any infirmity in the order of the adjudicating authority.
- (vii) The Department placed reliance on the case laws of Commissioner of Customs, Tuticorin vs. Sai Copiers[2008(226)ELT 486(Mad)], Om Prakash Bhatia vs. Commissioner of Customs, Delhi[2003(155)ELT 423(SC)], Samynathan Murugesan vs. Commissioner[2010(254)ELT A15(SC)]. The Department prayed that the impugned goods may not be allowed to be redeemed to the passenger on payment of fine and reduced penalty.

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7. The passenger was issued a show cause notice on 29.04.2015 calling upon them to show cause as to why the Order-in-Appeal should not be annulled and other orders not be passed in response to the revision application filed by the Department against the impugned Order-in-Appeal. Personal hearings were granted in the matter on 28.03.2018, 17.05.2018, 31.05.2018, 29.08.2018 & 11.09.2018. However, none appeared on behalf of the passenger or the Department.

8. The Government has gone through the case records. The passenger had attempted to clear himself through the green channel. The Customs Officers had intercepted him and gold was recovered from the pocket of the pant worn by the passenger. As such, the gold does not appear to have been ingeniously concealed. The import of gold is restricted but not prohibited. Although some contentions have been raised by the Department regarding the ownership of the gold, there is no investigation to establish the fact of ownership of the gold by the brother of the passenger. In fact, the copy of invoice for the gold seized has been issued in the name of the passenger. Government therefore infers that there is no conclusive evidence to substantiate the allegation that the passenger is a carrier of the gold.

9. There are also claims and counter claims from the passenger and the Department regarding the aspect of filling the Declaration Form. The passenger has claimed that the form was incomplete as he was not proficient in the language and the Department alleges that this fact indicates failure to adhere to the requirements of Section 77 of the Customs Act, 1962. Both sides agree that the declaration form was incomplete. It is observed that there are no specific findings to counter these submissions made by the passenger.

10. The passenger is an NRI who is returning to India on vacation. It is observed that the orders of the Commissioner(Appeals) allowing the passenger the benefit of concessional rate of duty in respect of the eligible quantity have

not been challenged in the revision application filed by the Department. Government therefore takes note that this aspect has been conceded by the Department.

11. In so far as the decision of the Commissioner(Appeals) to allow redemption of the seized goods is concerned, Government observes that there are a catena of judgments which align with the view that the discretionary powers vested with the lower authorities under Section 125(1) of the Customs Act, 1962 have to be exercised. Moreover, the goods have not been ingeniously concealed by the passenger and there is no contest on the fact that he is a passenger eligible to import gold. In these circumstances, Government is inclined to agree with the Commissioner(Appeals) that the impugned goods can be released on imposition of redemption fine and penalty. However, the redemption fine and penalty should be commensurate with the offence committed by the passenger to act as a deterrent and to dissuade such acts in future. Although the gold had not been concealed ingeniously, the passenger had failed to declare the impugned goods and therefore the redemption fine cannot be as low as ordered in the Order-in-Appeal. However, the facts of the case justify reduction in the penalty imposed on the passenger.

12. The impugned Order in Appeal is set aside. The Government allows redemption of the gold bar weighing 1 kg. valued at Rs. 24,44,120/- (Rupees Twenty Four Lakhs Forty Four Thousand One Hundred Twenty Only). The redemption fine imposed is increased from Rs. 500,000/- (Rupees Five Lakhs Only) to Rs. 7,50,000/-(Rupees Seven Lakhs Fifty Thousand Only) under section 125 of the Customs Act, 1962. The penalty imposed on the passenger is reduced from Rs. 2,50,000/-(Rupees Two Lakhs Fifty Thousand Only) to Rs. 1,50,000/- (Rupees One Lakh Fifty Thousand Only) under Section 112(a) and (b) of the Customs Act, 1962. In case the option is exercised to redeem the confiscated gold on payment of fine and penalty, the passenger is allowed to

clear the gold for home consumption on payment of concessional rate of duty as allowed by the Commissioner of Customs(Appeals) in the impugned order.

13. Revision applications filed by the passenger and the department are disposed off in the above terms.

14. So ordered.

(Handwritten signature)
20.11.2018

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

ORDER No. ¹⁰²⁶⁻¹⁰²⁷ /2018-CUS (WZ) /ASRA/Mumbai

DATED 30-11-2018

To,

- 1) Shri Alicherry U. Mohammedbuhari
Alicherry House,
P.O. Chemnad, Kasargod Dist.,
Kerala
- 2) Shri A. M. Sachwani & Ors.
Advocates, High Court,
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Copy to:

1. The Commissioner of Customs(Airport), Mumbai.
2. The Commissioner of Customs(Appeals), Mumbai-III
3. Sr. P.S. to AS (RA), Mumbai.
4. Guard File.
5. Spare Copy.