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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.No. 371/432/B/2022-RA

758

Date of Issue

01.02.2024

ORDER NO. 105 /2024-CUS (WZ)/ASRA/MUMBAI DATED ³⁰ .01 2024 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 : Shri. Subar TM

Respondent : Pr. Commissioner of Customs, CSMI Airport, Mumbai

Subject : Revision Application filed, under Section 129DD of the Customs Act, 1962 against the Order-in-Appeal No MUM-CUSTM-PAX-APP-610/2022-23 dated 11 07 2022 [Date of issue: 12 07.2022] F. No. (S/49-1965/2021) passed by the Commissioner of Customs (Appeals), Mumbai – III.

ORDER

This revision application has been filed by Shri. Subair TM (herein referred to as Applicant) against the Order-in-Appeal No. MUM-CUSTM-PAX-APP-610/2022-23 dated 11 07 2022 [Date of issue: 12 07 2022] F. No (S/49-1965/2021) passed by the Commissioner of Customs (Appeals), Mumbai – III.

2(a) Briefly stated the facts of the case are that the Applicant a domestic passenger, was intercepted when he disembarked from the aircraft at the Chhatrapati Shivaji Maharaj International Airport (CSMIA), Mumbai on 07 10.2019 which had arrived from Kozhikode. The applicant was in possession of a black coloured trolley bag and had no checked-in baggage. The applicant arrived from Kozhikode as a domestic passenger onboard Air India Flight No AI-582 / 07 10 2019. On examination of his baggage two packages wrapped with grey coloured adhesive tapes containing 04 gold bars weighing 467 grams were of 24 karats were valued at Rs. 16,13,945/- were recovered.

2(b). In his statement recorded under Section 108 of the Customs Act, 1962, the applicant revealed that his uncle Mr Muzammil who stays in Dubai had arranged for his travel from Kozhikode to Mumbai by Air India Flight No AI 582 dated 07.10 2019 in seat no 20F, that he was told by his uncle to take the impugned gold from under seat no 20F booked by him (uncle), that the impugned gold did not belong to him, that he concealed the gold bars to avoid detection from Customs, that after handing over the impugned gold was to be handed over to a designated person outside Mumbai airport; that he would be paid Rs 10,000/- from that person.

2(c) The gold bars were assayed by a Government Approved Valuer who certified that the 04 gold bars weighing 467 grams were of 24 karats were valued at Rs 16,13,945/-

3 The Original Adjudicating Authority viz, Addl Commissioner of Customs, CSMI Airport, Mumbai vide Order-In-Original No ADC/VDJ/ADJN/131/2021-22 dated 22 07.2021 through ordered for the absolute confiscation of the 04 gold bars weighing 467 grams were of 24 karats were valued at Rs 16,13,945/- under Section 111(d), (l) &

(m) of the Customs Act, 1962. A penalty of Rs. 1,50,000/- was imposed on the applicant under Section 112(a) and (b) of the Customs Act, 1962

4(a) Aggrieved by the said order, the applicant filed appeal before the Appellate Authority (AA) viz, Commissioner of Customs (Appeals), Mumbai – III who vide his Order-in-Appeal Nos. MUM-CUSTOM-PAX-APP-610/2022-23 dated 11.07.2022 [Date of issue 12.07 2022] F. No. (S/49-1965/2021) upheld the OIO and disposed the appeal.

5 Aggrieved with the above order of the appellate authority, the Applicant has filed this revision application on the following grounds of revision, that,

5.1 They submitted that the impugned order-in-appeal was bad in law and unjust and had been passed without giving due consideration to the documents on record and facts of the case; that dutiable goods brought in were neither restricted nor prohibited, that there was no previous case registered against the applicant.

5.2 that a bare perusal of sub-section (1) of Section 125 of the Customs Act, 1962, made it crystal clear that an option to pay fine in lieu of confiscation was required to be given in respect of the impugned goods, which even as per the Respondent were dutiable goods

5.3 that absolute confiscation of the impugned dutiable goods would only mean interpreting or giving a meaning to the said sub-section (1) of Section 125 of the Customs Act, 1962, in a manner neither authorized nor intended by the Act.

5.4 They relied upon a number of judgments of the Courts and the Tribunal, wherein it was held that gold is not a prohibited item and the same is restricted and therefore it should not be confiscated absolutely and option to redeem the same on redemption fine ought to be given

5.4.1 The Hon'ble Supreme Court of India in Hargovind Das K Joshi Versus Collector of Customs reported in 1992 (61) E.L.T 172 (S.C.)

5.4.2 The Hon'ble Tribunal in the case of ALFRED MENEZES v/s COMMISSIONER OF CUSTOMS, MUMBAI reported in 2011 (236) E.L.T. 587 (Tri. - Mumbai)

- 5.4.3 The Hon'ble Tribunal in the case of T ELVARASAN v/s COMMISSIONER OF CUSTOMS (AIRPORT), reported in 2011 (266) E.L T 167 (Mad)
- 5.4.4 The Hon'ble Tribunal in the case of YAKUB IBRAHIM YUSUF v/s COMMISSIONER OF CUSTOMS, MUMBAI reported in 2011 (263) E.L.T. 685 (Tri. - Mumbai)
- 5.4.5 The Hon'ble Tribunal in the case of Mohini Bhatia Vs Commissioner of Customs reported in 1999 (106) E.L T 485 (Tri. - Mumbai).
- 5.4.6 Universal Traders v. Commissioner - 2009 (240) E L T A78 (S.C) also the Apex Court allowed redemption of exported goods being not prohibited
- 5.4.7 Gauri Enterprises v CC, Pune - 2002 (145) E L.T 706 (Tri.-Bang.) the CESTAT held that if similar goods have been released on fine earlier, selective absolute confiscation is not called for absolute confiscation should be an exception rather than a rule.
- 5.4.8 In Shaik Jamal Basha v. Government of India - 1997 (91) E.L.T 277 (A P.) the Hon'ble High Court held that gold is allowed for import on payment of duty and therefore Gold in the form other than ornaments imported unauthorized can be redeemed.
- 5.4.9 In VP Hameed v. Collector of Customs, Mumbai - 1994 (73) E L T. 425 (Tri) it was held that there is no bar in allowing redemption of gold being an item notified under Section 123 of Customs Act, 1962 or for any other reason
- 5.4.10 In P. Sinnasamv. Commissioner of Customs, Chennai - 2007 (220) E.L.T 308 (Tri - Chennai), the Hon'ble Court allowed redemption of absolutely confiscated gold
- 5.4.11 In Union of India Vs Dhanak M Ramji - 2009 (248) E L T 127 (Bom.) affirmed vide 2010 (252) E.L.T. A102 (S C) it was held that gold is not a prohibited item and discretion of redemption can be exercised to the person from whom it was recovered.
- 5.4.12 In A. Rajkumary CC (Chennai) - 2015 (321) E.L.T. 540 (Tri.-Chennai) the redemption of 70 gold bars brought by concealing in air conditioner was allowed and fine was reduced to 14%.
- 5.4.13 In Kadar Mydin v. Commissioner of Customs (Preventive), West Bengal - 2001 (136) E L T 758 it was held that in view of the liberalized gold policy of the Government, absolute confiscation is unwarranted and redemption can be allowed.
- 5.4.14 In Sapna Sanjeev Kohli v. Commissioner of Customs, Airport, Mumbai - 2008 (230) E.L.T 305 the Tribunal observed that the frequent traveller was aware of rules

and regulations and absolute confiscation of gold jewellery not warranted which may be cleared on payment of redemption fine

5.4.15 In *Vatakkal Moosa v. collector of Customs, Cochin* - 1994 (72) E.L.T. 473 (G.O.I.), *Halithu Ibrahim v. CC* [2002-TIOL 195-CESTAT-MAD. = 2002 (148) E.L.T 412 (Tribunal)]; *Krishnakumari v CC, Chennai* - 2008 (229) E.L.T 222 (Tri-Chennai) ; *S Rajagopal v CC, Trichy* - 2007 (219) E L T 435 (Tri-Chennai), *M Arumugam v CC, Tiruchirappalli*, 2007 (220) E L T 311 (Tri-Chennai) also it was held that absolute confiscation was not warranted and redemption of gold should be allowed.

5.4.16 In the *COMMR. OF C EX & S.T, LUCKNOW V/s MOHD. HALIM MOHD. SHAMIM KHAN* it was held only prohibited goods cannot be released on payment of redemption fine - Gold not prohibited goods and cannot be confiscated absolutely - Order permitting release of such gold on payment of redemption fine in lieu of confiscation upheld - Section 125 of Customs Act, 1962. [paras 4, 5]

5.5 Applicant prayed to the revisionary authority to release the gold in terms of section 125 of the Customs Act, 1962 on nominal Redemption Fine along with applicable duty; substantial reduction of personal penalty or pass any order as deemed fit

Applicant has prayed to the revision authority to set aside the impugned Order-In-Appeal Original and to release the gold unconditionally and penalty imposed on him may be set aside.

6. Shri N J Heera Advocate appeared before me and submitted that the applicant brought small quantity of gold for personal use. He further submitted that there is no ingenious concealment and applicant is not a habitual offender. He requested to allow the redemption of gold on reasonable fine and penalty.

7.1. 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 123. Burden of proof in certain cases. -

(1) Where any goods to which this section applies are seized under this Act in the reasonable belief that they are smuggled goods, the burden of proving that they are not smuggled goods shall be -

(a) in a case where such seizure is made from the possession of any person,

(i) on the person from whose possession the goods were seized, and

(ii) if any person, other than the person from whose possession the goods were seized, claims to be the owner thereof, also on such other person,

(b) in any other case, on the person, if any, who claims to be the owner of the goods so seized

(2) This section shall apply to gold, and manufactures thereof, watches, and any other class of goods which the Central Government may by notification in the Official Gazette specify.

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.

7.2. 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 was liable for confiscation under Section 111(d) of the Customs Act. Section 123 places burden of proof on the person from whom gold is seized. Investigation revealed that the applicant could not discharge that burden. Therefore, the gold was liable to confiscation under these Sections.

8.1. 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".

8.2. 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 Applicants thus liable for penalty.

9 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.

10 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. In case of prohibited goods, such as, the gold, the Adjudicating Authority may allow redemption. 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. Thus, adjudicating authority can allow redemption under Section 125 of

any goods which are prohibited either under the Customs Act or any other law on payment of fine.

11.1 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 Shik 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

11.2 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

12. Government has gone through the facts of the case, written submissions made by the applicant, etc. Government notes that the applicant was travelling in the domestic sector and had not come to India from abroad

13 Case of the respondent is that gold had been concealed under the seat of the aircraft, that the applicant had removed the same and was attempting to take it outside without filing a declaration, that the gold was in primary form of high purity, in the shape of bars, that the applicant who had carried the gold in the domestic sector had no intention to declare the gold in his possession and had used the concealment and the domestic sector in a pre-planned and deliberate manner to hoodwink the law implementing authorities. Gold recovered did bear foreign markings and it was in uniform shape and size. Investigation could not establish any link with an international passenger. However, fact remains that applicant could not discharge the burden of presumption of being smuggled goods under Section 123 of the Customs Act, 1962.

14. 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 though the impugned gold was foreign marked, they were not ingeniously concealed, in fact the applicant admitted of carrying the gold when he was intercepted and he had removed it from his shirt pocket. Further, there were no allegations that the Applicant is a habitual offender and was involved in similar offences earlier. The absolute confiscation of the gold, is therefore harsh and disproportionate. Government considers granting an option to the Applicant to redeem the gold on payment of a suitable redemption fine, as the same would be more reasonable and fair.

15 Government notes that the fact remains that gold was recovered from the possession of the applicant. As discussed in the preceding paras, as required under Section 123 of the Customs Act, 1962, the onus to prove that the gold was not smuggled was on the applicant. During the investigation stage, the applicant had failed to produce any document or any credible evidence to show that he had made local purchases of the gold. In absence of any such evidence by the applicant, gold is presumed to be smuggled as per Section 123 of Customs Act, 1962. Thus, applicant had made himself liable to penalty under Section 112(a) & (b) of the Customs Act, 1962. The value of the gold in this case is Rs 16,13,945/-. Government notes that the quantum of penalty of Rs 1,50,000/- imposed on the applicant is commensurate to the omissions and commissions of the Applicant.

16 For the aforesaid reasons, Government modifies the impugned Order-In-Appeal No MUM-CUSTOM-PAX-APP-610/2022-23 dated 11 07 2022 as under,

(i). Government sets aside the absolute confiscation upheld in the OIA. The 04 gold bars weighing 467 grams were of 24 karats were valued at Rs. 16,13,945/- is allowed to be redeemed on payment of a redemption fine of Rs 3,00,000/- (Rupees Three Lakhs only) and duty at applicable rates,

(ii). The penalty of Rs. 1,50,000/- imposed on the applicant under Section 112(a) and (b) of the Customs Act, 1962 by the Original Adjudicating Authority and upheld by the Appellate Authority is sustained.

17. The Revision Application is decided on the above terms.

(SHRAWAN KUMAR)

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

ORDER NO. 105 /2024-CUS (WZ)/ASRA/MUMBAI DATED 30 .01.2024

To,

1. Shri. Subar TM, H No 13/126, Mulyar (GP), Mundakal House (PO), Mulyar, Kasargod Dist., Kerala 6710541.
2. Principal Commissioner of Customs, Chhatrapati Shivaji Maharaj International Airport, Terminal-2, Level-II, Sahar, Andheri, East, Mumbai - 400 099.

Copy to.

- 1 Shri. N J Heera, Advocate, Nulwala Building, Ground Floor, 41, Mint Road, Opp GPO, Fort, Mumbai 400001.
- 2 Sr. P S. to AS (RA), Mumbai
3. File Copy.
- 4 Notice Board.

