

REGISTERED
SPEED POST



GOVERNMENT OF INDIA
MINISTRY OF FINANCE
(DEPARTMENT OF REVENUE)

8th Floor, World Trade Centre, Centre - I, Cuffe Parade,
Mumbai-400 005

F.No. 371/76/B/2023-RA

1828

Date of Issue : 01.02.2024

ORDER No. 709 /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 : Mr. Shibu George

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

Subject : Revision Application filed under Section 129DD of the Customs Act, 1962 against the Order-in-Appeal No. MUM-CUSTM-PAX-APP-2323/2022-23 dated 07.02.2023 [Date of issue: 08.02.2023] [S/49-1499/2022] passed by the Commissioner (Appeals), Mumbai -Zone III.

ORDER

The Revision Application has been filed by Mr Shibu George (herein referred to as 'Applicant') against the Order-in-Appeal No. MUM-CUSTM-PAX-APP-2323/2022-23 dated 07.02.2023 [Date of issue: 08.02.2023] [S/49-1499/2022] passed by the Commissioner (Appeals), Mumbai -Zone III.

2. Brief facts of the case are that on 08.03.2020, based on intelligence and profiling, the officers of the Customs, Chatrapati Shivaji International (CSI) Airport, Mumbai, intercepted the Applicant, an Indian passport holder, who had arrived from Kuala Lumpur by Flight No MH0194, after he had walked through the Green Channel and was proceeding towards the exit gate. while attempting to exit through the Customs Green Channel. On being asked whether he was carrying any dutiable goods, gold, currency or any other contraband in his baggage or on his person, the Applicant replied in the negative. Not being satisfied with his reply, the Applicant was asked to pass through the DFMD after removing all metallic items like belt, watch etc. On passing through the DFMD, a loud deep sound indicating the presence of metal with the Applicant was heard. Subsequently, personal search of the Applicant resulted in the recovery of 20 gold bars of 100 grams each with them marking "Heraeus Feingold 999.9 100 g" and 02 gold bars of 100 grams each with the marking 'SUISSE 100g FINE GOLD 999.9', which were wrapped with adhesive white coloured plastic and concealed inside two black coloured mobile covers within the pocket of the jacket worn by the Applicant.

3. Pursuant to being examined and assayed, the impugned 22 gold bars of 999.9 purity, collectively weighing 2198 grams and valued at Rs. 86,82,320/- were seized under the reasonable belief that the same were being smuggled into India and hence liable to confiscation under the provisions of the Customs Act, 1962.

4. The Applicant in his statement stated that though his passport mentions the address of Kerala, he has settled in Malaysia since 10 years and

was in the business of import of spices from Cambodia and selling the same in Malaysia and later on started a business of manufacturing cigarettes; that he purchased the gold in Singapore and produced an invoice amounting to SGD 1,62,632.24, for the purchase of the gold; that he admitted knowledge, possession, carriage, concealment, non-declaration and recovery of the impugned seized gold and claimed ownership of the same; that he carried the gold bars to restart the business of spices in India; that he concealed the gold bars to avoid detection by the Customs authorities and evade customs duty; that he was aware that import of gold without declaration and payment of duty was an offence punishable under the provisions of the Customs Act, 1962

5. After following the due process of law, the Original Adjudicating Authority (OAA) i.e. Additional Commissioner of Customs, CSI Airport, Mumbai, vide Order-In-Original (OIO) No. ADCP/SS/ADJN/30/2021-22/R&I dated 30.03.2022 ordered for the absolute confiscation of the seized gold bars, collectively weighing 2198 grams and valued at Rs. 86,82,320/- under Section 111 (d), (l) & (m) of the Customs Act, 1962. Penalty of Rs. 8,70,000/- respectively was imposed on the Applicant under Section 112(a) & (b) of the Customs Act, 1962. The seized adhesive white coloured plastic alongwith two black coloured mobile covers used for concealment of the gold was absolutely confiscated under Section 119 of the Customs Act, 1962.

6. Aggrieved with this Order, the Applicant filed an appeal before the Appellate Authority (AA) viz: Commissioner (Appeals), Mumbai -Zone III, who vide Order-in-Appeal No. Order-in-Appeal No. MUM-CUSTM-PAX-APP-2323/2022-23 dated 07.02.2023 [Date of issue: 08.02.2023] [S/49-1499/2022] upheld the order passed by the OAA.

7. Aggrieved with the above order of the Appellate Authority, the Applicant has filed the Revision Application on the following grounds:

7.01. That the 'principles of natural justice' are based on justice, equity, common sense, fair play and rule of law and the adjudicating/appellate authority should act without bias and should be impartial. The adjudicating order should comply with the principles of natural justice but the order passed by the adjudicating/ appellate authority in the instant case was not on merits and not a speaking order and failed to take cognizance of the submissions made by the Applicant without giving any reason and that the AA cannot shut out or reject a defense merely by observing that the defense submissions are weak and do not provide any relief to the Applicants;

7.02. That the Appellate Authority has not followed the principles of natural justice as laid in the following decisions;

- (i) Liberty Oil Mills vs. UOI
- (ii) C.L. Tripathi vs. SBI
- (iii) Pitchaiah vs. Andhra University
- (iv) A.K. Kraipak vs. UOI

7.03. That in the impugned OIA, the AA made simple observations and passed the order without countering the entire defense submission, contention of the petitioner placed before him and therefore the impugned OIA cannot be branded as an order on the merits of the case and is therefore not sustainable. Reliance is placed on the Orissa High Court's judgment in the case of Chintamani Padhan v. Paika Samal

7.04. That the Appellate Authority failed to examine any evidence nor also tested the facts by evidence on the touchstone of law and did not determine the issue involved or tested the material evidence, did not examine the pleadings of the Applicant and then reach a conclusion.

7.05. That there is no obligation on a quasi-judicial body to give reasons in support of the decision arrived at by it so long as the decision is reached after observing the principles of natural justice and in this case the principles of natural justice were not followed. Reliance has been placed on the following decisions

- (i) M/s Sahara India TV Network vs CCE, Noida by CESTAT, N Delhi
- (ii) Joint Commissioner of Income Tax, Surat vs. Saheli Leasing and Industries Ltd [2010 (205) E.L.T. 705 (SC)]
- (iii) Vikas Enterprises vs. CCE, Allahabad by CESTAT, N. Delhi
- (iv) Sharp Carbon India vs. CCE Kanpur
- (v) UOI vs. Sri Kumar Agencies –Gujarat High Court
- (vi) International Woollen Mills Ltd vs. Standard Wool (UK) Ltd
- (vii) Kranti Associates Pvt Ltd vs. Masood Ahmed Khan [2011(273) E.L.T 345(SC)]
- (viii) Mahabir Prasad Santosh Kumar vs. State of UP and others [1970 SC 1302 AIR]
- (ix) Travancore Rayons Ltd vs UOI [AIR 1971SC 862]
- (x) Woolcombers of India Ltd vs. Woolcombers Workers Union and anr [AIR 1973SC 2758]
- (xi) Siemens Engineering and Mfg Co India Ltd vs. UOI [AIR 1976 SC 1785]
- (xii) Testeel Ltd vs. Desai (NM) –Gujarat High Court
- (xiii) SSE Hari Nagar Sugar Mills Ltd vs. Shyam Sundar Jhunjunwala [AIR 1961 SC 1669]
- (xiv) Bhagat Raja Case [AIR 1957 SC 1606]

7.06. That all the abovesaid cases are applicable to the present case and a judicial or quasi judicial authority giving its decision must give reasons in support of the decision and the only qualification to this rule is where an adjudication is provided against the decision of the quasi judicial authority; That the Adjudicating authority is expected to examine all evidences, issues and material on record, analyse those in the context of alleged charges in the show cause notice and is also expected to examine each of the points raised in the reply to the SCN and accept or reject them with cogent reasoning and after due analysis of facts and law, adjudicating authority is expected to record his observations and findings in the adjudication order;

7 07. That the Copy of the panchnama and statement dated 9-3-2020 were not given to the Applicant were not given to him after completion of proceeding even though his signatures were obtained in them. Copy of the panchnama and his statement were given to him only alongwith the impugned SCN dated 7-9-2020. Thus, there was infraction of Sub-sections 6 and 7 of Section 100 of Cr. P.C. object of which is to ensure that the investigation was done fairly

and there is this serious lacuna in the prosecution case and therefore the contents of the panchnama dated 9-3-2020 cannot be relied on fully in support of the prosecution case and that the net result of this breach is that the entire search panchama and the consequent recovery is to be held as vitiated, illegal and void. This fact by itself vitiates the seizure in view of the legal command which in this case are mandatory provisions which were supposed to be strictly complied with by the investigation agency. The Applicant has relied on the following case laws in support of their contention:

- (i) Shankar Banglorkar v State of Goa 25 February, 1992. [1992 (2) Bom CR 169, 1992 CrLJ 3034]
- (ii) Mohamed Rashid Mohamedi vs V.M. Dosi, I.O., NCB, Mumbai [2002 (144) ELT 279 Bom]
- (iii) Kisharichand Sobhrajmal vs Assistant Commissioner Of Income Tax [1992 41 ITD 97.JP]

7.08. That as regards the allegation made under para 15.4 of the SCN that Mr Shibu George was not the owner of the seized gold, the Investigating Agency failed to bring any evidence on record to prove that Mr Shibu George acted as a carrier for monetary consideration.

7.09. That the Applicant claimed ownership of the gold and never admitted that he acted as a carrier of the gold and it was not an inculpatory statement admitting that he acted as a carrier for monetary consideration and, therefore, the exculpatory statement cannot be taken for consideration to frame an allegation that the petitioner acted as a carrier and at every stage, the Applicant was denying his guilt and was putting forward the same explanation.

- (i) Biswanath Aggarwal V Meena Gupta and Ors, reported in 2000 CCr LR (SC)Palvinder Kaur vs The State of Punjab [1953] S.C.R. 94 AIR 1952 SC 354
- (ii) Decision of SC in the matter of State of T.N vs J.Jayalalitha
- (iii) Union of India v. Prafulla Kumar [AIR 1979 SC 366]
- (iv) Pakala Narayan Swami vs Emperor [A.I.R 1939 Privy Council 47 (52)(11)]
- (v) U.P. v. Deoman Upadhyaya [1961]1 S.C.R. 14 AIR 1960 SC 1125].

(vi) *Aghnoo Nagesia v. State of Bihar* [AIR 1966 SC 119 at para 12]

7.10. That the show cause notice dated 31-12-18 prejudged the entire issue and thus prejudged the petitioner. In a Show Cause Notice, the allegations and charges have to be made in a tentative manner (e.g. it appears that.....). However, in the present case the petitioner avers that the impugned show cause notice is bad in law on the ground that the show cause notice has prejudged and pre-determined the entire issue and left nothing for the Adjudicating Authority to enquire into. In the present case, the opportunity of submitting defence reply to the Show Cause Notice and hearing has become an idle formality and farce. The Show Cause Notice dated 20-5-2020 is therefore liable to be set aside.

7.11. That the Applicant submits that the authority who issued the SCN has already made up his mind that the gold under seizure is liable for absolute confiscation for the alleged acts of omission and commission.

7.12. That it is incumbent on the part of the enquiry officer/Adjudicating Authority to keep an open mind till it comes to a decision regarding the involvement of the Applicant in the illicit importation of gold into India.

7.13. That if it is found that they have already closed their minds in respect thereto the quasi-judicial proceeding it cannot be held to be in accordance with law or in compliance with the principles of natural justice.

7.14. That a show cause notice is meant to give the person proceeded against a reasonable opportunity of making his objection against the proposed charges indicated in the notice; that the person proceeded against must be told the charges against him so that he can take his defence and prove his innocence. That if the authority issuing the charge sheet/show cause notice instead of telling him the charges, confront him with definite conclusions of his alleged guilt, as has been done in the present case, the entire proceeding initiated by the show cause notice gets vitiated by unfairness and bias

Reliance is placed on the following case laws

- (i) Raghunandan Jalan vs Collector of C.Ex [1972. 1981 (8) ELT 476 Cal]
- (ii) V.C., Banaras Hindu University v. Shrikant [(2006) 11 SCC 42]
- (iii) K.I. Shephard v. Union of India [1987 (4) SCC 431]
- (iv) Decision in the case of High Court of Andhra Pradesh in SBQ Steels Ltd vs Commr. of Customs, Central Excise & Service Tax.
- (v) Poona Bottling Co. Ltd. & Anr v. Union of India and Others
- (vi) UOI and Ors. v. I.T.C. Limited and Another [1985 (21) E.L.T. 655 (Kar.)]
- (vii) Mysore Acetate and Chemicals Co Ltd. v A C, Central Excise, Mysore)
- (viii) Madras Rubber Factory Ltd vs. A.C. C.Ex, Madras [1981 (8) E L.T. 565 (Mad.)]
- (ix) Alembic Glass Industries Limited v. UOI [1989 (24) E.L T. 23 (Kar.)]
- (x) Calcutta Discount Co. Ltd. vs. Income Tax Officer, Companies District I, Cal..

7.15. That the Applicant avers that the impugned show cause notice is bad in law on the ground that the show cause notice has pre-judged and pre-determined the entire issue by indirectly proposing for absolute confiscation of the seized gold under the provisions of Customs Act, 1962. Neither Section 111 nor section 125 of the Act provides for absolute confiscation of goods which are not contrabands, and since gold is not a contraband or a prohibited item the owner or person from whom it is seized is entitled to have the goods released on payment of redemption fine and duty.

7.16. That under Section 125 of Customs Act, 1962 a discretion has been conferred on the Adjudicating Authority to give an option to the importer/owner of the goods to pay fine in lieu of confiscation in cases of goods, the importation or exportation whereof is prohibited under the Act or under any other law for the time being in force but in respect of other goods the officer is obliged to give such an option.

- (i) Decision of the High Court of Calcutta in CC (Prev) vs Uma Shankar Verma
- (ii) Gauri Enterprises Vs. Commissioner of Customs, Pune [2002 (145) E.L.T. 706 (Tri. Bang.)]
- (iii) Decision of the Hon'ble Supreme Court in the cases of Oryx Fisheries Private Limited and Siemens Ltd.
- (iv) Mohit Thakor vs. Collector [1994 (72) ELT 865]
- (v) Decision of the High Court of Calcutta in CC (Prev) vs Uma Shankar Verma

7.17. That it is the discretion of the authority to impose either the minimum or maximum penalty under the penal provision of the Act. Discretion is inevitable both in civil and criminal proceedings and the fundamental purpose of imposition of sentence is based on the principle that the accused must realise that the crime committed by him has not only created a dent in his life but also a concavity in the social fabric. The purpose of just punishment is designed so that it serves as a deterrent for the individual and the society should not also suffer from the commission of crime time and again.

7.18. That in matter of sentencing though the court/Adjudicating Authority has a conferred wide discretion but the courts has to follow a pragmatic sentencing policy. So the various factors which plays the important role in determine the awarding of sentence are the personality of the offender as revealed by his age, character, antecedents and other circumstances of tractability of the offender to reform, the nature of the offence and the manner in which offence was committed and a Judge has to balance the personality of the offender with the circumstances in which the offence has been committed and the gravity of the crime and choose the appropriate sentence to be imposed while exercising such discretion. The Applicant has relied on the following case laws in support of his contention:

- (i) Decision of the Hon'ble Supreme Court in Modiram Vs State
- (ii) Decision of the Hon'ble Goa and Rajasthan High Court in Raghunath vs Paria, Gopishankar vs State respectively
- (iii) In Partap Singh v. State of Punjab,

7.19. That it is the discretionary power of the adjudicating authority either to absolutely confiscate the seized goods or redeem the goods on payment of fine and the prosecution cannot interfere with such a discretionary power by proposing or suggesting absolute confiscation of the goods; that the authority who issued the impugned SCN interfered in the discretionary power of the adjudicating authority by proposing exemplary punishment on the Applicant.

7.20. That though power under Sections 111 and 112 of confiscation and penalty are available, under Section 125 of the Customs Act. Authority also enjoys discretionary power to impose fine in lieu of confiscation. Therefore, the proposal made in the SCN for absolute confiscation under Section 111(d), 111(1) and 111(m) of the Act is interference of the said discretionary power and therefore the SCN dated 31-12-18 is bad in law and not sustainable.

7.21. That the applicant submits that since the authority who issued the SCN has pre-judged the entire issue and the impugned proceedings, it is not a show cause notice, but in effect it is an order of adjudication except, it has been termed as a show cause notice

7.22. That to support his contention that the authority has pre-judged and pre-determined the issue and the petitioner would not have reasonable opportunity in defending himself. The Applicant has relied on the following case laws:

- (i) Oryx Fisheries Private Limited vs. UOI [(2010) 13 SCC 427]
- (ii) Siemens Ltd., vs. State of Maharashtra & Ors , [(2006) 12 SCC 33]
- (iii) K.I.Shephard vs. Union of India [(1987) 4 SCC 431]
- (iv) SBQ Steels Ltd. v Commr.of Cus, C.Ex and ST, Guntur [2013 (1) TMI 359]
- (v) Global Marine Agencies v. CC (Prev.) Jaipur [2012 (9) TMI 679]
- (vi) UOI v. Madras Steel Re-rollers Association [2012 (8) TMI 788 SC]

7.23. That the relevant provision in the context of prohibited goods is section 111 of the Customs Act, 1962 and it is not the case of the Department that gold has been notified as prohibited goods either absolutely or subject to some conditions;

7.24. 'Prohibition' under Section 111(d) of the CA, 1962 cannot be considered as a total prohibition and that expression does not bring with its fold the restrictions as a prohibition under Section 111(d) of the Act;

7.25. Gold is not 'prohibited goods' but only a 'restricted goods' and the intention behind the provisions of Section 125 is clear that the import of such goods under any circumstances would cause danger to the health, welfare or morals of people as a whole and this would not apply to a case where

import/export of goods is permitted subject to certain conditions or to certain category of persons and which are ordered to be confiscated for the reason that the condition has not been complied with is not liable for absolute confiscation.

The Applicant has relied upon the undermentioned case laws;

- Commr. Of Customs (Prev) vs. India Sales International [2009 (241) E.L.T. 182(Cal)].

7.26. That Notification No. 50/2017-Customs dated 30.06.2017 is not relevant to the present case and that Notification No. 50/2017 dated 30.06.2017 is only an exemption notification and it did not stipulate anywhere that gold is a prohibited goods and the eligibility of the Applicant for concessional rate of duty given in respect of gold under the said notification is not an issue in this case as the Applicant did not claim the said exemption;

7.27. That it is not the case of the Department that the gold has been notified as prohibited goods either absolutely or subject to certain conditions and no other legal provision is mentioned in the SCN by which import of gold has been prohibited and even Baggage Rules do not prohibit the importation of gold and its purpose is only to extend the facility of exemption from duty by way of providing of free allowances in respect of bonafide baggage goods which are generally household goods and goods of personal use and therefore, non-coverage of any goods under Baggage Rules such as gold only means that free allowance and exemption from duty is not allowed on such goods;

The Applicant has relied upon the following case laws in support of his contention:

- (i) Om Prakash Bhatia vs. Commr of Customs, Delhi [2003(155) eLT 423(SC)]
- (ii) Shaikh Jamal Basha s. UOI [1997(91) ELT 277(AP)]
- (iii) UOI vs. Dhanak Ramji [2003(248) ELT 128(Bom)]
- (iv) Sapna Sanjiv Kohli vs. Commr of Customs, Mumbai [2010(253) ELT A52(SC)]

- (v) Decision of the division bench of the Punjab and Haryana High Court in the case of Horizon Ferro Alloys Pvt Ltd vs UOI

7.28. That Section 125 of the Customs Act, 1962 vests the power to grant redemption of confiscated goods and it is seen that Section 125 divides the goods in two categories, one category relates to goods which are prohibited and the second category deals with all other goods. That the distinction between the categories is made on the basis of offences allegedly committed in the matter and in the second category the goods have to be invariably redeemed by giving an option to the person concerned to get the same redeemed by paying the redemption fine and in the case of the first category the adjudicating authority is given discretion to either absolutely confiscate the goods or allow redemption. The Applicant has relied on the following case laws in support of their contention:

- (i) Chellani Mukesh [2012(276) ELT 129 (GOI)]
- (ii) Suresh Kumar Agarwal vs Colector of Customs [1998 (103) ELT 18(AP)]
- (iii) Bhargav Patel vs CC, Mumbai [Appeals NO C/381/10] [2015-TIOL - 1951-CESTAT-Mum] and cases relied upon
- (iv) Sujahi vs. Commr. of Customs, Meenambakkam Airport [Order No 39/14-Cus]

7.29. That there are no specific guidelines demarcating the cases where absolute confiscation should be ordered in similar cases and in such situation the judicial precedence alongwith the overall circumstances of the case are taken into account for adjudging the matter and that in the instant case there are no enough grounds for absolute confiscation of the gold. Reliance has been placed on the following cases:

- (i) CC (Airport), Mumbai vs Alfred Menezes [2009 (242) ELT 334 (Bom)]
- (ii) Dhanak Ramji vs. CC (Airport), Mumbai [2009(237 [E.L.T 280 (Tr-Mm)]
- (iii) A Rajkumari vs. Commr. of Customs (Airport-Air cargo) Chennai [2015(321) E.L.T. 540].
- (iv) Mohd Zia Ul Haque vs. Addl Commissioner of Customs, Hyderabad [2014(214) E L.T 849 (GOI)]

- (v) In Neyveli Lignite Cor Ltd vs. UOI [2009 (242) E.L.T. 487 (Mad.)]
- (vi) Yakub Ibrahim Yusuf vs. CC, Mumbai [2011 (263) E.L.T. 685 (Tri-Mumbai)]
- (vii) Shaik Jamal Basha vs. Government of India [1997 (91) ELT 277(AP)]
- (viii) Mohamed Ahmed Manu vs Commr. of Customs Chennai [2006(205) ELT] 383 (Tri-Chennai)]
- (ix) Mohd. Zia Ul Haque vs. Addl Commr. of Customs, Hyderabad [2014(214) ELT 849(GOI)]

7.30. That the intention behind the provisions of Section 125 of CA, 1962 is clear that import of goods such as arms, ammunition, addictive substances viz, drugs which would cause danger to healthy, welfare, morals of people as a whole cannot be allowed under any circumstances and such goods have to be confiscated absolutely but gold is no of that kind;

7.31. That the settled legal position with regards to vesting of discretion is as per the following cases:

- (i) Commr of Cus, Delhi IV vs. Achiever International [2012(286) ELT 180(Del)]
- (ii) Shri Rama Sugar Industries Ltd vs. State of AP [(1974) 1SCC 534]
- (iii) Rajaram Bohr vs. UOI [2015(322) ELT 337 (Cal)]

7.32. That Circular No 495/5/92-CusVI dated 10.05.1993 cannot prevail over the statute and circulars are issued only to clarify the statutory provision and it cannot alter or prevail over statutory provision. In Circular No 495/5/92-Cus VI, Board has advised that in respect of gold seized for non declaration, no option to redeem the same on redemption fined under Section 125 of CA, 1962 should be given except in very trivial cases;

7.33. That when a quasi judicial authority enjoys a discretionary power while adjudicating a case of smuggling, giving directions to them and forcing them in deciding a case of smuggling in a particular manner ie. absolute confiscation of goods is illegal and against the provision of Section 151-A of CA, 1962; That Circular No 495/5/92-Cus-IV dated 10.05.1993 is only advisory in nature and the advisory cannot be made a rule for ordering confiscation of gold The Applicant has relied on the following case laws in support of their contention:

(i) Carista Herbal Products (P) Ltd vs. Commr. of C.Ex, Pondicherry [2019(370) ELT 223(Mad)]

(ii) UOI vs. Amalgamated Plantations Pvt Ltd [2016(340) ELT 310(Gau)]

7.34. That perusal of Section 125 leaves no manner of doubt that if the goods are prohibited, then the option is with the Customs Authority to confiscate without giving any option to pay fine in lieu thereof but when the goods are not prohibited then the customs authority has no other option but to grant an option to pay a fine in lieu of confiscation and Section 125 does not distinguish between declared and undeclared gold. The Applicant has relied upon the following case laws in support of their contention:

- Mafatal Industries [1997(89) E L.T 247 (SC)]

7.35. That circulars issued by CBEC and CBIT do not bind the assessee and the assessee has a right to challenge the correctness of the circular before a quasi-judicial authority constituted under the relevant statute;

7.36. That the fight between the assesseees' and the revenue department regarding the applicability and precedential value of the circulars issued by the Board has been put to an end by issuing a clarification vide Circular No. 1006/13/2015-CX dated 21.09.2015 which states that if any circular/instruction issued by the CBEC is contrary to any judgement of the Supreme Court, the SC judgement should be followed. Also that clarificatory circulars cannot amend or substitute statutory rules. The Applicant has relied upon the following case laws in support of their contention:

- (i) Bengal Iron Corporation vs Commercial Tax Officer
- (ii) Bhagwati Developers vs Peerless General Finance & Investment Co.
- (iii) Cases pertaining to Paper Products, Hindustan Aeronautics Ltd, Dhiron Chemicals, Indian Oil
- (iv) Kalyani Packaging Industry vs. UOI [1164(5) TMI 78 (SC)]
- (v) Commr of CEx, Bolpur vs Ratan Melting and Wire Industries [1168(10) TMI SC]
- (vi) Bhuwalka Steel Industries vs. Bombay Iron and Steel Ltd
- (vii) Pioneer India Electronics (P) Ltd vs.UOI [2014(301) E L.T 59(Del)]
- (viii) Paper Products Ltd vs Commr. C.Ex [1999(8) TMI 70 SC]
- (ix) Harrison and Crossfield (India) Ltd vs. Registrar of Companies
- (x) Etc ..

7.37. That there are several judgements of the Tribunals, High Courts and Supreme Court wherein goods imported/smuggled into India by way of concealment were allowed to be redeemed by the importer/owner of the goods. The Applicant reiterated the case laws cited earlier in support of his contention

7.38. That penalty imposed on the Applicant was disproportionate and imposition of heavy penalty on the Applicant is not sustainable; Applicant has made submissions about import of gold which has no relevance to the instant case and hence not mentioned;

7.39. That the course of action taken by the OAA must depend on the gravity and nature of the infraction by the individual Applicant and thus punishment must be proportional to the violation. The Applicants' has relied upon the following cases in respect of the above contention and also where redemption fine and penalty was reduced to 10% and 5% of value:

- (i) UOI vs. Mustafa & Najibhai Trading [1998(6 SCC 79]
- (ii) Management of Coimbatore DCC Bank vs. Secretary Coimbatore District Co-op Bank Employees Association [(2007) 4 SCC 669]
- (iii) Commissioner of Customs, Tuticorin vs. Sai Copiers [2008(226) ELT 486(Mad)]
- (iv) Commissioner of Customs(Import) vs. Shankar Trading Co [2008(224) ELT 206(Bom)]
- (v) CC, Tuticorin vs. Shri Kamakshi Enterprises [2009(238) ELT 242(Mad)]
- (vi) Maa Tara Enterprises vs. CC Cochin [2009(243) ELT 730 Tri-Bang]
- (vii) Commr. of Customs, Cochin vs. Dilip Ghelani [2009(248) ELT (Tri-LB)]
- (viii) New Copier Syndicate vs. Commr. of Customs [2015(232) ELT 620(Tri-Bang)]
- (ix) Omex International vs. Commr of Customs, new Delhi [2015(228) ELT (Tri-Del)]
- (x) Office Devices vs. Commr. of Customs, Cochin [2016-TIOL-2557-CESTAT-BANG]
- (xi) Sai International and ors vs CC, Cochin.

7.40. That the Applicant claims ownership of the goods and redemption of the gold on redemption fine and penalty; That the gold was purchased from M/s Bullion Star Pte, Singapore on payment of cash and he had submitted the original invoice in his name, showing the serial numbers of the gold bars which proves that he was not a carrier; that he submitted all bank statements

for six months to prove his financial capacity; that he was a reputed businessman residing in Malaysia; that he unintentionally crossed the green channel; that gold is not a prohibited item and is a restricted item and consequently the person from whom it was recovered or the owner was entitled for release of the seized goods under Section 125 of the Customs Act, 1962. The Applicant has relied on the following case laws in support of his contention:

- (i) Siemens Ltd. vs. CC [1999(113) E.L.T 776(SC)]
- (ii) HCL Hewlett Packard Ltd vs UOI [1997(92) E.L.T (367) T]
- (iii) Padia Sales Corporation vs. CC [1992(61) E.L.T (90)]
- (iv) Skantrons (P)Ltd vs.CC[1994(70) E.L T 635]
- (v) G.V. International and Anr [2000 (39) RLT 272]
- (vi) CC, Calcutta vs. J.B. (P) Ltd [2000(39) RLT 1074]
- (vii) Mukadam Rafique Ahmed [2011(270) E.L.T 447(GOI)]
- (viii) Liaquat Ali Ahmed vs. Commr. of Customs [2003(156) E.L.T 863 (Tri Chennai)]
- (ix) Chinnakaruppan vs Commr of Customs [2007(207) E.L.T 138(Tri-Chennai)]
- (x) Sri Nand Kishore Somani vs Commr. of Customs -Decision of Calcutta High Court
- (xi) Mohini Bhatia vs. Commr. of Customs [1999(106) E.L.T 485(Tri-Mumbai)]
- (xii) Hemant Bhai Patel vs. Commr. of Customs [2003(153) E.L T 226(Tri-Del)]

7.41. That it was a solitary incident of an alleged act of smuggling of goods which can never be justifiable ground for absolute confiscation invoking provisions of Section 111 of the Customs Act, 1962 and the act cannot be termed as an organised crime or manifesting of an organised smuggling activity

7.42. That the Applicant was a law abiding citizen who has never come under any adverse remarks and was falsely implicated in the case of smuggling as a carrier.

Under the circumstances the Applicant prayed for the release of the gold on payment of reasonable fine, for re-export and for dropping of futher proceedings.

The Advocate for the Applicant, vide letter dated 09.10.2023, requested for early hearing in the matter.

8. Personal hearing in the case was scheduled for 31.10.2023 or 16.11.2023. Shri Prakash Shingrani, Advocate for the Applicant, appeared for the hearing on 31.10.2023 and submitted that the Applicant is an NRI usually staying in Malaysia for last ten years and was in the business of spices. He further submitted that Applicant is the owner of the gold and had purchased the same out of his own savings. He further submitted that the Applicant has no past history of any offence and requested to allow redemption of gold for re-export. No one appeared for the personal hearing on behalf of the Respondent.

9. The Government has gone through the facts of the case and observes that the Applicant had brought 22 gold bars of 999.9 purity, collectively weighing 2198 grams and valued at Rs. 86,82,320/- and 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 had not disclosed that he was carrying dutiable goods. However, on being intercepted, 22 gold bars of 999.9 purity, collectively weighing 2198 grams and valued at Rs. 86,82,320/- were recovered from two black coloured mobile covers kept in the pocket of the jacket worn by the Applicant and it revealed his intention not to declare the said gold bars and thereby evade payment of Customs Duty. The confiscation of the gold bars was therefore justified and thus the Applicant had rendered himself liable for penal action.

10. 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.**

11. 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, 1962.

12. 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".

13. 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 liable for penalty.

14. 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.

15. 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."

16.1. 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:

- (i) 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."*
- (ii) The Hon'ble High Court of Judicature at Madras, in the judgment in the case of Shaik 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.
- (iii) 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..."

- (iv) 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.
- (v) Judgement dated 17.02.2022 passed by the Hon'ble High Court, Rajasthan (Jaipur Bench) in D.B. Civil Writ Petition no. 12001 / 2020, in the case of Manoj Kumar Sharma vs. UOI and others.

16.2. Further, The Hon'ble High Court, Madras, in a judgement passed on 08.06.2022 in WP No. 20249 of 2021 and WMP No. 21510 of 2021 in respect of Shri. Chandrasegaram Vijayasundaram and 5 others in a matter of Sri Lankans collectively wearing 1594 gms of gold jewellery upheld the Order no. 165 - 169/2021-Cus (SZ) ASRA, Mumbai dated 14.07.2021 in F.No. 380/59-63/B/SZ/2018-RA/3716, wherein Revisionary Authority had ordered for restoration of OIO, wherein the adjudicating authority had ordered for the confiscation of the gold jewellery but had allowed the same to be released for re-export on payment of appropriate redemption fine and penalty.

16.3. 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.

17. In view of the foregoing paras, the Government finds that the Applicant had not declared the impugned 22 gold bars of 999.9 purity, collectively weighing 2198 grams and valued at Rs. 86,82,320/- at the time of arrival and thus the confiscation of the same was justified. Though the quantum of gold

bars under import is substantial, it is not of commercial quantity. The gold bars were recovered from two mobile covers kept in the pocket of the jacket worn by the Applicant, which cannot be construed to be ingenious concealment. The Applicant is a businessman dealing in spices, cigarettes and other goods in various countries and is settled in Malaysia since 10 years. The Applicant also stated that he got the gold bars to restart the spice business in India. The Applicant provided the original invoice for purchase of the gold bars and also provided the source of funds and his financial status appears to be sound. There are no allegations that the Applicant is a habitual offender and was involved in similar offence earlier and there is nothing on record to prove that the Applicant was part of an organized smuggling syndicate.

18. The Government finds that the quantum of gold bars in question not being of commercial quantity and the Applicant, being in possession of original invoice for the purchase of the gold bars and not being proved to be a habitual offender suggests that this case is a case of non-declaration of gold. The absolute confiscation of the 22 gold bars of 999.9 purity, collectively weighing 2198 grams and valued at Rs. 86,82,320/-, leading to dispossession of the Applicant of the same is therefore harsh and not reasonable. Under the circumstances, the seriousness of the misdemeanour is required to be kept in mind when using discretion under Section 125 of the Customs Act, 1962 and while imposing quantum of penalty. In view of the aforesaid facts, option to redeem the gold bars on payment of redemption fine should have been allowed. Considering the above facts, Government is inclined to modify the order of absolute confiscation and allow the impugned gold bars to be redeemed on payment of a redemption fine.

19. Applicant has also pleaded for reduction of the penalty imposed on him. The market value of the gold bars in the instant case is Rs. 86,82,320/-. From

the facts of the case as discussed above, Government finds that the penalty of Rs. 8,70,000/- imposed on the Applicant under Section 112 (a) (i) of the Customs Act, 1962 is commensurate to the omissions and commissions of the Applicant and needs no interference.

20. In view of the above, the Government modifies the Order-in-Appeal No. MUM-CUSTOM-PAX-APP-2323/2022-23 dated 07.02.2023 [Date of issue: 08.02.2023] [S/49-1499/2022] passed by the Appellate Authority and allows the Applicant to redeem the impugned 22 gold bars of 999.9 purity, collectively weighing 2198 grams and valued at Rs. 86,82,320/-, for re-export, on payment of a redemption fine of Rs.17,00,000/- (Rupees Seventeen Lakhs only). The penalty of Rs. 8,70,000/- imposed on the Applicant under Section 112 (a) & (b) of the Customs Act, 1962 by the OAA, is sustained.

21. The Revision Application is disposed of on the above terms.

(SHRAWAN KUMAR)

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

ORDER No. 109 /2024-CUS (WZ)/ASRA/MUMBAI DATED 30.01.2024.

To,

1. Mr. Shibu George, GL-07, Bukit Indah Apartments, Johor Baru, Malaysia
2. The Pr. Commissioner of Customs, Terminal-2, Level-II, Chhatrapati Shivaji International Airport, Mumbai 400 099.

Copy to:

1. The Commissioner of Customs (Appeals), Mumbai Zone – III, Awas Corporate Point, 5th Floor, Makwana Lane, Behind S.M.Centre, Andheri-Kurla Road, Marol, Mumbai – 400 059.

2. Shri Prakash K.Shingrani, Advocate, 12/334, Vivek, New MIG Colony, Bandra (East), Mumbai-400 051
- ~~3.~~ Sr. P.S. to AS (RA), Mumbai.
4. File copy.
5. Notice Board.

