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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. 380/21/B/2017-RA (MUM)/82: Date of Issue : 12.01.2023

ORDER NO. 11/2023-CUS (WZ)/ASRA/MUMBAI DATED 10.01.2023
OF THE GOVERNMENT OF INDIA PASSED BY SHRI SHRAWAN KUMAR,
PRINCIPAL COMMISSIONER & EX-OFFICIO ADDITIONAL SECRETARY
TO THE GOVERNMENT OF INDIA, UNDER SECTION 129DD OF THE
CUSTOMS ACT, 1962.

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

Respondent : Shri. Mohamed Faiz Mohamed Meerasahib

Subject : Revision Application filed, under Section 129DD of the
Customs Act, 1962 against the Order-in-Appeal No.
MUM-CUSTM-PAX-APP-443/17-18 dated 16.08.2017 [S/49-
253/2016-AP] passed by Commissioner (Appeals), Mumbai –
400 059.

ORDER

This revision application has been filed by the Pr. Commissioner of Customs, CSI Airport, Mumbai - 400 099 (hereinafter referred to as the Applicant) against the Order-in-Appeal No. Order-in-Appeal No. MUM-CUSTM-PAX-APP-443/17-18 dated 16.08.2017 [S/49-253/2016-AP] passed by Commissioner (Appeals), Mumbai - 400 059.

2. Brief facts of the case are that based on a tip off given by the Directorate of Revenue Intelligence, Ahmedabad Zonal Unit, the Respondent who had arrived at the CSMI Airport, Mumbai on 26.08.2014 by Cathay Pacific Flight No. CX-685 from Hong Kong was intercepted at the exit gate of Terminal - 2, CSMI Airport, Mumbai by Customs officers of CSMI Mumbai. The Respondent had walked through the green channel and had submitted a nil Customs declaration form stating that he was not in possession of any dutiable items / contraband. On being queried about possession of any dutiable goods / contraband, he had replied in the negative. Personal search of the Respondent and examination of the contents of his baggage did not reveal anything incriminating. However, a foreign marked gold bar weighing 1000 grams and valued at Rs. 26,09,250/- was recovered which had been stuck using double sided adhesive tape to the bottom part of the trolley bag carried by the Respondent. The said gold bar was seized under the reasonable belief that the same was attempted to be smuggled into the country in-contravention of the provisions of the Customs Act, 1962.

3. After due process of investigations and the law, the Original Adjudicating Authority viz, Addl. Commissioner of Customs, CSI Airport, Mumbai vide

Order-In-Original No. ADC/RR/ADJN/027/2016-17 dated 22.04.2016 [S/14-5-667/2014-15 ADJN (SD/INT/AIU/624/2014 AP "A")] ordered for the absolute confiscation of the FM gold bar weighing 1 kg and valued at Rs. 26,09,250/- and a penalty of Rs. 2,50,000/- was imposed on the Respondent under Section 112(a) and (b) of the 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-443/17-18 dated 16.08.2017 [S/49-253/2016-AP] allowed the redemption of the gold bar weighing 1 kg on payment of a redemption fine of Rs. 4,70,000/- and did not find it necessary to interfere in the penalty amount which had been imposed by the original adjudicating authority.

5. Aggrieved with the above order, the Applicant has filed this revision application on the following grounds of revision;

- 5.1. that the order passed by the lower authority was not proper and legal.
- 5.2. that the gold bar did not belong to the respondent and had carried it for a monetary consideration; that the respondent was a carrier.
- 5.3. that the respondent was aware that import of gold bar into the country without declaration and payment of duty was an offence punishable under the provisions of the Customs Act, 1962.
- 5.4. that during investigations the respondent had stated that the gold was handed over to him at Hong Kong by a person named Yusuf. Coincidentally, another person using the same modus operandii had been intercepted who was carrying a similar invoice issued by the same seller and had also stated that the gold had been handed over to him at Hong Kong by a person named Yusuf.
- 5.5. that the manner in which the gold was brought was an ingenious method adopted by the respondent to hoodwink the authorities, that such smugglers should be meted out with exemplary punishment to

dissuade unscrupulous elements from mis-using the liberalized facilitation process.

5.6. that a few case laws have been cited to buttress their case

Applicant has prayed that the order of the appellate authority be set aside and the order passed by the original adjudicating authority be restored.

6. Personal hearings in the case through the online video conferencing mode were scheduled for 17.09.2021, 24.09.2021, 27.10.2021, 02.11.2021 and 02.12.2021. No one appeared on behalf of the applicant and respondent. Sufficient opportunities were given to the applicant and respondent who have not availed the same. Hence, the case is being taken up for a decision on the basis of evidence on the records.

7. The Government has gone through the facts of the case. The Applicant had been asked whether he was carrying any dutiable goods and he had replied in the negative. The gold bar was stuck at the bottom of the trolley and evidently the respondent had no intention to declare the gold and pay Customs Duty. The gold bar was discovered only when the Respondent had been thoroughly examined. The Respondent had not declared the gold bar as required under Section 77 of the Customs Act, 1962. Therefore, confiscation of the gold bar is justified and the Respondent had rendered himself liable for penal action.

8.1. The relevant sections of the Customs Act are reproduced below :

Section 2(33)

“prohibited goods” means any goods the import or export of which is subject to any prohibition under this Act or any other law for the time being in force but does not include any such goods in respect of which the conditions subject to which the goods are permitted to be imported or exported have been complied with”

Section 125

Option to pay fine in lieu of confiscation. - (1) Whenever confiscation of any goods is authorised by this Act, the officer adjudging it *may, in the case of any goods, the importation or exportation whereof is prohibited under this Act or under any other law for the time being in force, and shall, in the case of any other goods, give to the owner of the goods or, where such owner is not known, the person from whose possession or custody such goods have been seized, an option to pay in lieu of confiscation such fine as the said officer thinks fit :*

Provided that where the proceedings are deemed to be concluded under the proviso to sub-section (2) of section 28 or under clause (i) of sub-section (6) of that section in respect of the goods which are not prohibited or restricted, the provisions of this section shall not apply :

Provided further that, without prejudice to the provisions of the proviso to sub-section (2) of section 115, such fine shall not exceed the market price of the goods confiscated, less in the case of imported goods the duty chargeable thereon.

(2) Where any fine in lieu of confiscation of goods is imposed under sub-section (1), the owner of such goods or the person referred to in sub-section (1), shall, in addition, be liable to any duty and charges payable in respect of such goods.

(3) Where the fine imposed under sub-section (1) is not paid within a period of one hundred and twenty days from the date of option given thereunder, such option shall become void, unless an appeal against such order is pending.

8.2. It is undisputed that as per the Foreign Trade Policy applicable during the period, gold was not freely importable and it could be imported only by the banks authorized by the RBI or by others authorized by DGFT and to some extent by passengers. Therefore, gold which is a restricted item for import but which was imported without fulfilling the conditions for import becomes a prohibited goods in terms of Section 2(33) and hence it liable for confiscation under Section 111(d) of the Customs Act. It is undisputed that Section (l) and (m) are also applicable in this case as the respondent had adopted an

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

9.1. The Hon'ble High Court Of Madras, in the case of Commissioner Of Customs (Air), Chennai-I V/s P. Sinnasamy reported in 2016 (344) E.L.T. 1154 (Mad.), relying on the judgment of the Apex Court in the case of Om Prakash Bhatia v. Commissioner of Customs, Delhi reported in 2003 (155) E.L.T. 423 (S.C.), has held that “ *if there is any prohibition of import or export of goods under the Act or any other law for the time being in force, it would be considered to be prohibited goods; and (b) this would not include any such goods in respect of which the conditions, subject to which the goods are imported or exported, have been complied with. This would mean that if the conditions prescribed for import or export of goods are not complied with, it would be considered to be prohibited goods. Hence, prohibition of importation or exportation could be subject to certain prescribed conditions to be fulfilled before or after clearance of goods. If conditions are not fulfilled, it may amount to prohibited goods.*” It is thus clear that gold, may not be one of the enumerated goods, as prohibited goods, still, if the conditions for such import are not complied with, then import of gold, would squarely fall under the definition, “prohibited goods”.

9.2. Further, in para 47 of the said case the Hon'ble High Court has observed “*Smuggling in relation to any goods is forbidden and totally prohibited. Failure to check the goods on the arrival at the customs station and payment of duty at the rate prescribed, would fall under the second limb of section 112(a) of the Act, which states omission to do any act, which act or omission, would render such goods liable for confiscation.....*”. Thus failure to declare the goods and failure to comply with the prescribed conditions has made the impugned gold

“prohibited” and therefore liable for confiscation and the respondents thus, liable for penalty.

10. Once goods are held to be prohibited, Section 125 still provides discretion to consider release of the 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.

11. A plain reading of the section 125 shows that the Adjudicating Authority is bound to give an option of redemption when goods are not subjected to any prohibition. There is no bar on the Adjudicating Authority allowing

redemption of prohibited goods. This exercise of discretion will depend on the nature of the goods and the nature of the prohibition. For instance, spurious drugs, arms, ammunition, hazardous goods, contaminated flora or fauna, food which does not meet the food safety standards, etc. are harmful to the society if allowed to find their way into the domestic market. On the other hand, release of certain goods on redemption fine, even though the same becomes prohibited as conditions of import have not been satisfied, may not be harmful to the society at large. In case of goods, such as, gold which become prohibited for violation of certain conditions, the Adjudicating Authority may allow redemption

12. Government notes that while allowing the redemption of the goods, the AA at paras 6 and 7 of his OIA has observed as under;

"6. In this regard 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. A plain reading of sub-section (2) of Section 125 of CA, 1962, shows that an option has to be given to the owner of the goods or where

the owner is not known, to the person from whose possession or custody such goods have been seized. In the matter before me also, there is no indication in the order passed by the adjudicating authority that anybody else has claimed the goods. Undoubtedly, the gold has been seized from the possession of the appellant & there is no doubt about the ownership and since the Customs Act has clear provision in this regard, redemption can be given to the owner or to the person from whom goods have been recovered.”

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

14. Government further observes that there are a catena of judgements, over a period of time, of the Hon'ble Courts and other forums which have been categorical in the view that grant of the option of redemption under Section 125 of the Customs Act, 1962 can be exercised in the interest of justice. Some of these cases have been cited in the OIA.

15. Government finds that the AA has relied upon the precedent case laws on the subject and have applied the case laws judiciously while granting release of the gold bar. Quantity of gold is not large. A case that the respondent was a habitual offender had not been made out. Basic contention of the applicant is that the gold had ingeniously concealed at the bottom of the trolley to evade detection. 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. The AA has used discretion available under Section 125 of the Customs Act, 1962 and allowed the respondent no.1 to redeem the gold on payment of fine of Rs. 4,70,000/-. Government finds the OIA passed by the AA to be legal and proper and is not inclined to interfere in the same.

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

Shrawan
10/11/23
(SHRAWAN KUMAR)

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

ORDER No. \ /2023-CUS (WZ) /ASRA/MUMBAI DATED 10.01.2023.

To,

1. Pr. Commissioner of Customs Chhatrapati Shivaji International Airport, Terminal - 2, Mumbai - 400099.
2. Shri. Mohamed Faiz Mohamed Meerasahib, S/o. Mr. Mohamed Faiz, No. 3/58, North Street, Ammapattinam Post, Manamelukudi TK, Pudukkotal, Tamil Nadu - 614 617..

Copy To,

1. Sr. P.S. to AS (RA), Mumbai.
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