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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. 371/113/B/WZ/2022-RA / 880: Date of Issue : 05.01.2024

ORDER NO. 125 /2024-CUS (WZ)/ASRA/MUMBAI DATED 31.01.2024
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.

F.No. 371/113/B/WZ/2022-RA

Applicant : Shri. Pallibhai Mohammed Abdul Hameed

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-1039/2021-22 dated 18.11.2021
issued on 23.11.2021 through F.No. S/49-999/2020
passed by the Commissioner of Customs (Appeals),
Mumbai - III.

ORDER

This revision application has been filed by Shri. Pallibhai Mohammed Abdul Hameed (hereinafter referred to as the Applicant) against the Order-In-Appeal No MUM-CUSTM-PAX-APP-1039/2021-22 dated 18.11.2021 issued on 23.11.2021 through F.No. S/49-999/2020 passed by the Commissioner of Customs (Appeals), Mumbai - III.

2(a) Brief facts of the case are that the applicant on arrival at CSMI Airport on 07.01.2019 from Jeddah by Jet Airways Flight No. 9W - 521/07.01.2019 was intercepted by the Customs Officers near the exit gate after he had cleared the green channel of Customs. To the question put forth to him by the Customs Officers whether he was in possession of any dutiable goods, contraband or gold, the applicant had replied in the negative. A personal search of the applicant led was carried out however, nothing incriminating was found. Examination of the airport trolley on which the applicant was carrying his baggage was carried out. It was noticed that two solid objects had been kept underneath a box containing Zamzam water. These solid objects which had been wrapped with silver coloured adhesive were opened. Two gold bars were recovered. A Government Approved Valuer on examination of these two metal bars, certified that the same were of gold of 24 Kts, totally weighing 2000 grams and valued at Rs. 58,71,000/-. (T.V)

2(b). In his statement recorded under Section 108 of the Customs Act, 1962, the applicant had admitted to possession, carriage, concealment, non-declaration and recovery of the two gold bars, weighing 2000 grams. He further stated that he was the owner of the gold bars and had purchased the same using his own money and finance taken from known friends; that if had not been caught, he would have sold the gold bars in the market for a

profit; that he had not declared the gold with a motive of evading Customs duty.

3 After due process of the law, the Original Adjudicating Authority (OAA), viz Additional Commissioner Of Customs, CSMI Airport, Mumbai, vide Order-In-Original No. ADC/SKR/ADJN/70/2020-21 dated 05.08.2020 issued on 12.08.2020 through S/14-5-106/2019-20/Adjn (SD/INT/AIU/05/2019-AP'B' ordered for the absolute confiscation of the 2000 grams of the 24KT gold bars valued at Rs. 58,71,000/- under Section 111(d), 111(1) and 111 (m) of the Customs Act, 1962 and a penalty of Rs. 6,00,000/- was also imposed on the applicant under Section of 112 (a)(1) of the Customs Act, 1962.

4. Aggrieved by the said order, the applicant filed an appeal before the appellate authority (AA) viz, Commissioner of Customs (Appeals), Mumbai – III, who vide her Order-In-Appeal No. MUM-CUSTM-PAX-APP-1039/2021-22 dated 18.11.2021 issued on 23.11.2021 through F.No. S/49-999/2020 did not find any reason to interfere in the impugned OIO and upheld the same in toto.

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

5.01. was not a prohibited item and was only a restricted item; that absolute confiscation of the gold was incorrect; that prohibition was in relation to goods which cannot be imported by any one, such as arms, ammunition, drugs etc; that this would not apply to a case where import/export of goods is permitted subject to certain conditions or to a certain category of persons and which are ordered to be confiscated for the reason that the condition has not been complied with; that in such a situation, the release of such goods confiscated would not cause any danger or detriment to public health; The above view was also supported by the decision of Honble High Court of Calcutta in the case of Commissioner of Customs (Preventive), West Bengal Vs. India Sales International reported in 2009 (241) ELT 182 (Cal.); that gold was now removed from the negative list and can be imported in terms of notification No.171/94-Cus dated 30.9.94; that Tribunals have been

- consistently taking the view that even in extreme circumstances of attempting to smuggle foreign branded gold biscuits the authorities are required to release the gold biscuit on payment of redemption fine as held in V.P.HAMEED Vs CC, BOMBAY reported in 1994 (73) ELT 425(T); Judgement of KAMLESH KUMAR Vs CC reported in 1993 (67) ELT 1000 (G.O.I.);in the case of HARGOVID DAS K.JOSHI& OTHERS Vs CC 7 OTHERS reported in AIR 1987 SC 1982; In the case of SHAIK JAMAL BASHA Vs GOI & OTHERS; Etc.
- 5.02. that the undermentioned decisions relied upon by AA cannot be made applicable to the case of the applicant,
- (a). Uttam Chand Sawal Chand Jain vs UoI (2013) 42 GST 11 (Bom HC-DB)
 - (b). Ranwolf Charles Luka vs UoI (1996) 83 ELT 274 (BOM HC DB)
 - (c). Rafal Fawl, a Syrian National in 1992 (59) ELT 338
 - (d). Hsui Ringg Chang vs CC 1992 (62) ELT 225 (CEGAT)
 - (e). Abdul Razak vs Union of India
 - (f). Commissioner of Customs vs P.Sinnasamy;
- 5.03. that while applying the ratio of one case to that of the other, the decisions of the Hon'ble Supreme Court are always required to be borne in mind; that they have cited the undermentioned case laws;
- (a) CCE, Calcutta Vs Alnoori Tobacco Products [2004 (170) ELT 135 (SC)];
 - (b). Escorts Ltd. Vs CCE, Delhi [2004 (173) ELT 113 (SC)];
 - (c). CC (Port), Chennai Vs Toyota Kirloskar [2007 (213) ELT 4 (SC)];
 - (d). Sri Kumar Agency vs CCE, Bangalore 2008 (232) E.L.T. 577 (S.C.),
 - (e). etc.
- 5.04. that Circular no. 495/5/92-Cus VI dated 10 05.93 issued by Board cannot prevail over the statue. Circulars are issued only to clarify the statutory provision and it cannot alter or prevail over the statutory provision; that Board's Circular no 495/5/92-Cus VI dated 10.05.1993 specified that in r/o gold seized for non-declaration, no option to redeem the same on redemption fine under Section 125 of the Customs Act, 1962, should be given, except in very trivial cases where the adjudicating authority was satisfied that there was no concealment of the gold in question. ;that there was no concealment of gold;Reliance is placed on an exhaustive list of case laws.
- 5.05. that the OIA dated 18.11.2021 was not an order on merits and not a speaking order; that the OIO was not an order on merits and not a speaking order and it should be set aside; Reliance has been placed on the following decisions

- (a). Case of CESTAT, New Delhi in M/s Sahara India TV Network Vs CCE, Noida;
- (b). Apex Court in the case of Joint Commissioner of Income Tax, Surat vs. Saheli Leasing & Industries Ltd., reported in 2010 (253) ELT 705 (S.C.)
- (c). CESTAT, New Delhi M/s. Vikas Enterprises vs CCE, Allahabad.
- (d). M/S Sharp Carbon India Vs Commissioner of Central Excise, Kanpur
- (e). Gujarat High Court -Union of India vs Sri Kumar Agencies reported on 1 December, 2010
- (f). Apex Court of India in the case of M/s. International Woolen Mills Ltd Vs. M/s. Standard Wool (UK) Ltd.,
- (g). Apex Court in the case of Kranti Associates Pvt. Ltd. Vs. Masood Ahmed Khan{Citation:- 2011 (273) ELT 345 (SC)}
- (h). Apex Court in M/s. Mahabir Prasad Santosh Kumar vs. State of U.P and others, AIR 1970 SC 1302;
- (i). Apex Court in M/s. Woolcombers of India Ltd. vs. Woolcombers Workers Union and another, AIR 1973 SC 2758,
- (j). etc.

5.06. that the contentions submitted by the applicant had not been discussed by the AA in the OIA dated 18.11.2021; that for concluding that the imported gold was prohibited goods and for ordering absolute confiscation of the gold jewellery, the OAA had relied upon the judgment in the case of Om Prakash Bhatia, which has been over ruled by a larger Bench of Supreme Court; that the applicant had relied upon the case of Commissioner of Customs vs M/S. Atul Automations Pvt Ltd. on 24 January, 2019 wherein the Hon'ble Supreme Court of India had overruled the case of Om Prakash Bhatia; therefore, the *gold should not be considered as prohibited goods and therefore order of absolute confiscation of the gold was not sustainable.*

5.07. that the penalty of Rs 6,00,000/- imposed on the applicant was disproportionate to the value of gold imported by him; that this heavy penalty was not sustainable:

5.08. that the applicant had claimed ownership of the 2 gold bars having 24 Kt purity valued at Rs 58,71,000/- under absolute confiscation and has prayed for its redemption.

5.09. that they have relied on an exhaustive list of case laws wherein gold had been allowed to be redeemed by the Tribunals, High Courts and Apex Court; a few of these are as under;

- (a). Yakub Ibrahim Yusuf vs CC, Mumbai 2011 (263) ELT 685

- (b). Universal Traders v. Commissioner – 2009 (240) ELT A78 (SC)
- (c). Gauri Enterprises vs CC, Pune 2002 (145) ELT (705) (Tri-Bangalore)
- (d). CC (Airport), Mumbai vs Alfred Menezes 2009 (242) ELT 334 (Bom)
- (e). Shaikh Jamal Basha vs Government of India 1997 (91) ELT 277 (AP)
- (f). VP Hameed vs Collector of Customs, Mumbai 1994 (73) ELT 425 (Tri)
- (g). T. Elavarasan vs Commissioner of Customs (Airport), Chennai 2011 (266) ELT 167 (Mad)
- (h). Kadar Mydin vs Commissioner of Customs (Preventive), West Bengal 2011 (136) ELT 758
- (i). Sapna Sanjeeva Kohli vs Commissioner of Customs Airport, Mumbai 2008 (23) ELT 305
- (j). Vattakkal Moosa vs Collector of Customs, Cochin 1994 (72) ELT (GOI)
- (k). Halithu Ibrahim vs CC 2002-TIOL 195-CESTAT-MAD
- (l). R.Mohandas vs CC, Cochin 2016 (336) ELT 399 (Ker)

Under the circumstances, the applicant has prayed to the revision authority that the 2 gold bars having 24 Kt purity under absolute confiscation may be ordered to be released to him on payment of reasonable fine, penalty and applicable duty and further proceedings against him may be dropped; Also, the penalty imposed on the applicant maybe reduced.

6. Applicant has filed an application for condonation of delay and has attributed the same to the extraordinary situation at that time due to Covid pandemic

7 Personal hearings in the case was scheduled for 14.09.2023, 21.09.2023, 05.10.2023, 12.10.2023. Shri. Prakash Shingrani, Advocate appeared for personal hearing on 05.10.2023 and submitted that applicant was working in Saudi Arabia for several years and had purchased gold out of his savings. He further submitted that applicant has not concealed the gold and has no past record of any offence. He requested to allow redemption of gold on reasonable fine and penalty.

8. On the issue of condonation of delay, Government notes that the revision application has been filed on 28.02.2022. The OIA was issued on 23.11.2021. Government notes that during this period, the restrictions due to Covid pandemic had been imposed in the country. Due to the prevalent Covid conditions, Government observes that the Apex Court had granted a moratorium for filing appeals etc from 15 03.2020 to 28.02.2022 [Misc. Appln. No. 21/2022]. The applicant has filed the Revision Application on 28.02.2022. Considering the said moratorium period granted by the Apex Court, it is seen that the applicant had filed the revision application within time.

9. The Government has gone through the facts of the case and notes that the applicant was carrying a very large quantity of gold which had been innovatively concealed under the baggage placed on the airport trolley. Even after interception, when the applicant was asked about the possession of any gold or dutiable items, he had stoically denied that he was carrying any gold. The applicant had not declared the huge quantity of gold in his possession to the Customs. The applicant had not made a true declaration to the Customs and he had clearly 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 cleverly and innovatively hidden the gold which reveals his mindset to smuggle the goods and evade the duty. It reveals that the act committed by the applicant was conscious and pre-meditated. The applicant did not intend to declare the gold in his possession to Customs. The quantity of gold is large and the gold was in primary form, indicating that the same was for commercial use. Had he not been intercepted, the applicant would have gotten away with such a large quantity of gold. The Government finds that the confiscation of the gold is therefore justified.

10. 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”.

11. 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.

12. Once goods are held to be prohibited, Section 125 still provides discretion to consider release of goods on redemption fine. Hon’ble Supreme Court in case of M/s. Raj Grow Impex [CIVIL APPEAL NO(s). 2217-2218 of 2021 Arising out of SLP(C) Nos. 14633-14634 of 2020 – Order dated 17.06.2021] has laid down the conditions and circumstances under which such discretion can be used. The same are reproduced below.

71. Thus, when it comes to discretion, the exercise thereof has to be guided by law; has to be according to the rules of reason and justice; and has to be based on the relevant considerations. The exercise of discretion is essentially the discernment of what is right and proper; and such discernment is the critical and cautious judgment of what is correct and proper by differentiating between shadow and substance as also between equity and pretence. A holder of public office, when exercising discretion conferred by the statute, has to ensure that such exercise is in furtherance of accomplishment of the purpose underlying conferment of such power. The requirements of reasonableness, rationality, impartiality, fairness and equity are inherent in any exercise of discretion; such an exercise can never be according to the private opinion.

71.1. It is hardly of any debate that discretion has to be exercised judiciously and, for that matter, all the facts and all the relevant surrounding factors as also the implication of exercise of discretion either way have to be properly weighed and a balanced decision is required to be taken.

13. Government observes that the quantum of gold was large, of high purity, in primary form, of commercial quantity and it was cleverly, consciously, innovatively and premeditatedly concealed. Applicant was acting for monetary benefit and gold was being smuggled for commercial purpose. It revealed his clear intention to evade duty and smuggle the gold into India. The circumstances of the case especially that it is of huge commercial quantity and in primary form and was cleverly concealed, clearly brings out that the applicant had no intention of declaring the gold to the Customs at the airport. All these facts have been properly considered by the Original Adjudicating Authority while absolutely confiscating the two gold bars of 24KT, totally weighing 2000 grams gold bars valued at Rs. 58,71,000/-.

14. Government notes that the applicant has stated that he was working in Saudi Arabia for several years and had purchased the gold out of his savings.

Government observes that these facts have been recorded in his statements during the investigation stage. However, no tangible evidence that he was eligible to bring 1 kg gold at concessional rate of duty had been presented by him during the investigation stage or before the lower authorities who have decided his case. Government notes that at para 5 of the OIO, it is mentioned that arrival / departure details of the applicant were examined and it reveals that he had 11 arrivals and 10 departures to/from CSMIA during period 18.02.2017 to 28.12.2018. That being the case, if the applicant was eligible to bring 1 kg of gold at concessional rate of duty, he should have produced the relevant documents either at the time of investigations or before the lower adjudicating authorities. He has not done so. Moreover, the records indicate that this claim had not been made before the OAA and AA. Government notes that this claim of the applicant is an afterthought initiated to get a favourable order. Government is not inclined to accept the same.

15. The option to allow redemption of seized goods is the discretionary power of the adjudicating authority depending on the facts of each case and after examining the merits. In the present case, the manner of concealment being clever and innovative with conscious and firm intent to hoodwink the Customs and evade payment of duty, quantity being large and commercial, this being a clear attempt to smuggle gold bars in primary form, is a fit case for absolute confiscation as a deterrent to such offenders. Thus, taking into account the facts on record and the gravity of the offence, the adjudicating authority had rightly ordered the absolute confiscation of the gold. But for the intuition and the diligence of the Customs Officer, the large quantity of gold would have passed undetected. The redemption of the gold will encourage non bonafide and unscrupulous elements to resort to concealment and bring gold. Such blatant acts of mis-using the liberalized facilitation process should be meted out with exemplary punishment and the deterrent side of law for which such provisions are made in law needs to be invoked. The absolute confiscation of the gold

would act as a deterrent against such attempts and would deter persons who indulge in such acts with impunity. Therefore, Government finds that the OIO passed by the OAA is proper and legal and the same has been rightly upheld by the AA. In this case, judicious application of discretion in light of directions of Hon'ble Supreme Court as contained in decision at para 12, above is evident.

16. The Government finds that the penalty of Rs. 6,00,000/- imposed under Section 112 (a) and (b) of the Customs Act, 1962 by the original adjudicating authority is commensurate with the omissions and commissions committed by the applicant and does not find it necessary to interfere in the same.

17. In view of the above, the Government finds that the OIA passed by the AA who has upheld the OIO passed by the OAA is legal and proper and Government does not find it necessary to interfere in the same. The Revision Application filed by the applicant, fails.

18. Revision Application filed by the applicant is rejected / dismissed.

(SHRAWAN KUMAR)

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

ORDER No. 125 /2024-CUS (WZ) /ASRA/MUMBAI DATED 31.01.2024

To,

1. Shri. Mohammed Rashik Puchala, Address no. 1 : D.No. 5-41-A Bukari Nagara, Manjanady Mangalanthi, Mangaluru-18; Address no. 2 : Morla House, Naringana Village, Mantwal Taluka, Post - Naringana, Near Al Madina, Mangaluru.
2. Pr. Commissioner of Customs, Chhatrapati Shivaji Maharaj International Airport, Level - II, Terminal - 2, Sahar, Andheri West, Mumbai - 400 099.

Copy To,

1. Shri. Pallibhai Mohammed Abdul Hameed, C/o. Prakash Shingrani, Advocate, 12/334, Vivek, MIG Colony, Bandra (E), Mumbai - 400 051.
2. Sr P.S. to AS (RA), Mumbai.
3. File Copy.
4. Notice Board.