



GOVERNMENT OF INDIA
MINISTRY OF FINANCE
(DEPARTMENT OF REVENUE)

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

F.No. 371/317/B/2019-RA / 170 : Date of Issue: 16.01.2023

ORDER NO. \2/2023-CUS (WZ)/ASRA/MUMBAI DATED \0.01.2023
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.

Applicants : Shri Bagurudeen A.

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-CUSTOM-PAX-APP-323/19-20 dated 29.07.2019
[F.No. S/49-722/2018] [Date of issue: 01.08.2019]
passed by the Commissioner of Customs (Appeals),
Mumbai-III.

ORDER

The Revision Application has been filed by Shri Bagurudeen A.(herein referred to as the "Applicant") against the Order-in-Appeal No. MUM-CUSTOM-PAX-APP-323/19-20 dated 29.07.2019 [F.No. S/49-722/2018] [Date of issue: 01.08.2019] passed by the Commissioner of Customs (Appeals), Mumbai-III.

2. Brief facts of the case are that on 08.08.2017, based on some information the officers of Air Intelligence Unit (AIU) intercepted the applicant, a domestic passenger Shri Bagurudeen A. at CSI, Mumbai, who was supposed to depart from Mumbai to Chennai by Jet Airways Flight No. 9W 0490 dated 08.08.2017. At the time of interception, he was found in possession of one hand baggage. Thereafter, the AIU Officers in presence of Pancha witnesses asked him as to whether he was carrying any prohibited, restricted or dutiable goods like gold, silver, foreign currency etc to which he replied in positive and removed two packets covered with blue coloured adhesive tapes from his shirt pocket. He admitted that the above said two packets containing gold bars were handed over to him by a person known to his friend Mr. Kulam outside the Departure level of CSI Airport, Mumbai. The two packets contained six pieces of gold bars which were of 24 karat purity, foreign marked and total weighing 985 grams and valued at Rs.26,13,209/- and the same were seized by the officers in the reasonable belief that the same was smuggled into India in a clandestine manner in contravention of the provisions of the Customs act, 1962.

3. The Original Adjudicating Authority (OAA) viz the Additional Commissioner of Customs, C.S.I. Airport, Mumbai, vide his OIO no. ADC/AK/ADJN/267/2018-19 dated 26-09-2018 ordered absolutely confiscation of the recovered six pieces of gold bars totally weighing 985 gms and valued at Rs. 26,13,209/- under Section 111 (d), (l) and (m) of Customs Act, 1962. A personal penalty of Rs 3,00,000/- under section 112(a) & (b) of the Customs Act, 1962 was also imposed on the applicant.

4. Aggrieved, with this Order, the Applicant filed an appeal before the Appellate Authority (AA) viz, Commissioner of Customs (Appeals), Mumbai-III, who vide Order-in-Appeal No. MUM-CUSTOM-PAX-APP-323/19-20 dated 29.07.2019 [F.No. S/49-722/2018] [Date of issue: 01.08.2019] upheld the order passed by the OAA.

5. Aggrieved by this Order, the applicant has filed this revision application on the undermentioned grounds of revision;

5.1. That the Order of the respondent is against law, weight of evidence and circumstances and probabilities of the case. The gold is not prohibited item and according to the liberalized policy the gold can be released on payment of redemption fine and baggage duty.

5.2. That the Appellate authority simply glossed over the judgements and points raised in the grounds of appeal and rejected the appeal.

5.3. The applicant further submitted that the officers insisted him to write the statement as if the gold is belonging to someone else and he has brought it for any monetary consideration; that the officers have not found the owner of the gold and whether the same had been smuggled from abroad to India through whom, when and where,; that the authority registered the case based on their own surmises; that he is the owner of the gold found in his possession

5.4 That there is no distinction between owner and carried under the Customs Act 1962. Section 125 of the Customs Act stipulates that when even confiscation of any good is authorized 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 been such goods have seized. But the customs authority always claims that person carrying goods is not entitled to claim the gold under the said Act. The officers of

customs had made up their mind that the gold should not be released and the act of the department is totally against the provisions of the Customs Act and contrary to the Section 125 of the said Act.

5.5. That as per section 77 of the Customs Act 1962, the owner of any baggage shall, for the purpose of clearing it, make declaration of its contents to the proper officer. Since the passenger is being the owner of the baggage, in that circumstances the passenger is only liable for make declaration under the said act not any other person. The applicant further submitted that the authority one way stated that the passenger has not declared the contents of the baggage as per section 77 of the said act, other it is stated that he is not the owner of the goods. If authority had taken the stand that the passenger had not declared, then he cannot take the stand that he is not the owner of the baggage or goods.

5.6. The applicant further submitted that it is an admitted fact the goods have been recovered from the applicant and hence he is entitled to get back the gold on payment of baggage rate of duty. Further if the authority promptly read section 125 of the customs act 1962, the department cannot argue that the appellant is not the owner of the gold or carrier. The contention of the department the owner or carrier is unsustainable under law, when the law permits to release the gold on payment of redemption fine and baggage rate of duty from whose possession the gold have been recovered, the authority cannot interpret that the gold cannot be released on the ground that the appellant is not the owner of the gold is contrary to law and abuse of process of law and mockery of justice. Thus it is clearly established that the authority bound by law and should excise his power, otherwise the order become illegal. They relied on the following case laws: a) 2014 (309) E.L.T. 259 (Tri. Mumbai) In The Cegat, South Zonal Bench, Mumbai In Case Of Peringatil Hamza Versus Commissioner Of Customs, Mumbai and b) 2001 (137) E.L.T. 127 (Tri. - Chennai) In The Cegat, South Zonal Bench, Chennai in case of Shaik Shahabuddin Vs Commissioner Of Customs, Chennai.

5.7. The appellant further submitted the seized gold belongs to him and he has purchased through his earnings and he has not brought it for third party and the same is belonging to his family for personal use and the same is not trade or commercial

5.8. That the goods must be prohibited before export or import, simply because of non-declaration of the goods cannot become prohibited after import. Therefore the authority has come to the conclusion that the gold is prohibited because of non-declaration is nothing but clear non application of mind.

5.9. That as per condition of the Central government liberalized policy. if any passenger being an Indian origin or Indian passport holder staired abroad more than required period and is an eligible to bring 10 Kg of gold under concessional rate duty. In the context of Policy gold falls under restricted list and is not a prohibited item and hence absolute confiscation of gold is unwarranted Therefore the Government may ordered to redeem the gold under section 125 ibid on payment of customs duty.

5.10. There is no provision for absolute confiscation of goods. The option should be given under section 125 of the Customs act. Further there are several judgments by Revisional authority and Cestat and Hon'ble Supreme court and High court said the authority should excise the power under section 125 of the act because the same is mandatory.

5.11. The appellant further submits that the Apex court in the case of Hargovind Dash Vs Collector of Customs 1992 (61) ELT 172 (SC) and the several other cases has pronounced that a quasi judicial authority must excise discretionary powers in a judicious manner and not in arbitrary manner. As per the provisions of section 125 of the customs act, 1962 in case of goods which are prohibited the option of redemption is left to the discretionary power of the authority who is functioning as a quasi judicial authority and in cases of others goods option to allow redemption is mandatory. Considering the facts

and the circumstances and various precedent orders passed by the CESTAT/Government of India (order No. 135/2003 (GOI) CESTAT 2451/99). The seized gold ornaments should be release on the payment of nominal redemption fine. Further there are no provisions for absolute confiscation of the goods.

The Hon'ble High court Andhra Pradesh judgment reported in 1997 (91) ELT 277 (AP) Sheik Jamal Basha Vs Government of India held that under section 125 of the of the act is mandatory duty to give option to the person found guilty to pay in lieu of confiscation, (Gold was concealed).

The Revisional authority has passed order reported in 2011 (270) ELT 447 (GOT) MUKUADAM RAFIQUE AHMED order no. 198/2010-CUS dated 20.05.2010 in FNO. 375/14/8/2010-RA-CUS permitted the appellant to reshipment the goods on payment of lesser redemption fine even if not declared are required under section 77 of the customs act 1962.

The appellant further submits that the Hon'ble Supreme Court (full bench) has delivered a judgment on 30.09.2011 in OM Prakash's case Vs union of India wherein it is categorically stated that the main object of the enactment of the said act was the recovery of excise duties and not really to punish for infringement of its provisions. Further held that the offences are compoundable under section 137 of the said act and summary proceedings under section 138 of customs Act

5.12. The applicant further submitted that the confiscation of the goods valued about Rs. 26,13,209/- and the personal penalty of Rs. 3,00,000/- (personal penalty 15%) imposed is very high and unreasonable and hence the same to be reduced substantially and reasonably.

5.13. Under the above circumstances of the case the applicant has prayed to set aside the impugned order and to permit him to re-export or release the gold

and also reduce the personal penalty sum of Rs 3, 00, 000 under section 112 (a) and (b) of the Customs act 1962 and thus renders justice.

6. Personal hearing in the matter was scheduled for 22.09.2022 and 28-09-2022. The Advocate of the applicant expressed their inability to attend the hearing and requested to pass the order with available records and show leniency while passing the order.

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 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 liable for confiscation under Section 111(d) of the Customs Act.

8. 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" in terms of Section 2(33) and hence it is liable for confiscation under Section 111(d) of the Customs Act, 1962.

9. 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.

10. 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.

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. 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.

12.1 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.

12.2 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.

13. 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 were 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 facts of the case indicate that it is a case of non-declaration of gold, rather than a case of smuggling for commercial considerations. 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.

14. The Applicant has also pleaded for reduction of the penalty imposed on him. The value of the gold in this case is Rs.26, 13,209/-. Government finds that the penalty of Rs. 3, 00,000/- imposed on the Applicant under Section 112(a) & (b) of the Customs Act, 1962 is appropriate and commensurate to the omissions and commissions of the Applicant.

15.1 In view of the above, the Government sets aside the impugned order of the Appellate authority in respect of the impugned gold bars. The impugned gold bars totally weighing 985 grams and valued at Rs. 26, 13,209/- are allowed redemption on payment of Rs. 5,20,000/- (Rupees Five Lakh Twenty Thousand Only).

15.2 The penalty of Rs. 3, 00,000/- imposed under Section 112(a) and (b) of the Customs Act, 1962 being appropriate and commensurate with the omissions and

commissions of the Applicant, Government does not feel it necessary to interfere with the imposition of the same.

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

Shrawan
10/11/23

(SHRAWAN KUMAR)

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

ORDER NO. 12/2023-CUS (WZ)/ASRA/MUMBAI DATED 01.10.2023

To,

1. Mr. Bagurudeen A., House No.3/83 A, Machurvattanam, Thiruvadanal, Distt. Ramnathpuram, Tamil Nadu 623
2. The Pr. Commissioner of Customs, C.S.I Airport, Terminal 2, Level-II, Sahar, Andheri (East), Mumbai 400 099.
3. The Commissioner of Customs (Appeals), Mumbai-III, 5th Floor, Avas Corporate Point, Makwana Lane, Behind S.M.Centre, Andheri Kurla Road, Andheri (East), Mumbai 400 059.

Copy to:

1. Shri Bagurudeen A., C/o- S. Palanikumar & P. Kamal Malar, Advocate, No. 10, Sunk Ram Street, 2 Floor, Chennai 600.001
2. Sr. P.S. to AS (RA), Mumbai.
3. File Copy.
4. Notice Board.