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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. 371/204/B/2021-RA /150 Date of Issue 09.**01.2024**

ORDER No 13/2024-CUS (WZ)/ASRA/MUMBAI DATED. 8.01.2024 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 Vijay Tarachand Gandhi

Respondent Pr Commissioner of Customs, C S.I Airport, Mumbai

Subject Revision Application filed, under Section 129DD of the Customs Act, 1962 against the Order-in-Appeal No. MUM-CUSTM-PAX-APP-1757/2020-21 dated 28.02.2021 [Date of issue. 05 03.2021] [F No S/49-1313/2019] passed by the Commissioner of Customs (Appeals), Mumbai Zone-III

ORDER

This Revision Application has been filed by Mr. Vijay Tarachand Gandhi (herein referred to as 'Applicant)' against the Order-in-Appeal No MUM-CUSTM-PAX-APP-1757/2020-21 dated 28.02.2021 [Date of issue. 05.03 2021] [F. No S/49-1313/2019] passed by the Commissioner of Customs (Appeals), Mumbai Zone-III.

2 Brief facts of the case are that the Applicant, who had arrived from Dubai, was intercepted personal search of the Applicant led to the recovery of 02 gold bar and one gold chain with pendant weighing 360 grams having 24 KT and valued at Rs. 10,35,270/- were seized under the reasonable belief that the same were being smuggled into India and hence liable for confiscation under the provisions of the Customs Act, 1962 The Applicant admitted to ownership, possession, non-declaration, concealment and recovery of the seized gold.

3 After following the due process of law, the Original Adjudicating Authority (OAA) viz, Additional Commissioner of Customs, Chhatrapati Shivaji International (C S I) Airport, Mumbai vide Order-In-Original No ADC/AK/ADJN/158/2019-20 dated 17 09 2019 ordered the confiscation of the said 02 gold bar and one gold chain with pendant weighing 360 grams having 24 KT and valued at Rs 10,35,270/- under Section 111 (d), (l), and (m) of the Customs Act, 1962 The OAA gave the Applicant the option to redeem the said seized gold under Section 125 of the Customs Act, 1962 on payment of redemption fine of Rs 1,75,000/- in lieu of confiscation in addition to payment of the applicable customs duty Personal penalty of Rs. 1,20,000/- was imposed on the Applicant under Section 112(a) and (b) of the Customs Act, 1962.

4 Aggrieved by this order, the Respondent filed an appeal with the Appellate Authority viz, Commissioner of Customs (Appeals), Mumbai Zone-III, who vide her Order-in-Appeal No. MUM-CUSTM-PAX-APP-1757/2020-21 dated 28.02.2021 [Date of issue 05 03 2021] [F No S/49-1313/2019] set aside the Order-in-Original and ordered the absolute confiscation of the impugned gold The personal penalty imposed by the OAA was not interfered with by the AA

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

5 01 The impugned order passed by the Respondent is bad in law and unjust.

5 02 that the impugned order has been passed without giving due consideration to the documents on record and facts of the case

5 03 that the dutiable goods brought are neither restricted nor prohibited

5 04 that this is the first time that the applicant has brought this type of goods and there was no previous case registered against him

5 05 They relied on the following Judgements on the observance of Judicial Discipline

A Judgements of the Hon'ble Supreme Court in the case of **Birla Corporation Ltd. V/s. Commissioner of Central Excise reported in 2005 (186) ELT 266 (S.C.)**

B. Judgement of the Hon'ble Bombay High Court in the case of **Commissioner of Central Excise, Nasik V/s Jain Vanguard Polybutlene Ltd. Reported in 2010 (256) ELT 523 (Bom**

C. Judgement of the Hon'ble Tribunal in the case of **Nirma Ltd. V/s. Commissioner of Central Excise, Nasik** reported in **2012 (276) E.L.T. 283 (Tri. – Ahmd)**

5 06 that once the department or respondent accepts that the goods are dutiable, the option of redemption of goods as provided under section 125 of the Customs Act, 1962 will have to be given

5 07 They submitted for release of goods for re-export on the ground that the applicant is NRI and staying and working since so many of years in Dubai and has resident permit card and he is still employed with M/s Ramadi Kitchen Industries (L.L C) Therefore they requested to allow the re-export of Goods as applicant is still working as a partner in the same company

The applicant has prayed to the revisionary authority to quash and set aside the OIA passed by the lower authorities and to allow the gold jewellery weighing 200 grams for redemption on nominal fine and penalty and to grant any other reliefs as deemed fit The Applicant also filed an application for condonation of delay.

6 Shri N J Heera Advocate appeared before me and submitted that the applicant brought small quantity of gold jewellery for personal use. He further submitted that original authority has correctly allowed redemption of jewellery on reasonable RF and penalty He requested to set aside OIA and restore OIO as the same is legal and proper

7 The Government has gone through the facts of the case and observes that the Applicant had brought said 02 gold bar and one gold chain with pendant weighing 360 grams having 24 KT and valued at Rs 10,35,270/- 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, said 02 gold bar and one gold chain with pendant weighing 360 grams having 24 KT and valued at Rs 10,35,270/- were recovered from the Applicant and it revealed his intention not to declare the said gold and thereby evade payment of Customs Duty The confiscation of the gold was therefore justified and thus the Applicant had rendered himself liable to penal action.

7 2 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 3 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 to confiscation under Section 111(d) of the Customs Act, 1962

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"

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 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

11 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."*

12 1 Government further observes that there are 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 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

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.

e) 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

12 2 In a recent judgement passed by the Hon'ble High Court, Madras on 08 06 2022 in WP no. 20249 of 2021 and WMP No. 21510 of 2021 in r/o. Shri. Chandrasegaram Vijayasundarm + 5 others in a similar matter of Sri. Lankans wearing 1594 gms of gold jewellery (i.e. around 300 gms worn by each person) 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 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

12 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.

13 In view of the foregoing paras, the Government finds that as the Applicant had not declared said 02 gold bar and one gold chain with pendant weighing 360 grams having 24 KT and valued at Rs. 10,35,270/- at the time of arrival, the confiscation of the same was justified However, though the quantum of gold under import is not substantial and is not of commercial quantity Further, it is found that the Applicant is NRI, having a resident card There are no allegations that the Applicant is a habitual offender and was involved in similar offence earlier or there is nothing on record to prove that the Applicant was part of an organized smuggling syndicate.

14 The Government finds that the quantum of gold involved in this case is not substantial and the Applicant has claimed ownership of the impugned gold after explaining the purpose of getting the gold into the country. The absolute confiscation of the impugned gold, leading to dispossession of the applicant of the impugned gold in the instant case is therefore, harsh and not reasonable. Since applicant is NRI holding and UAE resident card and employed in Dubai for the aforesaid reasons, Government is inclined to accept the prayer put forth by the applicant for re-export of the impugned gold on payment of a redemption fine This case is at best a case of mis-declaration rather than smuggling Government finds that the discretion to allow the redemption of the impugned gold jewellery under Section 125 of the Customs Act, 1962 by the Original Adjudicating Authority is judicious and fair and the order absolute confiscation by the Appellate Authority is excessive and is therefore liable to be modified and the impugned gold jewellery is liable to be allowed redemption only for re-export on suitable redemption fine

15 Applicant has also pleaded for setting aside the penalty imposed on him. The market value of the impugned said 02 gold bar and one gold chain with pendant weighing 360 grams having 24 KT and valued at Rs. 10,35,270/-. From the facts of the case as discussed above, Government finds that the penalty of Rs. 1,20,000/- imposed on the Applicant under Section 112(a) and (b) of the Customs Act, 1962 is commensurate to the omissions and commissions of the Applicant

16 In view of the above, the Government modifies the impugned order of the Appellate authority in respect of the absolute confiscation of the impugned gold and allows the same to be redeemed only for re-export on payment of redemption fine. The said 02 gold bar and one gold chain with pendant weighing 360 grams having 24 KT and valued at Rs 10,35,270/- is allowed redemption only for re-export on payment of a fine of Rs. 2,00,000/- (Rupees Two Lakhs only).. The penalty of Rs. 1,20,000/- imposed under Section 112(a) and (b) of the Customs Act, 1962 by the Original Adjudicating Authority and upheld by the Appellate Authority is sustained.

17 The Revision Application is disposed of on the above terms

(SHRAWAN KUMAR)
Principal Commissioner & ex-officio
Additional Secretary to Government of India

ORDER No 13 /2024-CUS (WZ)/ASRA/MUMBAI DATED. 8.01 2024.

To

1 Mr Vijay Tarachand Gandhi, C/o Shri N J Heera, Advocate, Nulwala Building, Ground Floor, 41, Mint Road, Opp GPO, Fort, Mumbai 400001.
2 The Pr. Commissioner of Customs, Chhatrapati Shivaji International Airport, Terminal 2, Level-II, Sahar, Andheri (East), Mumbai 400 099.

Copy to

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3 Sr P S to AS (RA), Mumbai
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