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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. 371/327/B/2019-RA/51 : Date of Issue 12.01.2023

ORDER NO. 13/2023-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 : Shri Mohammed Aslam Aboobakar Kazi

Respondent : Commissioner of Customs (Appeals), Mumbai Zone-III.

Subject : Revision Application filed, under Section 129DD of the
Customs Act, 1962 against the Order-in-Appeal Nos.
MUM-CUSTM-PAX-APP-77/2019-20 dated 30.04.2019
(S/49-67/2017) passed by the Commissioner of Customs
(Appeals), Mumbai Zone-III.

ORDER

This Revision application has been filed by Shri Mohammed Aslam Aboobakar Kazi (herein referred to as Applicant) against the Order in Appeal Nos. MUM-CUSTOM-PAX-APP-77/2019-20 dated 30.04.2019 (S/49-67/2017) passed by the Commissioner of Customs (Appeals), Mumbai Zone-III.

2. The Brief facts of the case are that the Applicant having Indian Passport No. Z3089148, was intercepted by the AIU Officers, when he arrived at the CSI Airport, Mumbai on 19.10.2015 from Bangkok by Air India flight viz AI 331/19.10.2015 at the exit gate, after he had cleared himself and his baggage through Green Channel. The applicant was asked whether he was carrying any prohibited, restricted or dutiable goods such as Gold, Silver, Foreign Currency, etc, to which he denied having any dutiable goods in his possession. He was then asked to pass through the Metal Detector Frame which gave positive indication of presence of metal on his person. On screening of his leather chappal and black colored wrist watch in the screening machine, dark rectangular black images were found at the center of both the chappals and the image of the watch was also dark indicating concealment of gold in them. The soles of both the chappals were cut open which led to the recovery of 2 gold bars of 305 gms each and the body case of the wrist watch was found to made of gold weighing 260 gms of 99.39% purity. The total weight of the 2 gold bars was 610 gms and the wrist watch metal dial purported to be gold was weighing 260 grams, total gold weighing 870 grams having provisionally valued at Rs. 21,13,976/-. The applicant had also not declared the impugned goods in the Customs Declaration. The impugned gold was seized under the reasonable belief that the same were being smuggled to India in contravention of the provisions of the Customs act, 1962.

3. The case was adjudicated and the Original Adjudicating Authority viz, Additional Commissioner of Customs, Mumbai vide Order-In-Original No.

ADC/RR/ADJN/446/2015-16 dated 30.12.2016, ordered for (i) absolute confiscation of the 2 gold bars weighing 610 gms and the wrist watch metal dial purported to be gold was weighing 260 grams, total gold weighing 870 grams having provisionally valued at Rs. 21,13,976/- under Section 111(d), (i), (l) & (m) of the Customs Act, 1962; (ii) absolute confiscation of the seized leather chappals, red colored adhesive cello tape and blue carbon used to conceal the said recovered gold bars and rubber strap, glass cover and metal dial of the wrist watch having no commercial value under Section 119 of Customs Act, 1962 and (iii) Personal penalty of Rs. 2,11,400/- was imposed on the applicant under Section 112(a) and (b) of the Customs Act, 1962.

4. Aggrieved by the said order, the applicant filed appeal before the Appellate Authority (AA) viz, Commissioner of Customs (Appeals), Mumbai-III. The Appellate Authority vide his Order-In-Appeal Nos. MUM-CUSTOM-PAX-APP-77/2019-20 dated 30.04.2019 (S/49-67/2017) rejected the appeal and upheld the Original Adjudicating Authority's Order.

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

i) That the impugned order passed by the Respondent is bad in law and unjust;

ii) that dutiable goods brought in by the Applicant are neither restricted nor prohibited; that the Applicant has brought this type of goods and there is no previous case registered against him; that the Adjudicating Authority has not taken into consideration the points in Show Cause Notice issued by the Ld. Adjudicating authority, which would clearly reveal that the impugned goods/gold are dutiable goods and not prohibited goods;

iii) that the evasion of Customs duty can be done only in respect of dutiable goods and not prohibited goods and 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 to the Applicant. A bare perusal of the sub-section (1) of Section 125 of the Customs Act, 1962, makes it crystal clear that the Respondent is required to give the Noticee an option to pay fine in lieu of confiscation in respect of the impugned goods, which even as per the Respondent are dutiable goods.

iv) that the Applicant submits that in the facts and circumstances of the present case, absolute confiscation of the impugned dutiable goods would only mean interpreting or giving a meaning to the said sub-section (1) of Section 125 of the Customs Act, 1962, in a manner neither authorized nor intended by the Act. Thus, redemption of dutiable goods on payment of fine in lieu of confiscation is what the Legislature in its collective wisdom has proposed vide sub-section (1) of Section 125 of the Customs Act, 1962, and the same is the intent of the Legislature but inspite of the above observation the dutiable goods were absolute confiscated by the Respondent.

v) that without prejudice to the above contentions, there are a number of judgments of the Hon'ble Apex Court, the Hon'ble High Courts and the Hon'ble Tribunal, wherein it has been held that gold is not a prohibited item and the same is restricted and therefore it should not be confiscated absolutely and option to redeem the same on redemption fine ought to be given to the person from whom it is recovered. Some of the judgments relied are as below viz.

a. The Hon'ble Supreme Court of India in the case of Hargovind Das K. Joshi V/s Collector of Customs reported in 1992 (61) ELT. 172 (S.C.);

b. The Hon'ble Tribunal in the case of ALFRED MENEZES v/s COMMISSIONER OF CUSTOMS, MUMBAI reported in 2011 (236) E.L.T. 587 (Tri. Mumbai);

c. The Hon'ble Tribunal in the case of T. ELVARASAN v/s COMMISSIONER OF CUSTOMS (AIRPORT), reported in 2011 (266) E.L.T. 167 (Mad);

- d. The Hon'ble Tribunal in the case of YAKUB IBRAHIM YUSUF v/s COMMISSIONER OF CUSTOMS, MUMBAI reported in 2011 (263) E.L.T. 685 (Tri. - Mumbai);
- e. The Hon'ble Tribunal in the case of Mohini Bhatia V/s Commissioner of Customs reported in 1999 (106) E.L.T. 485 (Tri-Mumbai);
- f. The Hon'ble Supreme Court of India in the case of Universal Traders v/s. Commissioner - 2009 (240) E.L.T. A78 (S.C.);
- g. The Hon'ble Tribunal in the case of In Gauri Enterprises v/s. CC, Pune - 2002 (145) E.L.T. 706 (Tri-Bang);
- h. The Hon'ble High Court in case of Shaik Jamal Basha v/s. Government of India- 1997 (91) E.L.T. 277 (A.P.);
- i. The Hon'ble Tribunal in the case of VP Hameed v/s. Collector of Customs, Mumbai - 1994 (73) E.L.T. 425 (Tri.);
- j. The Hon'ble Tribunal in the case of P. Sinnasamy v/s. Commissioner of Customs, Chennai - 2007 (220) ELT. 308 (Tri. - Chennai);
- k. In Union of India Vs Dhanak M. Ramji - 2009 (248) E.L.T. 127 (Bom.) affirmed vide 2010 (252) E.L.T. A102 (S C.) it was held that gold is not a prohibited item and discretion of redemption can be exercised to the person from whom it was recovered.
- l. The Hon'ble Tribunal in the case of A. Rajkumari v/s. CC (Chennai) 2015 (321) E.L.T. 540 (Tri-Chennai);
- m. In Kadar Mydin v/s. Commissioner of Customs (Preventive), West Bengal - 2001(136) E.L.T. 758 it was held that in view of the liberalized gold policy of the Government, absolute confiscation is unwarranted and redemption can be allowed;
- n. The Hon'ble Tribunal in the case of Sapna Sanjeev Kohli v/s. Commissioner of Customs, Airport, Mumbai - 2008 (230) ELT. 305;
- o. In Vatakkal Moosa v/s. collector of Customs, Cochin - 1994 (72) ELT. 473 (G.O.I.); Halithu Ibrahim v/s. CC [2002-TIOL 195-CESTAT-MAD. = 2002 (148) E.L.T. 412 (Tribunal)]; Krishnakumari v/s. CC, Chennai - 2008 (229) E.L.T. 222 (Tri-

Chennai) :S. Rajagopal v/s. CC, Trichy - 2007 (219) E.L.T. 435 (Tri-Chennai); M. Arumugam v/s. CC, Tiruchirappalli, 2007 (220) E.L.T. 311 (Tri-Chennai) also it was held that absolute confiscation is not warranted and redemption of gold should be allowed;

p. Cestat, Regional Bench, Allahabad latest Judgement reported in 2018 (359) ELT 265 (Tri-All.)- Commr. Of C. Ex. & S.T., Lucknow V/s Mohd. Halim Mohd. Shamim Khan.

vi) that in view of the aforesaid submissions, the Customs department shall release the goods u/s. 125 of Customs Act, 1962 on nominal redemption fine and reduce the personal penalty as the violation, if any, is of technical in nature

6. Personal hearings in the case was scheduled for 07.10.2022. Shri. N. J. Heera, Advocate for the Applicant appeared for the hearing and submitted that quantity of gold was for personal use and that the applicant has no history of any contraventions, gold was for personal use. He requested to release the gold on nominal Redemption fine and penalty.

7. The Government has gone through the facts of the case, and observes that the applicant 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 the dutiable goods. The 2 gold bars had been kept inside the soles of the chappals worn by him and the metal dial of the watch was made of gold. The method adopted by the applicant clearly reveals his intention not to declare the gold and pay Customs duty on it. The Government finds that the confiscation of the impugned gold was therefore justified.

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 Applicants 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.

11.1. 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.

11.2. 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.


12. Government notes that the quantity of gold bars under import is not substantial and not in commercial quantity. The applicant claimed ownership of the gold bars. There are no other claimants of the said gold. There are no allegations that the applicant is a habitual offender and was involved in similar offence 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 impugned Gold, leading to dispossession of the Applicant of the Gold in the instant case is therefore harsh and not reasonable. 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 judicious.

13. The Applicant has also pleaded for reduction of the penalty imposed on him. The value of the Gold in this case is Rs. 21, 13,976/-. From the facts of the case as discussed above, Government finds that the penalty of Rs. 2, 11,400/- imposed on the Applicant under Section 112(a) (i) of the Customs Act, 1962 is appropriate and commensurate to the omissions and commissions of the Applicant.

14. In view of the above, the Government modifies the impugned order of the Appellate Authority in respect of the impugned Gold seized from the Applicant.

The seized Gold totally weighing 870 grams collectively valued at Rs. 21,13,976/- is allowed to be redeemed on payment of a fine of Rs. 4,20,000/- (Rupees Four Lakh Twenty thousand only). The penalty of Rs. 2,11,400/- imposed under Section 112(a) (i) 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.

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


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

ORDER NO. 13/2023-CUS (WZ/SZ)/ASRA/MUMBAI DATED 10.01.2023

To,

1. Mohammed Aslam Aboobakr Kazi, S/o. Shri. Aboobakr Kazi, 2nd Siddique, House Teri Galli, Versova, Andheri West, Mumbai-400061
2. Commissioner of Customs, CSI Airport, Terminal-2, Level-II, Sahar, Andheri East, Mumbai-400099.

Copy to:

1. Advani Sachwani & Heera, Advocates, Nulwala Building, 41 Mint Road, Fort, Opp. G.P.O. Fort, Mumbai 400 001.
2. Sr. P.S. to AS (RA), Mumbai.
3. Guard File,
4. File Copy
5. Notice Board