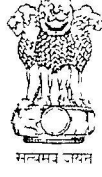


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GOVERNMENT OF INDIA
MINISTRY OF FINANCE
(DEPARTMENT OF REVENUE)
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Mumbai - 400 005

F No 371/135/B/2022-RA | 966

Date of issue: 12.02.24

ORDER NO. 146/2024-CUS (WZ)/ASRA/MUMBAI DATED 7 2 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 Bejoy Beena
Respondent · Pr. Commissioner of Customs, CSMI, Mumbai
Subject · Revision Application filed under Section 129DD of the
Customs Act, 1962 against the Order-in-Appeal No. MUM-
CUSTM-PAX-APP-1059/2021-22 dated 23 11.2021 [Date of
issue 24.11 2021] [F No S/49-926/2020] passed by the
Commissioner of Customs (Appeals), Mumbai Zone-III.

ORDER

This Revision Application is filed by Mr Bejoy Beena (here-in-after referred to as the 'Applicant') against the Order-in-Appeal (OIA) No MUM-CUSTOM-PAX-APP-1059/2021-22 dated 23 11 2021 passed by the Commissioner of Customs (Appeals), Mumbai Zone-III

2 Brief facts of the case are that on 07 05.2019, the officers of Customs, Chhatrapati Shivaji Maharaj International Airport, Mumbai, intercepted the Applicant, who had arrived by Flight No. IX-248 from Dubai, after he had cleared himself through the Customs Green Channel. A personal search of the Applicant resulted in recovery of 02 cut pieces of crude gold and 02 remnant pieces of crude gold totally weighing 402 grams and valued at Rs 11,66,821/- A seizure of the recovered gold was effected under a panchnama and after completion of investigations, a show cause notice dated 24 10.2019 was issued to the applicant.

3 The case was adjudicated in due course and the Original Adjudicating Authority (OAA) i.e., Additional Commissioner of Customs, CSMI Airport, Mumbai, vide Order-in-Original (OIO) dated 27 07.2020 ordered absolute confiscation of the seized gold totally valued at Rs 11,66,821/- under Section 111(d) of the Customs Act, 1962 The OAA also imposed a penalty of Rs 1,50,000/- under Section 112(a)(i) ibid

4 Aggrieved, the Applicant filed an appeal before the Appellate Authority (AA) who vide impugned OIA upheld the order of the OAA.

5 Hence, the Applicant has filed the instant revision application on the following grounds.

- a) that the order passed by the appellate authority was bad in law and unjust; that the OIA has been passed without due consideration to the documents on record and facts of the case; that the goods were neither restricted nor prohibited; that no previous case has been registered

against applicant; that the applicant is an owner of the goods and ready to pay the customs duty and any other customs dues, that violation, if any, was out of ignorance and technical in nature; that the Respondent has come to the conclusion that the acts and/or omissions on the part of the Applicant was to evade Customs duty; that the evasion of Customs duty can be done only in respect of dutiable goods and not prohibited goods; 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, that various judgements passed by the Apex Court, High Courts, Tribunal, GOI have held that gold was neither restricted nor prohibited and therefore it should not be confiscated absolutely.

b) the applicant has relied upon the following case laws:-

(i). Hargovind Das K Joshi v/s Collector of Customs [1992 (61) ELT 172 SC], Absolute confiscation of goods without considering question of redemption on payment of fine although having discretion to do so under Section 125, matter remanded back

(ii) UOI v/s. Dhanak M Ramji in W.P. No 1397 with 1022 of 2009 dated 04.08.2009 (2009-248-ELT-127-Bom.). Goods not prohibited but became prohibited due to violation of law, discretion to release on payment of redemption fine, is maintainable

(iii) T. Elvarasan v/s Commr. Of Customs (Airport), 2011-266-ELT-167-Tri-Madras on the issue of gold chains brought from Singapore and seized on the ground of non-declaration on arrival; passenger living abroad for more than 6 months and entitled to import gold, gold not prohibited item option to redeem the goods; impugned gold ordered to be released provisionally subject to adjudication proceedings.

(iv) Yakub Ibrahim Yusuf v/s Commissioner of Customs, Mumbai [Final Order No A/362/2010-WBZ-II/(CSTB) dated 28 10.2010 in Appeal no C/51/1996-Mum] [2011-263-ELT-685-Tri-Mumbai]. Term prohibited goods refers to goods like arms, ammunition, addictive drugs, whose import in any circumstance would danger or be detriment to health, welfare or morals of people as whole and makes them liable to absolute confiscation.

(v). Mohini Bhatia vs. Commr of Customs [1999-106-ELT-485-Tri-Mumbai on prohibited goods and restricted goods Gold was not included in the part II of restricted item.

(vi) Hon'ble Tribunal Bombay in the case of Sapna Sanjeev Kohli vs. Commr Of Customs, Airport, Mumbai (2008-230-ELT-305-Tri-

Mumbai), Plea of no intention of clearing goods without payment of duty not tenable, Absolute confiscation of gold jewellery not warranted.

(vii). Alfred Menezes v/s Commissioner of Customs (Mumbai) [2011 (236) ELT 587 (Tri-Mumbai)], Section 125(1) *ibid* clearly mandates that it is within the power of the adjudicating authority to offer redemption of goods even in respect of prohibited goods

(viii) Commissioner of Customs, Kandla v/s Deluxe Exports. Order nos 2064-2076/2000-WBZ/C-II dated 25 07.2000 in Appeals No. C/368, 554 to 564/2000. Adjudication Authority not to decide or investigate as to who is the owner of the goods

On the above grounds, the Applicant has prayed to allow redemption of the seized gold under section 125 of the Customs Act,1962, substantially reduce the personal penalty or to pass any other order as deemed fit

6 Personal hearing in the case was held on 19 10.2023 Shri N.J Heera, Advocate appeared for the personal hearing and submitted that the applicant has brought small quantity of gold for personal use He further submitted that there was no concealment and that the applicant has no past history of any offence He requested to allow redemption of gold on nominal fine and penalty. No one appeared for the personal hearing on behalf of the Respondent.

7. Government has gone through the facts of the case and observes that the Applicant had brought 02 cut pieces of crude gold and 02 remnant pieces of crude gold totally weighing 402 grams but 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, after clearing himself through the green channel of Customs and on being intercepted, 02 cut pieces of crude gold and 02 remnant pieces of crude gold totally weighing 402 grams and valued at Rs.11,66,821/- were recovered from the Applicant and revealed his intention of not to declare the said gold and thereby evade payment of Customs Duty The confiscation of the impugned cut pieces of crude gold was therefore justified and thus the Applicant 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 became liable for confiscation under Section 111(d) of the Customs Act, 1962

9 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”.

10 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.

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, the 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 but he is not bound to so release the goods.

12 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.”

13.1. Government further observes that there is 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
- f) 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 Vijayasundaram + 5 others in a matter of Sri Lankans wearing 1594 gms of gold jewellery 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 the 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.

13.2 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.

14 Government finds that as the Applicant had not 02 cut pieces of crude gold and 02 remnant pieces of crude gold totally weighing 402 grams and valued at Rs 11,66,821/- at the time of arrival, the confiscation of the same was justified. However, the quantum of gold under import is small and is not of commercial quantity. There are no allegations that the Applicant is a habitual offender and was involved in similar offence earlier. Further, there is nothing on record to prove that the Applicant was part of an organized smuggling syndicate. The absolute confiscation of the impugned gold leading to dispossession of the same from the applicant is therefore harsh and not reasonable.

15 Government finds that in view of the aforesaid facts, option to redeem the impugned gold on payment of redemption fine should have been provided to the applicant. Therefore, Government is inclined to modify the Order for absolute confiscation and allow the redemption of impugned 02 cut pieces of crude gold and 02 remnant pieces of crude gold totally weighing 402 grams and valued at Rs 11,66,821/- on payment of a redemption fine.

16 Government finds that the applicant has averred that he is a NRI, staying and working in Dubai and hence is an eligible passenger to import gold under notification no 50/2017 -Cus 30 06.2017. The applicant has contended he had brought this aspect to the notice of AA and has been recorded at para 6 of the impugned OIA, but it had not been considered in the OIA. Government finds that the ends of justice would be served, if this contention about eligibility made by the applicant is verified. Government directs the respondent to cause verification on the issue of eligibility of concessional rate to the applicant and duty may be accordingly, charged.

17 Applicant has also pleaded for setting aside the penalty imposed on him. The market value of the gold in this case is Rs 11,66,821/-. From the facts of the case as discussed above, Government finds that the penalty of Rs 1,50,000/- imposed on the Applicant under Section 112 of the Customs Act, 1962 commensurate with the omissions and commissions of the Applicant and is therefore sustained

18 In view of the above, the Government modifies the Order-in-Appeal No. MUM-CUSTOM-PAX-APP-1059/2021-22 dated 23.11.2021 passed by the Commissioner of Customs (Appeals), Mumbai Zone-III and allows the Applicant to redeem the impugned 11,66,821/-, on payment of a redemption fine of Rs 2,25,000/- (Rupees Two Lakhs Twenty Five Thousand Only).


(SHRAWAN KUMAR)

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

ORDER NO. 166/2024-CUS (WZ)/ASRA/MUMBAI DATED 7.2.24

To,

- 1 Mr Bejoy Beena,
Bijoy Bhavnam, Menampally,
Mukundapuram P O , Chavra, Kollam,
Kerala - 691 085
- 2 The Pr. Commissioner of Customs,
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Copy to

- 1 Shri N.J Heera, Advocate,
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2 Sr P S to AS (RA), Mumbai

3. Guard file