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GOVERNMENT OF INDIA
MINISTRY OF FINANCE
(DEPARTMENT OF REVENUE)

8th Floor, World Trade Centre, Centre - I, Cuffe Parade,
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F.No. 380/20/B/2017-RA(MUM) / 96

Date of Issue 12.01.2023

ORDER NO. 14/2023-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 : Commissioner of Customs, CSI Airport, Mumbai.

Respondent: Shri. Ammaduni Thekkoot

Subject : Subject : Revision Application filed, under Section
129DD of the Customs Act, 1962 against the Order-in-
Appeal No. MUM-CUSTM-PAX-APP-622/17-18 dated
11.10.2017 [S/49-214/2015-AP] passed by the
Commissioner of Customs (Appeals), Mumbai - III.

ORDER

This revision application has been filed by Commissioner of Customs, CSI Airport, Mumbai (herein after referred to as the Applicant) against the Order-In-Appeal No. MUM-CUSTM-PAX-APP-622/17-18 dated 11.10.2017 [S/49-214/2015-AP] passed by the Commissioner of Customs (Appeals), Mumbai - III.

2. Brief facts of the case are that the respondent on arrival at CSI Airport, Mumbai from Dubai by Emirates Flight No. EK-504 dated 17.01.2014 was intercepted at the exit gate by the Customs Officers. To the query whether he was carrying any dutiable goods, the respondent had replied in the negative. On examination and personal search of the respondent, a receipt for 2 kgs of gold was found. Thereafter, the respondent was made to pass through the metal detector which indicated presence of metal. Two gold bars of one kilogram each which were cleverly concealed in each of the sandals worn by the respondent were recovered. The two kilograms of gold valued at Rs. 50,63,080/- was seized in the reasonable belief that the same were attempted to be smuggled into India and were liable for confiscation under the provisions of the Customs Act, 1962.

3. After due process of the law, the Original Adjudicating Authority, viz Additional Commissioner of Customs, CSI Airport, Mumbai vide Order-In-Original No. ADC/ML/ADJN/119/2014-15 dated 16.01.2015 [F.No. S/14-5-32/2014-2015 Adjn - SD/INT/AIU/31/2014-AP 'C'] ordered for the absolute confiscation of the two gold bars valued at Rs. 50,63,080/- under Section 111(d), 111(1) and 111 (m) ibid of the Customs Act, 1962 and a penalty of Rs. 5,00,000/ was also imposed on the respondent under section of 112 (a) and (b) of Customs Act, 1962.

4. Aggrieved by the said order, the respondent filed an appeal before the Commissioner of Customs (Appeals), Mumbai-III who vide Order-In-Appeal No.

MUM-CUSTM-PAX-APP-622/17-18 dated 11.10.2017 [S/49-214/2015-AP] allowed to redeem the two gold bars on payment of a redemption fine of Rs. 9,00,000/- [Rupees Nine Lakhs Only] and the penalty of Rs. 5,00,00/- imposed by the Original Adjudicating Authority was maintained

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

- 5.1. that the Order-in-Appeal is not legal and proper.
- 5.2. that the manner of recovery of gold from the sandals worn by the respondent clearly indicated that the concealment was not only ingenious but also premeditated.
- 5.3. that the respondent had shown Rs. 5000 as the total value of dutiable goods being imported by him in the declaration form; that the respondent had failed to make a true declaration in the Customs Declaration Form of the contents of his baggage to Customs as required under Section 77 of the Customs Act, 1962 and therefore the goods under seizure are liable for confiscation under Section 111(d), (1) & (m) of the Customs Act, 1962.
- 5.4. that in terms of paragraph 2.20 of the Foreign Trade Policy (2009-14), formulated under Section 5 of the Foreign trade (Development and Regulation) Act, 1992, respondent was allowed to import only bonafide household goods. In terms of Circular No. 34/2013-Cus issued by Directorate General of Export Promotion vide F. No. DGEP/EOU/G&J/16/2009 dated 04.09.2013, import of gold was restricted and gold is permitted to be imported only by the agencies notified by DGFT. Hence, import of gold by any other person or agencies other than the ones notified by DGFT is prohibited in terms of Circular No. 34/2013-Cus issued by Directorate General of Export Promotion and the same was liable to be confiscated under the Customs Act, 1962.
- 5.5. the respondent had admitted that the gold did not belong to him and he had carried the same for a monetary consideration.
- 5.6. the applicant has relied on various case laws to buttress their claim.
- 5.7. considering the ingenious concealment, the appellate authority ought not to have released the gold.

Applicant has prayed to set aside the order passed by the appellate authority and to restore the order passed by the original adjudicating authority or pass any order as deemed fit.

6(a). Personal hearings in the case were scheduled online on 19.09.2021 / 23.09.2021, 14.10.2021 / 21.10.2021, 11.01.2021. Shri. V.M Advani and Shri. N.J Heera, both Advocates for the Respondent attended physical hearing on 13.01.2022. They stated that the Commissioner (Appeals) had correctly allowed the release of the gold on RF and penalty as their client was an eligible passenger. They requested to maintain the order passed by the Commissioner (Appeals).

6(b). However, the Applicant did not attend the hearing. Sufficient opportunities have been given to the Applicant to put forth their case. The case is taken up for a decision. The Respondent vide their letter dated 22.11.2021 have made a written submission.

7. The Respondent in their written submission dated 22.11.2021, through their Advocates has stated that;

- 7.1. that the order passed by the appellate authority was legal and proper.
- 7.2. that the respondent had submitted that the violation was out of ignorance and was technical in nature which was accepted by the appellate authority.
- 7.3. that the Appellate Authority in his findings had clearly brought out that in terms of clause (h) of Rule 3 of Foreign Trade (Exemption) from Application of Rules in Certain Casés) Order, 1993 import of gold is allowed in any form as part of baggage by passengers of Indian origin if the passenger satisfied the condition of six months stay abroad with conditions after liberalization of EXIM Policy. In the case of Respondent, he is an NRI who had been staying abroad for more than 25 years, which is not in dispute.
- 7.4. that due to the contravention of Section 77 of the Custom Act, 1962 a fine had been imposed on the respondent by the appellate authority.
- 7.5. that the respondent was in possession of an invoice for the purchase of the gold and was the owner of the goods.
- 7.6. that the Appellate Authority had held in his findings that the Respondent was eligible and permitted for redemption of the goods by quoting plethora of citations with justification

- 7.7. the respondent has relied upon various case laws to buttress their case wherein redemption of gold has been allowed by various forums.
- 7.8. that the contentions raised by the applicant in the revision application has all been dealt with in great detail in the order passed by the appellate authority.

Respondent in his written submission has prayed that the order passed by the appellate authority is proper and legal and therefore, the revision application filed by the applicant may be rejected.

8. The Government has gone through the facts of the case and notes that the Respondent had not declared the gold and had passed through the green channel. Thereafter, he was asked whether he was carrying any dutiable items to which he had replied in the negative. Further, the Respondent had not filed a true declaration to the Customs and had declared that the value of the dutiable goods in his possession was Rs. 5000/- only. The Respondent had clearly failed to make a truthful declaration of the goods to the Customs at the first instance as required under Section 77 of the Customs Act, 1962. The Invoice of the gold bars was found in the baggage of the respondent evidencing ownership of the goods. Had he not been intercepted, the Respondent would have gotten away without paying Customs duty on the gold bars. The Government finds that the confiscation of the gold is therefore justified.

9.1. 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.

9.2. 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. It is undisputed that Section (l) and (m) are also applicable in this case as the respondent had adopted an innovative method and it was not included in the declaration. Therefore, the gold was also liable for confiscation under these Sections.

10.1. 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”.

10.2. 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 respondents thus, liable for penalty.

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. 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. 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. In case of goods, such as, gold which become prohibited for violation of certain conditions, the Adjudicating Authority may allow redemption

13. Government notes that while allowing the redemption of the goods, the AA at paras 6,7 and 18 of his OIA, has observed as under;

*“6. Regarding exercising the discretion of redemption, I find that that Section 125 of Customs Act, 1962 provides that in case of **prohibited goods** the adjudicating authority **may** give an option of*

redemption and in this way he has discretionary power but for other than prohibited goods the adjudicating authority has to give option to pay fine in lieu of confiscation and in this way the adjudicating authority **shall** allow redemption to the owner or the person from whose possession such goods have been seized:

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:

.....

7. I find that in terms of Section 2(33) of Customs Act, 1962, "prohibited goods" means any goods the import 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. I find that the prohibition relates to two types of goods, one which cannot be imported by any one, such as arms, ammunition, addictive substance viz. Narcotic Drugs, wild life products etc, which are categorised as 'prohibited goods'. The other category includes the goods the import / export of which is allowed subject to fulfilment of certain condition and if the conditions are complied with, such goods will not fall in the category of 'Prohibited Goods'. Accordingly, the intention behind the provisions of Section 125 is clear that import of such goods (which are prohibited in absolute terms) under any circumstances would cause danger to the health, welfare or morals of people as a whole and therefore the discretion should not be exercised. Second category includes the goods, the import/ export of which 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. In this situation, the release of these goods would not cause any danger or harm to the public as a whole and though it is not mandatory for the adjudicating authority to allow redemption yet

such cases may be considered positively for redemption. It is an admitted fact that the import of gold is allowed in case of certain category of persons, subject to certain conditions. No permission or license from any Govt. agency or Reserve Bank of India is required now for entitled persons to bring in gold. Therefore, the relaxation is very liberal for such persons. Accordingly, the goods falling under this category may be considered for release on redemption fine. To put it differently, if the goods are unconditionally prohibited from importation, the importer/owner will not be entitled for claiming redemption. On the other hand, if the goods are conditionally prohibited from importation (i.e subject to some conditions), importer/owner may claim redemption. Nevertheless, as per Section 125 of the Customs Act, 1962 framed under the statute, an option of redemption can be given in his discretion by an adjudicating/ appellate authority, even in respect of prohibited goods.

18. Therefore, what transpires from various judgements of Honourable Courts and other forums is that gold brought by the passenger and not declared to avoid payment of duty, the option of redemption under section 125 of Customs Act, 1962 can be exercised to secure ends of justice. Appellant has pleaded to release the said gold on payment of redemption fine in terms of Section 125 of Customs Act, 1962. I find that the adjudicating authority has absolutely confiscated the gold vide Para 28 to 30 of the impugned order mainly on the grounds that the gold was brought in shoes which is ingenious concealment and the passenger was acting as carrier but I find that in the case of previous Order-in-Originals referred by the Advocate redemption of gold had been allowed on payment of fine in similar situations. Besides the statement was retracted by the passenger as per letter dated 17.01.2014 addressed to Deputy Commissioner /AIU and the passenger was admittedly carrying the invoice SAL No. 1214 dated 16.01.2014 of M/s VIN GOLD LLC, Dubai UAE. Further the contention that he is eligible for import of gold as he is NRI is supported by the fact that his passport has been issued at Dubai. I find that immediately after seizure the passenger had claimed ownership of the gold vide letter dated 17.01.2014 and during adjudication proceedings also he reiterated his claim on goods as suggested vide Para 16, 20 and 24 of the impugned Order The Order also does not dispute the claim that he is NRI living abroad for more than 20 yrs. Accordingly I find that there is not sufficient ground to

allege that the passenger was working as carrier for somebody else except a retracted statement and therefore the facts are clearly distinguishable from Abdul Razak 2012 (275) ELT 300 (Kerla). I find that it is settled law that retracted statement is a weak evidence against the maker as held in case of Haroon Haji Abdulla vs State of Maharashtra 1999 (110) ELT 309 (S.C.); DRI vs Mahendra Kumar Singhal 2016 (333) E.L.T 250 (Del.); Rakesh Kapoor vs Union of India 2015 (326) E.L.T. 465 (Del.)."

14. Government finds that the AA has used his discretion in releasing the gold. The option to allow redemption of seized goods is the discretionary power of the adjudicating / appellate authority depending on the facts of each case and after examining the merits. Government observes that while allowing the goods to be redeemed, the AA has relied upon a host of cases where the adjudicating authority had released the gold of varying quantities and the same were accepted by the Department. Further, in the extant revision application, the applicant have not controverted the same. Also, while allowing redemption of the gold, the AA has held that the respondent was an eligible person by virtue of his stay abroad which too has not been controverted by the applicant. A case of parity and fairness was made out by the respondent before the AA.

15. 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. Some of these cases have been cited by the AA in the OIA.

16. Government finds that the AA has relied upon the precedent case laws on the subject and have applied the case laws judiciously while granting release of the gold bar. Further, the AA has held that the respondent was the owner of the gold and was also an eligible person to bring gold. A case that the respondent was a habitual offender had not been made out. The applicant has contended that the gold had been concealed in the sandals worn by the respondent to evade

detection. It is a fact that travelers / passengers resort to innovative methods to hoodwink the Customs and bring gold by evading Customs duty. All these have been taken into account while imposing fine and penalty. The AA has used discretion available under Section 125 of the Customs Act, 1962 and allowed the respondent to redeem the gold on payment of fine of Rs. 9,00,000/-. Government finds the OIA passed by the AA to be legal and proper and is not inclined to interfere in the same.

17. Revision Application filed by the applicant is disposed of on above terms.

Shrawan
10/11/23

(SHRAWAN KUMAR)

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

ORDER No. 14/2023-CUS (WZ) /ASRA/MUMBAI DATED 10.01.2023

To,

1. Commissioner of Customs, Terminal - 2, Level - II, Chhatrapati Shivaji International Airport, Sahar, Mumbai - 400 099.
2. Shri. Ammaduni Thekkoot , Thekkoot House, Perumpadappa, Palapetty P.O, Malappuram Dist., Kerala - 679 579.

Copy To,

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