



GOVERNMENT OF INDIA
MINISTRY OF FINANCE
(DEPARTMENT OF REVENUE)
8th Floor, World Trade Centre, Centre – I, Cuffe Parade,
Mumbai-400 005

F.No. 380/37/B/WZ/2018-RA / 125

Date of Issue 16.01.2023

ORDER NO. 15 / 2023-CUS (WZ) / ASRA/MUMBAI DATED 12.01.2023
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, Pune.

Respondent : Smt Shaheena Banu Hurmath

Subject : Revision Application filed, under Section 129DD of the
Customs Act, 1962 against the Order-in-Appeal No.
PUN-EXCUS-001-072-17-18 dated 25.05.2017 [F.No.
V2PI/R-10/CUS/2016] passed by the Commissioner
(Appeals), Central Excise, Pune-I.

ORDER

This Revision application has been filed by the Commissioner of Customs, Pune (herein referred to as Applicant) against the Order-in-Appeal No. PUN-EXCUS-001-072-17-18 dated 25-05-2017 [F.No. V2PI/R-10/CUS/2016] passed by the Commissioner (Appeals), Central Excise, Pune, in respect of Smt Shaheena Banu Hurmath (herein referred to as Respondent).

2. Brief facts of the case are that on 01.01.2015, on receiving intelligence the Officers of Customs had intercepted, one Lady passenger namely Smt. Shaheena Banu Hurmath holding passport number JI383763, arriving from Dubai by the Air India Express flight No IX 212 on 01.01.2015, while trying to pass through the Green Channel after submitting a NIL Customs Declaration Form. On enquiry, she denied about carrying any valuable contraband goods with her whereas during personal search by the lady customs officer, three gold chains were recovered which were concealed around her waist underneath her Salwar. It was found that these three chains were made of 24K Gold totally weighing 1999.64 gms and collectively valued at Rs. 54,79,010/-. The same were seized under the reasonable belief that the same had been smuggled to India in a clandestine manner and in contravention of the provisions of the Customs Act, 1962.

3. After due process of investigations and the law, the Original Adjudicating Authority (OAA) i.e. the Addl. Commissioner of Customs Pune, vide Order-In-Original No. PUN-CUSTM-000-ADC-22/15-16 [F.No.VIII/Cus/Adj/SCN-Banu/25/15 F.No. Aircus/49-54/Gold case/2014] dated 10-02-2016 ordered as follows:

- (i) confiscation of three gold chains which were made of 24K Gold totally weighing 1999.64gms and collectively valued at Rs. 54,79,010/- under Section 111(d), 111(1) & 111(m) of the Customs Act, 1962. However, the adjudicating authority gave the passenger an option to redeem the gold chains on payment of a fine of Rs.11,00,000/- under Section 125(1) of the Customs Act, 1962, with applicable duty and other charges to be collected under section 125(2) of the Customs Act, 1962, from the passenger;

- (ii) Imposed penalty of Rs. 5,50,000/- (Rupees Five Lakh Fifty thousand Only) on the passenger under Section 112 (a) & (b) of the Customs Act, 1962,;
- (iii) imposed a penalty of Rs. 1,00,000/- (Rupees One lakhs Only) on the passenger under Section 114AA of the Customs Act, 1962.

4. Aggrieved by this Order, the Applicant preferred an appeal before the appellate authority i.e. Commissioner (Appeals), Central Excise, Pune, who vide Order-in-Appeal No. PUN-EXCUS-001-072-17-18 dated 25-05-2017 upheld the OAA's Order and rejected the department's appeal.

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

- 5.1. that the Order-in-Appeal order passed by the appellate authority was not legal and proper.
- 5.2. that the respondent attempted to clear herself through the green channel by filing NIL Customs Declaration and that she was aware of the fact that the goods she smuggled, were liable for Customs duty.
- 5.3. that the appellate authority had erred in interpreting Section 125 of the Customs Act, 1962 in isolation rather than interpreting it harmoniously alongwith other relevant Sections viz 2(33), 2(39), 11(2)(c), 11(2)(e), 11(2)(f), 11A(a), 77, 78, 79, 107, 108, etc of the Customs Act, 1962, Baggage Rules, 1998, Foreign Trade Policy 2015-20, Notification No. 12/2012 -CUS, Circular No. 495/5/92-Cus VI dated 10.05.1993 etc.

Further, as per Clause 3 of Foreign Trade (Exemption from application of rules in certain case) order, 1993, issued under Foreign Trade (Development and Regulation) Act, 1992, read with Customs Notification No. 171/94 dated 30-09-94 (as amended), the import of gold in any form including ornaments (but excluding ornaments studded with stones or pearls) will be allowed as part of baggage by a passenger of Indian origin or a passenger holding a valid passport issued under the Passport Act, 1957, subject interalia, to the condition that the passenger importing the gold is coming to India after period of not less than six months of stay abroad and the import duty on the gold shall be paid in convertible foreign currency. In this case, the passenger did not stay abroad for a period of six months.

Further, she had made NIL Customs declaration before the Customs Authorities with an intention to evade payment of Customs duty.

- 5.4 that the Appellate authority erred in holding that, the Respondent is not a 'carrier', as it has not been established on the basis of the statement dated 01.01.2015, which is a concrete evidence that the gold chains have been recovered from the passenger and that no owner has been found. It is an admitted position that the statement of the Respondent was recorded on 01.01.2015, under Section 108 of the Customs Act, 1962, which is in the nature of substantive evidence, with which the onus lies on the passenger to prove the ownership of imported goods in terms of the Section 123 of the Act. The passenger in her subsequent statement dated 26.05.2015 had stated that she had declared the said gold to Dubai Airport. that she gave the receipt of the gold to the boy which is now with Shri. Rizwan, her son. However, the Respondent failed to produce copy of receipt during the course of investigation and even during adjudication process before Adjudicating Authority. Hence, the Respondent had not discharged her obligation to prove her ownership of the imported goods.
- 5.5 that the case laws cited by the appellate authority in the order-in-appeal are squarely not applicable to the facts of the instant case.
- 5.6 that the Appellate Authority has erred in observing that the absolute Confiscation is warranted in cases of the goods which cannot be imported, such as arms, ammunition, addictive substance and the intention behind the provisions of Section 125 is clear that import of such goods under any circumstances would cause danger to the health, welfare or morals of people as a whole. It is submitted that the list of circumstances mentioned in the findings of Appellate Authority appears to be taken from the Section 11 of the Customs Act, 1962 and the said list also contains other circumstances viz prevention of smuggling, conservation of foreign exchange & safeguarding of balance of payments and prevention of injury to economy of the Country by the uncontrolled import or export of gold or silver specifically mentioned under Sections 11(2)(c), 11(2)(e) and 11(2)(f) of the Customs Act, 1962. In the present case the Appellate Authority erroneously has given an option to the Passenger to redeem the smuggled gold on payment of redemption fine in lieu of confiscation under Section 125 of the Customs Act, 1962. These actions are contrary to the intention of the legislature and board Circular no. 495/5/92-Cus. VI dated 10.05.1993 and Circular No. 6/2014-Cus dated 06.03.2014 which are binding in nature on quasi-judicial

authorities. Hence, the orders passed by the Appellate Authority needs to be set aside to the extent of giving an option to redeem the smuggled goods on payment of redemption fine.

5.7 In view of the above the applicant requested to set aside the OIA passed by the appellate authority upholding the OIO passed by the original adjudicating authority allowing redemption of confiscated gold

6. Personal hearings in the case were scheduled on 11.08.2022, 23.08.2022, 15.09.2022, 22.09. 2022, 12.10.2022 and 19.10.2022. However, no one appeared before the Revisionary Authority for personal hearing on any of the appointed dates for hearing. Since sufficient opportunity for personal hearing has been given in the matter, the case is taken up for decision on the basis of the available records.

7.1 The Government has gone through the facts of the case. The Respondent was intercepted as she was attempting to pass through the green channel. The three gold chains were discovered only when the Respondent was thoroughly checked. These were concealed around her waist underneath her salwar. The Respondent had not declared the gold chains as required under section 77 of the Customs Act, 1962. The confiscation of the gold is therefore justified and thus, the Respondent had rendered herself liable for 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 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 Respondent 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 pretense. 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 in the instant case, 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 is appropriate in the facts and circumstances of the instant case.

13. In the instant case, Government, notes that the Respondent even in her first statement has not stated that she has brought the gold for any monetary consideration. She stated that she had kept the gold jewellery on the waist as advised to her. Government notes that at times travellers resort to such safe keeping for safety reasons to avoid theft of their valuables. There are no allegations that the respondent is a habitual offender and was involved in similar offence earlier. Further the Respondent in her later statement claimed to be the owner of the gold chains and the applicant has not put forth any evidence disputing the same. 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. Under the circumstances, the seriousness of the misdemeanour is required to be kept in mind when using discretion under Section 125 of the Customs Act, 1962 and while deciding the quantum of penalty to be imposed. The Government notes that the adjudicating authority had used its discretion in allowing the release of the gold chains on payment of a redemption fine of Rs. 11, 00,000/- which is quite adequate for the misdemeanour committed. The appellate authority considering that the concealment of the gold chains was not ingenious had upheld the order of redemption passed by the original adjudicating authority. Government too is inclined to agree with the same.

14. On the issue of penalties, Government notes that a penalty of Rs. 5, 50,000/- under Section 112(a) and (b) of the Customs Act, 1962 and a penalty of

Rs.1,00,000/- under Section 114AA of the Customs Act, 1962 has been simultaneously imposed on the respondent. The penalty and quantum imposed under section 112 (a) & (b) is appropriate and commensurate with the omissions and commissions committed, however, once penalty has been imposed under Section 112(a) and (b) there is no necessity of imposing penalty under section 114AA. Hence the penalty of Rs. 1,00,000/- (Rupees One lakh only) imposed under section 114AA of the Customs Act,1962 is only set aside and the Government does not find it necessary to interfere in the remaining part of the order passed by the appellate authority.

15. Revision Application is dismissed on the above terms.


(SHRAWAN KUMAR)

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

ORDER No. 15 /2023-CUS (WZ) /ASRA/ DATED 21.01.2023

To,

1. The Commissioner of Customs, Pune, E-Wing, 4th Floor, 41-A, ICE-House, Sassoon Road, Opp Wadia Collage, Pune-411001.
2. Smt Shaheena Banu Hurmath, D. No. 717, 1st stage, Rajiv Nagar, Mysore-570019, Karnataka.

Copy to:

1. The additional Commissioner of Customs, Pune, E-Wing, 4th Floor, 41-A, ICE-House, Sassoon Road, Opp Wadia Collage, Pune-411001.
2. Sr. P.S. to AS (RA), Mumbai.
3. Guard File,
4. File Copy.
5. Notice Board.