



GOVERNMENT OF INDIA
MINISTRY OF FINANCE
(DEPARTMENT OF REVENUE)

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Mumbai-400 005

F.No. 380/07/B/WZ/2018-RA १२४

Date of Issue 06.02.2023

ORDER NO. 161 /2023-CUS (WZ) /ASRA/MUMBAI DATED 31 .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 : Pr. Commissioner of Customs (Airport), Mumbai.

Respondent : Ms Ifat Salim Tanki

Subject : Revision Application filed, under Section 129DD of the
Customs Act, 1962 against the Order-in-Appeal No. MUM-
CUSTM-PAX-APP-641/17-18 dated 24.10.2017 [F.No: S/49-
675/2015/AP (Deptt)] passed by the Commissioner of
Customs (Appeals), Mumbai-III

ORDER

This Revision application has been filed by the Principal Commissioner of Customs (Airport), Mumbai (herein referred to as Applicant) against the Order-in-Appeal No. CUSTM-PAX-APP-641/17-18 dated 24.10.2017 [F.No. S/49-675/2015/AP (Deptt)] passed by the Commissioner of Customs (Appeals), Mumbai-III, in respect of Ms Ifat Salim Tanki (herein referred to as Respondent).

2. Brief facts of the case is that on suspicion, the Officers of AIU Intelligence Unit intercepted, one Lady passenger namely Ms Ifat Salim Tanki, the Respondent, near the Exit Gate of T2 after she had cleared herself through Customs Green channel, after submitting a NIL Customs Declaration Form. The Respondent had arrived from Dubai by the Jet Airways flight No 9W-0537 dated on 22.03.2015. On personal search passenger was found to be in possession of 11 gold bars totally weighing 1280 grams and valuing Rs. 30,24,000/-. The said gold bars were found in 03 bundles covered by white tissue paper and wrapped in transparent adhesive tape which were concealed in the inner pockets of the salwar worn by the passenger. The impugned gold was seized in the reasonable belief that the same was smuggled into India in contravention of the provisions of the Customs Act, 1962 and liable for confiscation, under section 111 (d),(1)&(m) 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 (Airport), CSIA, Mumbai vide Order-In-Original No. ADC/RR/ADJN/110/2015-16] dated 14.07.2015 ordered as follows:

- (i) confiscation of 11 gold bars totally weighing 1280 grams and valuing Rs. 30,24,000/-. under Section 111(d), 111(1) & 111(m) of the Customs Act, 1962. However, the adjudicating authority gave the Respondent an

option to redeem the gold bars on payment of a fine of Rs.5,15,000/- 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 Respondent;

- (ii) Imposed penalty of Rs. 3,00,000/- on the Respondent under Section 112 (a) & (b) of the Customs Act, 1962,;

4. Aggrieved by this Order, the Applicant preferred an appeal before the appellate authority i.e. Commissioner of Customs (Appeals), Mumbai-III, who vide Order-in-Appeal No. CUSTM-PAX-APP-641/17-18 dated 24.10.2017 [F.No. S/49-675/2015/AP (Deptt)] 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;

5.01 That, the manner in which the gold was concealed in the inner pockets of the salwar worn by the passenger clearly indicates that the concealment was not only ingenious one but also premeditated. That the Respondent had willfully failed to make a true declaration in the Customs Declaration and also when questioned she denied carrying gold or contraband in her baggage or on her person and therefore the goods under seizure are liable to confiscation under section 111(d), (I) & (m) of the Customs Act, 1962.

5.02 That 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 are liable to be confiscated under the Customs Act, 1962.

5.03 That as per Section 77 of the Customs Act, 1962, the owner of any baggage, shall for the purpose of clearing it is required to make a declaration of its contents

to the proper officer and in terms of Section 2(33) of the Customs Act, 1962, if any goods are imported in violation of the conditions imposed for such importation, such goods shall be treated as "Prohibited goods". The Respondent failed to make a true declaration of the contents of her baggage to Customs as required under Section 77 of the Customs Act, 1962 and concealed the said gold weighing 1280 grams valued at Rs 30,24,000/- in the inner pockets of the salwar worn by her, thus rendering the goods as prohibited goods in terms of Section 2(33) of the Customs Act, 1962.

5.04 That the Adjudicating Authority in the impugned order has erred in holding that there is no ingenious concealment. The manner of packaging and wearing a salwar with inner pockets clearly indicated the willful intention to smuggle the 11 gold bars weighing 1280 valued at Rs. 30,24,000/- by way of ingenious concealment. Further, the Adj. Authority has erred in accepting copy of bill/invoice submitted by the passenger in her defence reply to establish the ownership of seized gold.

5.05 In the case of Samyanathan Murugesan v/s Commissioner of Customs (AIR). Chennai-1 as reported in 2010(254) ELT A15 (SC). This decision of Hon'ble Supreme Court was in the appeal against the Hon'ble Madras High Court's Order reported as 2009(247) ELT 21 (Mad.). Hon'ble High Court found that the passenger had attempted to smuggle 7.075 kilogram gold by ingenious concealment in T.V. set without making declaration before Customs in violation of provisions under Section 11 & 77 of the Customs Act, 1962 and the adjudicating authority had absolutely confiscated the gold. Thus, vide this order the Hon'ble High Court upheld the order of the Original adjudicating authority for absolute confiscation of gold.

5.06 The Section 123 of the Customs Act, 1962 put to onus of burden of proof that the seized gold is not smuggled from the person from whom it is recovered/seized but does not bestow the status of owner on such person. The

passenger being resident Indian and found carrying huge quantity of gold weighing 1280 gms valued at Rs. 30,24,000/-; the onus was on the Adj. Authority to ascertain the owner (as reported in the case of P. Hamza v/s. Commissioner of Customs (Airport)2014 (309) ELT 259 (Tri Mumbai).

5.07 The Commissioner (Appeals) has also erred in upholding the order in original of granting the release of seized gold bars by imposing Redemption Fine under Section 125 of the Customs Act, 1962. In this regard, it is to state that, the option to redeem the seized goods under Section 125 of the Customs Act, 1962 is the discretionary power of the Adjudicating authority depending on the facts of each case and after examining the merits. Taking into account the facts on record and the gravity of the offence, the lower authority had wrongly ordered the redemption of the impugned gold. Therefore, considering the fact that the gold was ingeniously concealed in the inner pockets of the salwar worn by the passenger and that she failed to declare the same, the Commissioner (Appeals) ought not to have allowed redemption of the impugned gold. Appellate Authority should not have upheld the order of lower authority. Therefore, Commissioner (Appeal)'s order is not proper from this aspect also.

5.08 That in this case, the Respondent has acted as carrier and release of seized gold to her on payment of redemption fine will not be in the interest of Indian economy and indirectly encourage the smuggling of impugned goods. Further the Judgment of Hon'ble High Court of Kerala in the case of Abdul Razak Vs. Union of India reported as in 2012(275) ELT 300(Ker.) is very much relevant as it laid down that seized goods are not to be released to the carrier.

5.09 Hon'ble Supreme Court's judgment in the case of Om Prakash Bhatia Vs Commissioner of Customs, Delhi (2003(155)ELT 423 (S.C.) is squarely applicable, wherein, it was held that, "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. In the

present case, the passenger did not declare the impugned gold which was concealed in the inner pockets of the salwar worn by her with express intention of evading customs duty and thereby she failed to fulfill the conditions laid down for importing the gold and had thus contravened the provisions of the Customs Act, 1962. Therefore, impugned seized gold should not have been released to her.

5.10 That the Commissioner (Appeal)'s conclusion justifying the applicability of the A. Rajkumari Vs CC (Chennai) to the facts of this case is improper.

5.11 That regarding the redemption fine and penalty, it is pertinent to mention here that, it shall depend on the facts and circumstances of the case and other cases cannot be binding as a precedent. In support of this contention, the judgment of Hon'ble Delhi High Court in the case of Jain Exports Vs Union of India 1987(29) ELT 753 wherein the Hon'ble High Court has observed that: "..... the resort to Section 125 of the C.A. 1962, to impose fine in lieu of confiscation cannot be so exercised as to give a bonanza or profit for an illegal transaction of imports" is very much relevant.

On the grounds stated above, the Order-in-Appeal No MUM-CUSTOM-PAX-APP- 641/17-18 dated 24.10.2017, passed by the Commissioner of Customs (Appeals), Mumbai Zone-III, may be set aside and order may be passed for absolute confiscation.

6. Personal hearings in the case were scheduled on 11.08.2022, 23.08.2022, 23.09.2022 and 30.09.2022. 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

eleven gold bars were discovered only when the Respondent was thoroughly checked. These were concealed in the inner pockets of 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. There are no allegations that the respondent is a habitual offender and was involved in similar offence earlier and also that there was no ingenious concealment. The impugned gold were kept in the inner pockets of the salwar. 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 bars on payment of a redemption fine of Rs. 5,15,000/- which is quite adequate for the misdemeanour committed. The appellate authority considering that the concealment of the gold bars were 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. 3,00,000/- under Section 112(a) and (b) of the Customs Act, 1962 has been imposed on the respondent. The penalty and quantum imposed under section 112 (a) & (b) is

appropriate and commensurate with the omissions and commissions committed, and has been upheld by the AA.

15. In view of the above, Government does not find it necessary to interfere in the order passed by the appellate authority.

16. Revision Application filed by the department is dismissed on the above terms.

Shrawan
31/1/23
(SHRAWAN KUMAR)

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

ORDER No. 161 /2023-CUS (WZ) /ASRA/Mum DATED 31/01.2023

To,

1. Ms. Ifat Salim Tanki, H.no. 3/29, Choudhary Mohalla, Kalyan West, Thane-421301.
2. The Pr. Commissioner of Customs, C.S.I Airport, Terminal 2, Level-II, Sahar, Andheri (East), Mumbai 400 099.
3. The Commissioner of Customs (Appeals), Mumbai-III, 5th Floor, Avs Corporate Point, Makwana Lane, Behind S.M.Centre, Andheri Kurla Road, Andheri (East), Mumbai 400 059.

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