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GOVERNMENT OF INDIA
MINISTRY OF FINANCE
(DEPARTMENT OF REVENUE)

8th Floor, World Trade Centre, Centre - I, Cuffe Parade,
Mumbai-400 005

(i). F.No. 380/77/B/WZ/2018-RA : Date of Issue 11.05.2022

ORDER NO. 168/2022 CUS (WZ)/ASRA/MUMBAI DATED 05.05.2022 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.

(i). F.No. 380/77/B/WZ/2018-RA

Applicant : Pr. Commissioner of Customs, CSI Airport, Mumbai.

Respondent : Shri. Shoaib Mohammed Fakir Mohammed Shaikh

Subject : Revision Applications filed respectively, under Section 129DD
of the Customs Act, 1962 against the Order-in-Appeal No. MUM-
CUSTM-PAX-APP-141/2018-19 dated 31.05.2018 [F.No. S/49-
268/2016] passed by the Commissioner of Customs (Appeals),
Mumbai - III.

ORDER

This revision application has been filed by Pr. Commissioner of Customs, CSI Airport, Mumbai (hereinafter referred to as the Applicant) against the Order-in-Appeal Nos. Order-in-Appeal No. MUM-CUSTOM-PAX-APP-141/2018-19 dated 31.05.2018 [F.No. S/49-268/2016] 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 on 27.06.2015 by Air India Flight No. AI-984 /27.06.2015 was intercepted by the Customs Officers after he had cleared himself through the green channel. In col. 9 of the Customs declaration form, the respondent had shown the 'Total value of dutiable goods being imported' as Nil. On screening of his checked-in baggage, some unusually dark image in the checked-in baggage was seen indicating presence of some heavy metal having been concealed in it. Examination of the drill machine led to the recovery of 20 cut pieces of gold cleverly concealed in the shaft of the drill machine, totally weighing 585 gms of 24 carats and having purity of 999% and valued at Rs 14,53,827/-. The respondent admitted that the twenty pieces of gold belong to his father and was not aware about the concealment of the gold. to have carried the same for a monetary consideration and admitted to possession, carriage, non-declaration and recovery of the gold.

3. After due process of the law, the Original Adjudicating Authority, viz Addl. Commissioner of Customs, CSI Airport, Mumbai vide Order-in-Original No. ADC/RR/ADJN/038/2016-17 dated 26.04.2016 [(S/14-5-357/2015-16-ADJN)(SD/INT/AIU/273/2015-AP'B)] ordered for the absolute confiscation of the twenty cut pieces of gold, totally weighing 585 grams, valued at Rs

14,53,827/- under Section 111(d), 111(l) & 111(m) of the Customs Act, 1962 and a penalty of Rs. 1,50,000/- 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 appellate authority viz, Commissioner of Customs (Appeals), Mumbai – III who vide Order-In-Appeal No. MUM-CUSTOMS-PAX-APP-141/2018-19 dated 31.05.2018 [F.No. S/49-268/2016] allowed the impugned gold to be redeemed on payment of a fine of Rs. 2,50,000/- and other charges if any, shall be paid as per Section 125(2) ibid. However, the penalty of Rs. 1,50,000/- imposed on the respondent by the OAA was upheld.

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

5.01. that the twenty pieces of gold weighing 585 grams had been ingeniously concealed inside the shaft of drill machine; that in the Indian Customs declaration form the column no. 9 for "Total value of dutiable goods being imported " had been left blank by the respondent; that the respondent had failed to make a true declaration to Customs.

.02. the respondent had admitted that he was aware that import of gold without declaration and payment of Customs duty was an offence punishable under Customs Act and admitted possession, concealment, carriage, non-declaration and recovery of the seized gold.

5.03. that the gold never belonged to the respondent and had been placed by his father and respondent was not aware of the concealment.

5.04. that the OAA while confiscating the goods absolutely had specifically held that the nature of concealment was such that detection was not possible by routine method of examination and it required special and extra efforts by the Customs Officers to first screen all the baggage and then retrieve the impugned gold concealed in the electric voltage convertor; that such concealment is nothing but ingenious concealment and merits absolute confiscation. Adjudicating authority relied upon the

judgment of Hon'ble Supreme Court in Samynathan. Murugesan Vs. Commissioner-2010 (254) ELT A 15 (SC) and ordered absolute confiscation

- 5.05. that the appellate authority had relied upon order of CESTAT, Chennai in the case of A. Rajkumari Vs CC (Chennai) 2015 (321) ELT 540 (Tri.-Chennai) for drawing the conclusion for release of the impugned gold on redemption fine and also held that the Hon'ble Apex Court vide order in the case as reported in 2015 (321) ELT A 207 (SC) had affirmed the said CESTAT Order; that this Order had been dismissed by the Apex Court on the grounds of delay and not on merits; that citing this case by the appellate authority was not proper in view of the fact that the Hon'ble Apex Court in case of Samynathan Murugesan vs. Commissioner (2010 (254) E.L.T. AIS (S.C.)). upheld the decision of Madras High Court's Judgment as reported in 2009 (247) E.L.T. 21 (Mad) of absolute confiscation of gold by the lower adjudicating authority for ingenious concealment of gold inside a T.V. Set without declaring to Customs in violation of provisions under Section 11 & 77 of Customs Act, 1962; that in the present case manner of concealment was ingenious and it had weighed with the adjudicating authority to order absolute confiscation.
- 5.06.that the option to allow redemption of seized goods was the discretionary power of the adjudicating authority depending on the facts of each case and after examining the merits; that in the present case, the respondent had not declared the said goods to Customs with an intent to avoid payment of Customs duty; that this was an ingenious concealment and the circumstances of the case and the intention of the respondent had not been considered by the Appellate Authority while giving him option to redeem the seized goods on payment of fine and penalty.
- 5.07.that the redemption on payment of fine and penalty would depend on the facts and circumstances of the case and other cases cannot be binding as a precedent; that judgment of Hon'ble Delhi High Court in the case of Jain Exports Vs Union of India 1987(29) ELT753 would be squarely applicable in this case.
- 5.08. the applicant has relied on the Hon'ble Supreme Court case of Om Prakash Bhatia Vs Commissioner of Customs, Delhi [2003 (155) E.L.T. 423 (SC)], that in matter of quasi-judicial discretion, interference by the

Appellate Authority would be justified only if the lower authority's decision was illogical or suffers from procedural impropriety

5.09. that in the instant case, the goods were attempted to be smuggled by concealing in shaft of drill machine and being high value, the appellate authority had erred in allowing the redemption of the goods.

Applicant prayed to the revisionary authority to set aside the order of the appellate authority and to restore the OIO or pass any order as deemed fit.

6(a). Personal hearing in the case was scheduled on 29.08.2019. Shri. R.P Gajwani, Superintendent attended the hearing. Thereafter, upon the change of the revisionary authority personal hearing through the online video conferencing mode were scheduled for 22.10.2021 / 29.10.2021, 02.12.2021 / 08.12.2021. However, none appeared for the applicant or the respondent. Sufficient opportunities have been given to both the applicant and the respondent to put forth their case. As none appeared, the case is being taken up for a decision on the basis of evidence on record.

6(b). The Advocate for the respondent vide his letter dated 15.12.2021 has informed that the impugned gold was disposed off and that the respondent had received the sales proceed. They have prayed that the revision application filed by the department be rejected.

6.1. In their written application submitted on 15.12.2021, they have stated that the order passed by the appellate authority is well-reasoned and the justification / rationale for permitting the redemption of the impugned goods is well founded and was based on solid grounds and sound principles of law.

6.2. The reasons for granting redemption of gold has been clearly and rightly expressed in the appellate order.

6.3. For the contravention of Section 77 of the Customs Act, 1962, the appellate authority had imposed fine and penalty.

6.4. They have submitted that for similar cases, the GOI had allowed the release of gold on payment of redemption fine and penalty. For 4 similar cases, the same Commissioner had accepted the orders and in these cases appeals were filed by the department.

6.5. the respondent has cited a bunch of case laws to buttress their case.

(i). Birla Corporation Ltd. v/s. Commissioner of C.Ex, [2005 (186) ELT 266 (SC)], on judicial discipline. When question arising for consideration and facts are almost identical to previous case, revenue cannot be allowed to take a different stand.;

(ii). Commr. Of C. Ex , Nasik vs. Jain Vanguard Polybutlene Ltd [2005 (1861) ELT 266(SC)], also on judicial discipline and binding principle.;

(iii). Nirma Ltd vs. Commr. Of C.Ex, Nashik, [2012 (276) ELT 283 (Tri-Ahmd)], on judicial discipline.

(iv). Hargovind Dás 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.

(v). 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.

(vi). 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.

(vii). R. Mohandas v/s. Commissioner of Customs, Cochin in WP(C) Nos. 24074 and 39096 of 2015 (H) decided on 29.02.2016. (*recognizes any person based on ownership or possession etc*).

(viii). 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]. *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.

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

(ix). Etc.

7. The Government has gone through the facts of the case and notes that the respondent had not declared the gold while availing the green channel facility. Thereafter, on interception he had been asked whether he was carrying any dutiable items to which he had replied in the negative. The impugned gold had been ingeniously concealed inside the shaft of the drill machine. The gold was of very high purity and was in primary form, indicates that the same was for commercial use. The respondent clearly had failed to declare the goods to the Customs at the first instance as required under Section 77 of the Customs Act, 1962. Further, the respondent had cleverly and ingeniously concealed the gold in the shaft of the drill machine. The nature of concealment reveals the mindset of the respondent to not only evade duty but smuggle the gold. It also reveals that the act committed by the respondent was conscious and pre-meditated. The respondent was given an opportunity to declare the dutiable goods in his possession but having confidence in the nature of his concealment, he denied carrying any gold. Had he not been intercepted, the respondent would have gotten away with the gold concealed in the drill machine.

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 ‘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 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. Government observes that besides the quantum of gold which indicates that the same was for commercial use, the manner in which it was attempted to be brought into the country is vital. The impugned gold was cleverly, consciously and ingeniously concealed which reveals the intention of the respondent. It also revealed his criminal bent of mind and a clear intention to evade duty and smuggle the gold into India. The purity and primary form of the gold indicated that the same was for commercial use. The appellate authority at para 24 of his order has observed that the *'the adjudicating authority ignored the fact that the passenger was working abroad for last 3 years and his father was also working at Dubai'*. Government notes that the respondent had never made a plea either at the time of the investigations or before the adjudicating authority that he was eligible to import the gold by virtue of his stay abroad. Claiming casually that he was working abroad for a period of 3 years cannot be construed that he was eligible to bring gold. Investigations had not unraveled this fact with any evidence and has not claimed before OAA that he was an eligible passenger. The aforesaid

circumstances of the case and ingenious concealment, probates that the respondent had no intention of declaring the gold to the Customs at the airport. All these have been properly considered by the Original Adjudicating Authority while ordering the absolute confiscation of the gold and appellate authority had erred in ordering for its release.

12. The main issue in the case is the manner in which the impugned gold was being brought into the Country. The option to allow redemption of seized goods is the discretionary power of the adjudicating authority depending on the facts of each case and after examining the merits. In the present case, the manner of concealment being clever, conscious and ingenious, type of gold being for commercial use, this being a clear attempt to brazenly smuggle the impugned gold, is a fit case for absolute confiscation as a deterrent to such offenders. Thus, taking into account the facts on record and the gravity of offence, the adjudicating authority had rightly ordered the absolute confiscation of the impugned gold. But for the intuition and the diligence of the Customs Officer, the gold would have passed undetected. Hon'ble Delhi High Court in the case of *Jain Exports Vs Union of India 1987(29) ELT753* 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.*". The redemption of the gold will encourage non bonafide and unscrupulous elements to resort to concealment and bring gold. If the gold is not detected by the Custom authorities, the passenger gets away with smuggling and if detected, he has the option of redeeming the gold. Such acts of mis-using the liberalized facilitation process should be meted out with exemplary punishment and the deterrent side of law for which such provisions are made in law needs to be invoked. Government is in agreement with the order of the OAA absolutely confiscating the impugned gold. The absolute confiscation of the gold would act as a deterrent against such persons who indulge in such acts with impunity. Considering the

aforesaid facts, Government finds that the appellate authority had erred in ordering for the release of the gold. The reliance placed by the appellate authority on the judgement of A. Rajkumari Vs CC (Chennai) 2015 (321) ELT 540 (Tri.-Chennai) while allowing for the release of the gold was mis-placed. Therefore, the Government finds that the order passed by the appellate authority releasing the impugned gold deserves to be set aside and the Government for the aforesaid reasons, is inclined to restore the original order passed by the OAA.

13. Government finds that the penalty of Rs. 1,50,000/- imposed on the respondent by the OAA under Section 112(a) & (b) of the Customs Act, 1962 is commensurate with the omissions and commissions committed and is not inclined to interfere in the same.

14. For the aforesaid reasons, the Government sets aside the order passed by the appellate authority and restores the Order-in-Original passed by the OAA as legal and proper. The Revision Application filed by the applicant, succeeds.

15. Accordingly, the Revision Applications filed by the applicant is allowed in in the above terms.


(SHRAWAN KUMAR)

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

ORDER No. 168 /2022-CUS (WZ) /ASRA/MUMBAI DATED 06.05.2022

To,

1. Shri. Shoaib Mohammed Fakir Mohammed Shaikh, F-Sector, D-2 Line, R. No. 8, Cheeta Camp, Trombay, Mumbai – 400 088.

2. Pr. Commissioner of Customs, CSI Airport, Terminal - 2, Level - 2,
Andheri East, Mumbai - 400 099 Anna International Airport,
Meenambakkam, Chennai - 600 027.

Copy to:

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