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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

F.No. 380/36/B/WZ/2018-RA / 934 : Date of Issue : 09.02.2023

ORDER NO. 188/2023-CUS (WZ)/ASRA/MUMBAI DATED 08.02.2023 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 : The Commissioner of Customs, Pune

Respondent : Mr. Mohamed Arif Mohamed Salim Bhakharani

Subject : Revision Application filed under Section 129DD of the Customs Act, 1962 against the Order-in-Appeal No. PUN-EXCUS-001-APP-22-17-18 dated 20.04.2017 [Date of issue: 20.04.2017] [F.No. V2PI/519/CUS/2016] passed by the Commissioner (Appeals-I), Central Excise, Pune-I.

ORDER

The Revision Application has been filed by the Commissioner of Customs, Pune (herein referred to as the 'Applicant') against the Order-in-Appeal No. PUN-EXCUS-001-APP-22-17-18 dated 20.04.2017 [Date of issue: 20.04.2017] [F.No. V2PI/519/CUS/2016] passed by the Commissioner (Appeals-I), Central Excise, Pune-I.

2.1. Brief facts of the case are that on 01.02.2016, on the basis of suspicion, the Customs Officers at the Pune International Airport intercepted the Respondent who had arrived from Dubai by Spice Jet Flight No SG-52 while he attempted to pass through the Green channel after filing a Nil Customs declaration. On screening the checked in baggage of the Respondent it was suspected that some suspicious goods were concealed in the bags. On examining the contents one bag something in straw form which appeared to be saffron concealed in cardamom packing was noticed. On further examination the Respondent informed that he was carrying gold concealed in the handles of the both the bags. On dismantling the handles it was observed that the ends of the handles attached to the bags contained gold in plates and in the form of washers.

2.2. In all eight gold plates and eight gold washers with rhodium coating totally weighing 634.79 grams valued at Rs. 17,49,412/- and 02 kgs of saffron valued at Rs. 94,050/-were recovered and seized under the reasonable belief that the same were being smuggled into India in contravention of the provisions of the Customs Act, 1962.

3. After following the due process of law, the Original Adjudicating Authority (OAA) i.e. Additional Commissioner of Customs, Pune vide Order-In-Original No. PUN-CUSTM-000-ADC-17/16-17 dated 02.11.2016 ordered for the absolute confiscation of the impugned gold plates and gold washers totally

weighing 634.790 grams and valued at Rs. 17,49,412/- and 02 kgs of saffron chain valued at Rs. 94,050/- under Section 111 (d), (i), (l) & (m) of the Customs Act, 1962. Penalty of Rs. 1,75,000/- was imposed on the Respondent under Section 112(a) and (b) of the Customs Act, 1962 and Rs. 75,000/- was imposed on the Respondent under Section 114AA of the Customs Act, 1962. Also an amount of Rs. 94,050/- realized on account of sale of saffron was appropriated and adjusted towards the penalty imposed.

4. Aggrieved, with this Order, the Respondent filed an appeal before the Appellate Authority (AA) viz, Commissioner (Appeals-I), Central Excise, Pune-I, who vide Order-in-Appeal No. PUN-EXCUS-001-APP-22-17-18 dated 20.04.2017 [Date of issue: 20.04.2017] [F.No. V2PI/519/CUS/2016] set aside the Order of the OAA and gave the Respondent the option to redeem the impugned gold on payment of redemption fine of Rs. 4,37,000/- alongwith appropriate duty applicable thereon and upheld the personal penalty under Section 112(a) & (b) and Section 114 of the Customs Act, 1962. The AA also upheld the appropriation of sale proceeds of Rs. 94,050/- towards penalties imposed on the Respondent.

5. Aggrieved with the above order of the Appellate Authority, the Applicant-Department has filed this revision application on the following grounds;

5.01. That the Respondent admitted that he had carried Rs. 15 lakhs in cash and he had smuggled the prohibited goods with an intention to evade payment of duty;

5.02. That the Respondent admitted to smuggling and this showed mens rea on the part of the Respondent;

5.03. That the AA erred in interpreting Section 125 of CA, 1962 in isolation rather than interpreting harmoniously alongwith other relevant sections of the Customs Act, 1962, the Baggage Rules, 1998 and other Regulations;

5.04. That the AA failed to appreciate the ratio of the Apex Court in the National Insurance Co Ltd vs. Keshav Bahadur [2004(2) SCC 370] and Shri Rama Sugar Industries Ltd vs. State of A.P [1974 (1) SCC 534] about exercising discretionary powers of the Authority;

5.05. That the judgement of the Hon'ble madras High Court in the Sinnaswami case [CMA No 1631 of 2008] and the cases relied on in the case are relevant to the instant case;

5.06. That the case laws relied upon by the Appellate authority for release of the gold are not squarely applicable to the instant case

Under the circumstances, the Applicant-department prayed to set aside the impugned OIA and restore the OIO.

6. Personal hearing in the case was scheduled for 21.08.2018, 11.08.2022 or 23.08.2022, 15.09.2022 or 22.09.2022. However, no one appeared before the Revision Authority for personal hearing on any of the dates fixed 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. The Government has gone through the facts of the case and observes that the Respondent had brought 02 kilograms of saffron and eight gold plates and eight gold washers with rhodium coating totally weighing 634.79 grams, valued at Rs. 17,49,412/- and concealed in the handles of the both the trolley bags and had failed to declare the goods to the Customs at the first instance, as required under Section 77 of the Customs Act, 1962. The Respondent had not disclosed that he was carrying dutiable goods. However, pursuant to detailed questioning after interception, the impugned gold which was concealed in the handles of the trolley bags were recovered from the

Respondent and the ingenious method of carrying the gold adopted by the Respondent clearly revealed his intention not to declare the said gold and thereby evade payment of Customs Duty. The Respondent had pre-planned to avoid detection and thereby to evade Customs duty. The confiscation of the gold was therefore justified and thus, the Respondent had rendered himself liable for penal action.

8.1. The relevant sections of the Customs Act are reproduced below :

Section 2(33) of the Customs Act, 1962

“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 of the Customs Act, 1962

“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 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 Respondent in the instant case was 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.

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 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.

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 observes that the aspect of allowing redemption of the gold has been gone into in great detail by the Appellate Authority and has passed a reasoned, legal and judicious order. The Appellate Authority while relying on various judgement having relevance to the grant of option to redeem the goods on payment of redemption fine has at Para 13,14 and 15(i) of the impugned Order in Appeal, stated as under

13. At this juncture I also find it worth to examine as to what has been fit." considered as "Prohibited Goods" under the Customs Act, 1962. In this regard I find that in terms of Section 2(33) of the Act "prohibited goods" means "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".

14. Now, I consider the present case in light of the prohibition referred under Section 2(33) of the Act. It is further contended that Section 111 provides for confiscation of any goods under import, contrary to any prohibition imposed by or under this Act or any other law for the time being in force. Here I would like to mention that while dealing with the duty evasion cases, we came across numerous cases of mis-declaration and manipulation of documents with an intent to evade duty. Goods in most of the cases, fall under category of prohibited goods due to violation of the statutory requirement under the Act. However, the option for redemption is not denied in all such cases though the goods are found to be prohibited in nature. If we compare the present case with the other cases of mis-declaration, in both type of cases the intention and result are duty evasion and the present case can not be equated with case where national or social security is under threat. I find that absolute confiscation is warranted in the cases of the goods which cannot be imported by any one, such as arms, ammunition, addictive substance viz, drugs. 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. This would not apply to a case where import/export of goods 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 such a situation, the release of such goods confiscated would not cause any danger or detriment to public health. Admittedly, import of gold is permitted in case of certain category of persons, subject to certain conditions in terms of Notification No. 12/2012 Cus dated 17.03.2012 therefore, it would not fall under the prohibited category as envisaged under the said provisions. The above view is also supported by Hon'ble High Court of Calcutta's decision in the case of Commr. of Customs (Preventive), West Bengal v. India Sales International reported in 2009 (241) E.L.T. 182 (Cal.). Hon'ble High Court while deciding whether 'prohibited' has to be read as 'prohibited absolutely', held that the Court cannot insert any word in the statute since it is in the domain of the legislators. The Hon'ble High Court has also held that option given under Section 125 of the said Act in respect of prohibited goods and right given to authorities for redemption of the confiscated goods cannot be taken away by Court by inserting a particular word therein. The Hon'ble High Court further held that power has been given by legislators

to a particular authority to act in a particular manner and the said authority must act accordingly and not otherwise at all. Therefore, the redemption of confiscated gold, on an option to pay fine in lieu of confiscation is not against the provisions of Section 125 of the Customs Act.

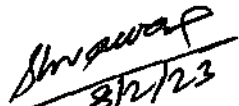
15(i). In terms of clause (h) of Rule 3 of the Foreign Trade (Exemption from Application of Rules in Certain Cases) Order, 1993 import of gold is allowed in any form as part of baggage by the passenger of Indian Origin if the passenger satisfies the condition of 06 months stay abroad, quantity does not exceed 5 Kilograms and duty is paid in convertible foreign currency. Prior to the liberalization of import Exim policy, gold was not allowed to be imported however in the post liberalization era gold is allowed to be imported under certain conditions. A plain reading of sub section (2) of Section 125 of the Act shows that an option has to be given to the owner of the goods or where the owner is not known, to the person from whose possession or custody such goods have been seized. In the matter before me also, there is no indication on the record that any one else has also claimed the gold. Therefore ownership of the gold is not under dispute. Thus, the option of redemption can be given to the Appellant as the goods were found in his possession.”

15. In the instant case, though the gold has been ingeniously concealed by the Respondent, and the quantum of gold under import is small and is not of commercial quantity. Besides, there are no allegations that the Respondent is a habitual offender and was involved in similar offence earlier. Also there is nothing on record to prove that the Respondent was part of an organized smuggling syndicate. Government notes that at times, passengers adopt innovative methods to bring valuables and attempt to evade payment of duty, thus making the goods liable to confiscation. Government finds that this is a case of non-declaration of gold. The absolute confiscation of the impugned gold leading to dispossession of the Respondent of the gold in the instant case would therefore be harsh and not reasonable and the Order of the Appellate Authority granting an option to the Respondent to redeem the gold on payment of suitable redemption fine is reasonable and fair.

16. The Government notes that considering the quantum of gold seized, the redemption fine imposed in the OIA passed by the Appellate Authority is legal and proper and also the penalty imposed on the Respondent to be commensurate with the omissions and commissions committed by the Respondent. Government is not inclined to interfere in the order passed by the Appellate Authority in this regard.

17. In view of the above discussion, Government is inclined not to interfere with the Order-in-Appeal No. PUN-EXCUS-001-APP-22-17-18 dated 20.04.2017 [Date of issue: 20.04.2017] [F.No. V2PI/519/CUS/2016] passed by the Commissioner (Appeals-I), Central Excise, Pune-I and upholds the same.

18. The Revision Application is decided on the above terms.


(SHRAWAN KUMAR)

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

ORDER NO. 28/2023-CUS (WZ)/ASRA/MUMBAI DATED 08.02.2023

To,

1. The Commissioner of Customs, Pune, E-Wing, 4th Floor, 41-A, ICE-House, Sassoon Road, Opp Wadia College, Pune-411 001.
2. Mr. Mohammed Arif Mohammed Salim Bhakharani, 24/26, Kambekar Street, IIIrd Floor, Room No. 18, Rahmat Manzil, Mumbai 400 003

Copy to:

1. The Commissioner (Appeals-I), C. Excise, Pune, GST Bhavan, F Wing, 3rd Floor, 41/A, Sassoon Road, Pune 411 001
2. Sr. P.S. to AS (RA), Mumbai.
3. File copy.
4. Notice Board.