

REGISTERED
SPEED POST
REGISTERED
SPEED POST



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

F.No. 371/261/B/2020

4625

Date of Issue 02.09.2021

ORDER NO. 196/2021-CUS (WZ)/ASRA/MUMBAI DATED 25.8.2021 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 : Shri Dilipkumar Vithaldas Pattani

Respondent : Pr. Commissioner of Customs, (Airport), Mumbai.

Subject : Revision Application filed, under Section 129DD of the Customs Act, 1962 against the Order-in-Appeal MUM-CUSTOM-PAX-APP-518/2020-21 dated 29.10.2020 passed by the Commissioner of Customs (Appeals), Mumbai-III.

ORDER

This revision application has been filed by Shri Dilipkumar Vithaldas Pattani (herein after referred to as the Applicant) against the Order in appeal No. MUM-CUSTOM-PAX-APP-518/2020-21 dated 29.10.2020 passed by the Commissioner of Customs (Appeals), Mumbai-III.

2. Briefly stated the facts of the case are that on 06.02.2019, on the basis of profiling, the Officers of Air Intelligence Unit, CSMI Airport, Mumbai (in short AIU) intercepted Mr. Dilipkumar Vithaldas Pattani, who arrived from Dubai after he had cleared himself through Customs Green Channel. On being asked, he admitted to be carrying gold. His personal search resulted in recovery of 03 nos. of kadas, one 'MALA', one bead studded ring, 10 nos. of bangles, 03 gold bracelets, 03 gold pendants, 06 gold ear rings, 03 gold rings, 01 gold chain with pendant all studded with CZ stones and 01 gold chain, totally weighting 558 Gms., valued at Rs. 16,14,578/- (Rupees Sixteen lakhs Fourteen thousand Five hundred and seventy eight).

3. The Original Adjudicating Authority vide Order-In-Original No. ADC/AK/ADJN/187/2019-20 dated 18.10.2019 ordered confiscation of the impugned gold, but allowed redemption of the same for re-export on payment of 2,50,000/- (Rupees Two lakhs Fifty thousand) and imposed penalty of Rs. 1,70,000/- (Rupees One lakh Seventy thousand) under section 112 (a) and (b) of the Customs Act, 1962 on the Applicants.

4. Aggrieved by the said order, the applicant filed appeal before the Commissioner (Appeals) who vide Order-In-Appeal No. MUM-CUSTOM-PAX-APP—518/2020-21 dated 29.10.2020, set aside the redemption and absolutely confiscated the gold keeping the penalties imposed intact.

5. Aggrieved with the above order the Applicant department has filed this revision application interalia on the grounds that;

5.1 The learned Additional Commissioner of Customs, after carefully going through the facts and circumstances of the case and considering merits on the defense of the Mr Dilipkumar Vithaldas Pattani, vide his order dated 18-10-19 ordered confiscation of the seized jewellery with an option to redeem the goods for re-export on payment of a redemption fine of Rs 2,50,000/- and penalty of Rs 1,70,000/-.

5.2 Under Section 125 of Customs Act, 1962 , a discretion has been conferred on the Adjudicating Authority to give the option to the importer/owner of the goods to pay fine in lieu of confiscation in cases of goods, the importation or exportation whereof is prohibited under the Act or under any other law for the time being in force but in respect of other goods the officer is obliged to give such an option. In a case of smuggling, having regard to the facts and circumstances in which the goods were said to be imported, the Adjudicating Authority if he considers it appropriate to direct absolute confiscation of the goods or consider it a fit case for exercise of his discretion to give an option to pay the redemption fine under Section 125 of the Act. In view of sec. 125, the discretion rests with the adjudicating authority for either allowing the goods to be released on redemption fine or confiscate absolutely.

5.3 The decision of the Appellate authority is biased, arbitrary and based on mere conjectures and surmises, therefore the impugned order in Appeal is not maintainable. The decisions of Tribunals, High Courts and Supreme Court relied upon by the petitioners were rejected by the Appellate authority without proper application of mind. The factual situation of the petitioners fits in with the decisions on which reliance was placed. The learned Appellate authority read those decisions in isolation and failed to read the decisions as whole in context of the cases. The order of the Appellate authority is vitiated on account of bias violations of principles of natural justice and fair play and therefore not sustainable.

5.4 The learned Additional Commissioner of Customs, after carefully going through the facts and circumstances of the case and considering merits on the defense of the respondents, vide his order dated 20-9-19 ordered (i) confiscation of the seized Gold under Section 111(d), (1) and (m) of the Customs Act. However, an option was given to the passengers to

redeem the seized gold on payment of fine of Rs.5,30,000/- under Section 125 (1) of the Customs Act, 1962. The applicable baggage rate of customs duty and other charges, if any, shall be paid by the passenger as per Section 125 (2) of the Customs Act, 1962

5.5 In this connection, the respondents refer to Section 125 of Customs Act which reads as follows: 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

5.6 Under Section 125 of Customs Act, 1962 , a discretion has been conferred on the Adjudicating Authority to give the option to the importer/owner of the goods to pay fine in lieu of confiscation in cases of goods, the importation or exportation whereof is prohibited under the Act or under any other law for the time being in force but in respect of other goods the officer is obliged to give such an option. In a case of smuggling, having regard to the facts and circumstances in which the goods were said to be imported, the Adjudicating Authority if he considers it appropriate to direct absolute confiscation of the goods or consider it a fit case for exercise of his discretion to give an option to pay the redemption fine under Section 125 of the Act. In view of sec. 125, the discretion rests with the adjudicating authority for either allowing the goods to be released on redemption fine or confiscate absolutely.

5.7 The High Court of Calcutta in CC (Prey) vs Uma Shankar Verma has held that where the goods are not prohibited, the authorities have no choice but to allow the option of redemption of goods on payment of fine. On the other hand, when the goods are prohibited, allowing redemption on payment of fine is wholly within the discretion of the adjudicating authority.

5.8 The law on absolute confiscation vis-a-vis option to redeem the same stands discussed in detail by the Tribunal in the case of Gauri Enterprises Vs. Commissioner of Customs, Pune [2002 (145) E.L.T. 706 (Tri. Bang.)]. The Tribunal held that"

- It was observed in the said judgment that resort to absolute confiscation should be an exception and not the rule.
- The petitioner should be given an option to redeem the goods on payment of fine,
- The matter be remanded to the Commissioner for fixing the quantum of redemption fine.

5.9 In view of the rulings cited, it is clear that allowing redemption of seized goods is a discretionary power which rests exclusively with the Adjudicating Authority who has to exercise this power judiciously.

5.10 The Board's Circular no 9/2001- Customs dated 22-2-2001 which states that the redemption fine and personal penalties should be such that it not only wipes out the margin of profit but also acts as a strong deterrent against repeat offences. Since, the exact margin of profit could not be calculated in the instant case, keeping the general trend of differential in gold prices in international market and domestic market, the Additional Commissioner of Customs considered a redemption fine of Rs 2,50,000/- which appears to meet the ends of justice.

5.11 The percentage of redemption fine and penalty works out to 26.01% and the total liability of the respondent works out to 26.83%. In view of these facts, the decision of the Adjudicating Authority is justified because it entirely wiped out not only the margin of profit but also acted as a strong deterrent against repeat offences and as far as the department is concerned.

5.12 While exercising the power of judicial review against an order of lower authority being supervisory, the Commissioner of Customs would be justified in interfering with the decision of the Additional Commissioner of Customs only when the learned Commissioner of Customs should record a finding that the decision of Additional Commissioner of Customs is based upon exclusion of some admissible evidence or consideration of some inadmissible evidence or the lower authority has no jurisdiction at all. Mr Dilipkumar Vithaldas Pattani submits that there appears to be no jurisdictional error in the order of the Additional Commissioner of Customs, neither his finding is based upon exclusion of some admissible evidence or consideration of some inadmissible evidence. Discretionary power conferred on an Adjudicating Authority under Section 125 of Customs Act, 1962 is a special power and not an ordinary power. Such a

special power cannot be lightly interfered by a higher authority or Court in an appeal or writ proceedings.

5.13 When the order of the learned Commissioner (Appeals) is seen, it reveals that the said authority has not at all examined any evidence nor also tested the facts by evidence on the touchstone of law. Such laxity cannot get approval of law. Such approach by the authority is contrary to the elementary principle of jurisprudence. The law requires the Appellate authority to determine the issue involved, the material evidence touching the issue to be tested, the pleadings of the accused to be examined on the light of the evidence and law and reach to the conclusion. Without following such a process, the learned Commissioner of Customs reached a bald conclusion and passed an unreasoned and non-speaking order. According to the Law, the importation and exportation of certain goods are prohibited or restricted. Restrictions usually refer to the need for securing the authority or inspection from the appropriate Government Department. The aim of prohibitions and restrictions is the protection of society and the perpetuation of a safe environment. More specifically, such prohibitions and restrictions are essential for the safeguard of social ethics, order and security, protection of public health or the health of animals or the protection of plant-life, the protection of industrial and commercial property, archaeological treasures, cultural artefacts and others.

5.14 The Deputy Commissioner of Customs relied upon various decisions wherein absolute confiscation of smuggled goods was upheld. However, the decisions relied upon by the learned Additional Commissioner of Customs to justify the order of redemption were not given consideration.

5.15 Though power under Sections 111 and 112 of confiscation and penalty are available, under Section 125 of the Customs Act, Adjudicating Authority also enjoys discretionary power to impose fine in lieu of confiscation. Therefore, the prayer made in the appeal for absolute confiscation under Section 111(d), 111(1) and 111(m) of the Act is interference of the said discretionary power and therefore the appeal is bad in law and not sustainable.

5.16 The respondents submit that there appears to be no jurisdictional error in the order of the Additional Commissioner of Customs, neither his

finding is based upon exclusion of some admissible evidence or consideration of some inadmissible evidence. Discretionary power conferred on an Adjudicating Authority under Section 125 of Customs Act, 1962 is a special power and not an ordinary power. Such a special power cannot be lightly interfered by a higher authority or Court in an appeal or writ proceedings. Reliance is placed in the decisions of the following cases: Gujarat High Court, Indian Petrochemicals Corpn. vs General Secretary on 19th March. 2008.

5.17 According to the respondents, restrictions cannot be considered as prohibition more particularly under the Foreign Trade Policy 2014-19. Under Export and Import Policy, laid down by the DGFT, in the Ministry of Commerce, certain goods are placed under restricted categories for import and export. Some of the goods are absolutely prohibited for import and export whereas some goods can be imported or exported against a licence.

5.18 Discretionary power of quasi judicial authority cannot be lightly interfered. The power of judicial review is a supervisory power and not a normal appellate power against the decisions of administrative authorities. The recurring theme of the Apex courts decision relating to nature and scope of judicial review is that it is limited to consideration of legality of decision making process and not legality of the order perse. That mere possibility of another view cannot be a ground for interference. There has to be grave miscarriage of justice or flagrant violation of law calling for interference.

5.19 The petitioners submitted case laws in favour of their case and prayed that the order in Appeal be set aside, and prayed for a reasonable order for redemption of the gold and drop further proceedings.

6. Personal hearings in the case was held on 08.07.2021. Shri Prakash Shingrani, Advocate appeared for the hearing. They reiterated their earlier submissions and submitted that the passenger was a NRI and gold jewelry was for personal purpose. The order of the original adjudicating authority is reasonable and in accordance with law. He requested for the order of the original adjudicating authority to be upheld. Nobody attended the hearing on behalf of the respondents.

7. The Government has gone through the facts of the case, The Applicant was carrying gold jewelry totally weighing 558 gms, being a dutiable item he should have mandatorily declared the same, instead he cleared himself through the green channel and was intercepted. The applicant did not file any declaration as required under section 77 of the Customs Act, 1962. The confiscation of the gold jewelry is therefore justified and the Applicants has rendered him liable for penal action.

8. Government notes that the order of the original adjudicating authority in para 10 states that the Applicant admitted that he was carrying gold jewelry when asked. The Applicant is an NRI and owns a jewelry shop in Dubai. There is no allegation that the impugned gold was concealed in any manner. Further the Applicant has submitted invoices covering the purchase of the gold and therefore the ownership of the gold is not disputed. The Applicant had submitted that he purchased the gold for his sons marriage. There is no evidence on record to infer that he was a carrier or part of some organized smuggling racket. In view of the above the Original Adjudicating Authority has allowed the redemption of the jewelry.

10. The Appellate authority has set aside redemption and ordered absolute confiscation of the gold relying on the judgement of the Apex Court in the case of Samynathan Murugesashan v/s Commissioner 2010 (254) ELT A 15 (SC). Abdul Razak v/s UOI 2012 (275) ELT 300 (Ker). However it is observed that in both the cases relied upon by the Appellate authority the gold was ingeniously concealed, in a TV in the case of Samynathan Murugesashan and in emergency light, mixie grinder etc in the case of Abdul Razak. The gold under import in both these cases was 7 to 8 kilograms. Government notes that the facts involved in both the cases are different from the impugned case. Therefore the absolute confiscation of the gold jewelry by relying on these two decisions is not sustainable. In the impugned case the Applicant is an NRI, the quantity of gold jewelry recovered is not very large and the same was definitely not in commercial quantity. Absolute confiscation for non-declaration is therefore very harsh and unjustified. The Government agrees with the Original Adjudicating authority in allowing the impugned gold jewelry on redemption fine and penalty. The Hon'ble Supreme Court in the *judgment of Omprakash Bhatia* 2003 (155) ELT 423 (SC) notes "*.....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." The Hon'ble Tribunal in the case of Alfred Menezes V/S Commissioner Of Customs, Mumbai reported in 2011 (236) E.L.T. 587 (Tri - Mumbai) held that "*Redemption fine - Prohibited/restricted goods, confiscation of - Power of adjudicating authority under provisions of Customs Act, 1962 to offer redemption fine in lieu of confiscation of prohibited/restricted goods confiscated - Section 125(1) ibid clearly mandates that it is within the power of adjudicating authority to offer redemption of goods even in respect of prohibited goods - Order of Commissioner not giving any reason for concluding that adjudicating authority's order is wrong, set aside - Section 125 ibid.*" This Order of the Hon'ble Tribunal has been upheld by the Hon'ble Bombay High Court on the issue of granting option of redemption.

11. The Hon'ble Supreme Court Of India in a recent case of Union Of India & Ors. V/s M/s. Raj Grow Impex & Ors., in para 71 of the order states "*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. Government therefore opines that the option to allow redemption of seized goods is the discretionary power to be exercised under section 125 of the Customs Act, 1962 depending on the facts of each case and after examining the merits. Taking into account the facts on record and the gravity of offence, the original adjudicating authority has rightly allowed redemption and the

redemption fine and penalty imposed nullifies the margin of profit but also acts as a strong and sufficient deterrent. The order of the Appellate authority confiscating the impugned gold absolutely on account of non declaration, is an order in excess and unjustified. The order of the Appellate authority is therefore liable to be set aside and the order of the original adjudicating authority is liable to be upheld.

13. In view of the above the Government sets aside the order of the Appellate authority and upholds the order of the original adjudicating authority.


25/8/21
(SHRAWAN KUMAR)

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

ORDER No. 96/2021-CUS (WZ) /ASRA/

DATED 25. 08.2021

To,

1. Shri. Dilipkumar Vitaldas Pattani, Flat No. A-201, 2nd Floor, Prince Apts, 16 Panchnath Plot, Rajkot, Gujarat 360 001.
2. The Commissioner of Customs, CSI Airport, Mumbai.

Copy to:

3. Shri P. K. Shingrani- Advocate, 12/334, New MIG Colony, Bandra (E) , Mumbai - 51.
4. Sr. P.S. to AS (RA), Mumbai.
5. Guard File.
6. Spare Copy.