



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

F.No. 380/40/B/WZ/2018 / 5203

Date of Issue 16.09.2021

ORDER NO 209/2021-CUS (WZ)/ASRA/MUMBAI DATED 26.08.2021 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 : Pr. Commissioner of Customs, CSI Airport, Mumbai

Respondent : Shri Sanjay Kishanchand Kungwani

Subject : Revision Application filed, under Section 129DD of the Customs Act, 1962 against the Order-in-Appeal No. MUM-CUSTM-PAX-APP-79/2018-19 dated 14.05.2018 passed by the Commissioner of Customs (Appeals), Mumbai-III.

ORDER

ORDER

This revision application has been filed by Pr. Commissioner of Customs, CSI Airport, Mumbai (herein referred to as Applicant department) against the Order in Appeal No. MUM-CUSTOM-PAX-APP-79/2018-19 dated 14.05.2018 passed by the Commissioner of Customs (Appeals), Mumbai- Zone-III.

2. The brief facts of the case are as follows, Officers of Customs intercepted the Respondent at the CSI Airport, Mumbai on 26.06.2014 as he was heading towards the exit gate after he had cleared himself through the green channel. When questioned whether he was carrying any contraband /dutiable goods he replied in the negative. The officer at the screening machine informed that the AIU officers that a dark line of continuous wire was appearing on the borders of the trolley bag carried by the Respondent. During examination the officers recovered another smaller bag kept inside the trolley bag, containing used clothes and eatables. Cutting the beading of both the bags resulted in the recovery of nine gold wires weighing 1400 gms valued at Rs.34,78,293/- (Rupees Thirty four lakhs Seventy Eight thousand Two hundred and Ninety three).

3. The Original Adjudicating Authority vide its Order-In-Original No. ADC/RR/ADJN/290/2015-16 dated 28.01.2016 observed that the nature of concealment was such that it required special and extra efforts by the Customs officers to retrieve the gold wires. Such ingenious concealment merits absolute confiscation and ordered absolute confiscation of the gold under Section 111 (d) (l) and (m) of the Customs Act, 1962, and imposed penalty of Rs. 3,50,000/- (Rupees Three lacs Fifty thousand) on the Applicant.

4. Aggrieved by this order the Applicant filed an appeal with the Commissioner of Customs (Appeals), pleading for release of the gold on redemption fine and penalty. The Commissioner (Appeals) vide his order No. MUM-CUSTOM-PAX-APP-79/2018-19 dated 14.05.2018 allowed redemption of the gold on payment of redemption fine of Rs. 6,25,000/- (Rupees Six lacs Twenty five thousand.) keeping the penalty imposed intact.

5. Aggrieved with the order of the Appellate authority, the Applicant department, has filed this revision application interalia on the grounds that;

5.1 The passenger Mr SanjayKishanchand Kungwani was found in possession of 1400 grams of gold found in the form of 9 wires ingeniously concealed in the beadings of the linings of his checked in Trolley Bags. The passenger had opted green channel for clearance without declaring the aforesaid item in his possession. Therefore the manner of recovery of gold clearly indicating that the concealment was not only ingenious one but also premeditated. In his statement recorded under Section 108 of the Customs Act, 1962 the passenger has admitted to knowledge, possession carriage, and non-declaration of the gold under seizure and also that he was carrying the gold for monetary consideration of Rs.10,000/- he also admitted that he was working as a carrier of goods for which he used to receive monetary consideration of Rs.5000/- per trip. thus it is evident that the passenger was a part of a organized syndicate involved in smuggling activities. Hence the Commissioner Appeal ought not to have allowed redemption of the impugned gold as the same should have been confiscated absolutely.

5.2 It is an admitted fact brought out in the O-in-O that the passenger had failed to make a true declaration of the contents of the goods imported by him in terms of value as well as quantity in his baggage as required under section 77 of the Customs Acts 1962. It is therefore evident that by attempting to clear 1400 grams of gold found in the form of 9 wires ingeniously concealed in the beadings of the linings of his checked in Trolley Bags without declaring the same was with the mala fide intention to evade customs duty and the passenger had attempted to smuggle the same in contravention to the aforesaid legal provisions of the Customs Act, 1962,

5.3 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. In the present case the manner of concealment being clever and ingenious is a fit case for absolute confiscation as a deterrent to passengers mis-using the facility of Green channel. Thus, taking into accounts the facts on record and the gravity of the offence, the lower authority had rightly ordered the absolute confiscation of the impugned 1400 grams of gold

found in the form of 9 wires ingeniously concealed in the beadings of the linings of his checked in Trolley Bags. In the instant case, the passenger did not declare the said gold to Customs on his own and the subject gold was detected only after he was intercepted by AIU and detailed search of his baggage was conducted. The manner in which gold was imported by ingeniously concealing in the beadings of the linings of his checked in Trolley Bags showed his criminal bent of mind and clear intention to evade duty and smuggle the same into India. 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 need to be invoked. In this regard, it is pertinent to mention here that the redemption fine and penalty shall depend on the facts and circumstances and other cases cannot be binding as a precedent.

5.4 Applying the ratio of the judgement in the case of Om Prakash Bhatia v/s Commissioner of Customs similar plea was considered and rejected by the Division Bench of this Court in C.M.A.No.2040 of 2007 [Commissioner of Customs (Air) vs. - Samynathan Murugesan and Customs, Excise and Service Tax Appellate Tribunal, South Zonal Bench reported in 2009(166) ECR 160 (Madras)] decided on 27.4.2009 in a case of smuggling of gold by a passenger of Indian Origin by concealment in a television set. The customs authorities seized the goods and confiscated the goods absolutely and refused to allow redemption. The Tribunal granted redemption of the goods on payment of fine which was set aside by the High Court on an appeal by the Commissioner, who justified the absolute confiscation.

5.5 The Division Bench considering the decision of the Supreme Court in Om Prakash Bhatia v. Commissioner of Customs 2003(6) SCC 161 came to the conclusion that the prohibition in terms of Section 2(33) of the Customs Act, 1962 was attracted in a case of this nature. Therefore, absolute confiscation was justified. This order of the Division Bench was taken up on appeal to the Supreme Court in Special Leave to Appeal (Civil) No.22072 of 2009 and the Special leave Appeal was dismissed.

5.6 Any restriction on import or export is to an extent a prohibition. The expression "any prohibition" in section 111 (d) of the Customs Act, 1962

includes restrictions. Merely because Section 3 of the Imports and Exports (Control) Act, 1947, uses three different expressions "prohibiting", "restricting" or "otherwise controlling", we cannot cut down the amplitude of the word "any prohibition" in Section 111(d) of the Act. "Any prohibition" means every prohibition. In other words all types of prohibitions. Restriction is one type of prohibition. From item (I) of Schedule I, Part IV to Import Control Order, 1955, it is clear that import of living animals of all sorts is prohibited. But certain exceptions are provided for. But nonetheless the prohibition continues".

5.7 Moreover, when the original adjudicating authority has taken an informed decision of confiscating the subject goods absolutely and imposed personal penalty, the Commissioner (Appeals) should not have allowed redemption, without pointing out any legal infirmity in the order of the adjudicating authority. It is submitted that the appellate authorities cannot be unmindful of the great weight to be attached to the findings of the original authority, who has first-hand knowledge and is in a position to assess the facts and the credibility of circumstances from his own observation. If the original authority has acted bonafide through a speaking order, which is not illogical or suffers from procedural impropriety, the appellate authority should not take a contrary view on the same issue as held in a plethora of judicial pronouncements.

5.8 It was held in Commissioner of Customs, Tuticorin V/ s Sai Copiers [2008 (226) E.L.T. 486 (Mad.)] that any order of the lower authority could be interfered with only in circumstances in which it was demonstrated that such order was purely arbitrary, whimsical and resulting in miscarriage of justice. Further it is observed by the Hon'ble Supreme Court in the 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. It is submitted that the impugned Order in Original does not suffer from any such vice and therefore Commissioner (Appeals) should not have allowed redemption of the subject gold bars in the present case following the ratio of the above referred judgments.

5.9 Commissioner (Appeals) in his findings has also observed that the Passenger has retracted his initial statement on the very next day of interception. It is felt that Commissioner (Appeals) has also erred to that extent as in the case of K.I. Pavunny Vs. Asstt. Collector (HQ) Central Excise Collectorate, Cochin 1997 (90) ELT 352 SC the Supreme Court has held that "Even though the Customs Officers have been invested with many of the powers which an officer in charge of police station exercises while investigating a cognizable offence, they do not, thereby, become police officer within the meaning of Section 25 of the Evidence Act and so the confessional statement made by the accused person to the Customs officials would be admissible in evidence against them"

5.10 In view of the foregoing, I find that the above Order-in-Appeal does not appear to be legal and proper and the Commissioner of Customs (Appeals), Mumbai has erred in allowing the redemption of the goods. The Applicant department submitted case laws in support of their case and prayed for setting aside the Order-in-Appeal passed by the Commissioner of Customs (Appeals), Mumbai-Zone-III, and uphold the Order-in-Original or any other order as may deemed fit and proper.

6. Personal hearings in the case was scheduled in the case on 14.05.2018, 10.12.2020, 17.12.2020, 24.12.2020, 03.02.2021, 18.03.2021, 25.03.2021. Nobody attended the hearing on behalf of the Applicant department nor the respondent. The case is therefore being decided on the basis of available records on merits.

7. The Government has gone through the facts of the case. The Respondent was intercepted at the exit after he had cleared himself through the green channel. When questioned whether he was carrying any contraband /dutiable goods he replied in the negative. The gold was discovered only when the baggage of the Respondent was passed through the metal scanner, which indicated the presence of metal wire running across the beading of the trolley bags carried by him. As the gold was concealed ingeniously and required special efforts for its detection, the impugned gold was confiscated absolutely by the original adjudicating authority, but the absolute confiscation was set aside by the

Appellate authority, and the gold was allowed to be redeemed. This revision Application has been filed by the department contesting the redemption of the gold by the Appellate authority.

8. At the outset Government notes that the impugned gold is 1400 gms and is in commercial quantity and in excess of the quantity for even eligible passengers. The Respondent has contended that gold is a duty paid item and not prohibited. 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 Applicants thus liable for penalty.

10. The Honble Apex Court in the case of Sheikh Mohd. Omer V/s Collector of Customs, Calcutta and others, reported in 1983 (13) ELT 1439 (S.C.) has

also held that, “ any goods which are imported or attempted to be imported contrary to “any prohibition imposed by any law for the time being in force in this country” is liable to be confiscated. “Any prohibition” referred to in that section applies to every type of “prohibition”. That prohibition may be complete or partial. Any restriction on import or export is to an extent a prohibition. The expression “any prohibition” in Section 111(d) of the Customs Act, 1962 includes restrictions.”. Therefore the contentions raised in the appellate order are not based on correct appreciation of laws as held by the Apex court and High Courts.

11. In addressing the case laws quoted by the Appellate authority in its order dated 14.05.2018 to para 22 states “..... Accordingly the analysis of various judgments on the issue of redemption of gold under section 125 of Customs Act, 1962 make it clear that the discretion has to be exercised based on merits of each case and there cannot be any straight jacket formula to decide such cases. Now coming to the merits of the present case I find that in the case at hand the passenger had claimed the ownership of gold and produced the purchase invoice before the adjudicating authority..” It is a matter of record that the ownership of the gold has not been disputed, and ownership of the impugned gold cannot be a factor for allowing redemption of the ingeniously concealed gold.

11.1 The Appellate authority further states “But the most important thing to be noted is that neither the larger bench of Tribunal in its order dated 01.12.2000 nor the Hon’ble Apex Court Omprakash Bhatia 2003 (155) ELT 423 (SC) gave any findings to the effect that such cases warrant absolute confiscation for violating any condition of import or export nor limited the scope of section 125 of Customs Act, 1962 for allowing redemption of offending goods. Therefore the judgment in case of Omprakash Bhatia (supra) passed by Honorable Supreme Court does not alter the scope of section 125 of Customs Act, 1962 in any manner and the position remains the same that in case of ‘Prohibited goods’ redemption may be allowed but in case of ‘other goods’ redemption shall be given to the owner or to the person from whose possession such goods have been seized.” In addressing this contention the Government notes that The Hon’ble Supreme Court in the same judgment of Omprakash Bhatia 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.” Further, The Supreme Court Of India In Civil Appeal Union Of India & Ors. V/S M/S. Raj Grow Impex Llp & Ors. 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 as such discernment is the critical and cautious judgment of what is correct and proper by differentiating between shadow and substance as also between 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.”

11.2 The Appellate order further states “*that the honourable Apex Court in case of Sri Kumar Agency vs CCE, Bangalore 2008 (232) E.L.T. 577 (S.C.), Escorts Ltd vs CCE, Delhi-II 2004 (173) E.L.T. 113 (S.C.) and CCE, Calcutta vs Alnoori Tobacco Products 2004 (170) E.L.T. 135 (S.C.) has stressed upon the concept of “Circumstantial flexibility”, and held that one additional or different fact may make a world of difference between conclusions in two cases and therefore disposal of cases by blindly placing reliance on a decision, not proper.*” It is observed that the Appellate authority has quoted the Apex Court to buttress the argument that the lower authority's decision was illogical or suffers from procedural impropriety without explicitly pointing out the defect in the impugned Order in Original.

11.3 Commissioner (Appeals) has also referred to the Order of CESTAT, Chennai in the case of A. Rajkumari Vs. CC (Chennai) 2015 (321) ELT 540 (Tri.Chennai) for drawing the conclusion of release of the impugned gold bars 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) has affirmed the said order of CESTAT, Chennai. However, the contention made regarding affirmation of CESTAT Chennai's judgment by Hon'ble Apex Court are not proper in view of the factual position that Hon'ble Apex Court dismissed the appeal by Revenue on the grounds of being time barred and thus the same is not based on the merits of the case. Therefore, the Commissioner (Appeals) conclusion justifying the applicability of the said judgment to the facts to this case is improper.

11.4 Similarly, the Appellate Authority states “*I find that in case of Samynathan Murugesan (supra) there is no distinction made by the Hon'ble High court in*

the manner of carrying the offending goods which could have an impact on the scope of section 125 of Customs Act, 1962. Otherwise also under section 125 of Customs Act, 1962 the criteria of allowing redemption is not dependent on the manner of carrying the offending goods by the Importer and there are no conditions attached to the discretion of allowing redemption which could have an overriding effect while interpreting the scope of section 125 of Customs Act, 1962. In other words the Hon'ble Madras High Court (supra) has not upheld the decision of Commissioner of absolute confiscation. due to any specific manner of carrying the gold i.e. ingenious concealment or otherwise. More so, in similar cases redemption has been allowed by the same adjudicating authority." In extending the argument the Appellate Authority contends that concealment of the impugned gold should not be an issue while interpreting the scope of section 125 of Customs Act, 1962. Government however opines that the manner in which the gold was concealed i.e. inside the beading around the trolley bags he was carrying, 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. Had the passenger not been intercepted he would have made good with 1400 grams of gold. These circumstances of the case and the intention of the Appellant was not at all considered by the Appellate Authority while giving him option to redeem the seized goods on payment of fine and penalty.

12. The 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 and ingenious is a fit case for absolute confiscation as a deterrent to passengers misusing the facility of green channel. Thus, taking into account the facts on record and the gravity of offence, the adjudicating authority had rightly ordered the confiscation of gold. In the instant case, the passenger did not declare the said gold to Customs on his own and the subject gold was detected only after he was intercepted by the AIU Officials. 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) ELT753 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.*" . The redemption of the gold will encourage such concealment as, if the gold is not detected by the Custom authorities the

passenger gets away with smuggling and if not 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. The order of the Appellate authority is therefore liable to be set aside.

13. In view of the above the Government sets aside the Order of the Appellate authority. The order of the Original Adjudicating Authority is upheld.

Shrawan Kumar
26/8/21
(SHRAWAN KUMAR)

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

ORDER No. 209/2021-CUS (WZ) /ASRA/MUMBAI DATED 26.08.2021

To,

1. The Commissioner of Customs, CSI Airport, Mumbai.
2. Shri Sunil Kundandas Kalyani, No. 601, Tirupati Apartments, Near Regency hotel, Chopra Court, Ulhasnagar, Thane-421 003.

Copy to:

1. Shri Advani Sachwani & Heera Associates, Advocates, Nulwala building, 41, Mint Road, Fort, Mumbai -400 001. Advocate,
2. Sr. P.S. to AS (RA), Mumbai.
3. Guard File. ,
4. Spare Copy.