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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. 380/02/B/WZ/2020-RA/1051 : Date of Issue : 18.02.2023

ORDER NO. 241/2023-CUS (WZ)/ASRA/MUMBAI DATED 16.02.2023
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 : Pr. Commissioner of Customs, CSMI Airport, Mumbai.

Respondent : Shri. Fairoz Ahmed Sayed

Subject : Revision Application filed, under Section 129DD of the
Customs Act, 1962 against the Order-in-Appeal No.
MUM-CUSTM-PAX-APP-600/2018-19 dated 30.10.2019
issued through A.F.No. S/49-459/2018 passed by the
Commissioner of Customs (Appeals), Mumbai - III.

ORDER

This revision application has been filed by Pr. Commissioner of Customs, CSI Airport, Mumbai. (herein referred to as Applicant) against the Order in Appeal No. MUM-CUSTM-PAX-APP-600/2018-19 dated 30.10.2019 issued through A.F.No. S/49-459/2018 passed by the Commissioner of Customs (Appeals-III), Mumbai.

2. Briefly stated the facts of the case are that the Respondent was intercepted by Customs Officers when he arrived at the CSMI Airport, Mumbai on 14.07.2018 from Dubai onboard Jazeera Airways Flight No. J9-602/17.07.2018. During personal search and detailed examination of his baggage, the respondent was found to be in possession of 232 grams of gold, valued at Rs. 6,76,900/-.

3. The Original Adjudicating Authority (OAA) viz, Dy. Commissioner of Customs, CSI Airport, Mumbai vide Order-In-Original No. AirCus/T2/49/187/2018-'B' dated 14.07.2018, ordered for the absolute confiscation of the gold weighing 232 grams, valued at Rs. 6,76,900/- under Section 111(d) of the Customs Act, 1962 and imposed a penalty of Rs. 1,00,000/- (Rupees Two Lakhs only) under Section 112 (a) and (b) of the Customs Act, 1962 on the respondent.

4. Aggrieved by the said order, the respondent filed an appeal before the appellate authority (AA) viz, Commissioner of Customs (Appeals), Mumbai - III who vide Order-In-Appeal No. MUM-CUSTM-PAX-APP-600/2018-19 dated 30.10.2019 issued through A.F.No. S/49-459/2018 allowed the impugned gold to be redeemed on payment of a redemption fine of Rs. 1,50,000/- and the penalty of Rs. 1,00,000/- imposed by the OAA was upheld.

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

- 5.01 that the appellate order was not legal and proper;
- 5.02. that the respondent had opted for the green channel of Customs and had been orally communicated about the charges in respect of the gold found in his possession on his arrival from Dubai after a stay there of 6 days; that the respondent had admitted that he had brought the gold for monetary gains.
- 5.03. the goods imported or attempted to be imported into India, contrary to any prohibitions imposed under the Act or any other law, would be liable for confiscation.
- 5.04. that the respondent had attempted to clear the impugned gold without declaring to Customs and had violated the conditions in Section 77 of the Customs Act, 1962. Since, the impugned gold had not been declared to Customs, its goods were liable for confiscation and the respondent made himself liable for penalty under Section 112(a) & (b) of the Customs Act, 1962.
- 5.05. the applicant has relied upon the undermentioned case laws;
- (a). Commissioner of Customs vs. P. Sinnaswamy passed by the Hon'ble Madras High Court, which had held that even though gold is not an enumerated prohibited item which can be imported, such imports are subject to restrictions, including the necessity to declare the goods on arrival at the Customs Station and make payment of duty at the rates prescribed. When there was a violation of statutory prohibitions mentioned in the Act, such restrictions can be termed as prohibition.
- (b). Om Prakash Bhatia vs. Commr. Of Customs, Delhi [2003-6-SCC-161], wherein the Apex Court had held that if conditions prescribed for import or export of goods are not complied with, it would be considered as prohibited goods. Non-fulfilment conditions of imports tantamount to prohibition. Also, it has been held that in matters of quasi-judicial discretion, interference by the Appellate Authority would be justified only if the lower authority's decision was illogical or suffered from procedural impropriety.
- (c). Case of Abdul Razak vs. UOI [2012-275-ELT-300-KER-DB] referring to Section 2(33) of the Customs Act, 1962 found no merit in the litigant's case that they had the right to get the confiscated gold released on payment of redemption fine and duty under Section 125 of the Customs Act, 1962.
- (d). Board's Circular no. 495/5/92-Cus.VI dated 10.05.1993 that in respect of gold seized for non-declaration, no option to redeem the same on redemption fine under Section 125 of the Customs Act, 1962 should be given except in trivial cases where the adjudicating authority is satisfied that there was no concealment.
- (e). that the option to allow redemption of seized goods is the discretionary power of the adjudicating authority depending upon the facts of each case and its merit; that the OIA was not legal and

proper and it had not considered the intention of the respondent to evade payment of duty.

(f). Commissioner of Customs, Tuticorin vs. Sai Copiers [2008-226-486-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 mis-carriage of justice.

(g). Judgement of Hon'ble Delhi High Court in the case of Jain Exports vs. UOI 1987-29-ELT-753 wherein it was held that "... the resort to Section 125 of the Customs Act, 1962, to impose fine in lieu of confiscation cannot be so exercised as to give bonanza or profit for an illegal transaction."

Under the aforesaid circumstances, the applicant has prayed to set aside the order passed by the appellate authority and to restore the OIO or to pass any order as deemed fit and proper.

6. Personal hearings in the case was scheduled, however, no one appeared for the applicant. Shri. N.J Heera, Advocate appeared for physical hearing on **10.11.2022**. He submitted that respondent had brought small quantity of gold and is a law abiding citizen. He requested to maintain Commissioner (Appeals) order.

7. The Government has gone through the facts of the case, and notes that the respondent had passed through the green channel 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 and had he not been intercepted would have walked away with the impugned goods without declaring the same to Customs. Gold weighing 232 grams was brought by the respondent. Only during personal search / examination of the respondent's baggage the gold was recovered. The respondent had attempted to evade Customs duty. Therefore, Government finds that the confiscation of the gold is justified.

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 ‘Respondents’ thus liable for penalty.

11. 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.

12. The quantity of gold under import is small and is not of commercial quantity. There are no allegations that the respondent is a habitual offender and was involved in similar offence earlier. 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 imposing quantum of penalty. Government notes that the appellate authority has rightly allowed to redeem the gold on payment of a redemption fine and had made judicious use of discretion available under Section 125 of the Customs Act, 1962. Government finds that the Appellate Order is proper and judicious and is not inclined to interfere in the same.

13. The issue of goods being allowed redemption to respondent has been discussed by Commissioner (Appeals) in his Order at para 9 and 10. Commissioner (Appeals) observed,

“9. I further find that in Neyveli Lignite Cor. Ltd. vs UOI 2009 (242) E.L.T. 487 (Mad.), the Hon'ble High Court of Madras held that:

Redemption fine-Prohibited goods, discretion-Section 125 of Customs Act, 1962- If goods are not prohibited, then adjudicating officer shall give to the owner of the goods an option to pay in lieu of confiscation, such fine as officer thinks fit-It is only, when it is prohibited goods that the officer has discretion and it is open to him not to give the option to pay fine in lieu of confiscation (para 32)

10. I further find that there are series of judgements where redemption of absolutely confiscated gold/ gold jewellery has been allowed. In Hargovind Das K. Joshi Vs Collector of Customs 1992 (61) ELT 172(SC), the Hon'ble Apex Court remanded the case to the Collector for exercising the option of redemption under section 125 of Customs Act, 1962. In Universal Traders vs. Commissioner - 2009 (240) EL.T. A78 (S.C.) also, the Apex Court allowed redemption of exported goods being not prohibited. In Gauri Enterprises Vs CC, Pune 2002 (145) ELT (705) (Tri-Bangalore), the CESTAT held that if similar goods have been released on fine earlier, selective absolute confiscation is not called for as absolute confiscation should be an exception rather than a rule. In CC (Airport), Mumbai Vs Alfred Menezes 2009 (242) ELT 334 (Bom.), the Hon'ble High Court held that 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. In Yakub Ibrahim Yusuf 2011 (263) E.L.T. 685 (Tri. Mumbai), the Tribunal held that Option of redemption has to be given to person from whose possession impugned goods are recovered, even though he had not claimed its ownership. In Shaik Jamal Basha Vs Government of India 1997 (91) ELT 277(AP), the Hon'ble High Court held that Gold is allowed for import on payment of duty and therefore Gold in the form other than ornaments imported unauthorised can be redeemed. In VP Hameed Vs Collector of Customs Mumbai 1994(73) ELT 425 (Tri) it was held that there is no bar in allowing redemption of gold being an item notified under Section 123 of Customs Act, 1962 or for any other reason. In T. Elavarasan Vs Commissioner of Customs (Airport), Chennai 2011 (266) ELT 167 (Mad), the Hon'ble High Court held that Gold is not a prohibited item and option is available to owner of goods or person from whom goods seized, to pay fine in lieu of confiscation.”

14. With regard to the penalty of Rs. 1,00,000/- imposed under Section 112(a) & (b) of the Customs Act, 1962, imposed by the OAA and upheld by the AA, the Government finds that the same is commensurate with the omissions and commissions committed by the respondent and is not inclined to interfere in the same.

15. For the aforesaid reasons, the Government does not find it necessary to interfere in the OIA passed by the AA.

16. Accordingly, the Revision Application filed by the applicant is dismissed.


(SHRAWAN KUMAR)

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

ORDER No. 241/2023-CUS (WZ) /ASRA/MUMBAI DATED 16.02.2023

To,

1. Pr. Commissioner of Customs, Chhatrapati Shivaji International Airport, Terminal - 2, Mumbai 400 099.
2. Shri. Fairoz Ahmed Sayed, Mariyambai Chawl, Room no. 14, 2nd Floor, Husaini Baug, M.A Road, Madanpura, Mumbai -

Copy to:

1. Shri. N.J Heera, Advocate, Nulwala Bldg, Ground Floor, 41, Mint Road, Opp. GPO, Fort, Mumbai - 400 001.
2. Sr. P.S. to AS (RA), Mumbai,
3. File Copy.
4. Notice Board.