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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. 371/250/B/WZ/2018-RA / 1169
F.No. 380/079/B/WZ/2018-RA

Date of Issue : 23.2.23

ORDER NO. 258-259 /2023-CUS (WZ)/ASRA/MUMBAI DATED 20.02.2023
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.

(i). F.No. 371/250/B/2018-RA

Applicant-Passenger: Shri. Mohamed Asif Umer Bukhari

Respondent-Department: Commissioner of Customs (Airport), CSI, Mumbai

(ii). F.No. 380/79/B/WZ/2018-RA

Applicant-Dept: Commissioner of Customs (Airport), CSI, Mumbai.

Respondent-Passenger: Shri. Mohamed Asif Umer Bukhari

Subject : Order-in-Appeal Airport No. MUM-CUSTM-PAX-APP-
101/18-19 dated 18.05.2018 [F.No.S/49-160/2017]
passed by the Commissioner of Customs (Appeals),
Mumbai-III

ORDER

These two revision applications have been filed by (i). Shri. Mohamed Asif Umer Bukhari, (hereinafter referred to as the Applicant-Passenger or also as Respondent-Passenger) and (ii). Commissioner of Customs (Airport), CSI Airport, Mumbai (hereinafter referred to as the Respondent-dept. or Applicant-department) against the Order in Appeal No. MUM-CUSTOM-PAX-APP-101/18-19 dated 18.05.2018 [F.No.S/49-160/2017] passed by the Commissioner of Customs (Appeals), Mumbai-III.

2. Brief facts of the case are that Mohamed Asif Umer Bukhari, the applicant-passenger who is a domestic passenger, on arrival at CSI Airport, Mumbai from Delhi by Air India Flight No. AI-659 dated 03.09.2015 was intercepted by the officers of the Air Intelligence Unit (AIU) in front of two panchas. To query put forth to him for possession of any dutiable items in front of panchas, he had replied in negative. Not satisfied with the reply, it was decided to check the applicant's baggage and also search in person. The personal search of the passenger and his baggage resulted into recovery of 01 gold bar of 1 kilogram and 01 gold bar of 116 grams from the pant pocket and 02 gold bars of 1 kilogram each from the hand bag, totally weighing 3116 grams gold valued at Rs. 76,49,442/-. The applicant passenger in his statement recorded on 3.09.2015 stated that the impugned gold belongs to one Mr. Asfaq and that the said gold was retrieved from the rear toilet of the aircraft. The same was seized by the officers in the reasonable belief that the same was smuggled into India in a clandestine manner in contravention of the provisions of the Customs Act, 1962.

3. The Original Adjudicating Authority (OAA) viz, Additional Commissioner of Customs, CSI Airport, Mumbai vide Order-In-Original No. ADC/RR/ADJN/554/2016-17 dated 07.03.2017 ordered for the absolute confiscation of the seized 03 gold bars of 01 kg each and 01 gold bar of 116 grams, totally weighing 3116 grams gold valued at Rs. 76,49,442/- under Section 111(d), (l) and (m) of the Customs Act, 1962. Personal Penalty of Rs. 7,65,000/- was imposed on the applicant, under Section 112(a) and (b) of the Customs Act, 1962.

4. Aggrieved by the said order, the applicant filed an appeals before the Appellate Authority (AA) i.e. Commissioner of Customs (Appeals), Mumbai-III, who vide Order in Appeal No. MUM-CUSTM-PAX-APP-101/18-19 dated 18.05.2018 [F.No. S/49-160/2017] modified the OAA's Order by allowing the redemption of the impugned goods on payment of fine of Rs.14, 00,000/-, however upheld the penalty imposed by the OAA.

5. Aggrieved with the above order with respect to the redemption of the impugned goods allowed, the Applicant Department has filed the revision application on the following grounds;

5.01 That Shri Mohamed Asif Umar Bukhari in his statement recorded under Section 108 of the Customs Act, 1962 on 03.09.2015 has stated that the seized gold bars having foreign markings totally weighing 3116 grams belongs to Mr. Ashfaq; that the above said gold was retrieved by him from the airplanes rear toilet on instructions of Mr. Ashfaq; that the said gold was supposed to be handed over to Mr. Ashfaq at outside Terminal 1-A of CSI Airport, Mumbai; that he was carrying the said gold for a monetary consideration of Rs.5000/- as promised by Mr. Ashfaq, further Mr. Ashfaq has arranged for his ticket fare

from Delhi to Mumbai; that he was aware that import of gold without declaration of payment of duty is an offence punishable under the Customs Act, 1962; that he admitted possession, carriage, non declaration and recovery of the said gold bars.

5.2 That Shri Mohamed Asif Umar Bukhari was working for monetary consideration for carrying the gold; that the passenger never turned up for recording further statement; these facts shows that he was working for monetary consideration for a syndicate which attempted to smuggle gold by hiding them in toilet of aircraft; that there is clear evidence of an attempted syndicated smuggling effort by concealing the gold in toilet of aircraft for subsequent clearance by domestic passenger. this shows clear evidence of an attempted syndicated smuggling effort by concealing the gold in toilet of aircraft for subsequent clearance by domestic passenger with intention to evade duty on dutiable goods and smuggle the same into India, had the officials of Customs not be alert, the passenger would have walked away without payment of duty. In the present case the modus operandi of gold smuggling had weighed the adjudicating authority to order absolute confiscation and finding release of the seized good is not tenable. The 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.

5.3 Further, the Commissioner (Appeals) has referred to the order of CESTAT, Chennai in the case of A. Rajkumari Vs CC (Chennai) 2015 ELT 540 (Tri.-Chennai) for drawing the conclusion of release of 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) has affirmed the said order of

CESTAT, Chennai. However, it may be seen that the Hon'ble Supreme Court dismissed the appeal of Revenue on the ground of delay and not on merits. Therefore, the Commissioner (Appeals) stand in stating that the order of CESTAT, Chennai is affirmed by the Hon'ble Apex Court is not the fact.

5.4 That regarding the redemption fine and penalty, it shall depend on the facts and of the case and other cases cannot be binding as a precedent. The applicant department relied on various case laws:

- a) Judgment of Hon'ble Delhi High Court in the case of Jain Exports Vs Union of India 1987(29) ELT753 ;
- b) Commissioner of Customs, Tuticorin V/S Sai Copiers (2008 (226) E.L.T. 486 (Mad.));
- c) Hon'ble Supreme Court in the case of Om Prakash Bhatia Vs Commissioner of Customs, Delhi [2003 (155) E.L.T. 423 (SC)];
- d) Abdul Razak Vs. UOI 2012 (275) ELT 300 (Ker)

5.5 That in the instant case, since the goods which have been confiscated were being smuggled in by the passengers without declaring the same to the Customs and are of high value, the Commissioner of Customs (Appeals), Mumbai has erred in allowing the redemption of the goods.

Under the circumstances of the case, the applicant-department prayed to set aside the impugned OIA and OIO be upheld.

B. Aggrieved with the impugned order passed by the AA, Shri Mohamed Asif Umar Bukhari, the Applicant-Passenger filed the revision application following grounds;

5.6 That the impugned Order has been passed without giving due consideration to the documents on record and facts of the case.

5.7 That u/S 125 the Redemption fine has to be imposed by Adjudication Authority to the extent of difference between CIF and market value to wipe out Margin of Profit.

5.8 That the department had not given any local market value and in absence of the same the Margin of profit cannot be ascertained and in this case there is no margin of profit left after payment of 36.05% of duty, therefore the heavy fine imposed is totally unjustified

Under the circumstances of the case, the applicant prayed to set aside the OIA in as much as to reduce the redemption fine and penalty imposed.

6. Personal hearings in the case was scheduled for 02.08.2022. Shri N.J. Heera, Advocate appeared for the hearing. He informed that he has not received the copy of the RA filed by the department and requested for a copy and requested for adjournment to 25.08.2022. He again requested for adjournment and hearing was scheduled on 07.10.2022. He then appeared for the hearing on 7.10.2022 and submitted a written submission on the matter. He requested to reduce Redemption fine and penalty as applicant-passenger was a domestic passenger. No one appeared for the department.

7. The Government has gone through the facts of the case, and notes that the applicant was caught with above gold while getting out of airport after landing in Mumbai from Delhi on a domestic flight. The Applicant in his initial

statement stated that the gold of foreign marking was retrieved by him from the airplanes rear toilet and was to be given to a person standing outside the terminal. His role in this was to retrieve the gold hidden in the toilet of the flight and hand it over to the person standing outside the terminal for monetary consideration. The applicant had not given source of procurement of gold leading to presumption that he had adopted an ingenious method to hoodwink the Customs and evade payment of Customs duty. The Government finds that the confiscation of the gold is therefore justified.

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 Applicants thus liable for penalty.

10. 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. 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. 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. In case of goods, such as, gold which become prohibited for violation of certain conditions, the Adjudicating Authority may allow redemption

12. Government notes that while allowing the redemption of the goods, the AA at para 6 & 7 of his OIA has observed as under;

*“6. In this regard I find that Section 125 of Customs Act, 1962 provides that in case of prohibited goods the adjudicating authority **may** give an option of redemption and in this way he has discretionary power but for other than prohibited goods the adjudicating authority has to give option to pay fine in lieu of confiscation and in this way the adjudicating authority **shall** allow redemption to the owner or to the person from whose possession such goods have been seized:*

*Section 125: 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”*

.....

(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.

7. I find that in terms of section 2(33) of 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..... It is an admitted fact that the import of gold is allowed in case of certain category of persons, subject to certain conditions. No permission or license from any Govt. agency or Reserve Bank of India is required now for entitled persons to bring in gold. Therefore the relaxation is very liberal for such persons. Accordingly the goods falling under this category may be considered for release on redemption fine. To put it differently, if the goods are unconditionally prohibited from Importation, the importer/owner will not be entitled for claiming redemption. On the other hand, if the goods are conditionally prohibited from importation (i.e. subject to some conditions), the importer/owner may claim redemption. Nevertheless as per section 125 of the Customs Act, 1962 framed under the statute, an option of redemption can be given in his discretion by an adjudicating/appellate authority, even in respect of prohibited goods.

13. The Government notes that the applicant-passenger in his reply to the Show cause Notice has stated that he was travelling as a domestic passenger; that as a domestic passenger he was not required to file a declaration as the gold was not imported; that the gold were local purchases and not imported from abroad; that the seized gold was locally acquired by him and was being brought by him for local sale in Mumbai as the retail price of Gold was higher in Mumbai than in Delhi and hence he was carrying it for monetary gain; that the seized gold was carried by him openly in his jeans pocket and his hand bag and that he had not concealed the gold. Government notes that the

investigating agency had not produced any evidence conclusively establishing that the seized gold had been smuggled into India. Investigations had not brought out that the aircraft used in the domestic flight had earlier operated as an International flight. This was crucial since the case was that applicant had picked up the gold bars from the rear toilet of the domestic flight where the same had been kept concealed. It was essential to prove that the flight prior to its changeover to the domestic sector had operated on an International sector or there was some earlier link of this domestic flight to an International sector.

14. Government finds that there is lack of evidence to clearly conclude that the gold bars were indeed smuggled into the country. Government finds that the AA has used his discretion in releasing the gold jewellery. The option to allow redemption of seized goods is the discretionary power of the adjudicating / appellate authority depending on the facts of each case and after examining the merits. Government observes that while allowing the goods to be redeemed on payment of redemption fine, the AA has relied upon a host of cases where the adjudicating authority had released the gold of varying quantities and the same were accepted by the Department.

15. 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. Some of these cases have been cited by the OIA.

16. In the instant case Government observes that neither the Applicant-passenger was a habitual offender nor the gold was concealed ingeniously, in fact, the gold was found in the pant pocket and the rest in the hand-baggage. Government finds that though the Applicant-passenger did not produce any

documents to substantiate his claim that the gold was procured locally ie from Delhi, the applicant department too did not have any evidence as to how the gold was smuggled into the Country. Government finds that the AA has held that there was no proper investigation in this case which he has detailed in Para 22 of his Order:

".....Now coming to the merits of the present case I find that during adjudication proceedings as also in the appeal submissions the appellant has questioned the allegations in the SCN and his statement and pleaded that gold was locally procured at Delhi for sale at Mumbai and it was not concealed to avoid detection. I also note that domestic passengers who board international flights in domestic leg are not required to file Customs Baggage Declaration Form as-per CBEC instructions issued under F.No. 520/43/2015-Cus VI dated 23.12.2015. Further on perusal of statement of the applicant while answering question No. 7 it is stated that "This is my first time that I have carried gold on my arrival to India" which raises some question mark on the quality of investigation and on the case of the department that the appellant passenger was travelling on domestic sector and whether gold was brought as a domestic passenger or as an international passenger. I find that another allegation on the appellant is that he retrieved gold from toilet of aircraft as per instructions of Mr. Ashfak but there is no investigation or interception of Mr. Ashfak who was allegedly waiting outside Terminal-I of airport at Mumbai. Even there is no reference of any telephonic communication based on Call Data Records of the appellant with Mr. Ashfak or anybody else to suggest any organised and planned way of smuggling of gold. I also find that there is nothing in the order to reflect about the exact incident of import of the offending goods in

India to substantiate smuggling and its mode. The investigation has also failed to find out about the alleged owner of the gold or to whom the gold was to be delivered at Mumbai. However section 123 of Customs Act, 1962 casts the burden on the appellant to prove that the gold was not smuggled but at the same time it does not preclude him from claiming redemption of seized gold under section 125 of Customs Act, 1962.....”

Government finds that the AA has relied upon the precedent case laws on the subject and have applied the case laws judiciously while granting release of the gold bars. The AA has used discretion available under Section 125 of the Customs Act, 1962 and allowed the Applicant to redeem the gold on payment of fine of Rs. 14,00,000/-. Government finds the OIA passed by the AA to be legal and proper and is not inclined to interfere in the same.

17. The Applicant-department has pleaded for setting aside the redemption granted to the applicant and the applicant-passenger has pleaded to reduce the redemption fine and penalty imposed by the Appellate Authority. The Government, keeping in mind the facts of the case neither agrees to the plea of the applicant-department nor to the plea of the applicant-passenger and finds that redemption allowed on the impugned goods by the AA is proper and judicious. For the aforesaid reasons, the Government does not find any reason to interfere with the order passed by the AA in respect of the redemption allowed.

18. With regard to the penalty imposed on the applicant-passenger under Section 112(a) and (b) of the Customs Act, 1962, Government notes that the fact remains that a considerable quantity of gold was recovered from the possession of the applicant. As required under Section 123 of the Customs Act, 1962, the onus to prove that the gold was not smuggled was on the

applicant-passenger. During the investigation stage, the applicant passenger had failed to produce any document or any credible evidence to show that he had made local purchases of the gold. In absence of any such evidence by the applicant-passenger, gold is presumed to be smuggled as per Section 123 of Customs Act, 1962. Thus, applicant-passenger had made himself liable for penalty under Section 112(a) & (b) of the Customs Act, 1962 and hence Government does not find any reason to interfere to the penalty imposed amounting to Rs.7,65,000/- for the gold valued at Rs.76,49,442/- by the OAA and upheld by the AA.

19. In view of the above, the Government upholds the order passed by the AA and rejects the Revision Application i.e. F.No. 371/250/B/2018-RA filed by the applicant-passenger and the Revision Application F.No. 380/79/B/WZ/2018-RA filed by the applicant-department.

20. The Revision Applications are disposed on the above terms.

Shrawan
20/2/23
(SHRAWAN KUMAR)

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

ORDER No. *258-259* /2023-CUS (WZ) /ASRA/ DATED 20.02.2023

To,

1. Shri. Mr. Mohamed Asif Umer Bukhari, Al-Ameer Apartment, Flat No. 201, 2nd Floor, B-Wing, 15-B, Umer Khadi Cross Lane, Jail Road (south), Dongri, Mumbai-400009.
2. The Pr. Commissioner of Customs, C.S.I Airport, Terminal 2, Level-II, Sahar, Andheri (East), Mumbai 400 099.
3. The Commissioner of Customs (Appeals), Mumbai-III, 5th Floor, Avas Corporate Point, Makwana Lane, Behind S.M.Centre, Andheri Kurla Road, Andheri (East), Mumbai 400 059.

Copy To,

1. Shri N.J. Heera, Advocate, Nulwala Building, 41, Mint road, Opp G.P.O., Fort, Mumbai- 400001.
2. Sr. P.S. to AS (RA), Mumbai.
3. File Copy.
4. Notice Board.