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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. 371/105/B/WZ/2022-RA / 312 : Date of Issue : 15.01.2024

ORDER NO. 26/2024-CUS (WZ)/ASRA/MUMBAI DATED 12.01.2024
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 Sumi Dhirejlal Rathod

Respondent : Pr. Commissioner of Customs, CSI Airport, Mumbai

Subject : Revision Application filed under Section 129DD of the
Customs Act, 1962 against the Order-in-Appeal No.
MUM-CUSTOM-PAX-APP-846/2021-22 dated 28.10.2021
[F. No. S/49-833/2020-21] passed by the Commissioner
of Customs (Appeals), Mumbai Zone-III

ORDER

The Revision Application has been filed by Shri Sunil Dhurajlal Rathod (herein referred to as the 'Applicant') against the Order-in-Appeal No. MUM-CUSTOM-PAX-APP-846/2021-22 dated 28.10.2021 (P. No. S/49-833/2020-21) passed by the Commissioner of Customs (Appeals), Mumbai Zone-III

2. Brief facts of the case are that on 26/27.01.2019, on the basis of inline screening and profiling, the officers of Air Customs, CSI Airport, Mumbai, intercepted the Applicant, an Indian passport holder, who had arrived by Spicejet Flight No. SG 014 from Dubai, after he had cleared himself through the Customs green channel. On being asked whether he was carrying any contraband or gold either in his baggage or on his person, the Applicant replied in the negative. Not being satisfied with the reply, examination of the strolley bag of the Applicant was conducted which showed suspicious dark images while screening the bag. The detailed examination of the handle of the strolley bag resulted in the recovery of 04 cut pieces of gold bars, assorted gold jewellery and wet gold granules and dust, concealed inside the handle pipe of the strolley bag.

3. Pursuant to being assayed, 04 cut pieces of gold bars of 24 Kt purity weighing 194 grams, assorted gold jewellery of 21Kt purity weighing 195 grams and gold dust converted into bars and remnants weighing 300.311 grams, collectively weighing 689.311 grams and valued at Rs. 19,94,3797- were seized under the reasonable belief that the same were being attempted to be smuggled into India in contravention of the provisions of the Customs Act, 1962.

4. After following the due process of law, the Original Adjudicating Authority (OAA) i.e. Additional Commissioner of Customs, CSI Airport Mumbai, vide Order-in-Original No. ADC/SKR/ADJN/09/2020-21 dated 20.05.2020 ordered the absolute confiscation of the 04 cut pieces of crude gold bars of 24 Kt purity weighing 194 grams, assorted gold jewellery of 21Kt purity weighing 195 grams and gold dust converted into bars and

remnants weighing 300.311 grams, collectively weighing 689.311 grams and valued at Rs. 19,94,379/- under Section 111(d), (f) and (m) of the Customs Act, 1962. Personal penalty of Rs. 2,00,000/- was imposed on the Applicant under Section 112 (a)(i) of the Customs Act, 1962. The handle of the strolley bag used for concealment and carrying the impugned gold was confiscated under Section 119 of the Customs Act, 1962.

5. Aggrieved by the Order, the Applicant filed an appeal before the Appellate Authority (AA) via, Commissioner of Customs (Appeals), Mumbai Zone-III who vide Order-in-Appeal No.MUM-CUSTOM-PAX-APP-846/2021-22 dated 28.10.2021[F. No. 5/49-833/2020-21] upheld the order passed by the OAA.

6. Aggrieved with the above order of the Appellate Authority, the Applicant has filed this revision application on the following grounds:

6.01. Gold is not 'prohibited goods' but only a 'restricted goods' and is not liable for absolute confiscation. Import of gold is no longer prohibited and therefore it is the duty of the adjudicating authority, if he is of the view that it is liable to confiscation, to permit its redemption on appropriate fine. That if the goods are restricted to import, the Government fixes some sort of barrier to import and the importer has to overcome such procedures which have to be completed. That restriction to import any goods is decided by the government under foreign trade policy amended from time to time;

6.02. That Gold is not a prohibited item for import and Section 125 of the Customs Act, 1962 provides that option of redemption can be given in case the seized goods are not prohibited and therefore absolute confiscation is not warranted in the instant case. Section 125 of the Customs Act, 1962 provides that the goods should be redeemed to the owner of the goods or the person from whose possession the goods were seized if the owner is not known. Further authority has discretion to order release of prohibited goods on payment of fine in lieu of

confiscation. The Applicant has relied upon the undermentioned case laws,

- (i) Commr. Of Customs (Prov) vs Jodia Sales International [2009 (241) E L T 182(Cal)]
- (ii) Yakub Ibrahim Yusuf vs CC, Mumbai [2011(263) ELT 685(Tri Mumbai)]
- (iii) Neveel Lignite Corporation Ltd vs UOI [2019(242) ELT 487(Mad)]

6.03 That there are a series of judgments where redemption of absolutely confiscated gold has been allowed. The Applicant has relied on the following case laws:

- (i) Hargovind Das K Joshi vs Collector of Customs [1992 (61) ELT 172(SC)]
- (ii) Universal Traders vs Commissioner [2009 (240) E L T A78 (SC)]
- (iii) Gauri Enterprises vs CC, Pune [2002 (145) ELT (705) (Tri Bangalore)]
- (iv) CC (Airport), Mumbai vs Alfred Mendes [2009 (242) ELT 334 (Bom)]
- (v) Shaikh Jamal Basha vs Government of India [1997 (91) ELT 277(AP)]
- (vi) VP Hameed vs. Collector of Customs Mumbai 1994(73) ELT 425 (Tri)
- (vii) T Elavarasan vs Commissioner of Customs (Airport), Chennai [2011 (266) ELT 167 (Mad)]
- (viii) Kadar Mydin vs Commissioner of Customs (Preventive), West Bengal [2011 (136) ELT 756]
- (ix) Sapna Sarjeeva Kolhe vs Commissioner of Customs, Airport, Mumbai
- (x) Vatakdol Moosa vs Collector of Customs, Cochin [1994 (72) ELT (G O)]
- (xi) Halahra Ibrahim vs CC [2002-TIOE: 195 CESTAT-MAD]
- (xii) Krsninalakumari vs CC, Chennai [2008 (329) ELT 222 (Tri-Chennai)]
- (xiii) S Jagagopal vs. CC, Trichy [2007 (219) ELT 435 (Tri-Chennai)]
- (xiv) M Arumugan vs CC, Trichirapali [2007 (220) ELT 311 (Tri-Chennai)]
- (xv) Union of India vs Dhanak M. Rami [2009 (248) E L T 127 (Bom)]
- (xvi) Perinigtul Hamza vs CC (Airport), Mumbai [2014 (309) ELT 259 (Tri Mumbai)]
- (xvii) R. Mahandas vs CC, Cochin [2016 (336) ELT 399 (Ker)]
- (xviii) Rajkumari vs Commr of Customs (Airport-Air cargo),Chennai [2015(321) E.L.T. 540]
- (xix) Shauk Mastan B; vs CC, Chennai [2017(345) E L T 201 (Mad)]
- (xx) Bhargav Patel vs CC, Mumbai [Appeals NO C/381/10]
- (xxi) Gauri Enterprises vs CC, Pune [2002(145) E L T 705 (Tri-Bang)]
- (xxii) Om Pralosh Bhatia vs Commr Of Customs Delhi [2003(155) E.L.T 423(SC)]

- (xxxii) Commr. of Customs (Prev) vs. Rajesh Pawar [2020(372) E.L.T 683(Ca)]
- (xxxiii) Commr. of CEX and ST, Lucknow vs. Ishahuddin Khan [2018(364) E.L.T 168(Tri-All)]
- (xxxiv) Barkathissa vs. Pr. Commr. of Customs, Chennai[2018(361) E.L.T 418(Mad)]
- (xxxv) Commr. of C Ex and ST, Lucknow vs. Mohd. Halim Mohd. Shamsur Khan [2018(359) E.L.T 265(Tri-All)]

6.04. That the decisions relied upon by the Commissioner of Customs (Appeals) are not applicable to the case and the Commissioner (Appeals) failed to discuss as to how the facts of the cases relied upon by him fit the factual situation of the case of the Applicant;

6.05. That under the doctrine of stare decisis, a lower court should honour findings of law made by the higher court that is within the appeals path of case the court hears and precedent is a legal principle or rule that is created by a court decision. This decision becomes an example, or authority for judges deciding similar issues later. That while applying the ratio of one case to that of the other, the decisions of the Hon'ble Supreme Court are always required to be borne in mind.

6.06. That while applying the ratio of one case to that of the other, the decisions of the Hon'ble Supreme Court are always required to be borne in mind. The applicant has relied upon the following case laws in support of their contention:

- (i) CCE, Calcutta vs. Alinari Tobacco Products [2004(170) E.L.T 135 (SC)]
- (ii) Escorts Ltd vs. CCE, Delhi [2004 (173) E.L.T 113 (SC)]
- (iii) CC (Port), Chennai vs. Toyin Kariyankar [2007 (213) E.L.T 4 (SC)]
- (iv) Sri Kumar Agency vs. CCE Bangalore [(2008(213)E.L.T 577(SC)]

6.07. That there should be consistency in favour of 'formal' justice i.e. that two cases which are the same (in relevant respects) should be treated in the same way and it would be inconsistent to treat them differently;

6.08. That concerns of consistency provide some justification for treating earlier decisions as sources of law rather than approaching each question anew when it arises again.

6.09. That if a legal system is morally legitimate and has authority over those subject to it, then it is inconsistent for one person to be treated less or more favourably by the law other than another person whose situation is legally indistinguishable;

6.10. That if the earlier decision was wrong, then the person subject to it may have been treated or less favourable than they should have been treated and if they were treated more favourable then clearly that should have been corrected,

6.11. That a lower court should honour findings of law made by the higher court that is within the appeals path of case the court hears and precedent is a legal principle or rule that is created by a court decision and is binding on or persuasive for a court or tribunal when deciding subsequent cases with similar issues or facts,

6.12. That the case at hand raises the legal issue as to how the case of the Applicant is different from the cases relied upon by the Applicant for claiming redemption of the goods under absolute confiscation;

6.13. That as regards allowing redemption of the seized goods, Section 125 of the Customs Act, 1962 provides the option of redemption can be given in the case of seized goods are not prohibited and gold is not a prohibited item and can be imported and such imports are subject to certain conditions and restrictions including the necessity to declare the goods on arrival at the Customs station and make payment at the rate prescribed. Reliance has been placed on the following case law

- ii) Shuk Jamal Basha vs Government of India [1972] 11 ELT 277(A)

- (ii) Mohd. Zia U Raque vs. Addl Commissioner of Customs, Hyderabad [2014(214) E.L.T 849 (GOI)]
- (iii) Mohammed Ahmed Mannu vs CC, Chennai [2006(205) E.L.T 383(Tri-Chennai)]

6.14. That the Applicant has relied upon the following case laws in support of the contention that when goods are not eligible for import as per the import policy, re-export of such goods is permitted on payment of penalty and redemption fine. The Applicant has relied on the following case laws in support of their contention:

- (i) CC vs. Elephanta Oil [2003(157) ELT 257 (SC)]
- (ii) Collector vs. N Patel [1992 (62) ELT 674 (GOI)]
- (iii) Kusumbhaji Dabhyabhi Patel vs. CC (P) [1995 (79) ELT 292 (CEGAT)]
- (iv) K&K Gems vs. CC [1996(100) ELT 70 (CEGAT)]

6.15 in the instant case, the Commissioner (Appeals) should have examined the judgements/decisions relied upon by the appellant, facts of the cases, legal issues involved in the cases, arguments raised and cases cited by the parties, legal reasoning that is relevant to resolve those issues, judicial opinions given by the Courts, ruling of the court on questions of law, the result of the case, the court's order, and which party was successful and the applicability of ratio of the said judgements in the case being dealt:

- (i) Decision of the Hon'ble Supreme Court in the case of Bomblay Dyeing and Manufacturing Company Ltd vs. BEAG
- (ii) Decision of the Hon'ble Supreme Court in the case of Islamic Academy of Education vs State of Maharashtra
- (iii) CIT vs. Sun Engineering Works (P) Ltd
- (iv) Madhav Rao Scindia vs Union of India

6.16. That the case of Om Prakash Bhatia has been over ruled by a larger bench of the Supreme Court and therefore reliance placed on the said decision is not sustainable,

6.17. That as held in the case of Commissioner of Customs vs Atul Automation Pvt Ltd, wherein the Hon'ble Supreme Court clearly distinguished between what is prohibited and what is restricted and held that restricted goods can be redeemed on payment of fine, in the instant case gold should not be considered as prohibited goods and order of absolute confiscation is not sustainable. Further the Applicant has also quoted from the decision in the case of Nalamkanta Mudali (2005) and of Sunita Pandey(2018);

6.18. That orders must be speaking order giving clear findings of the adjudicating/appellate authority and he shall discuss each point raised by the defence and shall give cogent reasoning in case of rebuttal of such points but in the present case, the learned Appellate Authority conveniently avoided to discuss and counter each point raised by the Applicant and passed the order against the Applicant without going into the merits of all the defense submission;

6.19. That the adjudicating/appellate authority is under obligation to take on record the submissions made by the Applicants as also the evidence produced by him and then come to a conclusion after examination in entirety along with evidence on record but in the instant case no answer is found to the Applicants defense in the Appellate proceedings;

6.20. That while exercising the judicial power, the Adjudicating /appellate Authority is bound to follow the 'principles of natural justice' which are based on justice, equity, common sense, fair play and rule of law and the authority should act without bias and should be impartial;

6.21. That had the Appellate Authority gone through each and every defense submission made by the Applicant he would have understood the infirmities in the prosecution case and would have desisted from passing such order which clearly establishes that there was no application of mind;

The Applicant has relied on the following case laws in support of his contention:

- (i) Judgment of the Supreme Court in the case of State of Punjab vs K.R. Ery
- (ii) Liberty Oil Mills vs. UOI
- (iii) C. L. Tripathi vs State Bank of India
- (iv) A.R. Krupak vs Union of India
- (v) Judgement of the Orissa High Court in the case of Chintamani Padha vs Padma Samal
- (vi) Decision of CESTAT in the case of Sahara India TV Network vs. CCE, Noida
- (vii) JC. Income Tax, Surat vs Saheli Leasing and Ind Ltd [2010(253) ELT 705(SC)]
- (viii) CESTAT order in the case of Vikas Enterprises vs. CCE Allahabad
- (ix) K Sharp Carbon India vs. CCEs, Kanpur
- (x) UOI vs. Sri Kumar Agencies
- (xi) International Wooden Mills Ltd vs. Standard Wool (UK) Ltd
- (xii) Krumb Associates Pvt Ltd vs. Masood Ahmed Khan [2011(273) ELT 345(SC)]
- (xiii) Mahabir Prasad Santosh Kumar vs. State of UP [AIR 1970 SC 1302]
- (xiv) Travancore Rayons Ltd vs. UOI [AIR 1971 SC 862]
- (xv) Woolcombers of India vs. Woolcombers Workers Union and anr [AIR 1973 SC 2758]
- (xvi) Siemens Engineering and Mfg Co India Ltd vs. UOI [AIR 1976 SC 1785]
- (xvii) Teesteels Ltd vs. Desai N.M
- (xviii) SSE Hari Nagar Sugar Mills Ltd vs. Shyamsundar Jhunjhunwala [AIR 1961 SC 1669]
- (xix) Bhagat Raja case [AIR 1957 SC 1606]

6.22. That all the abovesaid cases are applicable to the present case and a judicial or quasi judicial authority giving its decision must give reasons in support of the decision and the only qualification to this rule is where an adjudication is provided against the decision of the quasi judicial authority.

6.23. That the right to know the reasons for a decision which adversely affects ones person or property is a basic right of every litigant and giving of reasons serves both to convince those subject to the decisions that they are not arbitrary;

6.24. That if no reasons are given in the order, it would not be possible for the High Court or the Supreme Court exercising the power of judicial review whether the administrative officer has made any error of law in making the order and the power of judicial review would be stultified.

6.25. That the OAA is expected to examine all the evidences, issues and material on record, analyse those in the context of alleged charges in the show cause notice and is also expected to examine each of the points raised in the reply to the SCN and accept or reject them with a cogent reasoning.

6.26 The Applicant has made a gar of the submissions which were neither discussed nor countered in the OIA as follows. That the SCN dated 17.07.2019 prejudged the issue and thus prejudiced the petitioner, that the Applicant is not a carrier, as if the Applicant has to be penalised as a carrier, then the nexus between him and Nilesh bhai should have been established, that the statements of the Applicant were exculpatory and no presumptions could be made that he was not the owner of the gold;

6.27. That Circular No 495/5/92-CusVI dated 10.05.1993 cannot prevail over the statute and circulars are issued only to clarify the statutory provision and it cannot alter or prevail over statutory provision. In Circular No 495/5/92-Cus VI, Board has advised that in respect of gold seized for non declaration, no option to redeem the same on redemption fined under Section 125 of CA, 1962 should be given except in very trivial cases,

6.28. That when a quasi judicial authority enjoys a discretionary power while adjudicating a case of smuggling, giving directions to them and forcing them in deciding a case of smuggling in a particular manner i.e absolute confiscation of goods is illegal and against the provision of Section 151-A of CA, 1962; That Circular No 495/5/92-Cus-IV dated 10.05.1993 is only advisory in nature and the advisory cannot be made a rule for ordering confiscation of gold. The Applicant has relied on the following case laws in support of their contentum:

- (i) Carata Herbal Products (P) Ltd vs. Commr. of C Ex, Pondicherry (2019(370) ELT 223(Mad))
- (ii) UOI vs Amalgamated Plantations Pvt Ltd (2016(340) ELT 310(Gau))

6.29. That perusal of Section 125 leaves no manner of doubt that if the goods are prohibited, then the option is with the Customs Authority to confiscate without giving any option to pay fine in lieu thereof but when the goods are not prohibited then the customs authority has no other option but to grant an option to pay a fine in lieu of confiscation and Section 125 does not distinguish between declared and undeclared gold. The Applicant has relied upon the following case laws in support of their contention:

- Malatal Industries [1997(89) E.L.T 247 (SC)]

6.30. That circulars issued by CBEC and CBIT do not bind the assessee and the assessee has a right to challenge the correctness of the circular before a quasi-judicial authority constituted under the relevant statute;

6.31. That the fight between the assesses and the revenue department regarding the applicability and precedential value of the circulars issued by the Board has been put to an end by issuing a clarification vide Circular No. 1006/13/2015-CX dated 21.09.2015 which states that if any circular/instruction issued by the CBEC is contrary to any judgement of the Supreme Court, the SC judgement should be followed. Also that clarificatory circulars cannot amend or substitute statutory rules. The Applicant has relied upon the following case laws in support of their contention:

- (i) Bengal Iron Corporation vs. Commercial Tax Officer
- (ii) Bhagwati Developers vs. Peerless General Finance & Investment Co.
- (iii) Cases pertaining to Paper Products, Hindistan Aeronautics Ltd, Dharen Chemicals, Indian Oil
- (iv) Kalyani Packaging Industry vs. UOI [1164(5) TMI 78 (SC)]
- (v) Comur of CEs, Bolpur vs. Ratan Melting and Wire Industries [1168(10) TMI SC]
- (vi) Bhawalika Steel Industries vs. Bombay Iron and Steel Ltd
- (vii) Harrison and Crossfield (India) Ltd vs. Registrar of Companies
- (viii) Etc.

6.32. That there are several judgements of the Tribunals, High Courts and Supreme Court wherein goods imported/smuggled into India by way of concealment were allowed to be redeemed by the importer/owner of the

goods. The Applicant reiterated the case laws cited earlier in support of his contention.

6.33. That the Applicant claims ownership of the goods under absolute confiscation and the gold was purchased by him for the personal use of his family members and claims redemption of the gold on reasonable fine and penalty and reiterated the case laws cited earlier in support of his contention. In addition, the Applicant relied on the following cases:

- (i) Dhanraj M. Rang vs. Commr of Customs (Airport), Mumbai [2009 (237) E.L.T. 280 (Tri-Mumbai)] and the subsequent SLP filed by the Department.
- (ii) Horizon Ferro Alloys Pvt Ltd vs. UOI -judgement by the Division Bench of Punjab and Haryana High Court.
- (iii) Neyveli Lignite Corporation vs. UOI [2009(242) ELT 487(Mad)]
- (iv) Cooper Company vs. Commr of Customs, Chennai [2007(218) ELT 442(Tri-Chennai)]

6.34. That the above submissions provide a complete and comprehensive appreciation of all features of the case and the entire evidence on record and the allegations against the Applicant is not proved.

6.35. That the Applicant did not commit any act of omission or commission which can be termed as a crime or manifesting of an organised smuggling activity and therefore is not liable to any penal action under Section 112 of CA, 1962.

6.36. That the Applicant is not a habitual offender and is from a respectable family and a law abiding citizen/businessman and has never come under any adverse remark.

Under the circumstances the Applicant prays that the gold under absolute confiscation may be released on payment of reasonable fine, penalty and applicable and further proceedings may be dropped.

7. Personal hearing in the case was scheduled for 14.09.2023 or 21.09.2023. Shri Prakash Shrivastava, Advocate appeared for the personal

hearing on 14.09.2023 on behalf of the Applicant. He reiterated the earlier submissions and further submitted that the Applicant had brought small quantity of gold which was for personal use. He also submitted that there was no ingenious concealment and that the Applicant was not a habitual offender. He requested to allow redemption of goods on reasonable fine and penalty

8 The Government has gone through the facts of the case and observes that the Applicant had brought 04 cut pieces of gold bars of 24 Kt purity weighing 194 grams, assorted gold jewellery of 21Kt purity weighing 195 grams and gold dust converted into bars and remnants weighing 300.311 grams, collectively weighing 689.311 grams and valued at Rs. 19,94,379/- 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 Applicant had not disclosed that he was carrying dutiable goods. However, on being intercepted, 04 cut pieces of gold bars of 24 Kt purity weighing 194 grams, assorted gold jewellery of 21Kt purity weighing 195 grams and gold dust converted into bars and remnants weighing 300.311 grams, collectively weighing 689.311 were recovered from handle pipe of the strolley bag of the Applicant and it revealed his intention not to declare the said gold bars and gold jewellery and thereby evade payment of Customs Duty. The confiscation of the gold bars and gold jewellery was therefore justified and thus the Applicant had rendered himself liable for penal action.

9.1 The relevant sections of the Customs Act are reproduced below

Section 2(33)

"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

"Option to pay fine in lieu of confiscation: - (1) Whenever confiscation of any goods is authorized 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."

9.2 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.

10. The Hon'ble High Court Of Madras, in the case of Commissioner Of Customs (Air), Chennai-I V/s P. Srinasamy 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, a

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".

11. 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 Applicant thus liable for penalty.

12. 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 line, even though the same becomes prohibited as conditions of import have not been satisfied, may not be harmful to the society at large.

13. 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."

14.1. 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:

- (i) In the case of Commissioner of Customs, Aligarh, 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."*
- (ii) The Hon'ble High Court of Judicature at Madras, in the judgment in the case of Shank Mastani B. vs. Principal Commissioner of Customs, Chennai-I [2017(345) E.L.T. 201 (Mad)] upheld the order of the Appellate Authority allowing to export of gold on payment of redemption fine.

- (iii) 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 .."
- (iv) Also, in the case of Union of India vs Dhanek 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(246) E.L.T. 127 (Bom)], and approved redemption of absolutely confiscated goods to the passenger.
- (v) Judgement dated 17.02.2022 passed by the Hon'ble High Court, Rajasthan (Jaipur Bench) in D.B. Civil Writ Petition no. 12001 / 2020, in the case of Manoj Kumar Sharma vs. UOI and others.

14.2. Further, The Hon'ble High Court, Madras, in a judgement passed on 08.06.2022 in WP No. 20249 of 2021 and WMP No. 21510 of 2021 in respect of Shri. Chandraagaram Vijayaundaram and 5 others in a matter of Sri Lankans collectively wearing 1594 gms of gold jewellery upheld the Order no. 165 - 169/2021-Cus (SZ) ASRA, Mumbai dated 14.07.2021 in F.No. 380/59-63/B/SZ/2018-RA/3716, wherein Revisionary Authority had ordered for restoration of OI, wherein the adjudicating authority had ordered for the confiscation of the gold jewellery but had allowed the same to be released for re-export on payment of appropriate redemption fine and penalty.

14.3 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.

15 In view of the foregoing paras, the Government finds that the Applicant had not declared 04 cut pieces of gold bars of 24 Kt purity weighing 194 grams, assorted gold jewellery of 21Kt purity weighing 195 grams and gold dust converted into bars and remnants weighing 300.311 grams, collectively weighing 689.311 grams and valued at Rs. 19,94,379/- at the time of arrival and thus the confiscation of the same was justified. The quantum of gold bars and gold jewellery under import is not large and is not of commercial quantity. The Applicant is well placed financially to purchase the small quantity of gold bars and gold jewellery and has provided the source of funds and also had the invoices for purchase of the gold. There are no allegations that the Applicant is a habitual offender and was involved in similar offence earlier or there is nothing on record to prove that the Applicant was part of an organized smuggling syndicate.

16 The Government finds that the quantum of gold bars and gold jewellery in question, the Applicant being in possession of the invoice of the purchase of the gold bars and gold jewellery and being a person of decent means and not a habitual offender suggests that this case is a case of non-declaration of gold and gold jewellery by the Applicant. The absolute confiscation of the impugned 04 cut pieces of gold bars of 24 Kt purity weighing 194 grams, assorted gold jewellery of 21Kt purity weighing 195 grams and gold dust converted into bars and remnants weighing 300.311 grams, collectively weighing 689.311 grams and valued at Rs. 19,94,379/- leading to dispossession of the Applicant of the same is therefore harsh and not reasonable. 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. In view of the aforesaid facts, option to redeem the gold bars and the gold jewellery on payment of redemption fine should have been allowed. Considering the above facts, Government is inclined to modify the order of absolute confiscation and allow the impugned gold bars and the gold jewellery to be redeemed on payment of a redemption fine.

17. Applicant has also pleaded for reduction of the penalty imposed on him. The market value of the gold bars and gold jewellery, in the instant case is Rs.19,94,379/-. From the facts of the case as discussed above, Government finds that the penalty of Rs. 2,00,000/- imposed on the Applicant under Section 112 (a) (i) of the Customs Act, 1962 is commensurate to the omissions and commissions of the Applicant.

18. In view of the above, the Government modifies the Order-in-Appeal No. MUM-CUSTOMS-PAX-APP-646/2021-22 dated 28.10.2021 (F. No. S/49-833/2020-21) passed by the Appellate Authority and allows the Applicant to redeem the impugned 04 cut pieces of gold bars of 24 Kt purity weighing 194 grams, assorted gold jewellery of 21Kt purity weighing 195 grams and gold dust converted into bars and remnants weighing 300.311 grams, collectively weighing 689.311 grams and valued at Rs. 19,94,379/-, on payment of a redemption fine of Rs. 4,00,000/- (Rupees Four Lakhs only). The penalty of Rs. 2,00,000/- imposed on the Applicant under Section 112 (a) (i) of the Customs Act, 1962 by the OAA is sustained.

19. The Revision Application is disposed of on the above terms.


[SHRAWAN KUMAR]

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

ORDER NO.: 26/2024-CUS (WZ)/ASRA/MUMBAI DATED 12.01.2024

To,

1. Shri Sund Dhirajal Rathod, B/204, Shunpoli Naranjan CHS Ltd, Link Road, Chikuwadi, Borivali (West), Mumbai 400 092.
2. The Pr. Commissioner of Customs, Terminal-2, Level-II, Chhatrapati Shivaji International Airport, Mumbai 400 099.

Copy to:

1. The Commissioner of Customs (Appeals), Mumbai Zone-III, Awas Corporate Point, 5th Floor, Makwana Lane, Behind S.M.Centre, Andheri-Kurla Road, Marol, Mumbai - 400 059.
2. Shri Prakash Shingrani, Advocate, 12/334, Vreck, New MIG Colony, Bandra (East), Mumbai 400 051.
3. Sr. P.S. to AS (RA), Mumbai.
4. File copy.
5. Notice Board.

