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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. 371/322 & 323/B/WZ/2018-RA / 124 Date of Issue 01.03.23

ORDER NO. 262-263 /2023-CUS (WZ)/ASRA/MUMBAI DATED 24.02.2023 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.

F.No. 371/322 & 323/B/WZ/2018-RA

Applicant No. 1. : Shri. Laxman Kisanchand Tharwani.

Applicant No. 2. : Shri. Radheshyam Ramnarayan Tiwari.

APPLICANTS

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

Subject : Revision Applications filed, under Section 129DD of the Customs Act, 1962 against the Orders-in-Appeal F.Nos. (i). MUM-CUSTM-PAX-APP-652 & 653/2018-19 dated 26.12.2018 issued on 30.10.2018 through F.Nos. S/49-560 & 561/2016-AP resp., passed by the Commissioner of Customs (Appeals), Mumbai-II.

ORDER

These two revision applications have been filed by (i). Shri. Laxman Kisanchand Tharwani and (ii). Shri. Radheshyam Ramnarayan Tiwari [herein after both referred to as the Applicants; alternatively, Shri. Laxman Kisanchand Tharwani is also referred to as Applicant No. 1 (A1) and Shri. Radheshyam Ramnarayan Tiwari is referred to as Applicant no. 2(A2)] against the Orders-in-Appeal F.Nos. (i). MUM-CUSTM-PAX-APP-652 & 653/2018-19 dated 26.12.2018 issued on 30.10.2018 through F.Nos. S/49, 560 & 561/2016-AP resp., passed by the Commissioner of Customs (Appeals), Mumbai-III.

2(a). Briefly stated facts of the case are that the Applicant No. 1-i.e. Shri Laxman Kisanchand Tharwani a domestic passenger, was intercepted by the Officers of Customs at CSMI Airport, Mumbai on 18.11.2014. A1 was scheduled to fly to Cochin by Air India Flight AI-054 / 18.11.2014. To the query whether he was in possession of any gold, contraband etc, A1 had replied in the negative. A personal search of A1 led to the recovery of 04 cut pieces of gold bars, totally weighing 660 grams and valued at Rs. 15,44,281/- from his pant pockets.

2(b). A1 revealed that he was carrying the gold for a monetary consideration and the same had been handed over to him by A2 who was an international passenger. A1 revealed that the gold had been handed over to him by A2 in the toilet located in the transit area. A1 identified A2 who was sitting near gate no. 69 at the airport.

2(c). A2 admitted that he had handed over two bundles containing gold bars to A1. A2 informed that earlier he had arrived from Bangkok onboard Air India Flight No. AI-331/17.11.2014. Nothing incriminating was found in the baggage and on person of A2 who admitted that he was not the owner of the gold and had carried the gold for a monetary consideration. Also, A2 revealed that the gold belonged to a person named Raju alias RJ.

2(d). The 04 cut pieces of gold bars were assayed by a Government Approved Valuer, who certified that the gold was of 999.9 % purity, totally weighing 660 grams and valued at Rs. 15,44,281/-.

3. The Original Adjudicating Authority i.e. Addl. Commissioner of Customs, CSMI Airport, Mumbai by a common Order-In-Original i.e. OIO No. ADC/RR/ADJN/278/2016-17 dated 25.08.2016 issued through S/14-5-92/2015-16Adjn - SD/INT/AIU/800/2015 AP'A' ordered for the absolute confiscation of the impugned gold i.e. 04 cut pieces of gold bars, totally weighing 660 grams and valued at Rs. 15,44,281/- under Section 111(d), (l) and (m) of the Customs Act, 1962. A penalty of Rs. 75,000/- was imposed on A1 under Section 112 (a) and (b) of the Customs Act, 1962. Also, A penalty of Rs. 1,00,000/- was imposed on A2 under Section 112 (a) and (b) of the Customs Act, 1962.

4. Aggrieved by the said order, both the applicants filed appeals before the Appellate Authority i.e. Commissioner of Customs (Appeals), Mumbai - III who vide common order i.e. Orders-In-Appeal F.Nos. (i). MUM-CUSTOM-PAX-APP-652 & 653/2018-19 dated 26.12.2018 issued on 30.10.2018 through F.Nos. S/49-560 & 561/2016-AP resp., did not find it necessary to interfere in the OIO passed by the OAA and rejected both the Appeals.

5. Aggrieved with the above order, both the Applicants have filed these revision applications. It is noticed that both these revision applications are verbatim similar and the grounds of revision are as under;

5.01. that the applicants deny all the allegations made against them in the impugned SCN; that his friend Raju had suggested to the applicant no. 1 to supplement his income of selling namkeen by also trading in gold and precious stones on commission basis; that Raju would supply gold on 15 days credit and commission of Rs. 10 per gram and A1 could sell this gold in South India and earn extra commission; that in the second week of November, 2014 Raju had told A1 to come to the domestic

airport; A1 booked his ticket for Cochin and on 18.11.2014 by Air India Flight AI-54 leaving at 05:30 hrs, that on 17.11.2014, A1 went to the airport around 11:30 pm and here Raju gave him the impugned packet containing 4 cut pieces of gold, totally weighing 660 grams; that in the airport he met A2 who informed him that he had been to Bangkok and was going to Goa for a meeting by AI Flight no. AI-984 leaving at 05:30 Hrs.; that Customs Officers came and took him to the toilet and carried out personal search and recovered the packets; then A2 was also taken to the same toilet and searched; then they both i.e. A1 and A2 were off-loaded from the flight; that they were shocked to find their names in the panchanama; A1 was made to sign on blank CDF; that the two panchas had not witnessed the proceedings; that panchanama dated 18.11.2014 was in English which is a language unknown to them; that reliance is placed in the case of Hasan Imam Inamdar vs The State Of Maharashtra on 6th June, 2002 of Bombay High Court and Apex Court order in the case of Nainmal Pratapmal Shah V/s. Union of India - AIR 1980 SC 2129, 1980 on the issue of panchanama being in language not known to accused; that their statements too were recorded in English; that case was fabricated against them; that the cut pieces of gold were locally procured and they were neither imported nor smuggled; that there are no foreign markings on the gold pieces; that A1 was a domestic passenger; that there was no evidence that A1 had received gold from A2; that the onus to prove the goods were smuggled was on the department; that they have placed reliance on these cases i.e. (a) Aslam Noor Mohammed v. CCs - 2004 (169) E.L.T. 243 (Mumbai); (b). V. Muniyandi v. CCs, Chennai - 2004 (167) E.L.T. 215 (Chennai); (c). Commissioner of Customs v. J.T. Parekh - 2004 (167) E.L.T. 77 (Mumbai); (d) Ravinder Khurana v. CCs, Delhi - 2003 (161) E.L.T. 360; (e) Sadbhavana v. Commissioner of Customs 2003 (158) E.L.T. 652 ; etc ; on the issue of foreign marked gold; that A1 and A2 are not involved in any smuggling activity; since gold was of local purchase, it was not liable for confiscation and they were not liable for any penal action under section 112(a) and (b) of Customs Act, 1962.

- 5.02. that on the issue of FM gold they have also relied on the undermentioned case laws;
- (a). Tribunal's decision in the case of S.K Chains reported in 2001 (127) ELT 415 (T)
 - (b). Samir Kumar Roy v. CC (Prev.), Calcutta - 2001 (135) E.L.T. 1036 (T),

- (c). Rup Chand Jain v. CC (Prev.), Calcutta - 1996 (88) E.L.T. 335 (Cal.),
- (d). DhunDarbashawRanderiav. CC (Prev.), Mumbai - 2001 (136) E.L.T.1136 (T)
- (e). Harvinder Singh Katra (sic) v. Collector Customs, Bombay, reported in 1986 (26) E.L.T. 792- Tri.

- 5.03. that mere suspicion was no proof of the commission of the offence; that department had not brought any evidence to prove the smuggled nature of the 4 cut pieces of gold and hence the same should be released to A1;
- 5.04. that the entire case was made on presumptions; that the OIA was not on merits and was not a speaking order;
- 5.05. that principles of natural justice had not been followed as reasoned findings have not been made in the OIA; they have relied on the following judgements;
 - (a). M/s Sahara India TV Network Vs CCE, Noida.
 - (b). CESTAT, New Delhi M/s. Vikas Enterprises vs CCE, Allahabad.
 - (c). M/S Sharp Carbon India Vs Commissioner of Central Excise, Kanpur
 - (d). Gujarat High Court -Union of India vs Sri Kumar Agencies reported
 - (e). Apex Court's Order in M/s.International Woolen Mills Ltd Vs. M/s. Standard Wool (UK) Ltd;
- 5.06. that Raju was not apprehended; on this issue they have relied on a host of case laws;

Under the circumstances, A1 has prayed to the Revision Authority to release the impugned gold, unconditionally and the penalty imposed on him be set aside. A2 has also prayed that since a case of smuggling had not been made against him, the penalty imposed on him be set aside.

6. The respondent vide their written submission bearing F.No. Aircus/Review-1556/2018-19 dated 18.03.202 have reiterated their version as per the SCN and the OIO (paras 1, 1.1, 1.2, 1.3, 1.4, 1.5, 1.6, 2, 2.1 & 2.2) . They have stated that passenger had not produced any invoice to prove the licit acquisition and financing of the gold and that in terms of Section 123 of the Customs Act, 1962,

the onus was on the passenger to prove that the goods had not been smuggled; that they had admitted that they intended to evade Customs duty;

6.01. that they rely on the following case laws,

(a). Surjeet Singh Chhabra vs. UOI,[1997-89-ELT-646-SC] on the issue of confession though retracted, is an admission and binds the petitioner,

(b). Apex Court's Order in the case of K.I Pavunny vs. Asstt. Collector (HQ), C.Ex, Cochin [1997-90-ELT-241-SC] on the issue that confessional statement made to Customs officials is admissible evidence,

(c). Abdul Razak vs. UOI [2012-275-ELT-300 (Ker)] on the issue that appellant did not have right to get the confiscated gold.

(d). In P. Sinnasamy v. Commissioner of Customs, it is held that non-fulfilment of conditions tantamount to prohibition.

(e). Om Prakash Bhatia vs Commissioner of Customs, Delhi 2003(155) ELT 423 (S.C) it is held that non-fulfilment of conditions tantamount to prohibition.

(d). Board's Circular No. 495/5/92-Cus-VI dated 10.05.1993 on the issue of no option to redeem if the goods had not been declared.

(e). Baburaya Narayan Nayak vs. Commr. of Customs, Bangalore [2018-364-ELT-811-Tri-Bang] upheld absolute confiscation as evidence of licit purchase had not been provided.

Respondent has prayed to the Revision Authority to reject the revision application filed by the applicant and to uphold the OIA passed by the AA.

7. Personal hearing in the case was scheduled for 06.12.2022. Shri. Prakash Shingrani, Advocate appeared for personal hearing on 06.12.2022 and submitted that applicant 1 is the owner of gold which he brought for personal use. He submitted that applicant is not habitual offender, therefore small quantity of gold be released on RF and penalty.

8.1. 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 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 :*

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.

8.2. 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. It is undisputed that Section (l) and (m) are also applicable in this case as the applicant had adopted innovative method and it was not included in the declaration. Therefore, the gold was also liable for confiscation under these Sections.

9.1. 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".

9.2. 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. 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 fine, even though the same becomes prohibited as conditions of import have not been satisfied, may not be harmful to the society at large. Thus, adjudicating authority can allow redemption under Section 125 of any goods which are prohibited either under the Customs Act or any other law on payment of fine but he is not bound to so release the goods.

*

11. 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. Government further observes that there are a catena of judgements, over a period of time, of the Hon'ble Apex / High 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:

- a) In the case of Commissioner of Customs, Aliganj, 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.*"
- b) The Hon'ble High Court of Judicature at Madras, in the judgment in the case of Shik Mastani Bi vs. Principal Commissioner of Customs, Chennai-I [2017(345) E.L.T. 201 (Mad)] upheld the order of the Appellate Authority allowing re-export of gold on payment of redemption fine.
- c) 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...*"
- d) Also, in the case of Union of India vs Dhanak 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(248) E.L.T. 127 (Bom)], and approved redemption of absolutely confiscated goods to the passenger.

13.1. In the instant case, it is noted that quantity of gold with the applicants is small. It is not alleged that the gold had any foreign markings. A case that the applicants are habitual offenders have not been made out by the respondent. In the instant case, the impugned gold had been found in the pockets of A1 i.e. it was found on his person who was a domestic passenger. The gold had been innovatively exchanged from an International passenger to a domestic passenger but considering the cases cited above, Government finds that this is a case of non-declaration of gold to escape payment of Customs duty. In these circumstances, Government finds that the absolute confiscation of the gold leading to dispossession of applicants is harsh and excessive.

13.2. Government finds that all these facts have not been properly considered by the lower authorities while absolutely confiscating the 04 cut pieces of gold bars, totally weighing 660 grams and valued at Rs. 15,44,281/- recovered from the possession of A1. Also, observing the ratios of the judicial pronouncements cited above, Government arrives at the conclusion that decision to grant the option of redemption would be appropriate in the facts and circumstances of the instant case. Therefore, the Government maintains confiscation of the said gold but allows the impugned gold i.e. 04 cut pieces of gold bars to be redeemed on payment of a redemption fine.

14(a). The Government finds that the penalty of Rs. 75,000/-, imposed on A1 under Section 112(a) & (b) of the Customs Act, 1962 and Rs. 1,00,000/- imposed on A2 under Section 112(a) & (b) of the Customs Act, 1962 is appropriate and commensurate with the omission and commission committed by them. A2 had lured A1 and had passed on the gold to him. Therefore, Government does not find it necessary to interfere in the quantum of penalty imposed on A2 by the lower authorities.

15. In view of the above, the Government modifies;

F.No. 371/322 & 323/B/WZ/2018-RA

(i). the OIA bearing MUM-CUSTOM-PAX-APP-652 & 653/2018-19 dated 26.12.2018 issued on 30.10.2018 through F.Nos. S/49- 560 & 561/2016-AP resp., passed by AA in respect of A1 & A2. The Government sets aside the absolute confiscation of the 04 cut pieces of gold bars, totally weighing 660 grams and valued at Rs. 15,44,281 and grants an option to redeem the same on payment of a redemption fine of Rs. 3,00,000/- (Rupees Three Lakhs only).

(ii). As discussed above, the penalty of Rs.75,000/- and Rs. 1,00,000/- imposed on A1 and A2 resp., under Section 112(a) and (b) of the Customs Act, 1962 by the OAA and upheld by AA is sustained.

16. Accordingly, both the revision applications are disposed of on the above terms.


(SHRAWAN KUMAR)

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

ORDER No. 212-263 /2023-CUS (WZ) /ASRA/MUMBAI DATED 29.02.2023

To,

1. Shri. Laxman Kisanchand Tharwani, R/o. Flat No. 104, C-28, Shrushti Hill, Jamburgaon, Ambernath – Badlapur Highway.
2. Shri. Radheshyam Ramnarayan Tiwari, Room No. 3, Chawl No. 5, Sainath Colony, Near O.T. Section, Ulhasnagar, Thane – 421 005.
3. The Pr. Commissioner of Customs, Chhatrapati Shivaji International Airport, Terminal – 2, Sahar, Andheri East, Mumbai – 400 059.

Copy to:

4. Shri. Prakash Shingrani, Advocate, 12/334, Vivek New MIG Colony, Bandra East, Mumbai – 400 051.
5. Sr. P.S. to AS (RA), Mumbai.
6. File Copy.
7. Notice Board.