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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. 371/350/B/WZ/2022-RA / 1261 Date of Issue 01.03.23

ORDER NO. 267 /2023-CUS (WZ)/ASRA/MUMBAI DATED 07.02.2023
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. 371/350/B/WZ/2022-RA

Applicant : Shri. Owasis Mohamed Naseem Khan

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

Subject : Revision Applications filed, under Section 129DD of the
Customs Act, 1962 against the Order-in-Appeal F.No. ...
MUM-CUSTOM-PAX-APP-85/2022-23 dated 29.04.2022
and issued on 29.04.2022 through F.Nos. S/49-
938/2021 passed by the Commissioner of Customs
(Appeals), Mumbai-III.

ORDER

This revision application has been filed by Shri. Owasis Mohamed Naseem Khan [herein after referred to as the Applicant; against the Order-in-Appeal F.No. MUM-CUSTOM-PAX-APP-85/2022-23 dated 29.04.2022 and issued on 29.04.2022 through F.Nos. S/49-938/2021, passed by the Commissioner of Customs (Appeals), Mumbai-III.

2(a). Briefly stated facts of the case are that the Applicant who had arrived from Muscat onboard Air India Flight No. AI-986 / 23.02.2019 was intercepted on 23.02.2019 by the Officers of Customs at the exit gate of the arrival hall of CSMI Airport, Mumbai after he had cleared himself through the green channel. To the query put forth to him about the possession of any dutiable, prohibited, restricted goods, the applicant had replied in the negative. Nothing incriminating was during his personal search, however, search of his baggage led to the recovery of 3 metal bars with FM, purity of 24Kts, collectively weighing 350 gms and valued at Rs. 10,63,440/- (T.V).

2(b). In his statement recorded under Section 108 of the Customs Act, 1962, the applicant revealed that he was the owner of the said impugned gold bars and that he had been residing at Muscat for last 10 years. He had a bill for the purchase of the gold bars.

3. The Original Adjudicating Authority i.e. Addl. Commissioner of Customs, CSMI Airport, Mumbai by vide his Order-In-Original i.e. OIO No. ADC/VDJ/ADJN/29/2021-22 dated 27.05.2021 issued on 27.05.2021 through F.No. S/14-5-179/2019-20/Adjn - SD/INT/AIU/94/2019-AP'B'

ordered for the confiscation of the impugned 3 nos of gold, totally weighing 350 grams and valued at Rs. 10,63,440/- under Section 111(d), (l) and (m) of the Customs Act, 1962 recovered and seized from the applicant. However, an option to re-export the said impugned gold bars on payment of a redemption fine of Rs. 2,00,000/- under Section 125 of the Customs Act, 1962 was granted to the applicant. Also, a penalty of Rs. 1,00,000/- 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 appeal before the Appellate Authority (AA) i.e Commissioner of Customs (Appeals), Mumbai - III who vide his Order-in-Appeal F.No. MUM-CUSTOM-PAX-APP-85/2022-23 dated 29.04.2022 and issued on 29.04.2022 through F.Nos. S/49-938/2021 set aside the OIO dated 10.07.2021 passed by the OAA and ordered for the absolute confiscation of the impugned gold under Section 111(d), (l) and (m) of the Customs Act, 1962. The penalty amount imposed by the OAA was upheld.

5. Aggrieved with the above order, the Applicant has filed this revision application before the Revisionary Authority, Mumbai inter alia on the following grounds of revision;

5.01. that the OAA had ordered for the release of the impugned gold under Section 125 of the Customs Act, 1962; that a discretion was conferred on the Adjudicating Authority to grant an option to the importer in lieu of confiscation. that the absolute confiscation was not warranted in this case; that the issue of absolute confiscation of goods and option of redemption came up in the case of CC (Prev) vs Uma Shankar Verma where it was held that where the goods are not prohibited, the authorities have no choice but to allow the option of redemption of goods on payment of fine. On the other hand, when the goods are prohibited, allowing redemption on payment of fine is wholly within the discretion of the adjudicating authority; that in Gauri Enterprises vs. C.C Pune [2002-

145-ELT-706-Tri-Bangj], held that if similar goods had been released on fine earlier, selective absolute confiscation was not called for, Absolute Confiscation should be exception rather than a rule; that in Board's Circular no. 9/2001 -Customs dated 22.02.2001 it was stated that redemption fine and penalties should be such that it should wipe out the margin of profit; that the OAA had imposed a high redemption fine of Rs. 2,00,000/- and penalty of Rs. 1,00,000/- which was 28.21% and Customs duty of nearly 36%; that power under Section 125 of the Customs Act, 1962 was a special power and this cannot be lightly interfered with by a higher authority or Court.

5.02. In their submissions, the applicant has relied on the undermentioned judgements

(a) In Yakub Ibrahim Yusuf vs CC, Mumbai 2011 (263) E.L.T. 685 (Tri. Mumbai),

(b) In Neyveli Lignite Cor Ltd vs UOI 2009 (242) E.L.T. 487 (Mad.),

(c) In Hargovind Das Joshi Vs Collector of customs 1992 (61) ELT 172(SC)

(d) In Universal Traders Commissioner - 2009 (240) E.L.T. A78 (SC)

(e) In Gauri Enterprises CC, Pune 2002 (145) ELT (705) (Tri Bangalore)

(f) In CC (Airport), Mumbai Vs Alfred Menezes 2009 (242) ELT 334 (Bom.),

(g) 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 unauthorisedly can be redeemed.

(h) In VP Hameed Vs Collector of Customs Mumbai 1994(73) ELT 425 (Tri)

(i) In T. Elavarasan Vs Commissioner of Customs (Airport), Chennai 2011 (266) ELT 167 (Mad),

(j) In Kadar Mydin v/s Commissioner of Customs (Preventive), West Bengal 2011 (136) ELT

(k) In Sapna Sanjeeva Kolhi v/s Commissioner of Customs, Airport, Mumbai 2010(253)ELT A52(SC)

(l). M. Arumugam Vs CC, Trichirapalli 2007 (220) ELT 311 (Tri-Chennai)

(m). In the case of Union of India vs Dhanak M. Ramji 2009 (248) E.L.T. 127 (Bom.),

(n). In the case of Peringatil Hamza Vs CC (Airport), Mumbai 2014 (309) ELT 259 (Tri Mumbai)

(o). In the case of R. Mohandas Vs CC, Cochin 2016 (336) ELT 399 (Ker),

(p). The Hon' ble Tribunal in its judgement in case of Bhargav B. Patel (also relied upon the Apex Court's Judgement in case of Asian Food Indust 2006 (204) ELT 8 (SC); wherein the Hon'ble Apex Court observed that meaning of word "prohibited" will have to be construed in regard to the text context in which it is used and the words prohibition, restriction and regulation meant to be applied differently. The Apex Court also observed that, section 2(33), is with a rider 'unless the context otherwise requires'. If any goods are not expressly prohibited under Section 11 of the Customs Act, 1962 or by any other statutory notification, an option to redeem them on payment of fine in lieu of confiscation may be given.

(q). In the case of: MOHD..ZIA UL HAQUE before Government of India Revision Order no. 443/12-Cus dated 8-8-12; [2014-(214)-ELT-849-(GO1)].

5.03. that discretionary power of quasi-judicial authority cannot be lightly interfered with. They have placed reliance in the following decisions in this regard;

(a). Indian Petrochemicals Corporation vs. General Secretary, Gujarat High Court,

(b). Koshambh Multitred Pvt. Lrd vs. UOI 2018-361-ELT-604-Guj,

(c). NOCIL Ltd vs. Policy Relaxation Committee, 2018-359-ELT-316-Del,

(d). M.K. Govind Pillai vs. Collector of Customs, C.Ex, Cochin, 1994-71-ELT-881-Ker.

(e). Bharat Rice Mill vs. UOI, 2008-229-ELT-502.

5.04. that gold is not a prohibited item for import. Therefore, absolute confiscation is not warranted in this case.

5.05. Applicant has stated that Circular No. 495/5/92-Cus-VI dated 10.05.1993 cannot prevail over the statute. In this regard they have relied on Kalyani Packaging Industry vs. UOI 1404-5-TMI-78 SC and other cases,

5.06. Ratio of the decisions relied upon by the Principal Commissioner cannot be made applicable to the case of the applicant.

(a). Abdul Razak vs. UOI - 2012-275-ELT-300 (Ker((DB) are not applicable to their case as the situation therein were different where quantity of gold was 8 kgs.

(b). Commissioner Of Customs (Air), Chennai-I V/s P. Sinnasamy reported in 2016 (344) E.L.T. 1154 (Mad.), quantity of gold was nearly 2.5 kgs

5.07. On the issue of consistency in judgements, they have relied upon the case of Hari Singh vs. State of Haryana.

Under the circumstances, the applicant has prayed to the Revision Authority to set aside the OIA passed by the AA and to release the gold on payment of redemption fine and penalty as per the OIO passed by the OAA.

6. Personal hearing in the case was scheduled for 05.12.2022, 19.12.2022, 03.08.2022. Shri. Prakash Shingrani, Advocate appeared for personal hearing on 06.12.2022 and submitted that applicant brought small quantity of gold for personal use, applicant is not a habitual offender. He further submitted that original authority has passed legal and proper order. He requested to restore the same.

7.1. 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.

7.2. 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 an innovative method and it was not included in the declaration. Therefore, the gold was also liable for confiscation under these Sections.

8.1. 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”.

8.2. 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 applicant thus, liable for penalty.

9. Once goods are held to be prohibited, Section 125 still provides discretion to consider release of the 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.

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. 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.

11. Government notes that while allowing the redemption of the goods for re-export, the OAA at para 21 of his OIO has observed as under;

"18.6. I find from the panchanama dated 23.02.2019 that seized gold i.e. 03 gold bars purity 999.9% gold, totally weighing 350 grams and collectively valued at Rs 10,63,440/- (Rupees Ten Lakhs Sixty Three Thousand Four Hundred and Forty), were recovered from the leather bag (hand baggage) carried by him and which was later on confirmed as gold by valuer. The said seized gold was recovered from his baggage. I find that this is not a case of ingenious concealment as per letter F No SD/Adjn/Misc- 23/2013-14 Adjn, though the offence of non-declaration of the seized gold is proved. I also find from the statements of the passenger recorded under section 108 of the Customs Act 1962 that he has proved his financial credential for purchase of the seized gold and also produced the purchase invoice. He has sufficiently discharged the burden of proof casted upon him under section 123 of the Customs Act 1962. Further he was not found wanting earlier in the gold smuggling cases i.e. he is not a habitual offender and he has travelled twice only in one year's time as found out during investigation. Keeping in view these facts and also the fact that it is not a case of ingenious concealment, I am of the considered opinion that under section 125 of the Customs Act 1962, the option for redemption can granted only for the limited purpose of re-export in terms of saving clause 3(1) of the Foreign Trade (Exemption from application of Rules in certain cases) Order, 1993 as amended vide Foreign Trade (Exemption from application of Rules in certain cases) Order, 2017 dated 25.07.2017. I find that the option to re-export has been granted vide Order No 12/2001-CUS (WZ)/ASRA dated 18.01.2021 by the Revision Authority, Government of India. Similar view on redemption was taken by Revision authority vide Order no 41/2021-CUS (WZ)/ASRA dated 26.02.2021 issued under F No 371/41/8/15-RA/1635 dated 03.03.2021. I therefore, do find this case fit for redemption only for the limited purpose of re-export. I hold it accordingly under the powers vested with me under Section 125(1) of the Customs Act, 1962."

12. Government finds that the OAA has used his discretion in releasing the gold bars. 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, the OAA has relied upon a host of cases including those passed by the GOI, where the adjudicating authority had released the gold of varying quantities and the same were accepted by the Department. Further, in the extant revision application, the respondent has not controverted the same. A case of parity and fairness was made out by the applicant before the OAA.

13. 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.

14. Government finds that the OAA has relied upon the precedent case laws on the subject and have applied the case laws judiciously while granting release of the gold jewellery. Quantity of gold is small. A case that the applicant was a habitual offender had not been made out. The gold bars were not ingeniously concealed and they were found in his baggage. The AA in his OIA while reversing the OIO and absolutely confiscating the gold jewellery has relied upon a case law of the Hon'ble Bombay High Court in the case of S.G Rajadhyakshya vs. Leela Daulatram Uttamchandi [1991-51-ELT-3-Bom]. Government notes that this case law pertains to seizure effected in 1981 and a lot of changes have taken place since then. The Government notes that the OAA has relied upon contemporary cases where redemption had been allowed and finds that the OAA has used discretion available under Section 125 of the Customs Act, 1962 and allowed the applicant to redeem the gold for re-export on payment of fine of Rs. 2,00,000/-. Government finds the OIO passed by the OAA to be fair, legal and proper and is inclined to uphold the same. Government finds that the penalty of Rs. 1,00,000/- imposed on the applicant under Section 112(a) and (b) of the

Customs Act, 1962 by the OAA and upheld by the AA is commensurate with the omissions and commissions committed.

15. Accordingly, in view of the above, Government sets aside the OIA passed by the AA and restores the OIO passed by the OAA.

16. Revision Application filed by the applicant is disposed of on above terms.

Shrawan
27/2/23
(SHRAWAN KUMAR)

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

ORDER No. ३७१ /2023-CUS (WZ) /ASRA/MUMBAI DATED ३१-02.2023

To,

1. Shri. Owasis Mohamed Naseem Khan, Room No. 09, Mary Niketan Building, L.J Road, Opp. Paradise Cinema, Parkarwadi, Mahim, Mumbai - 400 016.
2. The Pr. Commissioner of Customs, Chhatrapati Shivaji Maharaj International Airport, Terminal - 2, Sahar, Andheri East, Mumbai - 400 099.

Copy to:

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