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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. 371/142/B/WZ/2022-RA

12/11/23

Date of Issue 01-03-23

ORDER NO 269/2023-CUS (WZ)/ASRA/MUMBAI DATED 29.02.2023 OF
THE GOVERNMENT OF INDIA PASSED BY SHRI SHRAWAN KUMAR,
PRINCIPAL COMMISSIONER & EX-OFFICIO ADDITIONAL SECRETARY TO
THE GOVERNMENT OF INDIA, UNDER SECTION 129DD OF THE CUSTOMS
ACT, 1962.

Applicant : Shri Dharmendra Kumar Talsibhai

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

Subject : Revision Application filed, under Section 129DD of
the Customs Act, 1962 against the Order-in-Appeal
No. MUM-CUSTM-PAX-APP-844/2021-22 through
F.No. S/49-1150/2020 dated 27.10.2021 passed by
the Commissioner of Customs (Appeals), Mumbai - III.

ORDER

This revision application has been filed by Shri Dharmendra Kumar Talsibhai Panchal (herein after referred to as the Applicant) against the Order-in-Appeal F.No.. MUM-CUSTM-PAX-APP-844/2021-22 through F.No. S/49-1150/2020 dated 27.10.2021 passed by the Commissioner of Customs (Appeals), Mumbai – III.

2. Briefly stated the facts of the case are that on 04.03.2020, the Customs Officers at CSMI Airport had intercepted the applicant who had arrived from Sharjah by Air Inida Express Flight No. 252 and had passed through the green channel. A personal search of the applicant led to the recovery of one crude gold kada weighing 100 grams and valued at Rs. 3,86,500/-

3. The Original Adjudicating Authority (OAA) viz, Dy./Asstt. Commissioner of Customs, CSMI Airport, Mumbai vide Order-In-Original No. AirCus/49/T2/1654/2020/UNI-A dated 04.03.2020 ordered for the absolute confiscation of the crude gold kadas weighing 100 grams and and valued at Rs. 3,86,500/- under Section 111 (d) of the Customs Act,1962, and imposed a penalty of Rs. 40,000/- (Rupees Forty thousand only) under Section 112 of the Customs Act, 1962.

4. Aggrieved by the said order, the applicant filed an appeal before the Appellate Authority (AA) viz, Commissioner of Customs (Appeals), Mumbai – III who vide Order-in-Appeal No. F.No.. MUM-CUSTM-PAX-APP-844/2021-22 through F.No. S/49-1150/2020 dated 27.10.2021, as far as the absolute confiscation of the the crude gold kada upheld the OIO passed by the OAA but the penalty of Rs. 40,000/- imposed by the OAA under Section 112 of the Customs Act, 1962 was reduced to Rs. 20,000/-.

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

- 5.01 that the applicant was an Indian and was residing at Dubai since last 15 years and was hold a resident identity card; that he was coming after 11 months from Dubai to attend the marriage of his niece; that he had brought gold kada to make jewellery for the marriage of his niece;
- 5.02. that the importation of gold by a passenger as baggage was allowed as per Sl. No. 356 of Notification no. 50/2017 dated 30.06.2017 read with condition 41 wherein 10 kgs of gold was allowed to be carried by an eligible passenger; that an eligible passenger meant a passenger of Indian Origin or passenger holding a valid passport who was coming to India after a period of not less than six months of stay abroad and short visit, if any made by the eligible passenger during the aforesaid six months would be ignored if the total duration of stay on such visit had not exceeded thirty days and such a passenger had not availed of the exemption; that he satisfied this definition of an eligible passenger; that by virtue of coming to India after 11 months of stay abroad, he was an eligible person and entitled for concessional rate of duty. the applicant had shown the gold kada but the same had not been considered.
- 5.03. that the applicant was an Indian national having an Indian passport.
- 5.04. that tax invoice dated 03/03/2020 had been attached; that he had not got an opportunity to declare the gold in his possession.
- 5.05. that the gold are dutiable goods and not prohibited goods; that redemption of the goods on payment of fine as per Section 125(1) of the Customs Act, 1962 ought to have been allowed.
- 5.06. that the OIA was passed on 27.10.2021 and had been served to his Advocate on 20.11.2021, hence, the Revision Application is within the time limit.

Under the above facts and circumstances of the case, the Applicant has prayed to the Revision Authority to set aside the OIA and allow the gold ornaments to be released on redemption fine and payment of appropriate duty and to reduce the fine of Rs. 20,000/- imposed under Section 112(a) and (b) of the Customs Act, 1962 and allow concessional rate of duty or may give further relief as deemed fit.

5.2. In the additional submission dated 23.09.2022, the applicant while repeating the earlier prayer has reiterated his earlier submissions emphasizing that he was an eligible passenger and gold jewellery brought by him ought to

have been released at concessional duty. He has relied upon the following case laws to buttress his case,

(i). GOI Order no. 69/14-Cus dated 07.04.2014 in respect of Badrul Muneer Ambidattil vs. Commr. of Customs, Goa were goods had been allowed to be released on payment of redemption fine and penalty.

(ii). In Union of India Vs Dhanak M. Ramji - 2009 (248) ELT 127 (Bom.) affirmed vide 2010 (252) ELT A102 (S C) it was held that gold is not a prohibited item and discretion of redemption can be exercised to the person from whom it was recovered.

(iii). T. Elvarasan v/s. Commr. Of Customs (Airport), 2011-266-ELT-167-Tri-Madras on the issue of gold chains brought from Singapore and seized on the ground of non-declaration on arrival; passenger living abroad for more than 6 months and entitled to import gold; gold not prohibited item option to redeem the goods; impugned gold ordered to be released provisionally subject to adjudication proceedings.

(iv). Yakub Ibrahim Yusuf v/s. Commissioner of Customs, Mumbai [Final Order No. A/362/2010-WBZ-II/(CSTB) dated 28.10.2010 in Appeal no. C/51/1996-Mum] [2011-263-ELT-685-Tri-Mumbai]. *Term prohibited goods, refers to goods like arms, ammunition, addictive drugs, whose import in any circumstance would danger or be detriment to health, welfare or morals of people as whole and makes them liable to absolute confiscation.*

(v). In Sapna Sanjeev Kohli v. Commissioner of Customs, Airport, Mumbai - 2008 (230) ELT. 305 the Tribunal observed that the frequent traveller was aware of rules and regulations and absolute confiscation of gold jewellery not warranted which may be cleared on payment of redemption fine.

(vi). Etc.

6. Personal hearing in the case was scheduled for 02.12.2022, 09.12.2022. Shri. Satish Dubey Advocate for the applicant appeared and submitted that applicant came to India after 11 months and holds UAE resident card. He therefore, submitted that applicant was an eligible person. He requested that gold jewellery is small in quantity, was for personal use, applicant is not a habitual offender, therefore, the same be released on nominal fine and penalty.

7. At the outset, Government notes that the Applicant had brought the gold in the form of a kada and had not declared the same. A declaration as required under Section 77 of the Customs Act, 1962 had not been submitted. The applicant admitted that he had not declared the gold in his possession as he harboured an intention to evade the Customs duty. Therefore, the confiscation of the gold is 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 'Applicant' thus, liable for penalty.

10. Once goods are held to be prohibited, Section 125 still provides discretion to consider release of goods on redemption fine. Hon'ble Supreme Court in case of M/s. Raj Grow Impex [CIVIL APPEAL NO(s). 2217-2218 of 2021 Arising out of SLP(C) Nos. 14633-14634 of 2020 – Order dated 17.06.2021] has laid down the conditions and circumstances under which such discretion can be used. The same are reproduced below.

71. Thus, when it comes to discretion, the exercise thereof has to be guided by law; has to be according to the rules of reason and justice; and has to be based on the relevant considerations. The exercise of discretion is essentially the discernment of what is right and proper; and such discernment is the critical and cautious judgment of what is correct and proper by differentiating between shadow and substance as also between equity and pretence. A holder of public office, when exercising discretion conferred by the statute, has to ensure that such exercise is in furtherance of accomplishment of the purpose underlying conferment of such power. The requirements of reasonableness, rationality, impartiality, fairness and equity are inherent in any exercise of discretion; such an exercise can never be according to the private opinion.

71.1. It is hardly of any debate that discretion has to be exercised judiciously and, for that matter, all the facts and all the relevant surrounding factors as also the implication of exercise of discretion either way have to be properly weighed and a balanced decision is required to be taken.

11. Government, however notes that the gold kada had not been ingeniously concealed. The ownership of the gold is not disputed. The quantity of gold under import is small. There are no allegations that the Applicant is a habitual offender and was involved in similar offences earlier. Also, he had produced the invoice, evidencing purchase of the gold. Moreover, the applicant had stated in his averments before the OAA that he was an eligible passenger having returned back after a period of 11 months. Infact, the respondent has recorded his stay abroad as 11 months and 21 days. As per the said notification no. 50/2017 -Cus

30.06.2017, when the 30 days of likely stay in India are excluded, the applicant was eligible to bring gold and concessional duty would be applicable to him. All this had not been refuted by the respondent before the lower authorities. Government notes that the aforesaid facts of the case indicate that it is a case of non-declaration of gold kada, rather than a case of smuggling for commercial considerations. Under the circumstances, the seriousness of the misdemeanour is required to be kept in mind when using discretion under Section 125 of Customs Act, 1962 and while imposing quantum of penalty. Government is inclined to release the impugned gold on redemption fine.

12. In view of the foregoing paras, the Government finds that as the applicant had not declared the gold at the time of arrival, the confiscation of the gold was justified. However, the absolute confiscation of the same was not justified in view of the aforesaid facts and option to redeem the same on payment of redemption fine should have been allowed. Also, considering his stay abroad which has been recorded as 11 months and 21 days, the applicant was an eligible passenger entitled to concessional rate of duty.

13. The Government finds that neither original authority nor the appellate authority has given any findings on the applicant's submission of being eligible passenger. It is evident that by virtue of his continuous stay abroad, he has claimed to be eligible to bring upto 1 kg gold at concessional duty. Government observes that gold brought by such eligible persons is not prohibited, provided that payment of the concessional duty is made through foreign currency. Government is inclined to release the impugned gold on payment of a redemption fine.

14. Government finds that the AA has reduced the penalty of Rs. 40,000/- imposed under Section 112(a) and (b) of the Customs Act, 1962 by the OAA to Rs. 20,000/-. Government finds that the same is commensurate with the omissions and commissions committed by the applicant and is not inclined to interfere in the same.

15. For the aforesaid reasons, Government therefore, modifies the impugned order passed by the Appellate authority. The absolute confiscation of the impugned crude gold kada weighing 100 grams, valued at Rs. 3,86,500/- is allowed redemption on payment of Rs. 75,000/- (Rupees Seventy Five only). The applicant being an eligible passenger by virtue of his stay abroad, is allowed to clear the impugned crude gold kada at concessional rate of duty. The penalty of Rs. 20,000/- under section 112 (a) & (b) of the Customs Act, 1962 is sustained.

16. Revision Application is decided on the above terms.


(SHRAWAN KUMAR)

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

ORDER No. 269 /2023-CUS (WZ) /ASRA/MUMBAI DATED 24-02-2023

To,

1. Shri. Dharmendra Kumar Talsibhai Panchal, Kheradi, TA Bhiloda, Dist. Sabarkhantha, Gujarat – 501 050.
2. Pr. Commissioner of Customs, CSMI Aiprot, Leverl – II, Terminal – 2, Sahar, Andheri East, Mumbai – 400 099.

Copy To,

1. Shri. Dharmendra Kumar Talsibhai Panchal, C/o. Satish Dubey, Advocate, Room No. 4A, First Floor, 105, Dhanji Street, Mumbai – 400 003.
2. Sr. P.S. to AS (RA), Mumbai.
3. File Copy,
4. Notice Board.