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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. 380/29/B/WZ/2017-RA / 4082 : Date of Issue : 22.09.2022

ORDER NO. 275 /2022-CUS (WZ)/ASRA/MUMBAI DATED 22.09.2022
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 : Commissioner of Customs, Goa.

Respondent : Smt. Rahima Zuber Khan

Subject : Revision Application filed, under Section 129DD of the
Customs Act, 1962 against the Order-in-Appeal No. GOA-
CUSTM-000-APP-040-2017-18 dated 05.06.2017 [DOI :
13.06.2017; F.No. A-23/CUS/GOA/2017-18] passed by
the Commissioner (Appeals), Pune Appeal -II CX. (At Goa).

ORDER

This revision application has been filed by Commissioner of Customs, Goa (herein after referred to as the Applicant) against the Order-In-Appeal No. GOA-CUSTM-000-APP-040-2017-18 dated 05.06.2017 [DOI : 13.06.2017; F.No. A-23/CUS/GOA/2017-18] passed by the Commissioner (Appeals), Pune Appeal -II CX. (At Goa).

2. Brief facts of the case are that the respondent a domestic passenger on arrival at Dabolim International Airport, Goa on 24.10.2015 from Mumbai on board a Dubai-Mumbai-Goa AI Flight No. AI-984 was intercepted at the exit gate by the Customs Officers. To the query whether she was carrying any dutiable goods, the respondent had replied in the negative. Also, the applicant submitted a Customs Declaration Form declaring that she did not possess any dutiable goods / contraband. Nothing incriminating was found during her personal search. The screening of her strolley hand baggage was carried out which revealed some dark patches. Thereafter, the screening of all the contents of the hand baggage was conducted one by one but nothing incriminating was noticed. Then, the empty strolley hand baggage was screened in the baggage screening machine which indicated the presence of gold in the form of wires concealed inside the inner metallic frame of the strolley hand baggage. The metallic frame was broken open and silver polished wires were found inside the frame. Since, the silver coloured wires were heavy, it was scraped which revealed a yellow colour inside. The gold wires weighing 177 grams and valued at Rs. 4,4,1,857/- were seized under Section 110 of the Customs Act, 1962 under reasonable belief that the same were liable for confiscation under Section 111(l) of the Customs Act, 1962. The respondent in her statement revealed that the strolley bag in which the gold wires were found concealed had been handed over to her mid flight in AI-984 by an International passenger and that she had carried the same for a monetary consideration. The security tags on the hand baggage were exchanged during mid-air by the International passenger.

3. After due process of the law, the Original Adjudicating Authority, viz Additional Commissioner Of Customs, Goa, vide Order-In-Original No. 54/2016-ADC(CUS) dated 22.03.2017 (through F.No. 11/53/2015-R&I (APT) ordered for the absolute confiscation of the 177 gms of gold wire and valued at Rs. 4,41,857/- under Section 111(d), 111(1) and 111 (m) of the Customs Act, 1962 and a penalty of Rs. 50,000/- was also imposed on the respondent under Section of 112 (a) of Customs Act, 1962.

4. Aggrieved by the said order, the respondent filed an appeal before the appellate authority viz, Commissioner (Appeals), Pune Appeal -II CX. (At Goa) who vide Order-In-Appeal No. GOA-CUSTM-000-APP-040-2017-18 dated 05.06.2017 [DOI : 13.06.2017; F.No. A-23/CUS/GOA/2017-18] allowed to redeem the 177 gms of gold wire, valued at Rs. 4,41,857/- on payment of a redemption fine of Rs. 75,000/- with payment of appropriate Customs duty, as applicable, under Section 125(1) of the Customs Act, 1962. Also, the penalty of Rs. 50,000/- imposed on the respondent under Section 112(a) of the Customs Act, 1962 was enhanced to Rs. 75,000/-.

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

5.01. that the ratio of the judgement of Hon'ble Supreme Court in the case of Om Prakash Bhatia vs. Commissioner of Customs [2003 (155) ELT 423 (SC)] pertaining to correct interpretation of the words, 'prohibited goods' had not been taken into consideration by the appellate authority while allowing the redemption of the gold bars.

5.02. that there was a categorical finding of the adjudicating authority that the respondent had deliberately attempted to smuggle 9447.84 grams of gold by concealing and without declaration to Customs for a monetary consideration had not been considered by the appellate authority.

5.03. that the ratio of the judgement in the case of Malabar Diamond Gallery Pvt. Ltd vs. ADG in WP No. 377 of 2016, the Madras High Court pertaining to complying with the conditions or in violation of

the statutory provisions of the Customs Act, 1962 had not been considered by the appellate authority.

- 5.04. that the ratio of the judgement passed by Madras High Court in the case of Commissioner of Customs (AIR), Chennai vs. Samyanathan Murugesan [2009 (247) ELT 21(Mad).] pertaining to ingenious concealment had not been considered by the appellate authority.
- 5.05. that this is a case of ingenious concealment and the gold wires ought not to have been allowed to be released on redemption fine by the appellate authority.
- 5.06. that the applicant had relied upon some case laws on absolute confiscation passed by the Government of India.
- 5.07. that the Order-in-Appeal is not legal and proper.

Applicant has prayed to set aside the order passed by the appellate authority and to restore the order passed by the original adjudicating authority or pass any order as deemed fit.

6. Personal hearings in the case were scheduled through online video conferencing mode was scheduled for 16.09.2021, 23.09.2021, 26.10.2021, 02.11.2021 and 02.12.2021. No one appeared for the applicant and respondent. Sufficient opportunities have been accorded to the applicant and respondent to put forth and defend their case. Since, no one have appeared for the applicant and respondent, the case is being taken up for a decision on the basis of evidence on record.

7. The Government has gone through the facts of the case and notes that the respondent was carrying gold on the domestic leg of the flight which had been handed over mid-air by an International passenger. The gold was ingeniously concealed by converting it into wires and coating it with silver and concealing it in the metal frame of the strolley bag. The strolley bag was ingeniously handed over to her mid-air by an International passenger. The respondent had even after being intercepted, when asked about possession of any gold or dutiable items, had stoically denied that she was carrying any gold. The respondent had not declared the dutiable items in her possession in the Customs declaration form submitted by him. The Respondent had not filed a true declaration to the

Customs and had clearly failed to declare the goods to the Customs at the first instance as required under Section 77 of the Customs Act, 1962. The respondent did not intend to declare the gold in her possession to Customs. Had she not been intercepted, the respondent would have gotten away with the gold. The Government finds that the confiscation of the gold is therefore justified.

8. The Hon'ble High Court Of Madras, in the case of Commissioner Of Customs (Air), Chennai-I V/s P. Sinnasamy reported in 2016 (344) E.L.T. 1154 (Mad.), relying on the judgment of the Apex Court in the case of Om Prakash Bhatia v. Commissioner of Customs, Delhi reported in 2003 (155) E.L.T. 423 (S.C.), has held that “ *if there is any prohibition of import or export of goods under the Act or any other law for the time being in force, it would be considered to be prohibited goods; and (b) this would not include any such goods in respect of which the conditions, subject to which the goods are imported or exported, have been complied with. This would mean that if the conditions prescribed for import or export of goods are not complied with, it would be considered to be prohibited goods. Hence, prohibition of importation or exportation could be subject to certain prescribed conditions to be fulfilled before or after clearance of goods. If conditions are not fulfilled, it may amount to prohibited goods.*” It is thus clear that gold, may not be one of the enumerated goods, as prohibited goods, still, if the conditions for such import are not complied with, then import of gold, would squarely fall under the definition, “prohibited goods”.

9. Further, in para 47 of the said case the Hon'ble High Court has observed “*Smuggling in relation to any goods is forbidden and totally prohibited. Failure to check the goods on the arrival at the customs station and payment of duty at the rate prescribed, would fall under the second limb of section 112(a) of the Act, which states omission to do any act, which act or omission, would render such goods liable for confiscation.....*”. Thus, failure to declare the goods and failure to comply with the prescribed conditions has made the impugned gold

“prohibited” and therefore liable for confiscation and the Respondent 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 observes that in this case the quantum of gold is small and the action of the respondent though innovative cannot be termed as smuggling of gold. Though the method adopted by the respondent is ingenious, the fact remains that the quantity of gold involved is small. Government notes that at times, passengers adopt innovative methods to bring valuables and attempt to

evade payment of duty. That is why goods are liable to confiscation. The Government notes that while granting an option to redeem the gold on payment of a redemption fine, the AA authority has laid an emphasis on the quantum of fine with a view to wipe out any profits accruing to the respondent. Considering the quantum of gold seized, Government finds the redemption fine imposed in the OIA passed by the AA to be legal and proper. Government is not inclined to interfere in the order passed by the AA in this regard.

12(a). The Government finds that the penalty of Rs. 50,000/- imposed under Section 112 (a) by the original adjudicating authority has been set aside and that the same has been enhanced by the appellate authority to Rs. 75,000/-. The Government finds that the enhancement of penalty by the AA on an appeal filed by the appellant (who is a respondent in this case) is not appropriate and is bad in law and the courts have held that such enhancement which places an appellant in a worse situation from the present position (as a consequence of appellant filing an appeal) is bad in law. the Government finds that the principle of "no reformatio in peius" would come into play, which means that a person should not be placed in a worse position, as a result of filing an appeal.

12(b). This principle of "no reformation in peius" is discussed by the *Division Bench of Madras High Court in Servo Packaging Limited Vs. CESTAT, 2016 (340) E.L.T. 6 held as follows:-*

"25. In the absence of any appeal filed by the department on the finding, relating to alleged clandestine removal of raw materials, the appellant cannot be put in a worse position, in their own appeal and in such circumstances, the principle of "no reformatio in peius" would come into play, which means that a person should not be placed in a worse position, as a result of filing an appeal. It is a latin phrase, expressing the principle of procedure, according to which, using the remedy at law, should not aggravate the situation of the one who exercises it.

12(c). The enhanced penalty imposed by the appellate authority is liable to be set aside. Government finds that the penalty of Rs. 50,000/- imposed by the

original adjudicating authority is appropriate and commensurate with the omission and commission by the Respondent and is inclined to restore the same.

13. In view of the above, the Government modifies the order passed by the appellate authority. The order of the confiscation of the impugned gold with an option to redeem the same on payment of a redemption fine of Rs. 75,000/- is upheld. However, the enhancement of the personal penalty is set aside and the penalty of Rs. 50,000/- imposed by the OAA is restored.

14. Revision Application is disposed of on above terms.

Shrawan
22/9/22
(SHRAWAN KUMAR)

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

ORDER No. 275 /2022-CUS (WZ) /ASRA/MUMBAI DATED 22.09.2022

To,

1. Commissioner of Customs, Goa Custom House, Marmagao, Goa – 403 803.
2. Smt. Rahima Zuber Khan, Room No. 6, Indira Housing Society, Sanjay Nagar Gausiya Masjid, Mumbra, Thane.

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1. Sr. P.S. to AS (RA), Mumbai.
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