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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. 371/139A, B & C/B/2018-RA | १११ : Date of Issue : 26.09.22

ORDER NO. ²⁷⁷⁻²⁷⁹ /2022-CUS (WZ)/ASRA/MUMBAI DATED 23.09.2022
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 No. 1. : (i). Shri. Sanjay Ananth Surve,
Applicant No. 2. : (ii). Smt. Rakhi Rahul Manjrekar,
Applicant No. 3. ; (iii). Shri. Suresh Kumar Jokhan Singh.

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

Subject : Revision Application filed, under Section 129DD of the
Customs Act, 1962 against the Orders-in-Appeal Nos.
MUM-CUSTM-PAX-APP-1122 to 1124/17-18 all dated
13.03.2018 issued on 15.03.2018 through F.No. S/49-
514 to 516/2016 passed by the Commissioner
of Customs (Appeals), Mumbai – III.

ORDER

These three revision applications have been filed by (i). Shri. Sanjay Ananth Surve, (ii). Smt. Rakhi Rahul Manjrekar (hereinafter referred to as the Applicants or Applicant no.1 (A1), Applicant no.2 (A2).) and (iii). Shri. Suresh Kumar Jokhan Singh (hereinafter referred to Applicant no.3 (A3).) against the Orders in Appeal Nos. MUM-CUSTOM-PAX-APP-1122 to 1124/17-18 all dated 13.03.2018 issued on 15.03.2018 through F.No. S/49-514 to 516/2016 passed by the Commissioner of Customs (Appeals), Mumbai – III.

2.1. Briefly stated the facts of the case are that the Applicant No. 1 and 2 upon their arrival at CSMI Airport, Mumbai were intercepted by the Customs Officers on 26.02.2015 at the arrival hall of Terminal-2. The applicants had arrived at Mumbai from Bangkok on board Flight No. TG-317 / 26.02.2015 and had been intercepted after they had crossed the green channel. Both had left blank the col. No. 9 of the Customs declaration form for possession of dutiable items. Also, they were questioned about possession of any prohibited or restricted goods on their person and both had replied in the negative. A1 and A2 were asked to pass through the metal detector which indicated the presence of metal. The pair of sandals worn by A1 & A2 were unusually heavy and the same were further screened. A1 and A2 admitted that they had concealed gold inside the soles of their sandals. From the sandals worn by A1, 2 cut pieces of gold bars weighing 705 grams, valued at Rs. 17,57,678/- were recovered. From the sandals worn by A2, 3 cut pieces of gold bars weighing 697 grams, valued at Rs. 17,37,732/- were recovered. Thus, a total of 1402 grams of gold, totally valued at Rs. 34,95,410/- were recovered.

2.2. A1 and A2 informed that the gold did not belong to them and had agreed to carry the same for a monetary consideration. They stated that they were to hand over the gold to Applicant No. 3 who was waiting outside the airport.

2.3. In immediate follow – up action, A3 who was waiting outside the airport was apprehended. He admitted to his role in receiving the gold bars. A3 was arrested and released on furnishing a bail bond.

2.4. The recovered gold was valued by Govt. Approved Valuer who confirmed the weight and value of the 5 pieces of gold bars and observed that the same were of 24 karat purity.

2.5. A1 and A2 admitted to possession, knowledge, concealment, non-declaration and recovery of the gold.

3. The Original Adjudicating Authority viz, Addl. Commissioner of Customs, CSMI Airport, Mumbai vide Order-In-Original No. ADC/RR/ADJN/319/2016-17 dated 28.09.2016 issued through S/14-5-221/2015-16 Adjn (SD/INT/AIU/95/2015 AP'C) ordered for the (i). absolute confiscation of gold bars weighing 705 grams, valued at Rs. 17,57,678/- under Section 111(d), (l) and (m) of the Customs Act, 1962 seized from A1; (ii). absolute confiscation of gold bars weighing 697 grams, valued at Rs. 17,37,732/- under Section 111(d), (l) and (m) of the Customs Act, 1962 seized from A2; (iii). imposed personal penalty of Rs. 1,75,000/- each on A1 and A2 under Section 112(a) and (b) of the Customs Act, 1962; and (iv). Imposed a personal penalty of Rs. 1,00,000/- under Section 112(a) and (b) of the Customs Act, 1962 on A3.

4. Aggrieved by the said order, all the three applicants filed appeals before the Appellate Authority (AA) viz, Commissioner of Customs (Appeals), Mumbai – III, who vide his Orders-In-Appeal Nos. MUM-CUSTM-PAX-APP-1122 to

1124/17-18 all dated 13.03.2018 issued on 15.03.2018 through F.No. S/49-514 to 516/2016 held that the OIO passed by the OAA was legal and proper and did not find it necessary to interfere in same.

5. Aggrieved with the above order, the Applicants have filed this revision application. Applicants have stated the following;

5.1. that the OIA is not on merits and not a speaking order. Principles of natural justice had not been followed. On these issues, to buttress their defense, they have relied upon the undermentioned case laws;

- (a) Apex Court's Order in the case of State of Punjab vs. K.R Erry,
- (b) Liberty Oil Mills vs. Union of India,
- (c) C. L Tripathi vs. State Bank of India
- (d) Pitchaiah vs. Andhra University
- (e) A.K Kraipak vs. UOI
- (f) Chintamoni Pradhan vs. PaikaSamal
- (g) CESTAT, New Delhi's order in Sahara India TV Network vs. CCE, Noida, relying upon the Apex Court's Order in the case of JT. Commr. IT, Surat vs. Saheli Leasing & Industries Ltd [2010-253-ELT-705-SC ; CESTAT, New Delhi order M/s. Vikas Enterprises vs. CCE, Allahabad ; M/s. Sharp Carbon India vs. Commr. Of C.Ex, Kanpur,
- (h) M/s. International Woollen Mills Ltd. Vs. Standard Wool (UK) Ltd
- (i) Etc.

5.2. Order upholding absolute confiscation of the gold is not justified. In support of their defense on this issue, they have relied on the undermentioned case laws.

- (a). Dhanak Madhusudan Ramji vs. Commr. of Customs (Airport), Mumbai wherein CESTAT had on the issue of title of the goods had held that option to redeem the goods on payment of RF should have been given to the owner of the goods. SLP filed by the department was dismissed by the Apex Court.
- (b). A Rajkumari vs. Commr. of Customs Airport [2015-321-ELT-540] where redemption had been allowed for gold bars concealed in air conditioner. The Apex Court had dismissed the appeal filed by the department on the grounds of delay and not on merits.
- (c). Neyveli Lignite Corporation vs. UOI, [2009-242-ELT-487-Mad], that if goods are not prohibited then adjudicating authority shall give the

owner option to redeem the goods and when the goods are prohibited, adjudicating authority has the discretion to give option to pay fine in lieu of confiscation.

- (d). Cestat's order in the matter of Yaqub Ibrahim Yusuf vs. Commr. of Customs [2011-263-ELT-685] that prohibition relates to goods which cannot be imported such as arms, ammunition, addictive substance viz drugs.
- (e). etc.

5.3. that the case against A3 had not been proved.

Under the circumstances, A1 and A2 have prayed to the Revision Authority for the release of the gold bars on payment of applicable duty, reasonable fine

6.1. Personal hearings in the case through the video conferencing mode was scheduled on 03.08.2022. Shri. Prakash Shingrani, Advocate appeared for the personal hearing on 03.08.2022 and reiterated earlier submissions. He submitted that both the applicants brought small quantity of gold for personal use, they are not habitual offenders. He requested to allow redemption of the goods on nominal RF and penalty.

6.2. None of the representatives of respondent attended the hearing.

6.3. The case is taken up for a decision based on the submissions, personal hearing and evidence on records.

7. The Government has gone through the facts of the case. The applicants have made an exhaustive submission of case laws and have submitted copies including, panchanama, SCNs, statements recorded, their submission before the lower authorities etc. Government observes that the applicant had failed to declare the goods to the Customs at the first instance as required under Section 77 of the Customs Act, 1962. The 2 pieces of the gold bars by A1 and 3 pieces by A3 had been kept inside the soles of the sandals worn by them.

The applicants had adopted such a method to conceal the gold bars which reveals that they did not intend to declare the gold and thereby evade payment of Customs Duty. The confiscation of the goods, therefore, was justified.

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 gold was found concealed 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.

12.1. In the instant case, it is noted that quantity of gold with both applicants was not large or commercial, applicants are not habitual offenders, applicants once confronted had admitted to carrying gold. In these circumstances, absolute confiscation of gold leading to dispossession of applicants is harsh and excessive.

12.2. Government notes that the applicants, at the first instance, had crossed the green channel and had not declared the dutiable goods in their

possession. However, later, at the second instance, when they were questioned again about possession of dutiable goods, they admitted to have concealed gold bars in the sandals. Upon this admission, the applicants could have been given an option to pay Customs duty along with appropriate fine and penalty. However, at the time when the applicants had admitted to the concealment of gold in their sandals, they had not been given an option to proceed to the red channel and make a declaration or an option to clear the goods after payment of duty, redemption fine, and penalty under spot adjudication after availing waiver of notice as per proviso to Section 124 of the Customs Act, 1962.

12.3. For the aforesaid reasons, considering that quantity of gold with applicant A1 and A2 was small, it was not for commercial purpose, applicants not being habitual offenders, the Government is inclined to set aside the absolute confiscation and grant an option to A1 and A2 to redeem the 5 pieces of gold bars on payment of a redemption fine, penalty and applicable duty.

13. Government finds that the penalty of Rs. 1,75,000/- each imposed on A1 and A2 respectively under Section 112(a) and (b) of the Customs Act, 1962, is commensurate with the omissions and commissions committed.

14. Based on the disclosures made by A1 and A2, in immediate follow up action, the applicant no. 3 was apprehended from outside the airport and was confronted with the applicants. There is no denying the fact, that A3 had been waiting outside the airport for receiving the gold bars from A1 and A2. Government finds that the penalty of Rs. 1,00,000/- imposed on A3 under Section 112(a) and (b) of the Customs Act, 1962 is commensurate with the omissions and commissions committed.

15. For the aforesaid reasons, Government sets aside the absolute confiscation held in the OIA. The 2 pieces of gold bars, totally weighing 705 grams and valued at Rs. 17,27,678/- seized from A1 under Section 111(d), (l) and (m) of the Customs Act, 1962 is allowed to be redeemed on payment of a redemption fine of Rs. 3,25,000/- (Rupees Three Lakhs Twenty-Five Thousand only). The 3 pieces of gold bars, totally weighing 697 grams and valued at Rs. 17,37,732/- seized from A2 under Section 111(d), (l) and (m) of the Customs Act, 1962 is allowed to be redeemed on payment of a redemption fine of Rs. 3,25,000/- (Rupees Three Lakhs Twenty-Five Thousand only). The Government finds that the penalties imposed on the A1, A2 and A3 by the OAA and upheld by the AA are appropriate.

16. The Revision Applications are decided on the above terms.


(SHRAWAN KUMAR)

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

ORDER NO. ²⁷⁻²⁷⁹ /2022-CUS (WZ)/ASRA/MUMBAI DATED ²³ .09.2022

To,

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2. Smt. Rakhi Rahul Manjrekar, Shahida Manzil, Room No. 4, Shivaji Nagar, Near Santoshi Mata Mandir, Rabodi - II, Thane - 400 601.
3. Shri. Suresh Kumar Jokhan Singh, **Address no. 1** : Village Suryapur, P.O. Srinivas Dham, Dist. Mirzapur, Uttar Pradesh - 231 001 ; **Address no. 1** : 65AB Bldg, No. 17, Shival Moti Mansion, DB Marg, Mumbai Central, Mumbai - 400 008.

4. Principal Commissioner of Customs, Chhatrapati Shivaji International Airport, Terminal - 2, Level - II, Sahar, Andheri (East), Mumbai - 400 099.

Copy to:

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