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GOVERNMENT OF INDIA  
MINISTRY OF FINANCE  
(DEPARTMENT OF REVENUE)  
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Mumbai-400 005

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F.No. **380/48/DBK/2016-RA** / 4680 : Date of Issue 11.10.2022

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ORDER NO. 285/2022-CUS (WZ)/ASRA/MUMBAI DATED 07.10.2022 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.

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Applicant : Pr. Commissioner of Customs, CSI Airport, Mumbai

Respondent : Shri Abdur Rehman Abdul Gaffar Duste

Subject : Revision Application filed, under Section 129DD of the Customs Act, 1962 against the Order-in-Appeal No. MUM-CUSTOM-PAX-APP-597/15-16 dated 21.01.2016 passed by the Commissioner of Customs, (Appeals), Mumbai -III.

**ORDER**

This revision application has been filed by the Principal Commissioner of Customs, C.S.I Airport, Mumbai (herein referred to as Applicant) against the Order in Appeal No. MUM-CUSTM-PAX-APP-597/15-16 dated 21.01.2016 passed by the Commissioner of Customs, (Appeals), Mumbai – Zone III.

2. Briefly stated the facts of the case are that the respondent was intercepted when he arrived at the C.S.I Airport, Mumbai on 18.02.2015 from Dubai via Bahrain onboard Gulf Airways Flight No. GF-64 while he was proceeding towards the exit gate after clearing himself through the Green Channel. The personal search of the respondent resulted in the recovery of six gold bars wrapped with straw coloured adhesive paper tape and brown paper beneath the socks worn by him. The total weight of the 6 gold bars of 10 tolas was 696 gms and was collectively assessed at Rs. 17,25,568/-. The respondent had also not declared the impugned goods in the Customs Declaration Form. The impugned gold was seized.

3. The Original Adjudicating Authority viz, Additional Commissioner of Customs, C.S.I. Airport, Mumbai vide Order-In-Original No. ADC/ML/ADJN/185/2015-16 dated 15.10.2015, issued on 16.10.2015 through F.No. S/14-5-204/2015-16 Adj (SD/INT/AIU/76/2015 AP 'A') ordered for the confiscation of the 06 gold bars of 10 tolas each, totally weighing 696 gms and valued at Rs. 17,25,568/- under Section 111(d), (l) & (m) of the Customs Act, 1962. A penalty of Rs. 1,70,000/- was imposed on the respondent under Section 112(a) and (b) of the Customs Act, 1962.

4(a). Aggrieved by the said order, the respondent filed an appeal before the Appellate Authority (AA) viz, Commissioner of Customs (Appeals), Mumbai-Zone-III.

4(b). The Appellate Authority vide his Order-In-Appeal No. MUM-CUSTM-PAX-APP-597/15-16 dated 21.01.2016 partially allowed the respondent's appeal and the order of the OAA was modified to the extent of giving the respondent the option to redeem the impugned gold on payment of redemption fine of Rs.

2,70,000/- and on payment of duty. The penalties under Section 112(a) and (b) imposed on the respondent by the OAA were however, upheld.

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

5.1 that admittedly the respondent failed to make a true declaration of the contents of his baggage as required under Section 77 of the Customs Act, 1962

5.2 that Section 80 of the Customs Act, 1962 says that where the baggage; of a passenger contains any article which is dutiable or the import of which is prohibited and in respect of which a true declaration has been made under Section 77 of the Customs Act,1962, the proper officer may, at the request of the passenger, detain such article for the purpose of being returned to him on his leaving India but in the instant case as the respondent has not declared the same on his arrival, the order to redeem the goods in not proper;

5.3 that the manner of concealment being clever and ingenious and the respondent not being eligible for import of gold, the instant case was a fit case of absolute confiscation;

5.4 that had the respondent not been intercepted, he would have made good with the gold with ingenious concealment and such acts of misusing the liberalized facilitation process should be meted with exemplary punishment of absolute confiscation;

5.5. that in the undermentioned cases, absolute confiscation of gold has been upheld in cases where the passenger was not eligible to import gold and had attempted to smuggle by ingenious concealment without declaring to Customs as held in

(a) Commr. of Customs, Chennai I vs. Samyanthan Murugesan [2009 (247)E.L.T. 21(Mad),

5.7. that in the undermentioned case, it has been held that redemption fine and penalty shall be dependent on the facts and circumstances and other cases cannot be binding as a precedent and Section 125 of the Customs Act, 1962 cannot be so exercised to give a bonanza or profit for an illegal transaction of imports.

(a) Jain Exports vs. U.O.I [1987 (29) E.L.T 753]

5.8. Applicant has prayed to set aside the impugned Order-in-Appeal and uphold the absolute confiscation ordered in the Order-in-Original or any other relief as deemed fit.

6. Personal hearings in the case was scheduled for 27.09.2018, 20.10.2021, 26.10.2021, 23.03.2022 and 30.03.2022. However, no one appeared before the Revision Authority for personal hearing on any of the dates fixed for hearing. Since sufficient opportunity for personal hearing has been given in the matter, the case is taken up for decision on the basis of the records available.

7. The Government has gone through the facts of the case, and observes that the respondent had failed to declare the goods to the Customs at the first instance as required under Section 77 of the Customs Act, 1962. The respondent had not disclosed that he was carrying dutiable goods. The 6 gold bars totally weighing 696 gms had been wrapped with straw coloured adhesive paper tape and brown paper beneath the socks worn by him. However, pursuant to enquiry, the respondent admitted to carrying the gold and the method of carrying the gold adopted by the respondent clearly revealed his intention not to declare the gold and thereby evade payment of Customs Duty.

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 evident 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. 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”.

10. 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.

11. 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.

12. Government notes that 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.*

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

12.2. Government notes that the respondent, at the first instance, had crossed the green channel and had not declared the dutiable goods in his possession. However, later, at the second instance, when he was questioned again about possession of dutiable goods, the respondent admitted to have concealed gold bars beneath the pair of socks worn by him. Upon this admission, the respondent could have been given an option to pay Customs duty along with appropriate fine and penalty. However, at the time when the respondent had admitted to the concealment of gold beneath the socks worn by him, he 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 respondent was small, it was not for commercial purpose, respondent not being a habitual offender, Government is inclined to agree with the Appellate Authority's order of setting aside the order of absolute confiscation by the OAA and imposition of redemption fine of Rs. 2,70,000/-.



13. Government finds that the penalty of Rs. 1,70,000/- imposed on the respondent by the OAA and upheld by the AA under Section 112(a) and (b) of the Customs Act, 1962, is commensurate with the omissions and commissions committed and attains finality.

14. The Revision Application is disposed of on the above terms.

  
( SHRAWAN KUMAR )

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

ORDER NO. 285/2022-CUS (WZ)/ASRA/MUMBAI DATED 07.10.2022

To,

1. The Pr. Commissioner of Customs, CSI Airport, Mumbai, C.S.I Airport, T-2, Sahar, Andheri (East), Mumbai 400 099
2. Shri Abdur Rehman Abdul Gaffar Duste, At PO Jui, Taluka Mahad, District Raigad 402 115

Copy to:

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2. Sr. P.S. to AS (RA), Mumbai.
3. Guard File,
4. File Copy.
5. Notice Board.