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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. 371/14/B/WZ/2018-RA ⁶⁴⁹⁰ : Date of Issue : 17.11.2022

ORDER NO. 316 /2022-CUS (WZ) /ASRA/MUMBAI DATED 14.11.2022
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 : Mrs. Fehmidabano Nisar Shaikh

Respondent : Pr. Commissioner of Customs (Airport), CSI, Mumbai.

Subject : Revision Application filed, under Section 129DD of the
Customs Act, 1962 against the Orders-in-Appeal No.
MUM-CUSTM-PAX-APP-545 & 546/2017-18 dated
28.09.2017 issued on 05.10.2017 through [F.No. S/49-
898/2015AP] passed by the Commissioner of
Customs (Appeals), Mumbai - III.

ORDER

This revision application has been filed by Mrs. Fehmidabano Nisar Shaikh (herein referred to as Applicant) against the Order-in-Appeal No. MUM-CUSTOM-PAX-APP-545 & 546/2017-18 dated 28.09.2017 issued on 05.10.2017 through [F.No. S/49- 898/2015AP] passed by the Commissioner of Customs (Appeals), Mumbai - III.

2(a). Brief facts of the case are that on 30.12.2014, the Officers of Customs had intercepted the Applicant at CSMI Airport where she had arrived from Dubai by Air India Flight No. AI-984. The Applicant had been intercepted near the exit gate of the Arrival Hall, T2, CSMI Airport, Mumbai after she had cleared herself through the green channel of Customs. To the query put forth to her regarding possession of any dutiable goods, she had replied in the negative. The applicant had declared an amount of Rs. 2000/- in the Customs declaration form (CDF) submitted by her as the value of the dutiable goods in her possession. Baggage of the applicant was examined and nothing incriminating was noticed. The applicant was asked to pass through the door frame metal detector which indicated the presence of some metal concealed on her person. The applicant admitted that she was carrying gold and then she took out one package which had been wrapped in white tissue paper and kept in the kneecap. On opening the said package, 05 gold bars of ten tolas each of 24 karats purity, totally weighing 583 grams and assorted jewellery, totally weighing 456 grams, of 18 karats and purity of 75% were found. The value of the 5 gold bars, weighing 583 grams was Rs. 14,74,092/- and the value of the assorted jewellery, totally weighing 456 grams was Rs. 8,64,731/-. Thus, a total of 1039 grams of gold valued at Rs. 23,38,823/- were recovered from the applicant.

2(b). The applicant stated that the gold did not belong to her and that she had agreed to carry the same for a monetary consideration

3. After due process of investigations and the law, the Original Adjudicating Authority i.e. the Addl. Commissioner of Customs, CSI Airport, Mumbai, vide Order-In-Original No. ADC/RR/ADJN/152/2015-16 dated 20.08.2015 issued through F.No. S/14-5-131/2015-16 Adjn {SD/INT/AIU/853/2014 AP D} ordered for the confiscation of the 05 gold bars of 10 tolas each (583 grams) and assorted jewellery (456 grams), totally weighing 1039 grams and valued at Rs. 23,38,823/- under Section 111 (d), (l) and (m) of the Customs Act, 1962. However, the applicant was given an option to redeem the goods on payment of a fine of Rs. 4,00,000/- under Section 125(l) of the Customs Act, 1962 alongwith applicable duty and other charges, if any. Further, a penalty of Rs. 2,30,000/- was imposed on the applicant under Section 112 (a) and (b) of the Customs Act, 1962.

4. Aggrieved by this Order, the applicant as well as the respondent preferred an appeal before the appellate authority i.e. Commissioner of Customs (Appeal), Mumbai III, who vide Order-in-Appeal No. MUM-CUSTOM-PAX-APP-545 & 546/2017-18 dated 28.09.2017 issued on 05.10.2017 through [F.No. S/49-898/2015AP] allowed the appeal filed by the respondent and ordered for the absolute confiscation of the impugned gold. The penalty of Rs. 2,30,000/- imposed by the OAA was upheld. In other words, the appeal filed by the applicant was rejected.

5. Aggrieved by this Order, the applicant has filed this revision application on the undermentioned grounds of revision;

5.01. that the order passed by the appellate authority was bad in law and unjust; that the OIA has been passed without due consideration to the documents on record and facts of the case; that the goods were neither restricted nor prohibited was appreciated by the AA; that no previous case has been registered against applicant; that evasion of Customs duty can be done only in respect of dutiable goods and not on prohibited goods; that option to redeem the goods under Section 125 of the Customs Act, 1962 was rightly passed by the OAA; that the AA had not appreciated that due to the contravention of Section 77 of the Customs Act, 1962, the OAA had imposed

fine and penalty; that various judgements passed by the Apex Court, High Courts, Tribunal, GOI have held that gold was neither restricted nor prohibited and therefore it should not be confiscated absolutely.

5.02. to buttress their case, the applicant has relied upon the following case laws;

(i). Hargovind Das K Joshi v/s. Collector of Customs [1992 (61) ELT 172 SC], Absolute confiscation of goods without considering question of redemption on payment of fine although having discretion to do so under Section 125, matter remanded back.

(ii). . UOI v/s. Dhanak M Ramji in W.P. No. 1397 with 1022 of 2009 dated 04.08.2009 (2009-248-ELT-127-Bom.). Goods not prohibited but became prohibited due to violation of law, discretion to release on payment of redemption fine, is maintainable.

(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). Mohini Bhatia vs. Commr. Of Customs [1999-106-ELT-485-Tri-Mumbai on prohibited goods and restricted goods. Gold was not included in the part II of restricted item.

(vi). Hon'ble Tribunal Bombay in the case of Sapna Sanjeev Kohli vs. Commr. Of Customs, Airport, Mumbai (2008-230-ELT-305-Tri-Mumbai), Plea of no intention of clearing goods without payment of duty not teneable; Absolute confiscation of gold jewellery not warranted.

(vii). Alfred Menezes v/s. Commissioner of Customs (Mumbai) [2011 (236) ELT 587 (Tri-Mumbai)], Section 125(1) ibid clearly mandates that it is within the power of the adjudicating authority to offer redemption of goods even in respect of prohibited goods.

(viii). Commissioner of Customs, Kandla v/s. Deluxe Exports. Order nos. 2064-2076/2000-WBZ/C-II dated 25.07.2000 in Appeals No. C/368, 554

to 564/2000. Adjudication Authority not to decide or investigate as to who is the owner of the goods.

(ix). R. Mohandas v/s. Commissioner of Customs, Cochin in WP(C) Nos. 24074 and 39096 of 2015 (H) decided on 29.02.2016. (*recognizes any person based on ownership or possession etc*).

(x). etc.

Applicant has prayed to the Revision Authority to set aside the OIA passed by the AA and to restore the OIO passed by the OAA or to pass any other order as deemed fit

6. The applicants have filed applications for condonation of delay of about 27 days and have expressed their apologies and have prayed that the delay may be condoned. The revision application was filed on 29.01.2018. The OIA was issued on 05.10.2017 and the applicant has stated that the same had been communicated to them on 05.10.2017, itself.

7. Personal hearing in the case was scheduled through the online video conferencing mode for 02.08.2022. Shri. N.J Heera, Advocate for the applicant appeared for physical hearing and submitted copies of judgement in the case of Commr. of Customs, Delhi vs. Ashwini Kumar alias Amanullah [2021-376-ELT-Tri-Del] where Tribunal has upheld redemption of huge quantity of gold of almost 12 kgs. He also submitted a copy of compounding order no. 2/2022-23 dated 27.04.2022 in the case of Mrs. Udaipurwala Zarina Shabbir, passed by Chief Commissioner, Zone-III, Mumbai, allowing compounding of offence in a case where over 1 kg gold was recovered. He requested to allow redemption of gold on nominal fine and penalty.

8. On the issue of condonation of delay, Government notes that the OIA was issued on 05.10.2017 and the applicant has stated that the same had been communicated to him on 05.10.2017, itself. It is seen that the statutory 3 months period expired on 03.01.2018. A further extension period of 3 months is available to the applicant. It is seen that the applicant has filed the revision application on

29.01.2018 which is well within the further extension / condonable period of 90 days. Therefore, the Government accepts the COD application filed by the applicant and condones the delay.

9. The Government has gone through the facts of the case and notes that the applicant had not declared the gold while availing the green channel facility. Thereafter, on interception when asked whether she was carrying any dutiable items, she had replied in the negative. The impugned gold had been cleverly concealed in a kneecap which had been detected on her person. This method was adopted with the express intention of hoodwinking the Customs and evading payment of Customs duty. The applicant clearly had failed to declare the goods to the Customs at the first instance as required under Section 77 of the Customs Act, 1962. Had she not been intercepted; the applicant would have gotten away with the gold bars and ornaments. Therefore, the confiscation of the gold was justified.

10.1. 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.

10.2. 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 and gold jewellery 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. Therefore, the gold was also liable for confiscation under these Sections.

11.1. 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”.

11.2 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 ‘applicnat’ thus, liable for penalty.

12. 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.

13. 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.

14. In the instant case, it is noted that quantity of gold with the applicant was not for commercial purpose, a case that she was a habitual offender had not been made out, she admitted to the possession of gold when she was confronted a second time. In these circumstances, absolute confiscation of gold leading to dispossession of applicants is harsh and excessive.

15. Government notes that the applicant, 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 she was questioned again about possession of dutiable goods, she admitted to have concealed gold bars and ornaments in the kneecap. Government notes that the OAA while granting redemption to clear the gold on payment of a redemption fine of Rs. 4,00,000/- had considered the aforesaid issues i.e. that the quantity of gold with applicant was small, it was not for commercial purpose, applicant not being habitual offender, ownership of the gold not claimed by anyone else, that the gold was

found on the person and it was not ingenious concealment etc. Government finds that the OIO passed by the OAA allowing the gold bars and ornaments to be released on payment of a redemption fine is proper and legal. Hence, Government is inclined to restore the same.

16. Government finds that the penalty of Rs. 2,30,000/- imposed on the applicant under Section 112(a) and (b) of the Customs Act, 1962, is commensurate with the omissions and commissions committed.

17. For the aforesaid reasons, Government sets aside the absolute confiscation held in the OIA. Government restores in to-to, the OIO passed by the OAA.

18. Accordingly, the OIO passed by the OAA is restored and the Revision Application is allowed.


(SHRAWAN KUMAR)

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

ORDER No. 316/2022-CUS (WZ) /ASRA/ DATED 14.11.2022

To,

1. Mrs. Fehmidabano Nisar Shaikh, 232/1853, Motilal Nagar No. 1, Road No. 6, Goregaon (West), Mumbai - 400 014.
2. Pr. Commissioner of Customs, CSMI Airport, Terminal - 2, Level - II, Sahar, Andheri West, Mumbai : 400 099.

Copy to:

1. Shri. N.J Heera, Advocate, Nulwala Bldg, Ground Floor, 41, Mint Road, Opp. GPO, Fort, Mumbai - 400 001.
2. Sr. P.S. to AS (RA), Mumbai.
3. File Copy.
4. Notice Board.