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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. 371/51/B/WZ/2018-RA/6649

Date of Issue 23/11/2022

ORDER NO. 328 /2022-CUS (WZ) /ASRA/MUMBAI DATED 22.11.2022
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 : Shri. Motesham Mohammed Mustansir

Respondent : Commissioner of Customs, Custom House, Marmagoa,
Goa - 403 803.

Subject : Revision Application filed, under Section 129DD of the
Customs Act, 1962 against the Order-in-Appeal No.
GOA-CUSTOM-000-APP-117-2017-18 dated 22.11.2017
issued on 21.12.2017 through F.No. A-40/CUS/GOA/2017-
18 passed by the Commissioner (Appeals)



ORDER

This revision application has been filed by Shri. Motesham Mohammed Mustansir (herein referred to as Applicant) against the Order-in-Appeal No. GOA-CUSTOM-000-APP-117-2017-18 dated 22.11.2017 issued on 21.12.2017 through F.No. A-40/CUS/GOA/2017-18 passed by the Commissioner (Appeals), Goa.

2(a). Brief facts of the case are that on 09.11.2016, the Officers of Customs had intercepted the Applicant at Dabolim International Airport, Goa where he had arrived from Doha by Qatar Airways Flight No. QR-522. The Applicant had been intercepted after he had cleared himself through the green channel of Customs. To the query put forth to him regarding anything to declare, he had replied in the negative. The applicant's strolley baggage was screened on the X-ray machine which indicated presence of metallic objects. To recover the metallic objects seen during the screening, the inner metallic lining which had been wrapped with adhesive tape and fixed to the stroller bag was broken open. 12 nos of round shape metallic washers and 2 nos of thick metallic wires which had all been coated with silver colour, were found. The same were analysed using a Spectrum Analyser which confirmed that the washers and wires were made of gold. The 12 nos of washers weighed 216 grams and was of purity between 14 karats to 20 karats and the two wires weighed, 538 grams and was 23 karats.

2(b). The same were later assayed and the weight of the 12 gold washers were ascertained at 231.900 grams and that of the 2 gold wires was 544.170 grams. The spectrometer indicated that the purity of the washers were between 14Kts to 20k and that of the two wire were 23Kts and the total weight of the recovered gold was 776.070 grams.

2(c). The applicant in his statement admitted that he had purchased one cut piece of gold weighing 775 grams which he had handed it over to a gold melting



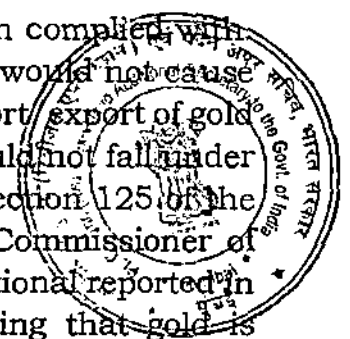
shop to be melted into 12 washers and 2 wires. These were fixed inside the stroller bag by the shopkeeper.

3. After due process of investigations and the law, the Original Adjudicating Authority i.e. the Addl. Commissioner of Customs, Marmagoa, Goa vide Order-In-Original No. 08/2017-18-ADC(CUS) dated 26.09.2017 issued on 27.09.2017 through F.No. 11/34/2016 R&I (AIU) Adj, ordered for the absolute confiscation of the 776.07 grams of gold, valued at Rs. 21,71,941/- under under Section 111 (d), (i), (1) and (m) of the Customs Act, 1962. Further, a penalty of Rs. 3,50,000/- was imposed on the applicant under Section 112 (a) and (b) of the Customs Act, 1962.

4. Aggrieved by this Order, the applicant preferred an appeal before the appellate authority i.e. Commissioner (Appeals), Goa who vide Order-in-Appeal No. GOA-CUSTOM-000-APP-117-2017-18 dated 22.11.2017 issued on 21.12.2017 through F.No. A-40/CUS/GOA/2017-18 upheld in to-to, the OIO passed by the OAA.

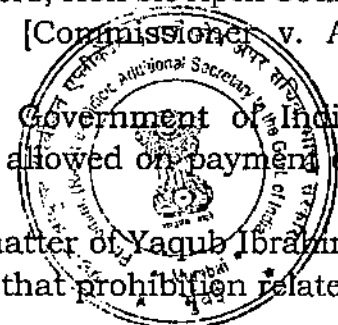
5. Aggrieved by this Order, the applicant has filed this revision application on the undermentioned grounds of revision;

5.01. that Gold is not prohibited goods. It is submitted that gold is not a prohibited item and is only a restricted item. Prohibition relates to goods which cannot be imported or exported by any one, such as arms, ammuniton, drugs etc. The intention behind the provisions of Section 125 is that import/export of such goods under any circumstances would cause danger to the health, welfare or morals of people as a whole. This would not apply to a case where import/export of goods is permitted subject to certain conditions or to a certain category of persons and which are ordered to be confiscated for the reason that the condition has not been complied with. In such a situation, the release of such goods confiscated would not cause any danger or detriment to public health. Admittedly, import/export of gold is permitted subject to certain conditions, therefore, it would not fall under the prohibited category as envisaged under the said of Section 125 of the Customs Act, 1962. They have relied upon the case of Commissioner of Customs (Preventive), West Bengal Vs. India Sales International reported in 2009 (241) ELT 182 (Cal.); that the AA erred in holding that gold is prohibited goods; that the OAA ought not have confiscated the gold



absolutely, as gold is not prohibited goods; that in a catena of decisions, Tribunals, Courts and the Government of India in its orders in revision have directed that confiscated gold have to be allowed to be redeemed on payment of appropriate fines by the persons from whom they were seized and confiscated.

- 5.02. that the Hon'ble Andhra Pradesh High Court in the case of Shaikh Jamal Basha vs Government of India - 1992 (91) ELT 227(AP) has held that option to pay fine in lieu of confiscation has to be given to imported gold as the same is otherwise entitled to be imported on payment of duty.
- 5.03. In the case of Mohamed Ahmed Manu Vs Commissioner of Customs, Chennai - 2006 (205) ELT 383 (Tri-Chennai), the Chennai Bench of the Tribunal has allowed redemption of the confiscated gold on payment of redemption fine.
- 5.04. Further, the Government of India in the case of Mohd Zia UIHaque Vs Addl Commissioner of Customs, Hyderabad vide revision order no 443/12-Cus dated 8-8-12, 2014 (214) ELT 849 (GOI) allowed the confiscated gold to be redeemed on payment of redemption fine.
- 5.05. that the applicant has claimed ownership of the goods and therefore the goods should have been redeemed to him. In this case it was argued that goods may not be redeemed to the person in the light of provisions of section 125 of the Customs Act 1962.; that in Section 125(1) provides for offer of redemption to the owner of the goods or where such owner is not known to the person from whose possession or custody such goods have been seized. Therefore, it cannot be held that the owner of the goods was not the passenger, but someone else. The offence committed by the passenger was not in dispute. It is only the decision of absolute confiscation taken in the matter is challenged.
- 5.06. that they have relied upon the case of Dhanak Madhusudan Ramji Versus Commissioner of Customs (Airport), Mumbai [2009 (237) E.L.T. 280 (Tri. - Mumbai)] Department filed a writ petition against the order of CESTAT in Hon'ble High Court of Bombay. There were twin issues of ownership of goods as well as redemption of the goods. Hon'ble Court considered the issues and the order passed by the tribunal. This case was also upheld by the Apex Court [Union of India v. Dhanak M. Ramji - 2010 (252) E.L.T. A102 (S.C.)J
- 5.07. In the case of A. RAJKUMARI Versus COMMR. OF CUS. (AIRPORT-AJRCARGO), CHENNAI 12015 (321) ELT 5401. Department filed civil appeal in the Apex Court against the above said orders, Hon'ble Apex Court dismissed the appeal on the grounds of delay [Commissioner v. A. Rajkumari 2015 (321) E.L.T. A207 (S.C.)]
- 5.08. In the case of: MOHD, ZIA UL HAQUE before Government of India T2014/314)849 GOI) redemption of the goods was allowed on payment of fine
- 5.09. . It has been observed by Hon'ble CESTAT in the matter of Yaqub Ibrahim Yusuf Vs Commr. of Customs [2011(263) ELT 685] that prohibition relates



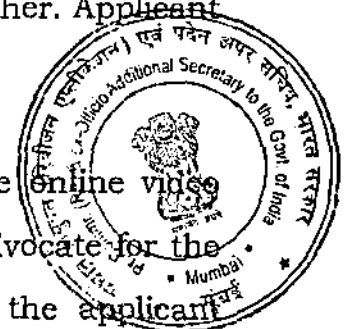
to goods which cannot be imported by any one, such as arms, ammunition, addictive substance viz. drugs.

- 5.10. that the absolute confiscation was not warranted in this case; that the issue of absolute confiscation of goods and option of redemption came up in the case of CC (Prev) vs Uma Shankar Verma where it was held that where the goods are not prohibited, the authorities have no choice but to allow the option of redemption of goods on payment of fine. On the other hand, when the goods are prohibited, allowing redemption on payment of fine is wholly within the discretion of the adjudicating authority.
- 5.11. that penalty was not warranted in this case.
- 5.12. Penalty imposed on the applicant was disproportionate to the value of gold carried by the appellant. Imposition of heavy penalty on the applicant was not sustainable; they have relied upon the Apex Court's Order in the case of Union of India Vs Mustafa & Najibai Trading Co (1998) 6 SCC 79
- 5.13. that the applicant claimed ownership of the gold
- 5.14. that they reject the cases referred by the OAA and AA in their orders and relied upon the Apex Court's Order in the case of CCE, Calcutta Vs Alnoori Tobacco Products 12004 (170) ELT 135 (SC)] where it has been stressed that the facts of decision relied upon should actually fit factual situation of a given case and to exercise caution while applying the ratio of one case to another; this was also reiterated by the Apex Court in the case of Escorts Ltd. Vs CCE, Delhi [2004 (173) ELT 113 (SC)], wherein it has been observed that one additional or different fact may make difference between conclusion in two cases; and so, disposal of cases by blindly placing reliance on a decision is not proper; that further in the case of CC (Port), Chennai Vs Toyota Kirloskar [2007 (213) ELT 4 (SC)], it has been observed by the Hon'ble Supreme Court that the ratio of a decision has to be understood in factual matrix involved therein and that the ratio of decision has to be culled out from facts of given case;

Under the circumstances, the applicant has prayed to the Revision Authority to release the gold on payment of a reasonable redemption fine and penalty.

6. The applicant filed an application for condonation of delay and the reasons cited are (i). on account of his job and (ii). poor health of his mother. Applicant has prayed that the delay may be condoned.

7. Personal hearing in the case was scheduled through the online video conferencing mode for 03.08.2022. Shri. Prakash Shingrani, Advocate for the applicant appeared for personal hearing and submitted that the applicant

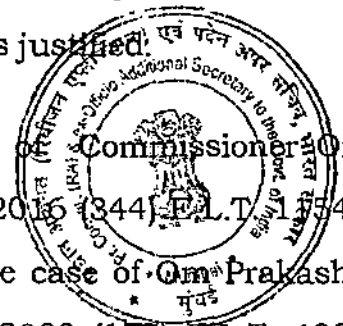


brought gold for personal use, quantity is small and applicant is not a habitual offender. He requested to allow release of goods on nominal RF and penalty.

8. On the issue of condonation of delay, Government notes that the revision application has been filed on 03.04.2018. The OIA was issued on 22.12.2017. The applicant has not stated the specific date on which they had received the OIA (concerned sr. no. 5 of their FORM No. CA-8 has been left blank). The applicant was required to file the revision application within 3 months i.e. 21.03.2018. Government notes that an extension period of 3 months was available to the applicant which would have expired on 19.06.2018. Government notes that the revision application was filed on 03.04.2018 which is well within the extension / condonable period i.e. 3 months + 3 months. Therefore, prayer for condonation of delay is accepted and Government 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 he had been asked whether he was carrying any dutiable items to which he had replied in the negative. The impugned gold had been converted into washers / wires and had been coated 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. The applicant was a frequent traveller and was well versed with the law and procedure. The concealment used reveals the mindset of the applicant to evade the payment of duty. It reveals that the act committed by the applicant was conscious and pre-meditated. Had he not been intercepted; the applicant would have gotten away with the gold concealed in his stroller bag. Therefore, the confiscation of the gold was justified.

10. 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 (153) E.L.T. 423

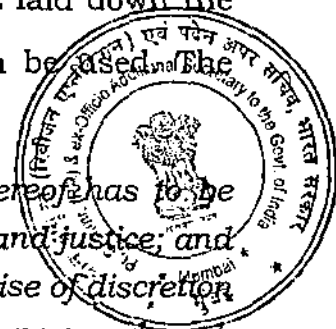


(S.C.), has held that “ if there is any prohibition of import or export of goods under the Act or any other law for the time being in force, it would be considered to be prohibited goods; and (b) this would not include any such goods in respect of which the conditions, subject to which the goods are 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. 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.

12. 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

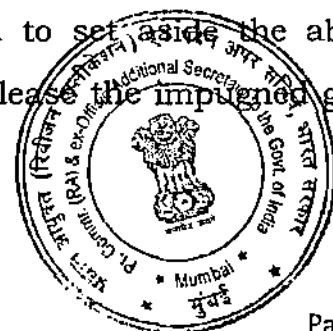


discernment is the critical and cautious judgment of what is correct and proper by differentiating between shadow and substance as also between equity and pretence. A holder of public office, when exercising discretion conferred by the statute, has to ensure that such exercise is in furtherance of accomplishment 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.

13. Government observes that the quantity of gold was not substantial and the gold was not of high purity which indicates that the same was not for commercial use. Though the gold was converted into washers, wires and coated and had been kept in the inner lining of the trolley bag, Government observes that the invoice of the gold evidencing its purchase had been produced by the applicant. A case that the applicant is a habitual offender has not been made out. The facts of the case indicate that it is a case of non-declaration of gold, rather than a case of smuggling for commercial considerations. Under the circumstances, the seriousness of the mis-demeanour is required to be kept in mind when using discretion under Section 125 of the Customs Act, 1962 and while imposing quantum of penalty

14. The absolute confiscation of the gold, leading to dispossession of the applicant of the gold in the instant case is therefore, harsh and not reasonable. Government for the aforesaid reasons, is inclined to set aside the absolute confiscation held in the OIA and grant option to release the impugned gold on payment of a redemption fine.



15. Government notes that the penalty of Rs. 3,50,000/- imposed on the applicant under Section 112(a) of the Customs Act, 1962 is about 16% of the seizure value. Government finds that the penalty imposed is a bit harsh and excessive, considering the value of the seized gold and therefore, is inclined to reduce the same.

16. Accordingly, the Government sets aside the impugned order of the appellate authority. The impugned gold, totally weighing 776.07 grams and valued at Rs. 21,71,941 is allowed redemption on payment of fine of Rs. 4,00,000/- (Rupees Four Lakhs only). The Government also finds that the quantum of penalty of Rs. 3,50,000/- imposed on the applicant under Section 112(a) by the OAA and upheld by the AA is harsh and unreasonable and the same is reduced to Rs. 2,00,000/- (Rupees Two Lakhs only).

17. Revision Application is disposed of on the above terms.


(SHRAWAN KUMAR)

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

ORDER No. 328 /2022-CUS (WZ) /ASRA/MUMBAI DATED 22.11.2022

To,

1. Shri. Motesham Mohammed Mustansir, S/o. Shri. M. Mohammed Sabir, Darul Anas Aminuddin Road, Nawayath Colony, Bhatkal, North Kanara, Pin : 581 320.
2. Commissioner of Customs, Custom House, Marmagoa, Goa – 403 803.

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.

