



GOVERNMENT OF INDIA
MINISTRY OF FINANCE
(DEPARTMENT OF REVENUE)
8th Floor, World Trade Centre, Centre – I, Cuffe Parade,
Mumbai-400 005

F.No. 380/20/B/WZ/2019-RA/6855

Date of Issue : 25/11/2022

ORDER NO. 344 /2022-CUS (WZ)/ASRA/MUMBAI DATED 24.11.2022
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 : Pr. Commissioner of Customs, CSMI Airport, Mumbai.

Respondent : Shri. Imran Mohd Husain Memon

Subject : Revision Application filed, under Section 129DD of the
Customs Act, 1962 against the Order-in-Appeal No.
MUM-CUSTM-PAX-APP-997/2018-19 dated 09.01.2019
{A.F.No. S/49-144/2018/AP} passed by the Commissioner
of Customs (Appeals-III), Mumbai.

ORDER

This revision application has been filed by Pr. Commissioner of Customs, CSI Airport, Mumbai. (herein referred to as Applicant) against the Order in Appeal No. MUM-CUSTM-PAX-APP-997/2018-19 dated 09.01.2019 {A.F.No. S/49-144/2018/AP} passed by the Commissioner of Customs (Appeals-III), Mumbai.

2. Briefly stated the facts of the case are that the Respondent was intercepted by Customs Officers at the exit gate when he arrived at the CSI Airport Mumbai on 30.06.2016 from Bangkok onboard Air India Flight No. AI-331 / 30.06.2016 after having passed through the green channel. On being queried, respondent had replied that he was not carrying any dutiable items. Upon screening his checked-in baggage, suspicious images were seen. On being questioned once again, the Respondent revealed that it was gold. On examination of his checked-in baggage, a sandwich maker was found. On dismantling the sandwich maker, 4 foreign marked gold bars each weighing 100 grams were found concealed in the sandwich maker and the same were recovered. A personal search of the respondent led to the recovery of a further 3 nos of gold bars weighing 100 grams concealed in his undergarments. Thus, 7 gold bars of 100 grams each, totally weighing 700 gms and all collectively valued at Rs. 20,48,305/- were recovered. The respondent had revealed that the gold bars did not belong to him and that he had carried the same for a monetary consideration.

3. The Original Adjudicating Authority viz, Additional Commissioner of Customs, CSI Airport, Mumbai vide Order-In-Original No ADC/RR/ADJN/560/2016-17 {(S/14-5-110/2016-17 ADJN), (SD/INT/AIU /69/2016 AP'C)} dated 15.03.2017 ordered for the absolute confiscation of the seven gold, totally weighing 700 grams, valued at Rs. 20,48,305/- under Section 111(d), (l) and (m) of the Customs Act, 1962 and imposed a penalty of Rs. 2,00,000/- (Rupees Two Lakhs only) under Section 112 (a) and (b) of the Customs Act, 1962 on the respondent.

4. Aggrieved by the said order, the respondent filed an appeal before the appellate authority (AA) viz, Commissioner of Customs (Appeals-III), Mumbai who vide Order-In-Appeal No. MUM-CUSTOM-PAX-APP-997/2018-19 dated 09.01.2019 {A.F.No. S/49-144/2018/AP} allowed the impugned seven gold bars to be redeemed on payment of a redemption fine of Rs. 3,50,000/- under Section 125 of the Customs Act, 1962 and imposed a penalty of Rs. 2,00,000/- alongwith payment of applicable Customs duty.

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

5.01 that the appellate order was not legal and proper;

5.02. that the respondent had cleared himself through Green Channel of Customs. 4 gold bars of 100 grams each had been concealed inside a sandwich maker and 03 gold bars of 100 grams each were concealed in his undergarments and that this was an ingenious concealment.

5.03. the respondent had admitted knowledge, possession, concealment, carriage, non-declaration and recovery of the said gold bars and had carried the same for monetary consideration.; that the said gold bars were handed over to him by Mr. Bala in Bangkok on 30.06.2016;

5.04. that as the impugned gold had not been declared and was concealed ingeniously, the same became prohibited goods in terms of Section 2(33) of the Customs Act, 1962 and therefore, was liable to confiscation and liable for penal action for his act of omission and commission.

5.05. that the manner of recovery of the gold indicates the concealment was not only ingenious one but also premeditated and deliberate act to evade Customs duty. The circumstances of the case and the intention of the respondent had not been considered at all by the Appellate Authority while giving the passenger an option to redeem the seized goods on payment of fine.

5.06. that the manner in which the gold was brought ie, concealed in sandwich maker and in the undergarments worn by the respondent indicated the greed and criminal mindset of the passenger.

5.07. that in this case, the gold being carried for monetary considerations and manner of its concealment being ingenious, was a fit case for absolute confiscation of seized gold as a deterrent punishment to passengers.

- 5.08. that the applicant has cited a few case laws to buttress their claim for absolute confiscation of the impugned gold.
- (i). Apex Court Order in the case of Samyanathan Murugesan V/s. COMmr. Of Customs (AIR), Chennai. 7.075 kgs of gold had been kept concealed in T.V Set which had been confiscated absolutely.
 - (ii). that the appellate authority had relied upon order of CESTAT, Chennai in the case of A. Rajkumari Vs CC (Chennai) 2015 (321) ELT 540 (Tri.-Chennai) for drawing the conclusion for release of the impugned gold on redemption fine and also held that the Hon'ble Apex Court vide order in the case as reported in 2015 (321) ELT A 207 (SC) had affirmed the said CESTAT Order; that this Order had been dismissed by the Apex Court on the grounds of delay and not on merits; that citing this case by the appellate authority was not proper;
 - (iii). that the redemption on payment of fine and penalty would depend on the facts and circumstances of the case and other cases cannot be binding as a precedent; that judgment of Hon'ble Delhi High Court in the case of Jain Exports Vs Union of India 1987(29) ELT753 would be squarely applicable in this case.

Under the aforesaid circumstances, the applicant has prayed to set aside the order passed by the appellate authority and to restore the OIO or to pass any order as deemed fit and proper.

6. Personal hearings in the case was scheduled on 29.08.2019. Thereafter, upon the change of the revisionary authority personal hearing through the online video conferencing mode were scheduled for 22.10.2021, 29.10.2021, 02.12.2021 and 08.12.2021. No one appeared for the applicant or the respondent. Sufficient opportunities have been given to both the applicant and the respondent to put forth their case. As none appeared, 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 had passed through the green channel and 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 and had he not been intercepted would have walked away with the impugned goods without declaring the same to Customs. Four gold bars were innovatively concealed inside the sandwich maker brought

by the respondent. Only upon opening up the machine, the four gold bars had been recovered. The respondent adopted an innovative method to hide the gold to avoid detection and consequently, evade Customs duty. Also, he had 3 more gold bars concealed in his undergarments. This modus adopted by the respondent clearly reveals that the respondent had no intention to declare the gold bars to the Customs and pay any duty thereon. The Government finds that the confiscation of the gold is therefore, justified.

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 ‘Respondents’ thus liable for penalty.

11. 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. The quantity of gold under import is not substantial and is not of commercial quantity. Much of the gold had been kept hidden inside the sandwich maker. There are no allegations that the respondent is a habitual offender and was involved in similar offence earlier. 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 misdemeanour is required to be kept in mind when using discretion under Section 125 of the Customs Act, 1962 and while imposing quantum of penalty. Government notes that the appellate authority has rightly allowed to redeem the gold on payment of a redemption fine and had made judicious use of discretion available under Section 125 of the Customs Act, 1962. The Government notes that considering the duty rate, quantum of redemption fine and penalty, the respondent has to pay more than 60% of the value of the goods and as such there cannot be any bonanza to the respondent. Government finds that the Appellate Order is proper and judicious and is not inclined to interfere in the same.

13. The issue of goods being allowed redemption to applicant has been discussed by Commissioner (Appeals) in his Order at para 16 and 22. Commissioner (Appeals) observed,

“16. I also find that in a recent judgement in case of R. Mohandas vs. CC, Cochin [2016 (336) ELT 399 (Ker)], the Hon’ble High Court held that:

“under Section 125 of the Customs Act, the goods can be released to the owner of the goods or to the person from whose possession or custody such goods have been seized. Section 125 was originally worded to give custody of such goods “to owner of the goods”. An amendment has been made with effect from 27.12.1985 by incorporating a provision to give release of the goods to the person from whose possession or custody such goods have been seized”.

22. *The analysis of various judgements on the issue of redemption of gold under Section 125 of the Customs Act, 1962 make it clear that the discretion has to be exercised based on merits of each case and there cannot be any straight jacket formula to decide such cases. I find on interception by Customs and during adjudication proceedings the appellant had pleaded that the gold belonged to him and there is nothing on record to suggest that the appellant passenger was part of any repeated and organised smuggling racket. The appellant had questioned his typed statement and denied having made any such averments vide letter dated 27.08.2016. Besides, the department*

conducted no investigation to find out about 'Bala' to link him with the impugned gold. I find that it is settled law that retracted statement is a weak evidence against the maker as held in case of Haroon Haji Abdulla vs. State of Maharashtra [1999 (110) ELT 309 (SC)], DRI vs. Mahendra Kumar Singhal [2016 (333) ELT 250 (Del.); Rakesh Kapoor vs. Union of India [2015 (326) ELT 465 (Del.)]. In any case, the findings and conclusion of the adjudicating authority vide Para 7 of the order also do not allege that the passenger had acted as carrier for somebody else for monetary consideration".

14. With regard to the penalty of Rs. 2,00,000/- imposed under Section 112(a) & (b) of the Customs Act, 1962, imposed by the OAA and upheld by the AA, the Government finds that the same is commensurate with the omissions and commissions committed by the respondent and is not inclined to interfere in the same.

15. For the aforesaid reasons, the Government does not find it necessary to interfere in the OIA passed by the AA.

16. Accordingly, the Revision Application filed by the applicant is dismissed.

Shrawan
24/11/22
(SHRAWAN KUMAR)

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

ORDER No. 344 /2022-CUS (SZ) /ASRA/MUMBAI DATED 24.11.2022

To,

1. Pr. Commissioner of Customs, Chhatrapati Shivaji International Airport, Terminal – 2, Mumbai 400 099.
2. Shri. Imran Mohd Husain Memon, Room No. 9, Ground Floor 12, Dargahwali Chawl, Khadia Street Cross Lane, Mumbai – 400 008.

Copy to:

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