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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. 371/538/B/2019-RA / 2052 : Date of Issue 30.11.2022

ORDER NO. 347 /2022-CUS (WZ)/ASRA/MUMBAI DATED 25.11.2022 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 Vijay Ashok Patil

Respondent : Pr. Commissioner of Customs, Ahmedabad

Subject : Revision Application filed, under Section 129DD of the Customs Act, 1962 against the Order-in-Appeal No. AHD-CUSTM-000-APP-423-19-20 dated 04.10.2019 passed by the Commissioner of Customs, (Appeals), Ahmedabad.

ORDER

This Revision Application has been filed by Shri Vijay Ashok Patil (herein referred to as "applicant") against the Order-in-Appeal No. AHD-CUSTOM-000-APP-423-19-20 dated 04.10.2019 passed by the Commissioner of Customs, (Appeals), Ahmedabad.

2. Briefly stated the facts of the case are that the applicant was intercepted while he was proceeding towards the exit gate after clearing himself through the Green Channel, when he arrived at the Ahmedabad Airport from Dubai on 21.06.2018, onboard Spice Jet Flight No. SG 16. The applicant was asked whether he had anything to declare to which he replied in the negative. The applicant, on being again asked whether he was carrying any metallic objects, removed one yellow metal kada of gold hidden under the right hand sleeve of his shirt and one hidden yellow metal chain of gold worn under the collar of his shirt. The weight of the gold kada of 24 Carat purity was 349.300 grams and the weight of the gold chain of 24 Carat purity was 251.200 grams. The gold kada and the gold chain totally weighing 600.500 grams having tariff value of Rs. 16,99,022/- and market value of Rs. 19,00,582/- was seized under the provisions of the Customs Act, 1962. The applicant in his statement recorded under Section 108 of the Customs Act, 1962, inter alia stated that he had also carried Indian currency of around Rs. 20 lakhs from India to Dubai and the same was converted into Dirhams at Dubai and had purchased the gold.

3. The Original Adjudicating Authority (OAA) viz, Additional Commissioner of Customs, Ahmedabad, vide Order-In-Original No. 15/ADC-MLM/SVPIA/O&A/ 2018-19 dated 31.12.2018, issued on 19.01.2019 through F.No. VII/10-86/SVPIA/O&A/2018 ordered for the confiscation of the 01 gold kada and 01 gold chain totally weighing 600.500 grams and having tariff value of Rs.

16,99,022/- and market value of Rs. 19,00,582/-, under Section 111(d), (i), (l) & (m) of the Customs Act, 1962. A penalty of Rs. 2,50,000/- under Section 112(a) and (b) of the Customs Act, 1962 . The OAA also held that the Indian currency notes worth Rs. 20 lakhs which was in excess of Rs. 25,000/- was also liable for absolute confiscation but since the same was not available for seizure/or seized, the OAA refrained from confiscating the same under Section 125 of the Customs Act, 1962. Penalty of Rs. 2,50,000/- under Section 114(i) of the Customs Act, 1962 was imposed on the applicant in respect of the Indian currency exported/smuggled out of India

4(a). Aggrieved by the said order, the applicant filed an appeal before the Appellate Authority (AA) viz, Commissioner of Customs (Appeals), Ahmedabad.

4(b). The Appellate Authority vide his Order-In-Appeal No. AHD-CUSTOM-000-APP-423-19-20 dated 04.10.2019 rejected the appeal and upheld the Order-in-Original in toto.

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

5.1. that there was no ingenious concealment of gold in the instant case as the gold kada was worn on his hand and the gold chain around his neck;

5.2. that the gold jewellery belonged to him only and was for personal and household use and not for sale or trade purpose and there was no malafide intention to hide the gold and avoid payment of duty;

5.3. that there were several cases where the facts and circumstances were similar to the instant case and where the undeclared gold bars and gold jewellery were released on payment of fine. The applicant has cited the following case laws in support of their contention

- (i) Sapna Sanjeev Kohli vs. CC, Customs, Airport, Mumbai [2008(230) E.L.T. 305]
- (ii) OIA No. MUM-CUSTOM-PAX-APP-311/16-17 dated 18.10.2016 passed by Commissioner (Appeals) Mumbai Zone III.
- (iii) OIO No. ADC/AK/ADJN/65/2017-18 dated 01.11.2017 passed by Additional Commissioner, CSI, Mumbai wherein several orders of the Tribunal, High Courts and Supreme Court has been referred.
- (iv) OIA No MUM-CUSTOM-PAX-APP-310/17-18 dated 02.06.2017 passed by Commissioner (Appeals) Mumbai Zone III.
- (v) UOI vs. Dhanak Ramji [2009(248) E.L.T. 127 (Bom HC)]

5.4. that the gold jewellery was liable for release on duty and fine and nominal penalty particularly when the goods were covered under the Baggage Rules, 1998 and hence no import licence was required for the import of the gold jewellery;

Reliance has been place on the case of Commissioner of Customs(Preventive), West Bengal vs. India Sales International [2009(241) E.L.T. 182(Cal.)]

5.5. that the applicant was not a carrier for some other person but was the actual owner and that it was not the case of the department that the applicant was engaged in any racket of smuggling of gold.

5.6. that the Indian currency is non-notified item under Chapter IV-A (Section 11B and Section 123 of the Customs Act, 1962 and hence the burden to prove that the alleged Indian currency was exported illegally by the applicant was on the department and the department had failed to prove it.

Applicant has prayed for release of the gold jewellery under Section 125 of the Customs Act, 1962 and waiver/reduction of the penalty imposed under Section 112 and 114 of the Customs Act, 1962.

6. Personal hearings in the case was scheduled for 12.08.2022 or 25.08.2022. Shri O.M. Rohira, Advocate appeared for the hearing on 26.08.2022 on behalf of the applicant. He submitted that the Indian currency was not recovered and penalty was imposed. He further submitted that the applicant was wearing the jewellery and requested to allow redemption of the goods on reasonable fine and penalty.

7. The Government has gone through the facts of the case, and 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 applicant had not disclosed that he was carrying dutiable goods. However, pursuant to enquiry, the applicant admitted to carrying the gold and the method of carrying the gold adopted by the applicant clearly revealed his intention not to declare the gold and thereby evade payment of Customs Duty. Further the applicant had also admitted that he had carried Indian currency amounting to Rs. 20 lakhs to Dubai which was used to purchase the jewellery.

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. The relevant sections of the Foreign Exchange Management (Export and import of currency) Regulations, 2015 are reproduced below

Rule 3(1) (a) of the Foreign Exchange Management (Export and import of currency) Regulations, 2015 issued under Notification No FEMA-6 (R)/RB-2015 dated 29.12.2015 issued by the Reserve Bank of India states as under

“In exercise of the powers conferred by clause (g) of sub-section (3) of Section 6, subsection (2) of Section 47 of the Foreign Exchange Management Act, 1999 (42 of 1999), and in supersession of Notification No. FEMA 6/2000-RB dated May 3, 2000, as amended from time to time, the Reserve Bank makes the following regulations for export from and import into, India of currency or currency notes, namely :-

1.
2.

3. Export and Import of Indian currency and currency notes: -

(1) Save as otherwise provided in these regulations, any person resident in India,

(a) may take outside India (other than to Nepal and Bhutan) currency notes of Government of India and Reserve Bank of India notes up to an amount not exceeding Rs.25000/- (Rupees Twenty Five Thousand Only) per person or such amount and subject to such conditions as notified by Reserve Bank of India from time to time;

(b)
.....”

8.3. 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 applicant 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. 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. In the instant case, the quantum of gold under import is small and is not of commercial quantity. The impugned gold jewellery had been worn by the applicant on his person and Government observes that sometimes passengers resort to such methods to keep their valuables / precious possessions safe. There are no allegations that the applicant 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.

14. Government finds that this is a case of non-declaration of gold. 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. Considering the aforesaid facts, Government therefore, sets aside the impugned order of the Appellate authority. The impugned gold, having a market value of Rs. 19,00,582/- is allowed to be redeemed on payment of fine of Rs. 3,80,000/- (Rupees Three Lakhs Eighty Thousand only)

15. The Government notes that the penalty of Rs. 2,50,000/- imposed on the applicant under Section 112(a)& (b) of the Customs Act, 1962 is appropriate and commensurate with the omission and commission committed by the applicant.

16. Government notes Regulations 3(1) (a) of the Foreign Exchange Management (Export and import of currency) Regulations, 2015 permits any person who is resident in India, to take outside India (other than to Nepal and Bhutan), currency notes of Government of India and Reserve Bank of India up to an amount not exceeding Rs.25000/-. In the instant case, the applicant has

admitted to having taken Rs. 20 lakhs out of India to Dubai. Government notes that in view of the above violations, the applicant was liable for penal action and the OAA has rightly imposed penalty under Section 114(i) of the Customs Act, 1962. Government observes that the quantum of penalty of Rs. 2,50,000/- (Rupees Two Lakhs Fifty Thousand only) imposed on the applicant under Section 114(i) of the Customs Act, 1962 is appropriate and commensurate, considering the violations of the law in this regard by the applicant.

16. Revision Application is disposed of on above terms.


(SHRAWAN KUMAR)

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

ORDER NO. 347 /2022-CUS (WZ)/ASRA/MUMBAI DATED 25.11.2022

To,

1. Shri Vijay Ashok Patil, 1188, Dahi Ni Khadki, Madangopal Haveli Road, Manek Chowk, Ahmedabad 380 001
2. The Principal Commissioner of Customs, Custom House, Navrangpura, Ahmedabad 380 009.
3. The Commissioner of Customs (Appeals), Ahmedabad, 7th Floor, Mrudul Tower, B/H Times of India, Ashram Road, Ahmedabad 380 009

Copy to:

1. Shri O.M.Rohira, Advocate, 148/301, Uphaar, 10th Road, Khar (West), Mumbai 400 052.
2. Sr. P.S. to AS (RA), Mumbai.
3. Guard File,
4. File Copy.
5. Notice Board.