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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. 380/24/B/WZ/2017-RA (MUM) 30/11/2022: Date of Issue : 30.11.2022

ORDER NO. 348/2022-CUS (WZ)/ASRA/MUMBAI DATED 28.11.2022
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.

F.No. 380/24/B/WZ/2017-RA (MUM)

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

Respondent : Shri. Shadman Mehboob Shaikh

Subject : Revision Application filed, under Section 129DD of the
Customs Act, 1962 against the Order-in-Appeal No. MUM-
CUSTM-PAX-APP-310/17-18 dated 02.06.2017 [S/49-
47/2017/AP] passed by the Commissioner of Customs
(Appeals), Mumbai -III.

ORDER

This revision application has been filed by Pr. Commissioner of Customs, CSI Airport, Mumbai (herein after referred to as the Applicant) against the Order-In-Appeal No. MUM-CUSTOM-PAX-APP-310/17-18 dated 02.06.2017 [S/49-47/2017/AP] passed by the Commissioner of Customs (Appeals), Mumbai -III.

2. Brief facts of the case are that on 09.07.2015, Customs Officers at CSMI Airport, Mumbai had intercepted the respondent at the exit gate of the arrival hall at CSI Airport after he had crossed the green channel. The Respondent had arrived from Dubai via Muscat onboard Oman Airways Flight No. WY203 /09.07.2015. It was ascertained that the respondent had filed a NIL Customs declaration form for possession of any dutiable items. To the query whether he was carrying any dutiable goods in his baggage or person, the respondent had replied in the negative. An examination of the sling bag in the possession of the respondent led to the recovery of 23 foreign marked gold bars of 10 tolas each, of 24 carats purity, totally weighing 2681 grams and collectively valued at Rs. 65,80,112/-. The respondent revealed that the gold did not belong to him and that he had carried the same for a monetary consideration.

3. After due process of the law, the Original Adjudicating Authority, viz Additional Commissioner of Customs, CSI Airport, Mumbai vide Order-In-Original No. ADC/RR/ADJN/396/2016-17 dated 09.12.2016 [S/14-5-375/2015-16ADJN -- SD/INT/AIU/285/2015 AP'C] ordered the absolute confiscation of the 23 gold bars of 10 tolas each, totally weighing 2681 grams and valued at Rs. 65,80,112/- under Section 111(d), 111(1) and 111 (m) of the Customs Act, 1962 and a penalty of Rs. 6,50,000/ was also imposed on the respondent under section of 112 (a) and (b) of Customs Act, 1962.

4. Aggrieved by the said order, the respondent filed an appeal before the appellate authority viz, Commissioner of Customs (Appeals), Mumbai -III who vide Order-In-Appeal No. MUM-CUSTOM-PAX-APP-310/17-18 dated 02.06.2017 [S/49-47/2017/AP] allowed to redeem the 23 gold bars of 10 tolas each, totally weighing 2681 grams and valued at Rs. 65,80,112/- on payment of a redemption fine of Rs. 12,00,000/- [Rupees Twelve Lakhs]. The appellate authority did not interfere in the quantum of penalty imposed on the respondent by the original adjudicating authority.

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

- 5.01. that the Order-in-Appeal is not legal and proper, mainly on the following grounds,
- 5.02. that the respondent had opted for the green channel for Customs clearance and had not declared the impugned gold. The manner of recovery of gold indicated that the concealment was premeditated,
- 5.03. that the respondent had admitted to the possession, carriage, non-declaration and recovery of gold and had disclosed that he had not declared the gold with intention to evade the Customs duty,
- 5.04. the respondent had willfully failed to make a true declaration in the Customs declaration form as required under Section 77 of the Customs Act, 1962,
- 5.05. the respondent had failed to substantiate his claim that he was the owner of the gold and had failed to submit any documentary evidence for purchase of such a large quantity of gold,
- 5.06. that various cases laws have been cited by the applicant on the use of discretionary powers under Section 125 of the Customs Act, 1962, respondent not being the owner of the gold, etc to buttress their case.

Applicant has prayed to set aside the order passed by the appellate authority and to restore the order passed by the original adjudicating authority or pass any order as deemed fit.

6. Personal hearings in the case were scheduled through the online video conferencing mode for 17.09.2021 / 24.09.2021, 27.10.2021 / 02.11.2021 and 02.12.2021. None appeared for the applicant and respondent. Sufficient opportunities have been accorded to the applicant and respondent to put forth and defend their case. Since, none have appeared for the applicant and respondents, 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 respondent was carrying a large quantity of gold in the sling bag carried by him and had not declared the same to the Customs. Even after interception, when the Respondent was asked about the possession of any gold or dutiable items, he had stoically denied that he was carrying any gold. The respondent had not declared the dutiable items in his possession in the Customs declaration form submitted by him. The Respondent had not filed a true declaration to the Customs and the respondent had clearly failed to declare the goods to the Customs at the first instance as required under Section 77 of the Customs Act, 1962. Quantity of the gold bars is large, of high purity and in primary form, indicating that the same is for commercial use. It also reveals that the act committed by the respondent was conscious and pre-meditated. The respondent harboured no intention to declare the gold in his possession to Customs and pay the Customs duty. Had he not been intercepted, the respondent would have gotten away with it. The Government finds that the confiscation of the gold is therefore, justified.

8. 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”.

9. 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.

10. 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.

11. Government observes that the quantum of gold was large, of maximum purity, in primary form, of commercial quantity and it was consciously and premeditatedly not declared which reveals the intention of the Respondent. Also, the gold was in primary form and of maximum purity which indicates that the same was for commercial use. Respondent had not declared the impugned gold to Customs and had furnished a false declaration also. This reveals his clear intention to evade duty and smuggle the gold into India. The circumstances of the case especially that it is of commercial quantity and consciously concealed, probates that the Respondent had no intention of declaring the gold to the Customs at the airport. All these have been properly considered by the Original

Adjudicating Authority while confiscating the 23 gold bars of 10 tolas each, totally weighing 2681 grams.

12. The main issue in the case is the quantum of the impugned gold which was attempted to be brought into the Country. Considering the quantity, purity and primary form, the fact that respondent was not a habitual offender and this was the first time that he had carried the gold is of no consequence. The option to allow redemption of seized goods is the discretionary power of the adjudicating authority depending on the facts of each case and after examining the merits. In the present case, the manner of concealment being conscious with clear intent, quantity being large and commercial, this being a clear attempt to smuggle gold bars in primary form, is a fit case for absolute confiscation as a deterrent to such offenders. Thus, taking into account the facts on record and the gravity of offence, the adjudicating authority had rightly ordered the absolute confiscation of the gold. But for the intuition and the diligence of the Customs Officer, the gold would have passed undetected. Hon'ble Delhi High Court in the case of Jain Exports Vs Union of India 1987(29) ELT753 has observed that, "*the resort to Section 125 of the C.A. 1962, to impose fine in lieu of confiscation cannot be so exercised as to give a bonanza or profit for an illegal transaction of imports.*". The redemption of the gold will encourage non bonafide and unscrupulous elements to resort to concealment and bring gold. If the gold is not detected by the Custom authorities, the passenger gets away with smuggling and if not, he has the option of redeeming the gold. Such acts of mis-using the liberalized facilitation process should be meted out with exemplary punishment and the deterrent side of law for which such provisions are made in law needs to be invoked. The absolute confiscation of the gold would act as a deterrent against such persons who indulge in such acts with impunity. Therefore, the order passed by the appellate authority is liable to be set aside and the order passed by the original adjudicating authority is liable to be upheld.

13. The Government finds that the penalty of Rs. 6.50 lakhs imposed under section 112 (a) and (b) is appropriate and commensurate with the omission and commission committed by the Respondent and the appellate authority has upheld the same. The Government does not find it necessary to interfere in the quantum of penalty which has been imposed on the respondent.

14. In view of the above, the Government sets aside the order passed by the appellate authority and restores in to-to, the order-in-original passed by the Original Adjudicating Authority .

15. Revision Application is allowed on above terms.


(SHRAWAN KUMAR)

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

ORDER No. 348/2022-CUS (WZ) /ASRA/ MUMBAI DATED 28.11.2022

To,

1. Pr. Commissioner of Customs, Chhatrapati Shivaji International Airport, Terminal - 2, Mumbai - 400 099.
2. Shri. Shadman Mehboob Shaikh, 8/10, Al Aziz Palace, Flat No. 1005, 10th Floor, Dongri X-Lane, Shafi Masjid, Mumbai - 400 009.

Copy To,

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