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SPEED POST



GOVERNMENT OF INDIA
MINISTRY OF FINANCE
(DEPARTMENT OF REVENUE)

8th Floor, World Trade Centre, Centre - I, Cuffe Parade,
Mumbai-400 005

F.No. 371/426/B/2019-RA

2022 :

Date of Issue 30.11.2022

ORDER NO. 349/2022-CUS (WZ)/ASRA/MUMBAI DATED 29.11.2022 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 : Mr Fakhardi Hasan Abu Mohammed

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

Subject : Revision Application filed, under Section 129DD of the Customs Act, 1962 against the Order-in-Appeal No. MUM-CUSTM-PAX-APP-190-19-20 dated 17.06.2019 [Date of issue: 24.06.2019] passed by the Commissioner of Customs, (Appeals), Mumbai -III.

ORDER

This Revision Application has been filed by Mr Fakhardi Hasan Abu Mohammed (herein referred to as "applicant") against the Order-in-Appeal No. MUM-CUSTOM-PAX-APP-190-19-20 dated 17.06.2019 [Date of issue: 24.06.2019] passed by the Commissioner of Customs, (Appeals), Mumbai -III.

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 Chhatrapati Shivaji International Airport (CSI) , Mumbai from Bahrain on 06.11.2016, onboard Gulf Air Flight No. GF-064. The personal search of the applicant resulted in the recovery of 03 gold bars weighing 348 grams, wrapped in adhesive tape, which was kept in the right side of the front pocket of the shirt worn by him. The 03 gold bars totally weighing 348 grams and purity of 999% and valued at Rs. 9,73,927/- were seized under the provisions of the Customs Act, 1962.

3. The Original Adjudicating Authority (OAA) viz, Additional Commissioner of Customs, CSI Airport, Mumbai, vide Order-In-Original No. ADC/AK/ADJN/154/2017-18 dated 20.02.2018, [S/14-5-03/2017-18 Adjn SD/INT/AIU/129/2016 AP B] order for the confiscation of the 03 gold bars totally weighing 348 grams valued at Rs. 9,73,927/- under Section 11 (d), (l) and (m) of the Customs Act, 1962. Penalty of Rs. 1,00,000/- was imposed on the applicant under Section 112(a) and (b) of the Customs Act, 1962.

4. Aggrieved by the said order, the applicant filed an appeal before the Appellate Authority (AA) viz, Commissioner of Customs (Appeals), Mumbai -III, who vide his Order-In-Appeal No. MUM-CUSTOM-PAX-APP-190-19-20 dated

17.06.2019 [Date of issue: 24.06.2019] rejected the appeal and upheld the Order-in-Original.

5. Aggrieved with the above order, the applicant has filed this revision application on the grounds that the lower authorities ought to have considered that in similar cases option of redemption was granted under Section 125 of the Customs Act, 1962 and should have granted the option in the instant case. The applicant prayed that the absolute confiscation be set aside and requested for reduction in penalty imposed under Section 112 (a) and (b) of the Customs Act, 1962.

6. Personal hearing in the case was scheduled for 10.08.2022 or 24.08.2022. Shri Prakash Shingrani, Advocate appeared for the hearing on 24.08.2022 on behalf of the applicant. He submitted that the gold was of small quantity and for personal use and that the applicant was not a habitual offender and the gold was not ingeniously concealed. He requested to allow release of the goods on nominal redemption 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 personal search of the applicant after he had cleared himself through the Green channel, the gold bars were recovered and the non-declaration of the same by the applicant clearly revealed his intention not to declare the gold and thereby evade payment of Customs Duty.

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. 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 wrapped in adhesive tape and recovered from the front pocket of the shirt worn by him 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 vs. 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. Government notes that 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.”

13.1. Government further observes that there are a catena of judgements, over a period of time, of the Hon'ble Courts and other forums which have been categorical in the view that grant of the option of redemption under Section 125 of the Customs Act, 1962 can be exercised in the interest of justice. Government places reliance on some of the judgements as under:

- a) In the case of Commissioner of Customs, Aliganj, Lucknow vs. Rajesh Jhamatmal Bhat, [2022(382) E.L.T. 345 (All)], the Lucknow Bench of the Hon'ble High Court of Allahabad, has held at Para 22 that “*Customs Excise & Service Tax Appellate Tribunal Allahabad has not committed any error in upholding the order dated 27.08.2018 passed by the Commissioner (Appeals) holding that Gold is not a prohibited item and,*

therefore, it should be offered for redemption in terms of Section 125 of the Act."

- b) The Hon'ble High Court of Judicature at Madras, in the judgment in the case of Shik Mastani Bi vs. Principal Commissioner of Customs, Chennai-I [2017(345) E.L.T. 201 (Mad)] upheld the order of the Appellate Authority allowing re-export of gold on payment of redemption fine.
- c) The Hon'ble High Court of Kerala at Ernakulam in the case of R. Mohandas vs. Commissioner of Cochin [2016(336) E.L.T, 399 (Ker.)] has, observed at Para 8 that *"The intention of Section 125 is that, after adjudication, the Customs Authority is bound to release the goods to any such person from whom such custody has been seized..."*
- d) Also, in the case of Union of India vs Dhanak M Ramji [2010(252)E.L.T. A102(S.C)], the Hon'ble Apex Court vide its judgement dated 08.03.2010 upheld the decision of the Hon'ble High Court of Judicature at Bombay [2009(248) E.L.T. 127 (Bom)], and approved redemption of absolutely confiscated goods to the passenger.

13.2. Government, observing the ratios of the above judicial pronouncements, arrives at the conclusion that decision to grant the option of redemption would be appropriate in the facts and circumstances of the instant case.

14. In the instant case, the quantum of gold under import is small and is not of commercial quantity. The impugned gold bars were kept by the applicant on his person, in the pocket of the shirt worn by him 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.

15. 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, modifies the impugned order of the Appellate Authority to the extent of allowing the release of the 03 gold bars, totally weighing 348 grams on payment of redemption fine. The impugned gold, valued at Rs. 9,73,927/-, is allowed to be redeemed on payment of fine of Rs. 1,75,000/- (Rupees One Lakh Seventy Five Thousand only).

16. The Government notes that the penalty of Rs. 1,00,000/- imposed on the applicant under Section 112(a)& (b) of the Customs Act, 1962 is appropriate and commensurate with the omissions and commissions committed by the applicant and Government does not feel it necessary to interfere with the imposition of the same.

17. Revision Application is disposed of on above terms.


(SHRAWAN KUMAR)

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

ORDER NO. 3A9/2022-CUS (WZ)/ASRA/MUMBAI DATED 29.11.2022

To,

1. Mr. Fakhardi Hasan Abu Mohammed, 300, Sayed Manzil, R. No 16, 1st Floor, Ibrahim Rahamatullah Road, Mumbai 400 003

Address No 2: C/o Mr Prakash Shingrani, Advocate, 12/334, Vivek, New MIG Colony, Bandra (East), Mumbai 400 099

1. The Pr. Commissioner of Customs, C.S.I Airport, Terminal 2, Level-II, Sahar, Andheri (East), Mumbai 400 099.

2. The Commissioner of Customs (Appeals), Mumbai-III, 5th Floor, Avas Corporate Point, Makwana Lane, Behind S.M.Centre, Andheri Kurla Road, Andheri (East), Mumbai 400 059.

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.