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GOVERNMENT OF INDIA
MINISTRY OF FINANCE
(DEPARTMENT OF REVENUE)
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Mumbai - 400 005

F No 371/177/B/2021-RA /512 Date of issue: 23.01.2024

ORDER NO 35/2024-CUS (WZ)/ASRA/MUMBAI DATED 17.1.2024 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

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| Applicant | Mr Sulıman Ahmed Sulıman Ahmed |
| Respondent | Pr. Commissioner of Customs, CSMI, Mumbai |
| Subject | Revision Application filed under Section 129DD of the Customs Act, 1962 against the Order-in-Appeal No. MUM-CUSTM-PAX-APP-1475/2020-21 dated 18 02 2021 [F. No. S/1045/2019] passed by the Commissioner of Customs (Appeals), Mumbai Zone-III |

# ORDER

The Revision Application is filed by Mr Sulıman Ahmed Suliman Ahmed (herein referred to as the 'Applicant) against the Order-in-Appeal (OIA) No. MUM-CUSTM-PAX-APP-1475/2020-21 dated 18 02 2021 passed by the Commissioner of Customs (Appeals), Mumbai - III.

2 Brief facts of the case are that on 05 11.2018, the officers of AIU, Mumbai Customs, Chhatrapati Shivaji Maharaj International Airport, Mumbai, intercepted the Applicant holding Sudanese passport, who had arrived by Jet Airways Flight from Dubai, after he had cleared through the Customs Green Channel A personal search of the Applicant-I led to the recovery of silver coated belt buckle made of gold totally weighing 583 grams valued at Rs.17.15.873/- from the belt worn by him

3 The case was adjudicated after issuance of show cause notice dated 28 01.2018 and the Original Adjudicating Authority (OAA), i.e Additional Commissioner of Customs, CSMI Airport, Mumbai vide Order-in-Original (OIO) No ADC/AK/ADJN/111/2019-20 dated 02 08 2019 ordered absolute confiscation of the impugned silver coated belt buckle made of gold totally weighing 583 grams valued at Rs 17 15 873/- under Section 111 (d), (l) and (m) of the Customs Act, 1962 and imposed a penalty of Rs 1,75,000/- under Section 112 of the Customs Act, 1962

4 Aggrieved, the Applicant filed an appeal before the Appellate Authority (AA) who vide impugned OIA upheld the order of the OAA and rejected the appeal

5 Hence, the Applicants have filed the instant revision applications mainly on the following grounds

5 Hence, the Applicant has filed the instant revision application mainly on the following grounds

5 2 that he is Foreign National and does not know to read and write English Language and understand his mother tongue only

5 3 that when arrived he at Airport was asked by the officer in plain clothing as to whether he was carrying any Gold, to which he answered in affirmative.

5 4 that the officer took the charge of the said Gold and prepared some papers in English Language &amp, obtained his signature on those papers The Customs official made out a case of non-declaration

5 5 that the Gold brought is neither restricted nor prohibited and can be released for Re-export under section 125 of the Customs Act, 1962

5 6 that when the Respondent has concluded that the acts and/ or omissions on the part of the Applicant was to evade Customs duty, the evasion of Customs duty can be done only in respect of dutiable goods and not prohibited goods.

5 7 that once the department or respondent accepts that the goods are dutiable, the option of redemption of goods as provided under section 125 of the Customs Act, 1962 will have to be given to the Applicant.

5 8 He placed his reliance on following case laws·

1 Collector of Customs vs Elephanta Oil and Inds.; 2003-(152)-ELT-0257-Supreme Court

2 Kusum Bhai DayaBhaiPatel Vs Commissioner of Customs 1995979) ELT 292 Tri
Mumbai

3 A K Jewllers vs Commissioner of Customs Mumbai; 2003(155) E L T. 585 (Tri- Larger
Bench)

4 Patel vs Commissioner of Customs Citation 2003(153) ELT 226 Tr

5 M V Marketing and Supplies vs Commissioner of Customs (Import), Chennai, 2004(178) E L.T 1034 (Tri-Chennai)

6 Revision order No 38/2008 passed in the case of Mrs Majeeda Mohammed Yunus, 178/2008 passed in the case Mr Ravinder Sadhuram Dulani, 33/2008 Mr Deepak Hiralal Parekh, 34/2008 Mr Pradeep Kumar Bhanwarlal, 392/2002 Mr Nasir Asgar Mirab passed by RA, New Delhi

On the above grounds, the Applicant prayed to allow redemption of gold for re-export on payment of fine and reduction of personal penalty

6 1 Personal hearing in the case was scheduled on 11 08 2023. Shri. N J Heera, Advocate appeared for the personal hearing on 11.08 2023 and submitted that the applicant was a foreign national and brought some gold. He requested to allow redemption of the goods on reasonable fine and penalty for re-export.

7 The Government has gone through the facts of the case and observes that the Applicant had brought assorted gold jewellery totally weighing 1393 grams 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 Applicant had not disclosed that they were carrying dutiable goods However, after clearing through the green channel of Customs and on being intercepted, resulted in the recovery of silver coated belt buckle made of gold totally weighing 583 grams valued at Rs 17,15,873/- from the belt worn, were recovered from the Applicant and it revealed his intention of not to declare the said gold and thereby evade payment of Customs Duty. The confiscation of the gold was therefore justified and thus the Applicant had rendered himself liable for penal action

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 to confiscation under Section 111(d) of the Customs Act, 1962

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 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 Government finds that the Applicant is a Sudanese national and was caught with gold It is noted that there have been several instances where Sudanese nationals were found indulging in carrying undeclared gold. As the Applicant had not declared the silver coated belt buckle made of gold totally weighing 583 grams valued at Rs 17,15,873/- recovered from the belt worn by him which was cleverly concealed by coating it with silver from the Applicant at

the time of arrival, the confiscation of the same was justified. Government agrees with the findings of OAA that being Sudanese national, the applicant is not 'eligible passengers' in terms of Notification No 50/2017-Cus dated 30.06.2017 and that the quantity of impugned gold cannot be treated as bonafide baggage of passenger in terms of said Notification Government also observes that applicant had admitted in his statement that he was carrying the impugned gold in concealed manner to avoid detection by customs and duty thereon.

13 In view of the foregoing paras, the Government finds that as the applicant had not declared the gold at the time of therefore absolute confiscation of the same was justified Considering the above facts, Government is not inclined to modify the absolute confiscation upheld by the AA.

14 Applicant has also pleaded for setting aside the penalty imposed on him. The market value of the gold in this case is Rs 17,15,873/-. From the facts of the case as discussed above, Government finds that the penalty of Rs 1,75,000/- under Section 112 of the Customs Act, 1962 is commensurate to the omissions and commissions of the Applicant and is not inclined to interfere in the same.

15 In view of the above, the Government upholds the order of absolute confiscation of gold passed by the appellate authority The penalty of Rs 1,75,000/- imposed under Section 112 of the Customs Act, 1962 by the OAA and upheld by the AA is sustained

16 The Revision Applications are disposed of on the above terms

( SHRAWAN KUMAR )
Principal Commissioner & ex-officio
Additional Secretary to Government of India

ORDER NO 35 /2024-CUS (WZ)/ASRA/MUMBAI DATED 17-1 24

To

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2 Sr P S. to AS (RA), Mumbaı
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