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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. 371/240/B/WZ/2019-RA / 1422 : Date of Issue : 15.03.2023

ORDER NO. 354 /2023-CUS (WZ)/ASRA/MUMBAI DATED 14.03.2023
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. 371/240/B/WZ/2019-RA

Applicant : Shri. Vijay Kumar Bhambani

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

Subject : Revision Application filed, under Section 129DD of the
Customs Act, 1962 against the Order-in-Appeal No.
MUM-CUSTM-PAX-APP-1033/18-19 dated 24.01.2019
issued on 28.01.2019 through F.No. S/49-116/2016/AP,
passed by the Commissioner of Customs (Appeals),
Mumbai – III.

ORDER

This revision application has been filed by Shri. Vijay Kumar Bhambani (herein referred to as Applicant) against the Order-in-Appeal No. MUM-CUSTOM-PAX-APP-1033/18-19 dated 24.01.2019 issued on 28.01.2019 through F.No. S/49-116/2016/AP passed by the Commissioner of Customs (Appeals), Mumbai - III.

2. Briefly stated the facts of the case are that on 24.02.2018, the Applicant was intercepted by the Customs Officers at CSMI Airport, Mumbai after he had opted for the green channel. Applicant had arrived at Mumbai from Dubai onboard Spice Jet Flight No. SG-014. A piece of crude gold bar weighing 150 grams and valued at Rs. 4,18,283/- was recovered from his body cavity i.e. rectum. The applicant had accepted to have carried the said goods concealed in his rectum.

3. After, due process of law, the Original Adjudicating Authority (OAA) viz, the Astd. Commr. Of Customs, CSMI Airport, Mumbai vide Order-In-Original No. Air Cus/T2/2111/2108/2018-'A'-Batch dated 24.02.2018 ordered for the absolute confiscation of the 1 cut piece of crude gold bar, totally weighing 150 grams, valued at Rs. 4,18,283/- under Section 111(d), (l) & (m) of the Customs Act, 1962. Penalty of Rs. 15,000/- was also imposed on the applicant under Section 112(b),(i) & (ii) 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 Order-in-Appeal No. MUM-CUSTOM-PAX-APP-1033/18-19 dated 24.01.2019 issued on 28.01.2019 through F.No. S/49-116/2016/AP disposed

of the appeal holding that he did not find it necessary to interfere in the OIO passed by OAA.

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

5.01. that the impugned OIA is bad in law and unjust; has been passed without giving due consideration to the documents on record and facts of the case,

5.02. that the lower authorities ought to have appreciated that dutiable goods brought in by the Applicant are neither restricted nor prohibited,

5.03. that the applicant had brought this type of goods for first time and there was no previous case registered against him,

5.04. that the Show Cause Notice issued by the Respondent clearly revealed that the impugned goods/ gold were dutiable goods and not prohibited goods; that the acts and/or omissions on the part of the applicant to evade Customs duty could only be done in respect of dutiable goods and not prohibited goods; that once the department or respondent had accepted that the goods are dutiable, then the option to redeem the goods as provided under Section 125 of the Customs Act, 1962 should be granted to the applicant.

5.03. that the allegation of concealment in his rectum is totally incorrect and has not been supported with any X-ray report nor by a Doctor's examination; that no panchanama was made to substantiate the claim of the department that the gold had been recovered from his rectum.

5.04. that in RA Order no. 166/10-CUS dated 15.04.2010 in the case of Abdul Razack Abdul Bakki, foreign currency concealed inside the body was allowed to be released on payment of a redemption fine of Rs. 6,50,000/- under Section 125 of the Customs Act, 1962.

5.05. that in RA Order no. 167/10-CUS dated 15.04.2010 in the case of Ameer Ali Sarpudeen, foreign currency concealed inside the body was allowed to be released on payment of a redemption fine of Rs 6,50,000/- under Section 125 of the Customs Act, 1962.

5.06. The applicant has relied upon the undermentioned cases to defend their case;

(a). Hargovind Das K Joshi v/s. Collector of Customs [1992 (61) ELT 172 SC], Absolute confiscation of goods without considering question of

redemption on payment of fine although having discretion to do so under Section 125, matter remanded back.

(b). Alfred Menezes v/s. Commissioner of Customs (Mumbai) [2011 (236) ELT 587 (Tri-Mumbai)], Section 125(1) ibid clearly mandates that it is within the power of the adjudicating authority to offer redemption of goods even in respect of prohibited goods.

(c). T. Elvarasan v/s. Commr. Of Customs (Airport), 2011-266-ELT-167-Tri-Madras on the issue of gold chains brought from Singapore and seized on the ground of non-declaration on arrival; passenger living abroad for more than 6 months and entitled to import gold; gold not prohibited item option to redeem the goods; impugned gold ordered to be released provisionally subject to adjudication proceedings.

(d). Yakub Ibrahim Yusuf v/s. Commissioner of Customs, Mumbai [Final Order No. A/362/2010-WBZ-II/(CSTB) dated 28.10.2010 in Appeal no. C/51/1996-Mum] [2011-263-ELT-685-Tri-Mumbai]. *Term prohibited goods refers to goods like arms, ammunition, addictive drugs, whose import in any circumstance would danger or be detriment to health, welfare or morals of people as whole and makes them liable to absolute confiscation.*

(e). Mohini Bhatia vs. Commr. Of Customs [1999-106-ELT-485-Tri-Mumbai on prohibited goods and restricted goods. Gold was not included in the part II of restricted item.

(f). In Universal Traders vs. Commissioner [2009-240-ELT-A78-SC], the apex court allowed redemption of exported goods being not prohibited.

(g). In Gauri Enterprises vs. C.C Pune [2002-145-ELT-706-Tri-Bang], held that if similar goods had been released on fine earlier, selective absolute confiscation was not called for, Absolute Confiscation should be exception rather than a rule.

(h). In Shaik Jamal Basha v. Government of India 1997 (91) ELT 277 (A.P.) the Hon'ble High Court held that gold is allowed for import on payment of duty and therefore Gold in the form other than ornaments imported unauthorized can be redeemed.

(i). In VP Hameed v. Collector of Customs, Mumbai - 1994 (73) ELT 425 (Tri.) it was held that there is no bar in allowing redemption of gold being an item notified under Section 123 of Customs Act, 1962 or for any other reason.

(j). In P. Sinnasamy v. Commissioner of Customs, Chennai 2007 (220) ELT 308 (Tri-Chennai), the Hon'ble Court allowed redemption of

absolutely confiscated gold observing that option to redeem the gold to be given as there is no bar against such option by reason of goods being an item notified under Section 123 of Customs Act, 1962 or for any other reason.

(k). In Union of India Vs Dhanak M. Ramji - 2009 (248) ELT 127 (Bom.) affirmed vide 2010 (252) ELT A102 (S C) it was held that gold is not a prohibited item and discretion of redemption can be exercised to the person from whom it was recovered.

(l). In Kadar Mydin v. Commissioner of Customs (Preventive), West Bengal - 2001 (136) ELT 758 it was held that in view of the liberalised gold policy of the Government, absolute confiscation is unwarranted and redemption can be allowed.

(m). In Sapna Sanjeev Kohli v. Commissioner of Customs, Airport, Mumbai - 2008 (230) ELT. 305 the Tribunal observed that the frequent traveller was aware of rules and regulations and absolute confiscation of gold jewellery not warranted which may be cleared on payment of redemption fine.

(n). In Vatakkal Moosa v. Collector of Customs, Cochin 1994 (72) ELT. 473 (G.O.I.); it was held that absolute confiscation is not warranted and redemption of gold should be allowed.

(o). Halithu Ibrahim v. CC [2002-TIOL 195-CESTAT-MAD. = 2002 (148) ELT 412 (Tribunal); it was held that absolute confiscation is not warranted and redemption of gold should be allowed.

(s). In the COMMR. OF C. EX. & S.T., LUCKNOW VI MOHD. HALIM MOHD. SHAMIM KHAN Final Order No. A/71054/2017-SM(BR), dated 13-9-2017 in Appeal No. C/70595/2016, reported in 2018 (359) E.L.T 265 (Tri-All.) ; Only prohibited goods cannot be released on payment of redemption fine Gold not being prohibited goods, cannot be confiscated absolutely - Order permitting release of such gold on payment of redemption fine in lieu of confiscation upheld.

Under the circumstances, the applicant has prayed that in view of the aforesaid case laws, the gold be released on payment of nominal redemption fine as per Section 125 of the Customs Act, 1962; or pass any other order as deemed fit and proper.

6. Applicant has filed an application for condonation of delay of about 73 days and he has attributed it to circumstances beyond his control. He has relied upon a case law of Apex Court on the issue of sufficient cause in Collector, Land Acquisition, Anantnag vs. Mrs. Katiji [1987-2-SCC-107]

7. Personal hearing in the case was scheduled for 09.12.2022. Shri. N.J Heera, Advocate for the applicant appeared for personal hearing on 09.12.2022 and submitted that applicant brought small quantity of gold for personal use, that applicant is not a habitual offender. He requested to release the gold on nominal fine and penalty.

8. On the issue of condonation of delay, Government notes that the revision application has been filed on 19.07.2019. The OIA which is dated 24.01.2019 was issued on 28.01.2019. Applicant has claimed that the OIA was received on 05.02.2019. This has not been refuted by the respondent. Accordingly, the applicant was required to file the revision application within 3 months i.e. by 06.05.2019. Government notes that an extension period of 3 months was available to the applicant which would have expired on 04.08.2019. Government notes that the revision application was filed on 19.07.2019 which is well within the extension / condonable period of 3 months. Therefore, prayer for condonation of delay is accepted and Government condones the delay.

9. The Government has gone through the facts of the case. The Applicant was intercepted after he had passed through the green channel. The applicant had not declared the gold bar. The gold is in primary form. He admitted to having concealed the gold bar in his body cavity. It is clear that the applicant had resorted to concealment to smuggle gold and evade duty. This action manifests that applicant had no intention to pay the Customs duty. The Applicant had not declared the impugned gold as required under section 77 of

the Customs Act, 1962. The type of concealment adopted to evade duty is important here. The applicant had pre-planned and selected an ingenious and risky method that he had used to avoid detection and thereby to evade Customs duty. The confiscation of the gold is therefore, justified and thus, the Applicant had rendered herself liable for penal action.

10. 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”.

11. 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, is liable for penalty.

12. 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. Government observes that the manner in which the gold was concealed i.e. inside his own body, reveals the intention of the Applicant. It also reveals his criminal bent of mind and a clear intention to evade duty and smuggle the gold into India. Quantity of gold is not important, the method adopted is of relevance. Also, the gold was in primary. The circumstances of the case especially the ingenious concealment which could be risky to the applicant’s life, adopted by

him, probates that the Applicant had no intention of declaring the gold to the Customs at the airport. The method of concealment indicates and the same was conscious and pre-meditated. All these have been properly considered by the Appellate Authority and the lower adjudicating authority while absolutely confiscating the gold bar.

14. The main issue in the case is the manner in which the impugned gold was being brought into the Country. 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 clever, ingenious and risky with a clear attempt to smuggle gold, it is a fit case for absolute confiscation which would also be a deterrent to such offenders. Thus, taking into account the facts on record and the gravity of the offence, the adjudicating authority had rightly ordered the absolute confiscation of gold. But for the intuition and the diligence of the Customs Officer, the gold would have passed undetected. The redemption of the gold will encourage non-bonafide and unscrupulous elements to resort to concealment and bring 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 order of the Appellate authority upholding the order of the adjudicating authority is therefore liable to be upheld.

15. Government notes that during the spot adjudication, the applicant had admitted that he had concealed the cut piece of gold in his body cavity. In the OIO it is recorded that the cut piece was recovered from rectum. Later, he has claimed that no X-ray has been produced / no panchanama had been prepared. Government, notes that this claim on the part of the applicant is an afterthought ostensibly resorted to somehow obtain a favourable order.

16. The Government finds that the penalty of Rs. 15,000/- imposed on the applicant under Section 112(b),(i) & (ii) of the Customs Act, 1962 by the OAA and upheld by the AA is commensurate with the omissions and commissions committed and is not inclined to interfere in the same.

17. As discussed above, Government does not find it necessary to interfere in the OIA passed by the AA, which is legal and proper.

18. The Revision Application filed by the applicant is dismissed. .

Shrawan
14/3/23
(SHRAWAN KUMAR)

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

ORDER No. 354 /2023-CUS (WZ) /ASRA/MUMBAI DATED 14 .03.2023

To,

1. Shri. Vijay Kumar Bhambani, Flat No. 108, Rekha Apts., Near SES School, Ulhasnagar, Thane : 421 001.
2. Pr. Commissioner of Customs, Terminal – 2, Level – II, Chhatrapati Shivaji International Airport, Sahar, Mumbai – 400 099.

Copy to:

1. A.M Sachwani / V.M Advani / N.J Heera / R.R Shah, Advocates, Nulwala Bldg, Ground Floor, 41, Mint Road, Opp. G.P.O, Fort, Mumbai ; 400 001.
2. Sr. P.S. to AS (RA), Mumbai.
3. File Copy.
4. Notice Board.