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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. 371/28/B/WZ/2019-RA / 167^D : Date of Issue : 21.03.2023

ORDER NO. 368/2023-CUS (WZ)/ASRA/MUMBAI DATED 17.03.2023
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.

Applicant : Shri. Mohammed Aslam Khadirmeeran Hussaina

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-951/2018-19 dated 28.12.2019 issued
on 09.01.2019 through F.No. S/49-148/2017/Airport
passed by the Commissioner of Customs (Appeals),
Mumbai - III.

ORDER

This revision application has been filed by Shri. Mohammed Aslam Khadirmeeran Hussaina (hereinafter referred to as the Applicant) against the Order-In-Appeal No MUM-CUSTOM-PAX-APP-951/2018-19 dated 28.12.2019 issued on 09.01.2019 through F.No. S/49-148/2017/Airport passed by the Commissioner of Customs (Appeals), Mumbai - III.

2. Brief facts of the case are that the applicant on arrival at CSMI Airport on 14.11.2015 from Riyadh Jet Airways Flight 9W-0523 was intercepted by the Customs Officers at the exit gate after having cleared himself through the green channel. On screening of one of his baggage through the screening machine, a dark black image of unusual rectangular shape was seen in the water dispenser of 'CLICKON' brand kept in the baggage. With the help of technical staff of GVK airport, the compressor of the said water dispenser was cut opened using a cutting grinder. The central winding section was found covered with some black coloured material. On unwrapping the same, 17 nos of gold bars of 10 tolas each, totally weighing 1980 grams, 03 nos of gold coins weighing 24 grams and 01 nos of heart shaped gold pendant weighing 6 grams, all collectively weighing 2010 grams, valued at Rs. 47,10,395/- were recovered.

2(b). In his statement recorded under Section 108 of the Customs Act, 1962, the applicant stated that he had stayed at Riyadh for just a month and had carried the impugned gold for a monetary consideration. He admitted to concealing the gold to avoid detection by Customs and to evade the Customs duty. For the purpose of carrying out further investigations, numerous summons were issued to the applicant. However, he did not join the investigations.

2(c). The impugned gold were assayed by a Government Approved Valuer who certified that the 17 gold bars of 10 tolas each were of 24 kts purity and the 03

nos of gold coins and the heart shaped gold pendant were of 22 kts and collectively, valued at Rs. 47,04,489/-.

3. After due process of the law, the Original Adjudicating Authority (OAA), viz Additional Commissioner Of Customs, CSMI Airport, Mumbai, vide Order-In-Original No. ADC/RR/ADJN/483/2016-17 dated 23.01.2017 issued through S/14-5-24/2016-17/Adjn (SD/INT/AIU/395/2015-'A' ordered for the absolute confiscation of the 17 gold bars of 10 tolas, totally weighing 1980 grams, 03 nos of gold coins of 24 grams and 01 nos of heart shaped gold pendant of 6 grams, all collectively weighing 2010 grams, valued at Rs. 47,04,489/- under Section 111(d), 111(1) and 111 (m) of the Customs Act, 1962 and a penalty of Rs. 4,70,000/- was also imposed on the applicant under Section of 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, who vide Order-In-Appeal No. MUM-CUSTOM-PAX-APP-951/2018-19 dated 28.12.2019 issued on 09.01.2019 through F.No. S/49-148/2017/Airport who did not find any reason to interfere in the impugned OIO.

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

5.01. that the order passed by the appellate authority was bad in law and unjust; that the OIA has been passed without due consideration to the documents on record and facts of the case; that the goods were neither restricted nor prohibited was not appreciated by the AA; that no previous case has been registered against applicant; that evasion of Customs duty can be done only in respect of dutiable goods and not on prohibited goods; that option to redeem the goods under Section 125 of the Customs Act, 1962 ought to have been granted by the AA; that various judgements passed by the Apex Court, High Courts, Tribunal have held that gold was

neither restricted nor prohibited and therefore it should not be confiscated absolutely.

5.02. to buttress their case, the applicant has relied upon the following case laws;

(i). 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.

(ii). 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.

(iii). 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.

(iv). 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.*

(v). 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.

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

(vii). 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.

(viii). 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.

(ix). 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.

(x). 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.

(xi). 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.

(xii). 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.

(xiii). 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.

(xiv). Vatakkal Moosa vs. Collector of Customs, Cochin - 1994(72)ELT473 (G.O.I.); it was held that absolute confiscation is not warranted and redemption of gold should be allowed.

(xv). 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.

(xvi). Krishnakumari v. CC, Chennai - 2008 (229) ELT 222 (Tri-Chennai) ; it was held that absolute confiscation is not warranted and redemption of gold should be allowed.

(xvii). S. Rajagopal v. CC, Trichy - 2007 (219) ELT 435 (Tri-Chennai); it was held that absolute confiscation is not warranted and redemption of gold should be allowed.

(xvii). M. Arumugam v. CC, Tiruchirappalli, 2007 (220) ELT 311 (Tri-Chennai); it was held that absolute confiscation is not warranted and redemption of gold should be allowed.

(ixx). 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 to the Revision Authority that the gold may be released on payment of nominal redemption fine as per Section 125 of the Customs Act, 1962 along with applicable duty; personal penalty may be reduced or to pass any other order as deemed fit and proper.

6. Personal hearings in the case was scheduled for 29.12.2022, 06.01.2023. Shri. N.J Heera, Advocate appeared for personal hearing on 29.12.2022 and submitted that quantity of gold was not very large, applicant is not a habitual offender, gold is not prohibited and there was no ingenious concealment. He requested to release the goods on reasonable fine and penalty.

7. The Government has gone through the facts of the case and notes that the applicant had not declared the gold while availing the green channel facility. The impugned gold of substantial quantity had been ingeniously concealed inside the compressor of the water dispenser. The gold bars were of 24Kts i.e. it was in primary form which indicates that the same was for commercial use. The applicant clearly 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 was returning after staying abroad for only a month. The gold bars had been cleverly and ingeniously concealed and to retrieve the same, the compressor was required to be cut opened. The applicant had adopted an ingenious concealment method to avoid detection. The nature of concealment reveals the mindset of the applicant to

not only evade duty but smuggle the gold. It also reveals that the act committed by the applicant was conscious and pre-meditated. The applicant had an opportunity to declare the dutiable goods in his possession but having confidence in the nature of his concealment, he failed to avail the same. Had he not been intercepted, the applicant would have gotten away with the large quantity of gold concealed in the water dispenser. Government finds that the confiscation of the gold was 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 ‘applicant’ 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 besides the quantum of gold which is quite high and its purity and shape, indicating that the same was for commercial use, the manner in which the gold was attempted to be brought into the country is vital. The impugned gold had been cleverly, consciously and ingeniously concealed

inside the compressor of the water dispenser which reveals the intention of the applicant. The compressor was required to be cut opened to retrieve the gold bars. The purity and primary form of the gold indicated that the same was for commercial use. Applicant was acting for monetary benefit and gold was being smuggled for commercial purpose. The aforesaid quantity, purity and ingenious concealment, probates that the applicant 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 ordering the absolute confiscation of the gold and appellate authority had rightly upheld the same.

12. 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, conscious and ingenious, type of gold being for commercial use, this being a clear attempt to brazenly smuggle the impugned gold, 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 impugned gold. But for the intuition and the diligence of the Customs Officers, the gold would have passed undetected. 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. Government is in agreement with the order of the AA absolutely confiscating the impugned gold. The absolute confiscation of the gold would act as a deterrent against such persons who indulge in such acts with impunity. Considering the aforesaid facts, In this case, judicious application of discretion in light of directions of Hon'ble Supreme Court as contained in decision at para 10, above is evident. Government is inclined not to interfere in the order of absolute confiscation passed by the AA.

13. Government finds that the penalty of Rs. 4,70,000/- imposed on the applicant by the OAA under Section 112(a) & (b) of the Customs Act, 1962 and upheld by the AA is commensurate with the omissions and commissions committed by the applicant in carrying the gold in an ingenious manner and therefore, is not inclined to interfere in the same.

14. For the aforesaid reasons, the Government finds that the OIA passed by the AA is legal and proper and does not find it necessary to interfere in the same. The Revision Application filed by the applicant, fails.

15. Accordingly, for the reasons stated above, the Revision Application filed by the applicant is dismissed.


(SHRAWAN KUMAR)

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

ORDER No. 368/2023-CUS (WZ) /ASRA/MUMBAI DATED 17.03.2023

To,

1. Shri. Mohammed Aslam Khadirmeeran Hussaina, S/o. Khadir Meeran Mohammed Hussaina, Hajee Husaina Magdoomiya Mohalla, Cross Line, Murdeshwar, Bhatkal, Karwar, Karnataka, Pin : 581 350.
2. Pr. Commissioner of Customs, Level - II, Terminal - 2, Chhatrapati Shivaji Maharaj Airport, Sahar, Andheri West, 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.