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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

(i). F.No. 380/25/B/WZ/2017-RA / 7541 : Date of Issue 14.12.2022

ORDER NO. 371 /2022 CUS (WZ)/ASRA/MUMBAI DATED 12.12.2022
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.

(i). F.No. 380/25/B/WZ/2017-RA

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

Respondent : Shri. Ijaz Ahamed

Subject : Revision Applications filed respectively, under Section 129DD
of the Customs Act, 1962 against the Order-in-Appeal No. MUM-
CUSTM-PAX-APP-206/2017-18 dated 31.05.2017 issued on
06.06.2017 through F.No. S/49-63/2015/AP passed by the
Commissioner of Customs (Appeals), Mumbai – III.

ORDER

This revision application has been filed by Pr. Commissioner of Customs, CSMI Airport, Mumbai (hereinafter referred to as the Applicant) against the Order-in-Appeal No. MUM-CUSTM-PAX-APP-206/2017-18 dated 31.05.2017 issued on 06.06.2017 through F.No. S/49-63/2015/AP passed by the Commissioner of Customs (Appeals), Mumbai – III.

2. Brief facts of the case are that the respondent on arrival at CSMI Airport, Mumbai from Riyadh on 22.11.2013 by Air India Flight No. AI-920 /22.11.2013 was intercepted by the Customs Officers at the exit gate after he had cleared himself through the green channel. On screening of his two checked-in baggages, some suspicious objects were noticed. A 'Dingling Professional Hair Clipper Model No. RF-609' which was unusually heavy was found. Examination of the hair clipper led to the recovery of ten gold bars of ten tolas each , totally weighing 1166 grams and valued at Rs. 30,85,000/-. Also, six mobiles, totally valued at Rs. 75,000/- were found. The respondent had admitted the knowledge, possession, transportation concealment, non-declaration of the gold bars and other dutiable items recovered from him.

3. After due process of the law, the Original Adjudicating Authority (OAA), viz Jt. Commissioner of Customs, CSMI Airport, Mumbai vide Order-in-Original No. JC/RR/ADJN/214/2014-15 dated 28.12.2014 issued through F.No. S/14-5-115/2013-14Adj (SD/INT/AIU/UNI/144/2013 AP'B"] ordered for the absolute confiscation of the ten gold bars, weighing 1166 gms, valued at Rs. 30,85,000/- and other dutiable items valued at Rs. 75,000/- under Section 111(d), 111(l) & 111(m) of the Customs Act, 1962 and a penalty of Rs. 3,00,000/- 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-206/2017-18 dated 31.05.2017 issued on 06.06.2017 through F.No. S/49-63/2015/AP allowed the impugned goods (i.e. 10 gold bars and 6 mobile phones) to be redeemed on payment of a fine of Rs. 6,00,000/- along with applicable duty. However, the penalty of Rs. 3,00,000/- imposed on the respondent by the OAA was upheld.

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

5.01. that the respondent had opted for the green channel for Customs clearance without declaring the impugned goods in the Customs declaration form; that the respondent had wilfully failed to make a true declaration of the contents of his baggage to Customs as required under Section 77 of the Customs Act, 1962; that AA had referred to a number of judgements in the impugned OIA which did apply to this case;

5.02. that the ratio of the judgement passed by Madras High Court in the case of Commissioner of Customs (AIR), Chennai vs. Samyanathan Murugesan [2009 (247) ELT 21(Mad).] pertaining to ingenious concealment was applicable to this case.

5.03. the case of Dhanak Ramji vs. UOI 2010-252-ELT-A-102-SC did not apply to this case as the aspect of ingenious concealment had not been discussed therein.

5.04. that the AA had erred in releasing the impugned gold bars and had wrongly applied discretion under Section 125 of the Customs Act, 1962 and had not considered that the gold bars was attempted to be brought into the country in an ingenious manner; that taking into account the facts of the case and the gravity of the offence, the OAA had rightly

ordered for the absolute confiscation of the impugned gold ingeniously concealed in the hair clipper.

5.05. that the judgement of the Apex Court in the case of Om Prakash Bhatia vs. Commr. Of Customs, Delhi (2003-155-ELT-423-SC) on the issue of prohibition subject to certain prescribed conditions to be fulfilled, was squarely applicable to this case.

5.06. that the appellate authority had relied upon order of CESTAT, Chennai in the case of A. Rajkumari Vs CC (Chennai) 2015 (321) ELT 540 (Tri.-Chennai) for drawing the conclusion for release of the impugned gold on redemption fine and also held that the Hon'ble Apex Court vide order in the case as reported in 2015 (321) ELT A 207 (SC) had affirmed the said CESTAT Order; that this Order had been dismissed by the Apex Court on the grounds of delay and not on merits; that citing this case by the appellate authority was not proper.

5.07. that the redemption on payment of fine and penalty would depend on the facts and circumstances of the case and other cases cannot be binding as a precedent; that judgment of Hon'ble Delhi High Court in the case of Jain Exports Vs Union of India 1987(29) ELT753 would be squarely applicable in this case.

Applicant prayed to the revisionary authority to set aside the order of the appellate authority and to restore the OIO or pass any order as deemed fit.

6. Personal hearing in the case was scheduled through the online video conferencing mode for 13.10.2021, 20.10.2021, 17.11.2021, 24.11.2021, 11.01.2022 and 03.02.2022. However, none appeared for the applicant or the respondent. Sufficient opportunities have been given to both the applicant and the respondent to put forth their case. As none appeared, 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 the respondent had not declared the gold while availing the green channel facility. The impugned gold i.e. 10 gold bars of ten tolas each, had been ingeniously concealed

inside hair clipper. The gold was in primary form which indicates that the same was for commercial use. The respondent clearly had failed to declare the goods to the Customs at the first instance as required under Section 77 of the Customs Act, 1962. Further, the respondent had cleverly and ingeniously concealed the gold bars in the hair clipper. The nature of concealment reveals the mindset of the respondent to not only evade duty but smuggle the gold. It also reveals that the act committed by the respondent was conscious and pre-meditated. The respondent 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 respondent would have gotten away with the gold concealed in the drill machine.

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 is quite large and in primary form, the same was for commercial use, and the manner in which it was attempted to be brought into the country is vital. The impugned gold was cleverly, consciously and ingeniously concealed which reveals the intention of the respondent. It also revealed his criminal bent of mind and a clear intention to evade duty and smuggle the gold into India. The appellate authority at para 15 of his order has observed that the *'I also find that one of the crucial aspects of the case as included in para 7 of the impugned Order is that the passenger claimed before the adjudicating authority that he was a NRI working abroad for 9 months and was eligible passenger under Notification no. 12/2012 Cus dated 17.03.2012 and that he had produced copy of purchase invoice which has not been taken into consideration. Besides, the Order also suggest that the appellant passenger had retracted his initial statement. There are no contrary findings on the status of the passenger having returned after stay abroad for more than 9 months. The investigation has failed to find out about the alleged owner of the gold or whom the gold was to be delivered at Mumbai'*. Government notes that the aforesaid circumstances of the case and ingenious concealment, probates that the respondent had no intention of declaring the gold to the Customs at the airport. The actions i.e. non-declaration and ingenious concealment of the respondent clearly indicate that he harboured no intention of paying the Customs duty. Upon being unsuccessful in his attempt to sneak out the gold bars, as an afterthought, the respondent has claimed that he was eligible to import the gold. All these and the retraction have been properly considered by the Original Adjudicating Authority while ordering the absolute confiscation of the gold and

the Government observes that appellate authority had erred in ordering for its release.

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, quantity being large, this being a clear attempt to brazenly smuggle the impugned gold bars, 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 original adjudicating authority had rightly ordered the absolute confiscation of the impugned gold. But for the intuition and the diligence of the Customs Officer, the gold would have passed undetected. Further, respondent was also attempting to smuggle mobile phones alongwith gold. This further confirms that respondent was indulging in blatant contravention of the Customs law. If the gold is not detected by the Custom authorities, the passenger gets away with smuggling and if detected, 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. Government is in agreement with the order of the OAA absolutely confiscating the impugned gold. The absolute confiscation of the gold jewellery would act as a deterrent against such persons who indulge in such acts with impunity. Considering the aforesaid facts, Government finds that the appellate authority had erred in ordering for the release of the gold jewellery. The reliance placed by the appellate authority on the judgement of A. Rajkumari Vs CC (Chennai) 2015 (321) ELT 540 (Tri.-Chennai) while allowing for the release of the gold was mis-placed. Therefore, the Government finds that the order passed by

the appellate authority releasing the impugned gold deserves to be set aside and the Government for the aforesaid reasons, is inclined to restore the original order passed by the OAA.

13. Government finds that the penalty of Rs. 3,00,000/- imposed on the respondent 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 and is not inclined to interfere in the same.

14. For the aforesaid reasons, the Government sets aside the order passed by the appellate authority and restores the Order-in-Original passed by the OAA as legal and proper. The Revision Application filed by the applicant, succeeds.

15. Accordingly, the Revision Applications filed by the applicant is allowed in in the above terms.


(SHRAWAN KUMAR)

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

ORDER No. 37\ /2022-CUS (WZ) /ASRA/MUMBAI DATED \2.12.2022

To,

1. Pr. Commissioner of Customs, CSI Airport, Terminal - 2, Level - 2, Andheri East, Mumbai - 400 099.
2. Shri. Ijaz Ahamed, 4-47-2, Kallau Melagudde House, Permannur, Mangalore, D.K, Pin : 545 017.

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