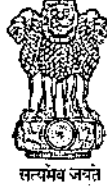


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GOVERNMENT OF INDIA  
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F.No. 371/191/B/WZ/2019-RA/2498 : Date of Issue : 12/12/2022

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ORDER NO. 373/2022-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.

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Applicant : Shri. Mohammed Zeeshan Pakhali

Respondent : Commissioner of Customs, Custom House, Marmagoa, Goa

Subject : Revision Application filed, under Section 129DD of the Customs Act, 1962 against the Order-in-Appeal No. GOA-CUSTM-000-APPP-010-2019-20 dated 23.05.2019 issued on 24.05.2019 through F.No. A-01/CUS/GOA/2019-20 passed by the Commissioner Appeals, CGST & Customs, Patto, Panaji, Goa 403-001.

**ORDER**

This revision application has been filed by Shri. Mohammed Zeeshan Pakhali (herein referred to as Applicant) against the Order in Appeal No. GOA-CUSTM-000-APPP-010-2019-20 dated 23.05.2019 issued on 24.05.2019 through F.No. A-01/CUS/GOA/2019-20 passed by the Commissioner Appeals, CGST & Customs, Patto, Panaji, Goa 403-001.

2. Brief facts of the case are that the applicant had arrived at Dabolim International Airport [DIA], Goa from Sharjah by Air Arabia Flight No. GI-0492 on 28.07.2018 and had been intercepted by the Customs Officers while he was attempting to pass through the green channel. A scrutiny of his passport by the Customs Officers revealed that the applicant was a frequent traveller and had come to India after a short stay abroad. An examination of his baggage led to the recovery of 39 cartons of 'Gudang Garam Cigarettes', valued at Rs. 1000/- per carton, totally valued at Rs. 39,000/-. These cigarettes were in trade quantity and did not bear pictorial warning as per the Cigarettes and Other Tobacco Products Act, 2003. [COTPA, 2003]. A personal search of the applicant led to the recovery of a belt buckle coated with silver colour paint which was unusually heavy. The applicant admitted that the belt buckle was made of crude gold and had been polished with silver colour paint. The said buckle was put through a spectrometer which indicated that the metal was gold of purity 23.936 karats, weighing 160 grams and valued at Rs. 4,46,554/-. The applicant was found to be carrying 39 cartons of 'Gudang Garam' cigarettes and 160 grams of gold. Since, the gold and cigarettes had been imported (a). without any valid declaration under Section 77 of Customs Act, 1962, (b). the said cigarette cartons / packets did not contain the statutory pictorial warning as prescribed under Cigarettes and Other Tobacco Products Act, 2003, (c). the cigarettes were in commercial quantity and were restricted items, therefore, the same were placed under seizure as they were liable for confiscation under Section 111 of the Customs Act, 1962.

3. The Original Adjudicating Authority (OAA) viz, Assistant Commissioner of Customs, Custom House, Marmagoa, Goa vide Order-In-Original 04/2018-19-AC(CUS) dated 25.03.2019 issued through F.No. 11/49/2018-R&I(APT)(AIU)/Adj., ordered for the absolute confiscation of (i). the 160 grams of gold valued at Rs. 4,46,554/- under Section 111(d), 111(i), 111(j), 111(l) and 111(m) of the Customs Act, 1962 and (ii). the 39 cartons of Gudang Garam brand cigarettes of foreign origin, valued at Rs. 39,000/- under Section 111(d), 111(j), 111(l) and 111(m) of the Customs Act, 1962 read with Section 7(1) (3) of the Cigarettes and Other Tobacco Product (Prohibition of Advertisement and Regulation of Trade and Commerce, Production, Supply and Distribution) Act, 2003 and amended Rules as per para 1(i)(1), para 2(2), para 3(2)(a) and (b) made under the Cigarettes and Other Tobacco Products (Packaging and Labeling) Rules, 2008. Also, a penalty of Rs. 60,000/- under Section 112(a) of the Customs Act, 1962 was imposed on the applicant.

4. Aggrieved with the Order, the applicant filed an appeal before the Appellate Authority viz Commissioner Appeals, CGST & Customs, Patto, Panaji, Goa 403-001 who vide his Order-in-Appeal no. GOA-CUSTM-000-APPP-010-2019-20 dated 23.05.2019 issued on 24.05.2019 through F.No. A-01/CUS/GOA/2019-20, rejected the appeal and upheld the OIO.

5. Aggrieved with the order of the Appellate authority, the Applicant has filed this revision application inter alia on the grounds that;

5.1. that Gold is not prohibited item. It is submitted that gold is not a prohibited item and is only a restricted item. Prohibition relates to goods which cannot be imported or exported by anyone, such as arms, ammunition, drugs etc. The intention behind the provisions of Section 125 is that import/export of such goods under any circumstances would cause danger to the health, welfare or morals of people as a whole. This would not apply to a case where import/export of goods is permitted subject to certain conditions or to a certain category of persons and which are ordered to be confiscated for the reason that the condition has not been complied with. In such a situation, the release of such goods

confiscated would not cause any danger or detriment to public health. Admittedly, import/export of gold is permitted subject to certain conditions, therefore, it would not fall under the prohibited category as envisaged under the said of Section 125 of the Customs Act, 1962. They have relied upon following the case Commissioner of Customs (Preventive), West Bengal Vs. India Sales International reported in 2009 (241) ELT 182 (Cal.);

- 5.02. that notification no. 50/2017-Cus dated 30.06.2017 cannot be made applicable in the present case; that this notification was only an exemption notification and did not stipulate that gold was prohibited and the eligibility of the applicant for concessional rate of duty was never an issue claimed by the applicant.; that even the Baggage Rules does not prohibit the importation of gold.
- (a). Madras High Court in, Commissioner Of Customs (Air) vs Samynathan Murugesan on 27 April, 2009., and
  - (b). Madras High Court Aiyakannu vs Joint Commissioner Of Customs on 2nd March, 2012
  - (c). Om Prakash Bhatia vs Commissioner of Customs, Delhi 2003(155) ELT 423 (S.C).
  - (d). In T. Elavarasan Vs Commissioner of Customs (Airport), Chennai 2011 (266) ELT 167 (Mad),
  - (e). Hon'ble Andhra Pradesh High Court in the case of Shaikh Jamal Basha vs Government of India - 1997 (91) ELT 227(AP),
  - (f). In the the case of U.O.I vs. Dhanak Madhusudan Ramji Versus [2003(248) ELT 128 (Bom)],
  - (g). Sapna Sanjeev Kohli Vs Commissioner of Customs, Airport, Mumbai [2010(253) ELT A52(SC)]
- 5.03. that the decision in the cases relied upon by the OAA could not be made applicable to the case of the applicant.; that they have relied upon the following case laws,
- (a). the Apex Court's Order in the case of CCE, Calcutta Vs Alnoori Tobacco Products 12004 (170) ELT 135 (SC)] where it has been stressed that the facts of decision relied upon should actually fit factual situation of a given case and to exercise caution while applying the ratio of one case to another; this was also reiterated by the Apex Court in the case of Escorts Ltd. Vs CCE, Delhi [2004 (173) ELT 113 (SC)], wherein it has been observed that one additional or different fact may make difference between conclusion in two cases; and so, disposal of cases by blindly placing reliance on a decision is not proper; that further in the case of CC (Port), Chennai Vs Toyota Kirloskar [2007 (213) ELT 4 (SC)], it has been observed by the Hon'ble Supreme Court that the ratio of a decision has to be understood in factual matrix involved therein and that the ratio of decision has to be culled out from facts of given case;

- 5.04. that the applicant was eligible for the redemption of the gold. They have stated that the issue of absolute confiscation of goods and option of redemption came up in the case of CC (Prev) vs Uma Shankar Verma where it was held that where the goods are not prohibited, the authorities have no choice but to allow the option of redemption of goods on payment of fine.
- (a). they have also relied upon the case of Gauri Enterprises CC, Pune 2002 (145) ELT (705) (Tri Bangalore)
- (b). In VP Hameed Vs Collector of Customs Mumbai 1994(73) ELT 425 (Tri),
- (c). In Hargovind Das Joshi Vs Collector of customs 1992 (61) ELT 172(SC),
- (d). In the case of Mohamed Ahmed Manu Vs Commissioner of Customs, Chennai - 2006 (205) ELT 383 (Tri-Chennai), the Chennai Bench of the Tribunal has allowed redemption of the confiscated gold on payment of redemption fine.
- (e). Further, the Government of India in the case of Mohd Zia UlHaque Vs Addl Commissioner of Customs, Hyderabad vide revision order no 443/12-Cus dated 8-8-12, 2014 (214) ELT 849 (GOI) allowed the confiscated gold to be redeemed on payment of redemption fine.
- (f). It has been observed by Hon'ble CESTAT in the matter of Yaqub Ibrahim Yusuf Vs Commr. of Customs [2011(263) ELT 685] that prohibition relates to goods which cannot be imported by any one, such as arms, ammuniton, addictive substance viz. drugs
- 5.05. that applicant prays for the release of the cigarettes which had been brought for his personal consumption in terms of Section 18(1) of the COPTA.
- 5.06. that the applicant claimed ownership of the gold.
- 5.07. that they have also relied upon the undermentioned case laws,
- (a). Haiithu Ibrahim Vs Commissioner of Customs [2002 -TIOL 195 CESTAT-MAD],
- (b). Felix DorexFernnees vs Commissioner of Customs [2002 TIOL 194 CESTAT MUM],
- (c). Yakub Ibrahim Yusuf Vs CC, Mumbai 2011 (263) ELT 685 (Tri - Mumbai),
- (d). RejiCheriyam Vs CC, Kochi,
- (e). P.Sinnasamy Vs CC, Chennai 2007 (220) ELT 308 (Tri-Chennai)
- (f). Krishnakumari Vs CC, Chennai 2008 (229) ELT 222 (Tri-Chennai),
- (g). S.Rajagopal Vs CC, Trichy 2007 (219) ELT 435 (Tri-Chennai),
- (h). M Arumugam Vs CC, Tiruchirapalli, 2007 (220) ELT 311 (Tri-Chennai)
- (i). Shaik Jamal Basha V. Government of India (1997(91) E.L.T. 277 (A.P.),

- (j). Commissioner of Customs (Preventive) Vs. Uma Shankar Verma (2000 (120) E.L.T. 322 Cal.),
- (k). T.Elavarasan vs The Commissioner of Customs
- (l). etc.

5.08. that the applicant has claimed ownership of the goods and has prayed for its release on payment of redemption fine.

Under the circumstances, the applicant has prayed to the Revision Authority to release the gold on payment of appropriate fine, reasonable penalty and appropriate duty and to drop further proceedings. Also, the applicant has prayed for release of the cigarettes for self-consumption and that he undertook not to sell the cigarettes to any other person.

6. Personal hearings in the case was scheduled through the online video conferencing mode for 23.08.2022. Shri. Prakash Shingrani, Advocate for the applicant appeared for personal hearing and submitted that quantity of gold is very small, for personal use, there is no concealment, applicant is not a habitual offender. He requested for release of the goods.

7. **Cigarettes** :- The Government observes that the applicant was carrying 39 cartons of cigarettes in his baggage. The quantum of cigarettes carried was of commercial quantity. The Government observes that despite carrying commercial quantity of cigarettes, the applicant had not declared the impugned goods as required under Section 77 of the Customs Act, 1962. Cigarettes are restricted items as they are hazardous to health. It was incumbent on the applicant to have declared the same upon arrival. The facts of the case reveal that, a proper written declaration of the impugned goods was required to be made by the Applicant as required under Section 77 of the Customs Act, 1962. However, the applicant had failed to do so. Also, none of the cigarette cartons bear the pictorial health warning as required under the Cigarettes and Other Tobacco Products (Prohibition of Advertisement and Regulation of Trade and Commerce, Production, Supply and Distribution) Act, 2003 read with Cigarettes and Other Tobacco Products (Packing and Labelling) Rules, 2008. Such cigarette packets which do not bear the pictorial health warning are proscribed

to be sold in India. Hence, such cigarettes are prohibited for sale or consumption. The cigarettes brought were also of commercial quantity, thus warranting absolute confiscation of the goods. In view of the aforesaid facts, the Government finds that the absolute confiscation of the goods is justified and therefore liable to be upheld.

8. **GOLD IN THE FORM OF BELT BUCKLE:-** The Government has gone through the facts of the case, and notes that the applicant was attempting to pass through the green channel and had failed to declare the gold in his possession to the Customs at the first instance as required under Section 77 of the Customs Act, 1962. The applicant had been granted an opportunity to declare the goods in his possession. However, he chose not to do so. The silver coating and shape of the goods i.e. belt buckle, clearly reveals intention of the applicant and it is evident that the applicant had not intended to declare the same to Customs. The Government finds that the confiscation of the gold is therefore justified.

9.1. 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”.

9.2. 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 Applicants thus liable for penalty.

10. 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.*

11.1. Government notes that at para 3.4 of the impugned OIO, the OAA has observed the following,

*“3.4. I find that, the passenger is a repeat offender; he was earlier booked under an ITC case at Goa International Airport for importing 50 cartons of Gudang Garam cigarettes. ....”.*

11.2. Government notes that the above case of bringing 50 cartons of cigarettes is not sufficient to label a person a habitual offender. Government notes that the quantity of gold is small and the same was for personal use. The action and demeanor of the applicant indicates that the act of the applicant was to evade duty. Had it not been due to the alertness and diligence of the officers manning the exit gate, the applicant would have gotten away with the impugned gold without discharging the duty. Considering the quantity of gold, gold article being clearly visible, applicant not being a habitual offender, allowing redemption of gold article would be reasonable and fair.

12. Further, the plea made by the applicant that the cigarettes had been brought for his personal consumption is just an attempt to somehow obtain a favourable order. Since, pictorial health warnings are not depicted on the cartons / packets which is mandated under the law, the question of allowing its release cannot be entertained. The Government finds no merit in these averments made by the applicant and dismisses the same.

13. Government finds that the penalty imposed on the applicant is commensurate with the acts of omission and commissions committed and is not inclined to interfere in the same.

14. For the aforesaid reasons, the Government modifies the order passed by the AA only to the extent of allowing the gold belt buckle weighing 160 grams, valued at Rs. 4,46,554/- to be redeemed on payment of a fine of Rs. 90,000/- (Rupees Ninety Thousand only.) The absolute confiscation of the 39 cartons of Gudang Garam Cigarettes upheld by the AA is sustained. The penalty of Rs. 60,000/- imposed by the OAA and upheld by the AA is also sustained.

15. Accordingly, the Revision application is decided on the above terms.

  
12/12/22  
( SHRAWAN KUMAR )

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

ORDER NO. 373 /2022-CUS (WZ)/ASRA/MUMBAI DATED \2.12.2022

To,

1. Shri. Mohammed Zeeshan Pakhali, S/o. Muhmed Hanif Ismail Moosa Pakhali, 52, Fatmabi Amir Chawl Bldg, Room No. 20, 2<sup>nd</sup> Floor, Quresh Nagar, Kurla (East), Mumbai - 400 070.
2. The Commissioner of Customs, Custom House, Marmagoa, Goa - 403 803.

Copy to:

1. Shri. Prakash 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.