



GOVERNMENT OF INDIA
MINISTRY OF FINANCE
(DEPARTMENT OF REVENUE)

8th Floor, World Trade Centre, Centre – I, Cuffe Parade,
Mumbai-400 005

F.No. 380/104 & 105/B/WZ/2018-RA /43 : Date of Issue : 10.01.23

ORDER NO. 436-437/2022-CUS (WZ)/ASRA/MUMBAI DATED: 30.12.2022
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. 380/104 & 105/B/WZ/2018-RA

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

Respondent: Shri. Patel Harshit Thakur.

Subject : Revision Application filed, under Section 129DD of the
Customs Act, 1962 against the Order-in-Appeal No. MUM-
CUSTM-PAX-587 & 588/18-19 dated 28.09.2018 [(DOI:
05.10.2018)(S/49-344/2016-17/AP(Review)(D))] passed
by the Commissioner of Customs (Appeals), Mumbai – III.

ORDER

This revision application has been filed by Pr. Commissioner of Customs, CSI Airport Mumbai (herein after referred to as the Applicant) against the Order-In-Appeal No. MUM-CUSTM-PAX-587 & 588/18-19 dated 28.09.2018 [(DOI: 05.10.2018)(S/49-344/2016-17/AP(Review)(D))] passed by the Commissioner of Customs (Appeals), Mumbai – III.

2. Brief facts of the case are on 11.09.2014, the Customs Officers while screening the baggage of the respondent in the baggage screening machine at the Customs Arrival Hall, noticed some abnormal dark images in his stroller bag. These dark spots raised a suspicion that some precious metal had been concealed in the baggage. The respondent claimed the ownership of the stroller bag and to the query about possession of any contraband or dutiable goods, he had replied in the negative. Also, in the Customs Declaration form filed by the respondent, the col pertaining to 'Total Value of dutiable goods being imported' had been left 'blank'. The respondent had arrived from Bangkok onboard Jet Airways flight no. 9W-069 / 11.09.2014 and examination of his stroller bag resulted in the recovery of 5 pieces of gold, totally weighing 997 grams and valued at Rs. 25,54,314/- kept concealed and attached to the pipes and fitted inside the stroller bag.

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/072/2016-17 dated 26.05.2016 [(S/14-5-709/2014-15 ADJN)(SD/INT/AIU/UNI/663/2014 AP"C)], confiscated the gold totally weighing 997 gms valued at Rs. 25,54,314/- under Section 111(d), 111(1) and 111 (m) of the Customs Act, 1962 and granted an option to redeem the goods on payment of fine of Rs. 4,25,000/- under Section 125(1) of the Customs Act, 1962. Also, a penalty of Rs. 2,50,000/- was also imposed on the respondent under Section of 112 (a) and (b) of Customs Act, 1962.

4. Aggrieved by the said order, the applicant as well as the respondent filed an appeal before the appellate authority viz, Commissioner of Customs (Appeals), Mumbai – III who vide Orders-In-Appeal No. CUSTM-PAX-587 & 588/18-19 dated 28.09.2018 [(DOI: 05.10.2018)(S/49-344/2016-17/AP(Review)(D))] did not find any infirmity in the Order-in-Original dated 26.05.2016 passed by the OAA.

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

5.01. that the appellate order was not legal and proper

5.02. 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, and was in possession of five pieces of gold concealed in five packets wrapped with the black coloured foam and black coloured adhesive tape tagged with both the pipes and fitted inside the stroller bag totally weighing 997 grams valued at Rs. 25,54314/- therefore, the gold had been ingeniously concealed.

5.03. that the manner of recovery of the gold indicates that the concealment was not only ingenious but it was a premeditated act to smuggle the gold

5.04. that the respondent had not only admitted to the ownership, possession, carriage non-declaration of the gold under seizure but also to the concealment of the same with the sole intention of evading customs duty.

5.05. that the judgement of the Hon'ble High Court of Kerala in the case of Abdul Ruzak Vs. Union of India reported as in 2012(275) ELT 300(Ker.) was squarely applicable.

In this case, the Hon'ble High Court had held that

"the appellant, as a matter of right cannot claim release of the goods on payment of redemption fine and duty. Even though gold as such is not a prohibited item and can be imported subject to lot of restrictions including the necessity to declare the goods on arrival at the customs station and make payment of duty at the rate prescribed."

Therefore, in the present case the Appellate Authority's order was not correct as the impugned gold, totally weighing 997 grams, had been concealed in five packets wrapped with the black coloured foam and black coloured adhesive tape tagged with both the pipes and fitted inside the stroller bag

5.06. Also, the respondent was a frequent flier having travelled seven times in 2014 and the blatant mis-use of the facility of opting to clear through green channel by ingeniously concealing the gold indicates his greed and criminal mindset. In the present case, since the manner of concealment was and ingenious, it was a fit case for absolute confiscation as a deterrent to passengers for mis-using the facility of green channel.

5.07. The judgement of Hon'ble Supreme Court, in the case of Samyanathan Murugesan v/s Commissioner of Customs (AIR), Chennai-1 as reported in 2010(254) ELT A15 (SC) was squarely applicable to this case. Also, Hon'ble Delhi High Court case of Jain Exports Vs. Union of India 1987(29) ELT753 was applicable to this case.

Applicant has prayed to set aside the order passed by the appellate authority and to pass any order as deemed fit.

6. Personal hearing in the case was scheduled for 06.09.2019. Ms. Pushpa Anchan, Supdt. had appeared on behalf the applicant. Thereafter, upon change of the revisionary authority, personal hearing through online video conferencing mode were scheduled for 22.10.2021 / 19.10.2021, 22.10.2021 / 29.10.2021, 02.12.2021 / 08.12.2021. None appeared for the applicant and respondent. Sufficient opportunities have been accorded to the applicant and respondent to put forth and defend their case. Since, none have appeared for the applicant and respondent, 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 was carrying gold and had not declared the same to the Customs. During screening of his baggage, dark spots indicating presence of precious

metal were seen in his baggage. The gold had been innovatively and cleverly attached and tagged to both the pipes and fitted inside the stroller bag, The respondent was given an opportunity to come clean. However, he did not avail the same both in his written declaration and in reply to the query put forth to him. The Respondent had not filed a true declaration to the Customs and he had clearly failed to declare the goods to the Customs at the first instance as required under Section 77 of the Customs Act, 1962. It is clear that the respondent did not intend to declare the gold in his possession to Customs. It also reveals that the act committed by the respondent was conscious and pre-meditated. Had he not been intercepted by the Customs, the respondent would have gotten away with the gold. The Government finds that the confiscation of the gold is therefore, justified.

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 for confiscation under Section 111(d) of the Customs Act. It is undisputed that Section (l) and (m) are also applicable in this case as the gold was found concealed and it was not included in the declaration. Therefore, the gold was also liable for confiscation under these Sections.

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 'respondent' thus, liable for penalty.

11. 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.

12. A plain reading of the section 125 shows that the Adjudicating Authority is bound to give an option of redemption when goods are not subjected to any prohibition. There is no bar on the Adjudicating Authority allowing redemption of prohibited goods. This exercise of discretion will depend on the nature of the goods and the nature of the prohibition. For instance, spurious drugs, arms, ammunition, hazardous goods, contaminated flora or fauna, food which does not meet the food safety standards, etc. are harmful to the society if allowed to find their way into the domestic market. On the other hand, release of certain goods on redemption fine, even though the same becomes prohibited as conditions of import have not been satisfied, may not be harmful to the society at large. In case of goods, such as, gold which become prohibited for violation of certain conditions, the Adjudicating Authority may allow redemption

13. Government notes that while upholding the redemption of the goods allowed by the OAA, the AA at para 8 of his OIA has observed as under;

"8. I find that the prohibition of goods relates to two types of goods, one which cannot be imported by any one, such as arms, ammunition, addictive substance viz. Narcotic Drugs, wild life products etc, which are categorised as 'prohibited goods'. The other category includes the goods the import / export of which is allowed subject to fulfilment of certain condition and if the conditions are complied with, such goods will not fall in the category of 'Prohibited Goods'. Accordingly, the intention behind the provisions of Section 125 is clear that import of such goods (which are prohibited in absolute terms) under any circumstances would cause danger to the health, welfare or morals of people as a whole and therefore the discretion should not be exercised. Second category includes the goods, the import/ export of which 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 this situation, the release of these goods would not cause any danger or harm to the public as a whole and though it is not mandatory for the adjudicating authority to allow redemption yet such cases may be considered positively for

redemption. It is an admitted fact that the import of gold is allowed in case of certain category of persons, subject to certain conditions. No permission or license from any Govt. agency or Reserve Bank of India is required now for entitled persons to bring in gold. Therefore, the relaxation is very liberal for such persons. Accordingly, the goods falling under this category may be considered for release on redemption fine. To put it differently, if the goods are unconditionally prohibited from importation, the importer/owner will not be entitled for claiming redemption. On the other hand, if the goods are conditionally prohibited from importation (i.e subject to some conditions), importer/owner may claim redemption. Nevertheless, as per Section 125 of the Customs Act, 1962 framed under the statute, an option of redemption can be given in his discretion by an adjudicating/appellate authority, even in respect of prohibited goods”.

14. Government finds that the OAA has used his discretion in releasing the gold. While doing so, the OAA has referred to a catena of case laws in which gold had been allowed to be redeemed. The option to allow redemption of seized goods is the discretionary power of the adjudicating / appellate authority depending on the facts of each case and after examining the merits. Government observes that while allowing the goods to be redeemed, the OAA / AA has relied upon a host of cases where the Tribunal / High Courts etc had released the gold of varying quantities and the same were accepted by the Department. Further, in the extant revision application, the applicant have not controverted the same. A case of parity and fairness was made out by the respondent before the OAA.

15. Government further observes that there are a catena of judgements, over a period of time, of the Hon'ble Courts and other forums which have been categorical in the view that grant of the option of redemption under Section 125 of the Customs Act, 1962 can be exercised in the interest of justice. Some of these cases have been cited in the OAA and OIA.

16. Government finds that the OAA has relied upon the precedent case laws on the subject and have applied the case laws judiciously while granting release of the gold. The quantity of gold is not substantial, a case that the respondent was a habitual offender has not been made out. Basic contention of the applicant

is that the gold had been innovatively kept attached to the pipes and fitted inside the stroller bag. This has been taken into account while imposing fine and penalty. Government finds that the AA has rightly upheld that this is a case of misdeclaration of gold rather than brazen smuggling. The OAA has used discretion available under Section 125 of the Customs Act, 1962 and allowed the respondent to redeem the gold on payment of a fine of Rs. 4,25,000/-. The same has been rightly upheld by the AA. Government finds the orders passed by the lower authorities to be legal and proper and is not inclined to interfere in the OIA passed by the AA.

17. Revision Application filed by the applicant is disposed of on above terms.

Shrawan
30/12/22
(SHRAWAN KUMAR)

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

^{H36-}
ORDER No. ^{H37}/2022-CUS (WZ) /ASRA/MUMBAI DATED 25.12.2022

To,

1. Pr. Commissioner of Customs, Chhatrapati Shivaji International Airport, Terminal - 2, Mumbai - 400 099.
2. Shri. Patel Harshit Thakur, 64, Kalyan Colony, Malviya Nagar, Jaipur, Rajasthan, Pin - 302 017.

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