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GOVERNMENT OF INDIA  
MINISTRY OF FINANCE  
(DEPARTMENT OF REVENUE)

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F.No. 380/19/B/WZ/2019-RA | 3508 : Date of Issue 02.05.23

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ORDER NO. 447 /2023-CUS (WZ)/ASRA/MUMBAI DATED 28 .04.2023  
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.

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

Respondent : Shri. Nooruddin Ahmed Mohd Yakub Lokhandwala

Subject : Revision Application filed, under Section 129DD of the  
Customs Act, 1962 against the Order-in-Appeal Nos.  
MUM-CUSTM-PAX-APP-998/2018-19 dated 09.01.  
2019 [(DOI : 10.01.2019)(S/49-643/2018/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 (herein referred to as Applicant) against the Order in Appeal Nos. MUM-CUSTOM-PAX-APP-998/2018-19 dated 09.01.2019 [(DOI: 10.01.2019)(S/49-643/2018/AF)] passed by the Commissioner of Customs (Appeals), Mumbai – III in respect of Shri Nooruddin Ahmed Mohd Yakub Lokhandwala (hereinafter referred to as the Respondent).

2. Briefly stated the facts of the case are that on 25.03.2018 the Officers of the AIU intercepted the Respondent holding Indian Passport No. P 9075357 was intercepted on his arrival at CSMI Airport, Mumbai from Dubai by Air India Flight No. AI 984/24.03.2018. The respondent had cleared himself and his baggage through the green channel. Detailed search of the Respondent's bag resulted into recovery of 700 gms of gold in the form of wire concealed in the inner Aluminium lining of the bag having value of Rs. 19,62,156/-. The gold was concealed in the inner Aluminium lining of the bag.

3. The Original Adjudicating Authority (OAA) viz, Additional Commissioner of Customs, Mumbai vide Order-In-Original No. ADC/AK/ADJN/321/2018-19 dated 17-10-2018 ordered for the absolute confiscation of gold wires totally weighing 700 gms and valued at Rs. 19,62,156/- under Section 111 (d), (1) and (m) of the customs Act, 1962. A penalty of Rs. 2,30,000/- was imposed on the appellant under Section 112 (a) and (b) of the Customs Act, 1962.

4. Aggrieved by the said order, the respondent had filed an appeal before the Appellate Authority (AA) viz, Commissioner of Customs (Appeals), Mumbai-III who vide his Order-In-Appeal Nos. MUM-CUSTOM-PAX-APP-

998/2018-19 dated 09.01.2019 [(DOI: 10.01.2019)(S/49-643/2018/AP)] allowed the respondent to redeem the impugned gold bar on payment of a redemption fine of Rs. 3,50,000/-, however he upheld the penalty of Rs. 2,30,000/- imposed on the Respondent.

5.1 Aggrieved with the above order, the Applicant-department has filed this revision application on the following grounds;

5.2 That the passenger had stated and admitted knowledge, ownership, possession, concealment, carriage, non-declaration and recovery of the said gold wire; that he had purchased the gold from a mall in Dubai and converted it into gold wires from a jewel making shop in the same mall in Dubai; that his monthly income was Rs. 25,000/- per month; that the gold was purchased from the money given to him by his brother in Dubai; that he was intended to sell said Gold in India for earning profit; that he had got converted the gold into wire so that it could be concealed easily; that he did not have purchase invoice of the seized gold.

5.3 That as the passenger had tried to clear the impugned gold without making a declaration under Section 77 of the Customs Act, 1962 by opting Green channel for clearance through Customs, the seized gold cannot be treated as bonafide baggage of the passenger in terms of Notification No.12/2012-Cus dated 17.03.2012 read with Rule 3 and 5 of the Baggage Rules, 2016 and hence its importation was in violation of Para 2.26 of the Foreign Trade Policy (2015-20).

5.4 That the circumstances of the case and the intention of the passenger were not at all considered by the Appellate Authority while giving the passenger an option to redeem the seized goods on payment of fine.

5.5 Further, the nature of concealment of the seized gold was ingenious in nature as much as the gold was imported in wire form and concealed in the inner lining of the bag. Hence, mensrea of the passenger to clear the goods without payment of duty in clandestine manner is apparent and is fit case for Absolute Confiscation of seized gold as a deterrent punishment to passengers.

5.6 The Commissioner (Appeals) has also erred in granting the release of seized gold by imposing Redemption Fine under Section 125 of the Customs Act, 1962. In this regard, it is to state that, the option to redeem the seized goods under Section 125 of the Customs Act, 1962 is the discretionary power of the Adjudicating authority depending on the facts of each case and after examining the merits. Considering the fact that the impugned gold was ingeniously concealed in the form of wire concealed in the inner aluminum lining of the bag by the passenger and he failed to declare the same, the Commissioner (Appeals) ought not to have allowed redemption of the impugned gold. The same should have been confiscated absolutely. Therefore, Commissioner (Appeals)'s order is not proper from this aspect too,

5.7 The following case laws have been relied upon:

- i) Hon'ble Supreme Court in the case of Samyanthan Murugesan v/s Commissioner of Customs (AIR), Chennai-1 as reported in 2010(254) ELT AIS (SC);
- ii) Regarding the redemption fine and penalty, the applicant referred to the judgment of Hon'ble Delhi High Court in the case of Jain Exports Vs Union of India 1987(29) ELT753.

Applicant prayed to the revisionary authority to set aside the Order-in-Appeal No. MUM-CUSTOM-PAX-APP- 998/18-19 dated 09.01.2019, passed by the Commissioner of Customs (Appeals), Mumbai Zone-III and to restore the OIO or pass any order as deemed fit.

5.7 The Respondent submitted his counter objection to the Notice issued in view of the Revision Application filed by the department. They requested to maintain the Order in Appeal and reject the Revision Application filed by the department.

6. Personal hearing in the case was scheduled for 06.12.2022, 20.12.2022, 08.02.2023, 15.02.2023. However, no one appeared before the Revisionary Authority for personal hearing on any of the appointed dates for hearing. Since sufficient opportunity for personal hearing has been given in the matter, the case is taken up for decision on the basis of the available records.

7. The Government has gone through the facts of the case, and observes that the respondent had failed to declare the goods to the Customs at the first instance as required under Section 77 of the Customs Act, 1962. The respondent had not disclosed that he was carrying any dutiable goods. The gold was hidden in the form of wire concealed in the inner Aluminium lining of the bag. The confiscation of the gold is therefore justified and thus, the Respondent had rendered himself liable for penal action.

7.1. 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.”*

7.2. 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 is liable for confiscation under Section 111(d) of the Customs Act.

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” in terms of Section 2(33) and hence it is liable for confiscation under Section 111(d) of the Customs Act, 1962.

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. 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. In case of prohibited goods, such as, the gold, the Adjudicating Authority may allow redemption. 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. Thus, Adjudicating authority can allow redemption under Section 125 of any goods which are prohibited either under the Customs Act or any other law on payment of fine.

12.1 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. Government places reliance on some of the judgements as under:

- a) In the case of Commissioner of Customs, Aliganj, Lucknow vs. Rajesh Jhamatmal Bhat, [2022(382) E.L.T. 345 (All)], the Lucknow Bench of the Hon'ble High Court of Allahabad, has held at Para 22 that “Customs Excise & Service Tax Appellate Tribunal Allahabad has not committed



any error in upholding the order dated 27.08.2018 passed by the Commissioner (Appeals) holding that Gold is not a prohibited item and, therefore, it should be offered for redemption in terms of Section 125 of the Act.”

- b) The Hon’ble High Court of Judicature at Madras, in the judgment in the case of Shik Mastani Bi vs. Principal Commissioner of Customs, Chennai-I [2017(345) E.L.T. 201 ( Mad)] upheld the order of the Appellate Authority allowing re-export of gold on payment of redemption fine.
- c) The Hon’ble High Court of Kerala at Ernakulam in the case of R. Mohandas vs. Commissioner of Cochin [2016(336) E.L.T, 399 (Ker.)] has, observed at Para 8 that “The intention of Section 125 is that, after adjudication, the Customs Authority is bound to release the goods to any such person from whom such custody has been seized...”
- d) Also, in the case of Union of India vs Dhanak M Ramji [2010(252) E.L.T. A102(S.C)], the Hon’ble Apex Court vide its judgement dated 08.03.2010 upheld the decision of the Hon’ble High Court of Judicature at Bombay [2009(248) E.L.T. 127 (Bom)], and approved redemption of absolutely confiscated goods to the passenger.

12.2 Government, observing the ratios of the above judicial pronouncements, arrives at the conclusion that decision to grant the option of redemption would be appropriate in the facts and circumstances of the instant case.

13. In the instant case, the quantum of gold involved is small i.e 700 grams and is not of commercial quantity. The quantum of the same does not suggest the act to be one of organized smuggling by a syndicate. Further, there were no allegations that the Respondent is a habitual offender and was involved in similar offences earlier. The facts of the case indicate that it is a case of non-declaration of gold, rather than a case of smuggling for commercial considerations. Considering the seriousness of the misdemeanour, Government notes that the appellate authority has used his discretion under Section 125 of the Customs Act, 1962 in granting an option to the respondent to redeem the impugned gold wires on payment of a redemption fine. The

Appellate Authority has in his Order justified the redemption which is as under:

*“22. .... I find that right from the interception the appellant had pleaded that the gold belong to him and was purchased by taking money from his brother at Dubai. Besides, there is nothing on record to suggest that the appellant passenger was part of any repeated and organised smuggling racket. No evidence to allege that he had brought gold in his any of the previous visits.*

*23. I find that the adjudicating authority has absolutely confiscated the gold relying upon the judgment in case of Samynathan Murugesan [2010 (254) ELT A15 (Supreme Court)] vide Par 19 of the Order due to the nature of concealment. I find that nowhere the Hon'ble Court has made any distinction in the manner of carrying the offending goods which could have an impact on the scope of Section 125 of the Customs Act, 1962. Otherwise also under section 125 Customs Act, 1962 the criteria of allowing redemption is not dependent on the manner carrying the offending goods by the Importer and there are no conditions attached to the discretion of allowing redemption which could have an overriding effect while interpreting the scope of section 125 of Customs Act, 1962. In other words the Hon'ble Madras High Court in case of Samynathan Murugesan has not upheld the decision of Commissioner of absolute confiscation due to any specific manner of carrying the gold ie, ingenious concealment or otherwise.*

*24. I find that the appellant had claimed the ownership immediately on interception and also explained how he arranged finances abroad. There is absolutely no credible material to allege that he was carrier or habitual offender or was part of any organised smuggling racket. ....*

*25. In view of above decisions of various judicial forums and the fact that order-in-original does not substantiate that passenger is a habitual offender or professional smuggler, I give an option to redeem the goods on payment of fine and on payment of applicable rate of duty.....”*

In view of the above, Government notes that the AA has rightly and judiciously used his discretion in allowing the Respondent to redeem the impugned Gold wires. Government too is inclined to agree with the same.

14. Government finds that the penalty of Rs. 2,30,000/- imposed on the respondent by the OAA under Section 112(a) & (b) of the Customs Act, 1962 and upheld by the Appellate Authority is commensurate with the omissions and commissions committed and is not inclined to interfere in the same.

15. For the aforesaid reasons, Government is in agreement with the OIA passed by the AA and does not find it necessary to interfere in the same.

16. Revision Application filed by the applicant is dismissed of on above terms.

  
( SHRAWAN KUMAR )

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

ORDER NO. 447/2023-CUS (WZ)/ASRA/MUMBAI DATED 28.04.2023

To,

1. Pr. Commissioner of Customs, CSI Airport, Terminal - 2, Level - 2, Andheri East, Mumbai - 400 099.
2. Shri. Nooruddin Ahmed Mohd Yakub Lokhandwala, 15/17, Daruwala Building, 2<sup>nd</sup> Floor, Flat No.10, Morland Road, Mumbai-400011

Copy to:

1. Commissioner of Customs (Appeals), Mumbai-III, Awas corporate Pont (5<sup>th</sup> Floor), Makwana Lane, Andheri-Kurla Road, Marol, Mumbai-400059
2. Shri P.K.Shingrani, Advocate, 12/334, Vivek, New MIG Colony, Bandra East, Mumbai-400051.
3. P.S. to AS (RA), Mumbai.
4. Notice Board.