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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. 371/508/B/2022-RA/3666 : Date of Issue: 15.05.2023

ORDER NO. 452/2023-CUS (WZ)/ASRA/MUMBAI DATED 09 .05.2023 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.

Applicants : Shri Santosh Anandrao Patil.

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

Subject : Revision Application filed, under Section 129DD of the Customs Act, 1962 against the Order-in-Appeal No. MUM-CUSTM-PAX-APP-105/2022-23 dated 29.04.2022 [F.No. S/49-1262/2021] [Date of issue: 06.05.2022] passed by the Commissioner of Customs (Appeals), Mumbai-III.

ORDER

This Revision Application has been filed by Shri Santosh Anandrao Patil (herein referred to as the "Applicant") against the Order-in-Appeal No. MUM-CUSTM-PAX-APP-105/2022-23 dated 29.04.2022 [F.No. S/49-1262/2021] [Date of issue: 06.05.2022] passed by the Commissioner of Customs (Appeals), Mumbai-III.

2. Brief facts of the case are that on 22.06.2021, the Officers of CSMI Airport Mumbai on the basis of suspicion, intercepted one passenger Shri Santosh Anandrao Patil, the applicant, holding Indian passport number F1554098 who had arrived from Doha by Flight No. QR-556 along with his family. The applicant cleared himself without any declaration of dutiable goods to Customs. During personal search the Officers recovered 01 crude gold chain of 24KT weighing 100 grams valued at Rs.4,56,246/- and 01 gold coin of 24KT weighing 10 grams valued at Rs.45,625/-, totally valued at Rs.5,01,811/- which was not declared. The same were seized by the officers in the reasonable belief that the same was smuggled into India in a clandestine manner in contravention of the provisions of the Customs Act, 1962.

3. The case was adjudicated and the Original Adjudicating Authority (OAA) viz the Assistant Commissioner of Customs, C.S.I. Airport, Mumbai, vide his OIO No. AirCus/49/T2/1997/2021 'Uni B' dated 22-06-2021 ordered absolute confiscation of the recovered gold viz, 01 crude gold chain of 24KT weighing 100 grams valued at Rs.4,56,246/- and 01 gold coin of 24KT weighing 10 grams valued at Rs.45,625/-, totally valued at Rs.5,01,811/- under Section 111 (d), (l) and (m) of Customs Act, 1962. A personal penalty of Rs 50,000/- under section 112(a) & (b) of the Customs Act, 1962 was also imposed on the applicant.

4. Aggrieved, with this Order, the Applicant filed an appeal before the Appellate Authority (AA) viz, Commissioner of Customs (Appeals), Mumbai-III, who vide Order-in-Appeal No. MUM-CUSTM-PAX-APP-105/2022-23 dated 29.04.2022 [F.No. S/49-1262/2021] [Date of issue: 06.05.2022] upheld the order passed by the OAA.

5. Aggrieved by this Order, the applicant has filed this revision application on the undermentioned grounds of revision;

5.1 That the applicant is an employee in one company in Doha and staying there. He arrived after 2 years and 8 months along with his family to meet his father who was hospitalized as his health was in deteriorated condition.

5.2 That he was not a frequent traveler as he is stationed at Doha for job purpose since many years and had never attempted to breach any of the provisions of Customs Act, 1962

5.3 That the applicant was an eligible passenger entitled to import gold upto 01 kilogram of gold on return to India after one year as defined in condition No. 35 of the Notification No.12/2012-Cus and the appellant is eligible to pay concessional duty as provided under Notification No. 12/2012-Cus read with the provisions of Customs Tariff Act and there appears to be no case of alleged violation of the provisions of Section 111(d), (l) and (m) so far the said gold is concerned.

5.4 That he had not done any concealment as he had kept the gold jewellery in his Shirt's Pocket and not placed in any luggage or concealed in any cavity of the luggage, since that his father was critically ill, and due to emergency he forgot to declare the gold chain and small gold coin and inadvertently he

passed through the green channel and further on interception he himself declared his gold jewellery before the custom officers. He also submitted the Tax Invoices of purchase of Gold for determining the Customs duty on the said gold, but the Custom Officers had not considered his contention and proceeded for seizing the said gold under the provisions of the Customs Act.

5.5 That the applicant would have given an option for redemption under section 125 of the Customs Act, 1965 instead order for absolute confiscation as the gold is restricted not prohibited goods.

5.6 That in terms of clause (h) of Rule 3 of Foreign Trade (Exemption from Application of Rules in certain cases) Order, 1993 import of gold is allowed in any form as part of baggage by passengers of Indian origin if the passenger satisfies the condition of six month stay in abroad, quantity does not exceed 5 kilogram and duty is paid in convertible foreign currency. This condition is applicable to the applicant as he had arrived after 02 years to India from abroad.

5.7 The Applicant relied on case laws, judicial decisions such as Yukub Ibrahim Yusuf Vs Commissioner of Customs 2011(263) ELT 685 (Tri-Mumbai)]. Nevyveli Lignite Corporation Ltd., Vs UOI IN 2009 (242) ELT 487 (Mad).

5.8 The Applicant submitted that that there are series of judgments where redemption of absolutely confiscated gold/jewellery has been allowed. Appellants would also like to rely upon the following case judgments

i) Hargovind das K Joshi Vs Collector of Customs 1992(610 ELT 172(SC) the Hon'ble Apex Court remanded the case to the Collector for exercising the option of redemption under section 125 of Customs Act, 1962.

ii) Universal Traders v. Commissioner - 2009 (240) ELT A78 (S.C.) also the Apex Court allowed redemption of exported goods being not prohibited.

iii) In CC (Airport), Mumbai Vs Alfred Menezes 2009 (242) ELT 334 (Bom.), the Hon'ble High Court held that Section 125()) ibid clearly mandates that it is within the power of adjudicating authority to offer redemption of goods in respect of prohibited goods.

iv) In T Elavarasan Vs Commissioner of Customs (Airport), Chennai: 2011 (266) ELT 167 (Mad), the Hon'ble High Court held that Gold is not a prohibited item and option is available to owner of goods or person from whom goods seized, to pay fine in lieu of confiscation.

v) Kadar Mydin Vs Commissioner of Customs (Preventive), West Bengal 2011 (136) ELT 756 2 was held that in view of the liberalised gold policy of the Government absolute confiscation is unwarranted and redemption can be allowed.

5.9 that the penalty was imposed on the appellant under both section 112(a) and (b) as both the section covers different situation of imposing penalty therefore the appellant is unable to defend the exact provision therefore it shall be set aside. The Applicant placed reliance on the judgment of the Hon'ble Supreme Court in the case of Amrit Foods reported In 2005 (190) ELT 0433 (SC) where in it was held by the apex court with reference to Rule 173Q of the

Central Excise Rules 1944 which also had similar sub clauses proposing different standards of penalty for different situation

5.10 Therefore, in view of above submission and the judgments/case laws relied upon, the applicant submitted that the absolute confiscation of the gold jewellery seized from the Applicant is not warranted and redemption of gold should be allowed. The applicant prayed to set aside the impugned order dated 22.06.2021 and allow redemption of goods on nominal fine

6. Personal hearing in the matter was scheduled for 11.04.2023. Shri Lilesh Sawant, Advocate of the applicant, appeared for the hearing and submitted that the applicant brought small quantity of jewellery for personal use, applicant is not a habitual offender and jewellery was purchased on own funds. He requested to allow redemption of goods one on nominal fine and penalty.

7. The Government has gone through the facts of the case, and observes that the applicant had failed to declare the impugned gold carried by him to the Customs at the first instance as required under Section 77 of the Customs Act, 1962. The applicant had not disclosed that he was carrying the dutiable goods. By not declaring the gold carried by him, the applicant clearly revealed his intention not to declare the gold and pay Customs duty on it. The Government finds that the confiscation of the impugned gold was 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.

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

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 'Applicant' 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 pretense. 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. In the instant case, the quantum of gold involved is small (i.e. only 110 grams and in the form of jewellery and one coin), found on person, which indicates that the same was not for commercial purpose. It also does not suggest the act to be one of organized smuggling by a syndicate. Government, notes that the impugned gold were not ingeniously concealed, it was found from the applicant's Shirt pocket. The applicant has claimed ownership of the gold for personal use and also produced the copy of the purchase invoice of the said goods. Government, notes that there were no allegations that the Applicant is a habitual offender or that it was ingeniously concealed or that it was involved in similar offences earlier. Considering the quantity of gold, the same not being concealed in an ingenious manner, applicant working in Doha for more than two years, the absolute confiscation of the same was harsh and not justified.

13. In view of the above facts, Government is inclined to modify the absolute confiscation upheld by the AA and allow the impugned gold viz 01 crude gold chain of 24 KT weighing 100 grams valued at Rs.4, 56, 246/- and 01 gold coin of 24 KT weighing 10 grams valued at Rs.45,625/-, totally valued at Rs.5,01,811/- redemption on payment of redemption fine. Government considers granting an option to the Applicant to redeem the gold on payment of a suitable redemption fine, as the same would be more reasonable and fair.

14. Government finds that the penalty of Rs. 50,000/- imposed on the Applicant under Section 112(a) & (b) of the Customs Act, 1962 is appropriate and commensurate to the omissions and commissions of the Applicant.

15.1 In view of the above, the Government modifies the impugned order passed by the Appellate authority and allows the applicant to redeem the impugned gold viz 01 crude gold chain of 24KT weighing 100 grams valued at Rs.4,56,246/- and 01 gold coin of 24KT weighing 10 grams valued at Rs.45,625/-, totally valued at Rs.5,01,811/- on payment of redemption fine of Rs. 90,000/- (Rupees Ninety Thousand Only).

15.2 The penalty of Rs. 50,000/- imposed under Section 112(a) and (b) of the Customs Act, 1962 being appropriate and commensurate with the omissions and commissions of the Applicant, Government does not feel it necessary to interfere with the imposition of the same and is sustained.

16. The Revision Application is disposed of on the above terms.

9/5/23

(SHRAWAN KUMAR)
Principal Commissioner & ex-officio
Additional Secretary to Government of India

ORDER NO. 452/2023-CUS (WZ)/ASRA/MUMBAI DATED 09.05.2023

To,

1. Shri Santosh Anandrao Patil, Row No. D-26, Airoli Row House, Navi Mumbai -400708.
2. The Pr. Commissioner of Customs, C.S.I Airport, Terminal 2, Level-II, Sahar, Andheri (East), Mumbai 400 099.
3. The Commissioner of Customs (Appeals), Mumbai-III, 5th Floor, Avas Corporate Point, Makwana Lane, Behind S.M.Centre, Andheri Kurla Road, Andheri (East), Mumbai 400 059.

Copy to:

1. Advocate Lilesh Sawant & Associates, 223-A, Gokul Arcade, 2nd Floor, Garware Chowk, Subash road, Vile Parle (East), Mumbai-400057.
2. Sr. P.S. to AS (RA), Mumbai.
3. File Copy.
4. Notice Board.