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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. 371/108/B/WZ/2020-RA/4036 : Date of Issue: 02.06.2023

ORDER NO. 466/2023-CUS (WZ)/ASRA/MUMBAI DATED 31.05.2023
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.

Applicant : Shri. Mohammed Sikandar

Respondent : Pr. Commissioner of Customs, Custom House,
Near Akashwani, Navrangpura, Ahmedabad 380 009.

Subject : Revision Application filed, under Section 129DD of the
Customs Act, 1962 against the Order-in-Appeal No. AHD-
CUSTM-000-APP-547-19-20 dated 02.01.2020 issued
through F.No. S/49-172/CUS/AHD/19-20 passed by the
Commissioner of Customs (Appeals), Ahmedabad.

ORDER

This Revision application has been filed by Shri. Mohammed Sikandar (hereinafter referred to as the Applicant) against the Order-in-Appeal No. AHD-CUSTM-000-APP-547-19-20 dated 02.01.2020 issued through F.No. S/49-172/CUS/AHD/19-20 passed by the Commissioner of Customs (Appeals), Ahmedabad.

2. Brief facts of the case are that the applicant holding an Indian Passport No. S 0810707, had arrived on 20-05-2018 at Ahmedabad Airport by the Ethiad Airways Flight No. EY 322/326 from Dammam via Abu Dhabi. He was intercepted by Customs Officers as he was about to exit through the green channel opted by him. To query whether he had anything valuable to declare, the applicant had replied in negative. On scanning the black checked trolley bag carried by him, unusual images were noted. On opening the black bag, a KOYO brand electronic insect killer machine was found and on opening the insect killer machine, a capacitor of heavy weight was found from the upper part of the machine, not connected with any part of the machine. The Officers broke the seal of the capacitor and cut the transparent adhesive tape and carbon, resulting in the recovery of 4 yellow metal bars marked 10 tolas each and 4 small cut pieces of yellow metal bars. The valuation report showed the 4 gold bars and 4 cut gold bars having a purity of 999.9 (24 Kt)to be totally weighing 633.300 grams (4 gold bars weighing 466.640 grams and valued at Rs 15,06,781/- and 4 cut gold bars weighing 166.660 grams and valued at Rs 5,38,145/-), totally valued at Rs 20,44,926/- (market value) and Rs 18,47,732/- (tariff value). This gold were placed under seizure vide panchnama drawn on 29.5.2018. The seizure was made under the provisions of Customs Act, 1962 on the reasonable belief that the said goods were smuggled into India and liable for confiscation. Subsequently a Show Cause Notice dated 31-08-2018 was issued to the applicant as to why the impugned

gold should not be confiscated and as to why penalty should not be imposed under Customs Act, 1962.

3. The Original Adjudicating Authority (OAA), viz, Addl. Commissioner, Customs, Ahmedabad vide Order-In-Original No. 26/ADC-MLM/SVPIA/O&A/2018-19 DATED 26.02.2019 issued on 07.03.2019 through F.No. VIII/10-76/SVPIA/O&A/2018 ordered for the absolute confiscation of the impugned gold i.e 4 gold bars and 4 cut gold bars having a purity of 999.9 (24 Kt)to be totally weighing 633.300 grams and totally valued at Rs 20,44,926/- (market value) and Rs 18,47,732/- (tariff value) under Sections 111(d), 111(i), 111(l) & 111(m) of the Customs Act, 1962 and a penalty of Rs. 2,75,000/-- under Section 112 (a) & (b) of the Customs Act, 1962 was imposed on the applicant.

4. Aggrieved by the said order, the applicant preferred an appeal before the appellate authority (AA) viz, Commissioner of Customs (Appeals), Ahmedabad, who vide Order-In-Appeal No. AHD-CUSTOM-000-APP-547-19-20 dated 02.01.2020 issued through F.No. S/49-172/CUS/AHD/19-20 did not find any reason to interfere in the Order-in-Original passed by the OAA and upheld the same.

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

- 5.01. that the orders of the lower authorities were patently erroneous and were based on assumptions and presumptions and incorrect appreciation of law.
- 5.02. that he had declared the gold in his possession and disembarkation cards / declaration forms were not available with the airline as they had discontinued the same and the Customs had not kept the forms at prominent location; that an oral declaration was also a declaration under Section 77 of the Customs Act, 1962; that they rely on the

case of Naresh Lokumal Serai vs. Commr. Of Customs, (Export), Raigad reported in 2006-203-ELT-580-Tri-Mumbai wherein it was held that absence declaration of value in the BDF cannot be a ground for imposing a penalty and confiscating the goods.

- 5.03. that Section 125 of the Customs Act, 1962 clearly lays down that where the goods are not prohibited, the goods may be released on redemption fine; that adjudicating / appellate authority had the discretion to release the goods on payment of redemption fine; that they rely on the case of Commr. Of Customs (Air) vs. P. Sinnasamy in CMA No. 1638 of 2008 passed by the Madras High Court. the corroborative facts had not been mentioned by the OAA.
- 5.04. that the lower authorities had arrived at erroneous conclusions and had failed to exercise the discretion as per the canons laid down in said judgement of P.Sinnasamy.
- 5.05. that the applicant relies on the following case laws where redemption had been granted,
- (a). Yakub Ibrahim Yusuf Vs CC, Mumbai 2011 (263) ELT 685 (Tri - Mumbai),
 - (b). Shaik Jamal Basha V. Government of India (1997(91) E.L.T. 277 (A.P.)
 - (c). V.P.Hamid Vs Commissioner of Customs, 1994(73) ELT 425 (Tri)
 - (d). T.Elavarasan vs The Commissioner of Customs 2011-266-ELT-167-Mad.
 - (e). Union of India v. Dhanak M. Ramji - 2010 (252) E.L.T. A102 (S.C.)
- 5.06. that no offence had been committed and the penalty imposed was high and not commensurate with the misdemeanor.

Under the above facts and circumstances of the case, the Applicant has prayed that the Revision Authority be pleased to hand over the goods on payment of duty or allow to re-export the goods and drop the penalty or reduce it to reasonable level or pass any such order as deemed fit.

6. Personal hearing through the online video conferencing mode was scheduled for 11.05.2023. Shri. Rishikesh Mehra, Advocate appeared online

for personal hearing on 11.05.2023 and submitted that gold bars were kept inside insect killer machine for safety. He requested to allow redemption of gold on reasonable redemption fine and penalty.

7. The Government has gone through the facts of the case and notes that the applicant had failed to declare the goods in his possession as required under Section 77 of the Customs Act, 1962. The applicant had not disclosed that he was carrying dutiable goods and had he not been intercepted, he would have walked away with the impugned gold bars and cut gold bars without declaring the same to Customs. By his actions, it was clear that the applicant had no intention to declare the impugned gold to Customs and pay Customs duty on it. The Government finds that the confiscation of the gold bars and cut gold bars, were 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 is liable for confiscation under Section 111(d) of the Customs Act.

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

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 ‘Applicant’ thus, liable for penalty.

9.3 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.

10. 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.

11.1 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.

11.2 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.

12. In the instant case, the quantum of gold involved is small (only 633.300 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. The applicant claimed that the same was for personal use. Further, there were no allegations that the Applicant 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. Under the circumstances, the seriousness of the misdemeanour is required to be kept in mind when using discretion under Section 125 of the Customs Act, 1962 and while imposing quantum of penalty.

13. The absolute confiscation of the gold, leading to dispossession of the applicant of the gold in the instant case is therefore, harsh and not reasonable. Government observes that the applicant has made request of re-export in their Revision Application. However, Government is not inclined to allow the impugned gold bars and cut gold bars to be re-exported on payment of redemption fine.

14.1 In view of the above Government sets aside the impugned order of the appellate authority and allows the applicant to redeem the impugned gold i.e 4 gold bars and 4 cut gold bars having a purity of 999.9 (24 Kt)to be totally weighing 633.300 grams, totally valued at Rs. 20,44,926/- (market value) and Rs. 18,47,732/- (tariff value), on payment of redemption fine of Rs. 4,00,000/- (Rupees Four Lakhs Only).

14.2 The Government finds that the penalty of Rs. 2,75,000/- imposed on the applicant under Section 112(a) & (b) of the Customs Act, 1962 for the

goods valued at Rs 20,44,926/- (market value) and Rs 18,47,732/- (tariff value) is little excess and the same is reduced to Rs.2,00,000/-(Two Lakhs only).

15. Revision Application is disposed of on the above terms.

Shrawan
31/5/23
(SHRAWAN KUMAR)

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

ORDER NO. 266/2023-CUS (WZ)/ASRA/MUMBAI DATED 31.05.2023.

To,

1. Shri. Mohammed Sikandar, Village: Phulasi, Post: Sampla, Khatri, Tehsil: Deoband, District: Saharanpur 247554.
2. Pr. Commissioner of Customs, Custom House, Near Akashwani, Navrangpura, Ahmedabad 380009.

Copy to:

1. Shri Rishikesh Mehra, Advocate, B/1103, Dev Vihaan, Behind Third Eye Residency, Opp. Motera Stadium, Sabarmati, Ahmedabad-380005.
2. Commissioner of Customs (Appeals), Ahmedabad, 7th Floor, Mridul Towers, B/H Times of India, Ashram Road, Ahmedabad 380009
3. Sr. P.S. to AS (RA), Mumbai.
4. File Copy.
5. Notice Board.