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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. 371/73/B/WZ/2021-RA / 4186 : Date of Issue : 28.06.2023

ORDER NO. 478/2023-CUS (WZ)/ASRA/MUMBAI DATED 22.06.2023 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 : Mr. Gopal Puri

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

Subject : Revision Application filed under Section 129DD of the Customs Act, 1962 against the Order-in-Appeal No. MUM-CUSTOM-PAX-APP-1443/2019-20 dated 29.01.2021 [Date of issue: 12.02.2021] [F. No. S/49-803/2019] passed by the Commissioner of Customs (Appeals), Mumbai Zone-III.

ORDER

The Revision Application has been filed by Mr. Gopal Puri (herein referred to as the 'Applicant') against the Order-in-Appeal No. No. MUM-CUSTOM-PAX-APP-1443/2019-20 dated 29.01.2021 [Date of issue: 12.02.2021] [F. No. S/49-803/2019] passed by the Commissioner of Customs (Appeals), Mumbai Zone-III.

2. Brief facts of the case are that on 30.07.2019, on the basis of suspicion, the officers of Air Customs, Chhatrapati Shivaji International Airport, Mumbai, intercepted the Applicant, holding an Indian passport, who had arrived by Flight No. SG-82 from Bangkok, after he had cleared himself through the Customs green channel. The personal search of the Applicant led to the recovery of one crude gold coin weighing 151 grams and one crude gold kada weighing 100 grams, both of 24 Kt purity, totally weighing 251 grams and collectively valued at Rs. 7,91,941/-.

3. The case was adjudicated after waiver of show cause notice and the Original Adjudicating Authority (OAA) i.e. Deputy Commissioner of Customs, 'C' Batch, CSI Airport, Mumbai, vide Order-in-Original No. Air Cus/T2/49/988/2019 "C" batch dated 30.07.2019 absolutely confiscated the impugned one crude gold coin weighing 151 grams and one crude gold kada weighing 100 grams, both of 24Kt purity and collectively valued at Rs. 7,91,941/- under Section 111 (d) of the Customs Act, 1962. A penalty of Rs. 1,00,000/- was imposed on the Applicant under Section 112(a) (i) of the Customs Act, 1962.

4. Aggrieved by the Order, the Applicant filed an appeal before the Appellate Authority (AA) viz, Commissioner of Customs (Appeals), Mumbai Zone-III who vide Order-in-Appeal No. MUM-CUSTOM-PAX-APP-1443/2019-20 dated

29.01.2021 [Date of issue: 12.02.2021] [F. No. S/49-803/2019] upheld the order passed by the OAA.

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 show cause notice was waived off by the Applicant and the OAA prejudged the issue and made up his mind to confiscate the gold at the time of issue of the detention receipt only and when the authority has already closed their minds in respect thereto the quasi judicial proceedings it cannot be held to be in accordance with law or in compliance with the principles of natural justice. The Applicant has relied upon the following case laws in support of their contention:

- (i) Raghunandan Jalan vs. Collector of Central Excise [1981(8) E.L.T. 476 Cal]
- (ii) V.C, Banaras Hindu University vs. Shrikant [(2006) 11 SCC 42]
- (iii) Poona Bottling Co vs. UOI
- (iv) UOI vs. ITC Ltd [1985(21) E.L.T. 655(Kar)]
- (v) Mysore Acetate and Chemicals Co. Ltd vs. AC, C.Ex, Mysore
- (vi) MRF Ltd vs. AC.CEx. Madras [1981(8) E.L.T. 565(Mad)]
- (vii) Alembic Glass Industries Ltd vs. UOI [1989(24) E.L.T 23(Kar)]
- (viii) Calcutta Discount Co Ltd vs. ITO

5.02. That under Section 125 of the Customs Act, 1962, discretion has been conferred on the OAA to give an option to the importer/owner of the goods to pay fine in lieu of confiscation in cases of goods, the importation or exportation whereof is prohibited under the Act or under any other law for the time being in force but in respect of other goods the officer is obliged to give such an option. The Applicant has relied upon the following case laws in support of their contention:

- (i) CC (Prev) vs. Uma Shakar Verma
- (ii) Gauri Enterprises vs. CC Pune [2002(145) E.L.T 706 (Tri. Bang)]

- (iii) Oryx Fisheries Pvt Ltd vs. UOI [(2010) 13 SCC 427]
- (iv) Siemens Ltd vs. State of Maharashtra [(2006) 12SCC 33]
- (v) K.L. Shephard vs UOI [(1987) 4 SCC 431]
- (vi) Global Marine Agencies vs I CC (Prev) Jaipur [2012(9) TMI 679]
- (vii) UOI vs. Madras Steel Re-rollers Association [2012(8) TMI 788 (SC)]
- (viii) Mohit Thakor vs. Collector [1994(72) E.L.T 865]

5.03. Gold is not a prohibited item and is not liable for absolute confiscation. Gold is not a prohibited item for import and Section 125 of the Custom Act, 1962 provides that option of redemption can be given in case the seized goods are not prohibited and therefore absolute confiscation is not warranted in the instant case. Section 125 of the Customs Act, 1962 provides that the goods should be redeemed to the owner of the goods or the person from whose possession the goods were seized if the owner is not known. Further authority has discretion to order release of prohibited goods on payment of fine in lieu of confiscation. The Applicant has relied upon the undermentioned case laws;

- (i) Commr. Of Customs (Prev) vs. India Sales International [2009 (241) E.L.T. 182(Cal)].
- (ii) Yakub Ibrahim Yusuf vs. CC, Mumbai [2011 (263) E.L.T. 685 (Tri. Mumbai)]
- (iii) In Neyveli Lignite Cor Ltd vs. UOI [2009 (242) E.L.T. 487 (Mad.)]
- (iv) Hargovind Das K. Joshi vs. Collector of customs [1992 (61) ELT 172(SC)]
- (v) Universal Traders vs. Commissioner [2009 (240) E.L.T. A78 (SC)]
- (vi) Gauri Enterprises vs. CC, Pune [2002 (145) ELT (705) (Tri Bangalore)]
- (vii) CC (Airport), Mumbai vs. Alfred Menezes [2009 (242) ELT 334 (Bom)]
- (viii) Shaik Jamal Basha vs. Government of India [1997 (91) ELT 277(AP)]
- (ix) VP Hameed vs. Collector of Customs Mumbai 1994(73) ELT 425 (Tri)
- (x) T. Elavarasan Vs Commissioner of Customs (Airport), Chennai [2011 (266) ELT 167 (Mad)]
- (xi) Kadar Mydin vs. Commissioner of Customs (Preventive), West Bengal [2011 (136) ELT 758]

- (xii) Sapna Sanjeeva Kolhi v/s Commissioner of Customs, Airport, Mumbai
- (xiii) Vatakkal Moosa vs. Collector of Customs, Cochin [1994 (72) ELT (G.O.I)]
- (xiv) Halithu Ibrahim vs. CC [2002-TIOL 195 CESTAT-MAD]
- (xv) Krishnakumari vs. CC, Chennai [2008 (229) ELT 222 (Tri Chennai)]
- (xvi) S.Rajagopal vs. CC, Trichy [2007 (219) ELT 435 (Tri-Chennai)]
- (xvii) M. Arumugam vs. CC, Trichirapalli [2007 (220) ELT 311 (Tri-Chennai)]
- (xviii) Union of India vs. Dhanak M. Ramji [2009 (248) E.L.T. 127 (Bom.)]
- (xix) Peringatil Hamza vs CC (Airport), Mumbai [2014 (309) ELT 259 (Tri Mumbai)]
- (xx) R. Mohandas vs. CC, Cochin [2016 (336) ELT 399 (Ker)]
- (xxi) A Rajkumari vs. Commr. of Customs (Airport-Air cargo) Chennai [2015(321) E.L.T. 540].
- (xxii) Shaik Mastani Bi vs. CC, Chennai [2017(345) E.L.T 201(Mad)]
- (xxiii) Bhargav Patel vs CC, Mumbai [Appeals NO C/381/10]
- (xxiv) Gauri Enterprises vs. CC, Pune [2002(145) E.L.T 705 (Tri-Bang)]
- (xxv) Om Prakash Bhatia vs. Commr. Of Customs Delhi [2003(155) E.L.T.423(SC)]
- (xxvi) Etc

5.04. That the decisions relied upon by the Appellate Authority for denying redemption of gold are not applicable in the instant case;

5.05. That a lower court should honour findings of law made by the higher court that is within the appeals path of case the court hears and precedent is a legal principle or rule that is created by a court decision. The Applicant has relied on the following case laws in support of their contention:

- (i) CCE, Calcutta vs. Alnoori Tobacco Products [2004(170) ELT 135 (SC)]
- (ii) Escorts Ltd. vs. CCE, Delhi [2004 (173) ELT 113 (SC)]
- (iii) CC (Port), Chennai vs. Toyota Kirloskar [2007 (213) ELT 4 (SC)]
- (iv) Sri Kumar Agency vs. CCE, Bangalore [2008 (232) E.L.T. 577 (S.C.)]

That two cases which are the same in relevant aspects should be treated in the same way and it would be inconsistent to treat them differently;

5.06 The Applicant has relied upon the following case laws in support of the contention that when goods are not eligible for import as per the import policy, re-export of such goods is permitted on payment of penalty and redemption fine.

- (i) CC vs. Elephanta Oil [2003(152) ELT 257 (SC)]
- (ii) Collector vs. N Patel [1992 (62) ELT 674 (GO1)]
- (iii) Kusumbhai Dahyabhai Patel vs. CC (P) [1995 (79) ELT 292 (CEGAT)]
- (iv) K&K Gems vs. CC [1998(100) ELT 70 (CEGAT)]

5.07. That in the present case, the Appellate Authority failed to discuss as to how the facts of the case mentioned below relied by him in the OAA fit the factual situation of the case.

- (i) CCE, Calcutta vs. Alnoori Tobacco Products [2004(170) E.L.t. 135(SC)
- (ii) Hsui Chaing Chang vs. CC [1992(62) E.L.T. 225 (CEGAT)]
- (iii) Abdul Razak vs. UOI [2012(275) E.L.T. 300 (Ker)]
- (iv) Ranwolph Charles Luka vs. UOI [1996 (83) E.L.T 274 (BOM HC)]
- (v) CC (AIR) vs. P.Sinnasamy

5.08. That construction of a judgement should be made in the light of the factual matrix involved therein and what is important is to see the issues involved therein and the context wherein the observations were made and any observation made in the judgement should not be read in isolation and out of context. The Applicant has relied upon the following case laws in support of their contention:

- (i) Bombay Dyeing and Manufacturing Company Ltd vs. BEAG
- (ii) Islamia Academy of Education vs. State of Karnataka
- (iii) CIT vs. Sun Engineering Works (P) Ltd

- (iv) Madhav Rao Scindia vs. Union of India
- (v) CC, Customs vs. M/s Atul Automations Pvt Ltd

5.09. That the Applicant claims ownership of the goods and redemption of the gold on payment of reasonable fine and penalty. That Section 125 of the Customs Act, 1962 vests power to grant redemption of confiscated goods. The Applicant has relied upon the following case laws in support of their contention:

- (i) Dhanak Ramji vs. CC (Airport), Mumbai [2009(237) E.L.T 280 (Tri-Mm)]
- (ii) A Rajkumari vs. Commr. of Customs (Airport-Air cargo) Chennai [2015(321) E.L.T. 540].
- (iii) Mohd Zia Ul Haque vs. Addl. Commissioner of Customs, Hyderabad [2014(214) E.L.T 849 (GOI)]
- (iv) In Neyveli Lignite Cor Ltd vs. UOI [2009 (242) E.L.T. 487 (Mad.)]
- (v) Yakub Ibrahim Yusuf vs. CC, Mumbai [2011 (263) E.L.T. 685 (Tri. Mumbai)]
- (vi) Copier Company vs. CC, Chennai [2007(218) E.L.T. 442(Tri-Chennai)]
- (vii) Horizon Ferro Alloys Pvt Ltd vs. UOI –judgement by the Division Bench of Punjab and Haryana High Court.
- (viii) S.Rajagopal vs. CC, Trichy [2007 (219) ELT 435 (Tri-Chennai)]

Under the circumstances, the Applicant prayed for a reasonable order for redemption of gold under absolute confiscation on payment of reasonable fine and penalty and drop further proceedings.

6. Personal hearing in the case was scheduled for 18.05.2023. Shri Prakash Shingrani, Advocate appeared for the personal hearing on the scheduled date on behalf of the Applicant. He submitted that that Applicant brought one gold chain and one kada for personal use and the Applicant is not a habitual offender. He requested to allow the option to redeem the goods on nominal fine and penalty.

7. The Government has gone through the facts of the case and observes that the Applicant had brought one crude gold coin weighing 151 grams and one crude gold kada weighing 100 grams, both of 24Kt purity, totally weighing 251 grams and collectively valued at Rs. 7,91,941/- and had failed to declare the goods 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 dutiable goods. However, after clearing the green channel of Customs and on conducting personal search of the Applicant after being intercepted, the impugned one crude gold coin weighing 151 grams and one crude gold kada weighing 100 grams, both of 24Kt purity, totally weighing 251 grams and collectively valued at Rs. 7,91,941/- was recovered from the Applicant and the method of carrying the gold adopted by the Applicant clearly revealed his intention not to declare the said gold and thereby evade payment of Customs Duty. The confiscation of the gold was therefore justified and thus, the Applicant had rendered himself liable for penal action.

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, 1962.

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 Applicant thus liable for penalty.

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.

12. 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.”

12.1. 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 Shaik 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 under import is small and is not of commercial quantity. The impugned gold was worn by the Applicant and was recovered from the Applicant. There are no allegations that the Applicant is a habitual offender and was involved in similar offence earlier or that there was an ingenuous concealment of gold. Also there is nothing on record to prove that the Applicant was part of an organized smuggling syndicate.

14. Government finds that this is a case of non-declaration of gold. The absolute confiscation of the impugned gold leading to dispossession of the Applicant of the gold in the instant case is therefore harsh and not reasonable.

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.

15. Applicant has also pleaded for reduction of the penalty imposed on him. The market value of the gold in this case is Rs. 7,91,941/-. From the facts of the case as discussed above, Government finds that the penalty of Rs. 1,00,000/- imposed on the Applicant under Section 112(a) (i) of the Customs Act, 1962 is harsh and on the higher side considering the omissions and commissions of the Applicant.

16. In view of the above, the Government modifies the impugned order of the Appellate Authority in respect of the gold seized from the Applicant. The impugned one crude gold coin weighing 151 grams and one crude gold kada weighing 100 grams, both of 24Kt purity, totally weighing 251 grams and collectively valued at Rs. 7,91,941/- is allowed to be redeemed on payment of a fine of Rs. 1,50,000/- (Rupees One Lakh Fifty Thousand only). The penalty of Rs. 1,00,000/- imposed under Section 112 (a)(i) of the Customs Act, 1962 is reduced to Rs. 75,000/- (Rupees Seventy Five Thousand only).

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


(SHRAWAN KUMAR)

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

ORDER NO. 178 /2023-CUS (WZ)/ASRA/MUMBAI DATED 22.06.2023

To,

1. Mr. Gopal Puri, Flat No. 108, 1st Floor, Shadawal Apartments, Boisar, Palghar 401 501
Address No 2: Mr Gopal Puri, C/o Shri Prakash K. Shingrani, Advocate, 12/334, Vivek, New MIG Colony, Bandra (East), Mumbai-400 051

2. The Pr. Commissioner of Customs, Terminal-2, Level-II, Chhatrapati Shivaji International Airport, Mumbai 400 099.

Copy to:

1. The Commissioner of Customs (Appeals), Mumbai Zone - III, Awas Corporate Point, 5th Floor, Makwana Lane, Behind S.M.Centre, Andheri-Kurla Road, Marol, Mumbai - 400 059.
2. Shri Prakash K.Shingrani, Advocate, 12/334, Vivek, New MIG Colony, Bandra (East), Mumbai-400 051
3. Sr. P.S. to AS (RA), Mumbai.
4. File copy.
5. Notice Board.