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SPEED POST



GOVERNMENT OF INDIA  
MINISTRY OF FINANCE  
(DEPARTMENT OF REVENUE)

8<sup>th</sup> Floor, World Trade Centre, Centre - I, Cuffe Parade,  
Mumbai-400 005

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F.No. 371/38/B/WZ/2021-RA | 4240 : Date of Issue : 27.06.23

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ORDER NO. 483/2023-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.

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(i). F.No. 371/38/B/WZ/2021-RA

Applicant : Shri. Kalpesh Samji Baradiya

Respondent : Pr. Commissioner of Customs, CSMI Airport, Mumbai  
400 099.

Subject : Revision Application filed, under Section 129DD of the Customs Act, 1962 against the Order-in-Appeal. No. MUM-CUSTOMS-PAX-APP-529/2019-20 dated 04.11.2020 issued on 11.11.2020 through F.No. S/49-527/2019 passed by the Commissioner of Customs (Appeals), Mumbai - III.

ORDER

This revision application has been filed by Shri. Kalpesh Samji Baradiya (hereinafter referred to as the Applicant) against the Order-in-Appeal No. MUM-CUSTM-PAX-APP-529/2019-20 dated 04.11.2020 issued on 11.11.2020 through F.No. S/49-527/2019 passed by the Commissioner of Customs (Appeals), Mumbai – III.

2. Brief facts of the case are that the applicant was intercepted by Customs Officers on 21.05.2019 at CSMI Airport, Mumbai after he had opted for the green channel. Earlier, the applicant had arrived from Dubai onboard IndiGo Airways Flight No. 6E-629 / 20.05.2019. The applicant was returning back from abroad after a stay of 2 days. Two gold chains and 1 gold bar, collectively weighing 316 grams, valued at Rs 9,16,552/- was recovered from the applicant.

3. The Original Adjudicating Authority (OAA), viz, Deputy Commissioner of Customs, CSMI Airport, Mumbai vide Order-In-Original F. No. Air Cus/T2/49/796/2019-C dated 21.05.2019 ordered for the absolute confiscation of the two gold chains and 1 gold bar, collectively weighing 316 grams and valued at Rs. 9,16,552/- under Section 111(d) of the Customs Act, 1962 and a penalty of Rs. 1,00,000/- under Section 112 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), Mumbai - III, who vide Order-In-Appeal No. MUM-CUSTM-PAX-APP-529/2019-20 dated 04.11.2020 issued on 11.11.2020 through F.No. S/49-527/2019 did not find any reason to interfere in the impugned OIO passed by the OAA. Also, the

personal penalty imposed on the applicant under Section 112 (a) and (b) of the Customs Act, 1962 was found commensurate with the offence committed.

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

5.01. that impugned order was on false legal footings; that the impugned goods are not prohibited goods and were not liable for absolute consumption; that the impugned goods had been purchased for personal consumption and in bonafide was exiting through the green channel; that he was not aware of the baggage rules but upon being confronted accepted his bonafide fault; that the lower authorities had erroneously held that the impugned goods were in violation of Rule 5 of the Baggage Rules, 2016 which was not applicable in this case as the said rule was only in respect of jewellery imported by passengers residing abroad for more than a period of 1 year; that the applicant was abroad only for a few days; that during the relevant time the impugned goods which fall under chapter 71081200 and 71131910 were freely importable and hence, were neither restricted nor prohibited under prevalent FTP; that it was only on 18.12.2019, the DGFT vide its not<sup>n</sup> no. 36/2015-20 had amended the import policy for goods falling under chapter heading 71081200 from free to restricted;

5.02. to buttress their case, the applicant has relied upon the following case laws;

(i). Vattakkal Moosa vs. Collector of Customs, Cochin - 1994(72)ELT473(GOI) wherein it was held that *'as soon as any goods are confiscated under the Customs Act, 1962, provision of Section 125 come into play. Sub-section (1) of Section 125 has two limbs. Thus, where the goods are other than prohibited goods the adjudicating authority is required to grant an option of redemption fine as per the second limb'*

(ii). The GOI order in r/o. Ranmeet Bhatia - 2018(364) ELT 1144 (GOI) had held that *'Confiscation of the gold is upheld by the Commissioner (A) also and the Government agrees with this order to the extent that gold items could not be confiscated absolutely as the gold is not the prohibited goods'*.

(iii). Mohd. Zia Ul Haque - 2014(314) ELT 849 (GOI) where it was held that *'In the instant case, the passenger is neither a habitual offender nor*

*carrying the said goods for somebody else. He is the owner of the goods and concealment was not in an ingenious manner. There is merit in the pleading of applicant that goods should be allowed to be redeemed on payment of redemption fine and therefore, said plea is acceptable'.*

(iv). Hargovind Das K Joshi v/s. Collector of Customs [1992 (61) ELT 172 SC],

(v). Motor Image vs. Commissioner of Customs, Madras – 2000(118) ELT 414(Tribunal); *'Since the goods in question were not shown to be prohibited goods or notified goods under Section 123, the goods should not have been absolutely confiscated. Instead, the Commissioner (Appeals) should have exercised the discretionary authority under Section 125 and allowed release thereof on a specified quantum of redemption fine'.*

(vi). Etc.

Under the circumstances, the applicant has prayed to the Revision Authority that the gold which was just 316 grams and not in commercial quantity may be released on payment of nominal redemption fine as per Section 125 of the Customs Act, 1962 and personal penalty may be waived off.

6. The respondent vide their written submission bearing F.No. Aircus/Review-26/2021-22 dated 22.04.2021 have stated that in the instant case, the offence had been committed in a premeditated and clever manner with indicated mensrea; that had the applicant not been intercepted, he would have gone away without payment of duty; that the applicant had deliberately not declared the gold to Customs in order to evade Customs duty; that applicant had admitted to possession, non-declaration, carriage and recovery of the seized gold, that the applicant could not produce any purchase invoice; that Section 123 of the Customs Act, 1962 cast a burden on the applicant to prove that the gold was not smuggled; that they rely on the following case laws;

(i). Abdul Razak vs. UOI – 2012(275)ELT 300(Ker)(DB) passed by the Division Bench of the Hon'ble High Court, Kerala, on the issue that appellant did not have right to get the confiscated gold ;

(ii). Commissioner of Customs (Air) vs. P. Sinnasamy, passed by Hon'ble Madras High Court, it is held that non-fulfilment of conditions tantamount to prohibition.;

(iii). Om Prakash Bhatia vs. Commissioner of Customs, Delhi – 2003(6) SC 161 of the Apex Court, it is held that non-fulfilment of conditions tantamount to prohibition.;

(v). Cestat Order in respect of Baburaya Narayan Nayak vs. Commissioner of Customs, Bangalore – 2018(364) ELT 811 (Tri-Bang), upheld absolute confiscation as evidence of licit purchase had not been provided;

(vi). Board's Circular no. 495/5/92-Cus.VI dated 10.05.1993 which specifies that in r/o gold seized for non-declaration, no option to redeem the same on redemption fine under Section 125 of the Customs Act, 1962, should be given, except in very trivial cases where the adjudicating authority was satisfied that there was no concealment of the gold in question.

Therefore, under the circumstance of the case, the respondent has prayed to the Revision Authority to reject the revision application filed by the applicant and to uphold the OIA passed by the AA.

7. Personal hearing in the case was scheduled for 11.04.2023. Shr. Ashish Chauhan, Advocate for the applicant the applicant appeared for personal hearing on 11.04.2023 and submitted that small quantity of gold brought for personal use has been absolutely confiscated for non-declaration. He submitted that applicant is not a habitual offender and therefore requested to allow redemption of goods on nominal RF and penalty.

8. 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 the goods and had he not been intercepted would have walked away with the impugned gold chains (2 nos) and gold bar 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 two gold chains and a gold bar was therefore, justified.

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. 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 the 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. The quantity of the gold under import is small and is not of commercial quantity. Respondent had not made out a case that the impugned gold had been ingeniously concealed by the applicant. There are no allegations that the applicant is a habitual offender and was involved in similar offence 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 impugned gold chains (2 nos) and a gold bar, leading to dispossession of the applicant of the same in the instant case is therefore, harsh and not reasonable. Government is inclined to allow the redemption of the same on payment of a redemption fine. Government therefore, sets aside the impugned order of the appellate authority. The impugned gold i.e. 2 gold chains and a gold bar, totally weighing 316 grams and valued at Rs. 9,16,552/- is allowed to be redeemed on payment of fine of Rs. 1,80,000/- (Rupees One Lakh Eighty Thousand only). The Government finds that the penalty of Rs. 1,00,000/- (Rupees One lakh only) imposed on the applicant under Section 112 of the Customs Act, 1962 which has been also upheld by the AA, is appropriate and commensurate with the omission and commission committed and the same does not merit interference.

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

  
( SHRAWAN KUMAR )

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

ORDER NO. 283 /2023-CUS (WZ)/ASRA/MUMBAI DATED 22.06.2023.

To,

1. Shri. Kalpesh Samji Baradiya, **Address No. 1** : Plot No. RM57, MIDC, Phase - 2, Near Aims Hospital, Dombivali East, Thane - 421201; **Address No. 2** : Village Kalitalavdil, Tal. Bhuj, Kutch, Gujarat.
2. Pr. Commissioner of Customs, Chhatrapati Shivaji Maharaj International Airport, Terminal 2, Level - II. Sahar, Mumbai 400 099.

Copy to:

1. Aurum Law Advisors, 307, Ecostar, Near Udipi Vihar Hotel, Vishweshwar Nagar, Off. Aarey Road, Goregaon East, Mumbai - 400 063.
2. Sr. P.S. to AS (RA), Mumbai.
3. File Copy.
4. Notice Board.