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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. 380/13-14/B/WZ/2018-RA / 823

: Date of Issue: 19.01.2023

ORDER NO. 49-50/2023-CUS (WZ)/ASRA/MUMBAI DATED 17.01.2023
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 : Pr. Commissioner of Customs, Pune.

Respondent : 1. Shri. Dadaso Mahatma Dusharekar
2. Shri Digvijay H. Ghorpade

Subject : Revision Application filed, under Section 129DD of the
Customs Act, 1962 against the Order-in-Appeal No. PUN-
CT-APPII-000-200 & 201-17-18 dated 008.09.2017 [F.No.
V-2 PI/318/CUS/2016/145/2017-18 & V-2 PI/322/
CUS/2016/146/2017-18] passed by the Commissioner
(Appeals), Central Tax, Pune-II.

ORDER

These two Revision applications have been filed by Commissioner of Customs, Pune (herein after referred to as the Applicant) against the Order-In-Appeal No. PUN-CT-APP11-000-200 & 201-17-18 dated 08.09.2017 passed by the Commissioner (Appeals), Central Tax, Pune – II in respect of Shri Dadaso Mahatma Dusharekar (herein after referred to as the Respondent No. 1) and Shri Digvijay H. Ghorpade (herein after referred to as the Respondent No. 2).

2. Brief facts of the case are that on 18.11.2014, the Pune Customs Officers had intercepted the Respondent No.1 at the Pune International Airport when he attempted to pass through the Green Channel after filing a Nil Customs Declaration. Respondent No.1 had arrived at the Pune International Airport by Air India Express Flight No.IX 212 on 18.11.2014, from Dubai. On questioning the Respondent No.1 could not give a satisfactory reply and hence the Officers carried out his personal search in front of Panchas. During his personal search before the Panchas, three Gold bars of foreign original of 995 purity totally weighing 3 kgs, valued at Rs.79,98,000/- was recovered from him which were concealed in his socks and shoes and below the front side of his waist. The Respondent No. 1 revealed in his statement that on 3.11.2014 he went to Dubai alongwith Respondent No. 2 and they met one Mr Riyaz who arranged for their stay in Dubai. Respondent No. 2 returned within a few days. Mr Riyaz on hearing of Respondent No. 1's plan to return to India, asked him to act as a carrier to carry gold for monetary consideration and to hand over the same to Respondent No. 2. Respondent No. 1 agreed to do the same and had brought the impugned gold. The Respondent No. 1 had opted for green channel and filed a Nil Customs declaration and attempted to smuggle Gold into India in contravention of the provisions of the Customs said Act with an intension to evade payment of the

Customs Duty. The said gold bars were taken over and seized under the Panchnama dated 18.11.2014, under the provisions of the Customs Act, 1962.

3. After due process of the law, the Original Adjudicating Authority, viz the Additional Commissioner of Customs, Pune vide OIO No. PUN-CUSTOM-000-ADC-03/16-17 dated 26.04.2016, ordered:

(i) Absolute confiscation of the 3 Gold bars, totally weighing 3 Kgs and collectively valued at Rs.79,98,000/-, under the provisions of Section 111(d), Section 111(1) and Section 111(m) of the Customs Act, 1962.

(ii) Imposition of personal penalty of Rs.15,00,000/- on the Passenger and Rs.5,00,000/- on Mr Digvijay under Section 112 (a) & (b) of the Customs Act, 1962.

(iii) Imposition of penalty of Rs.4,00,000/- on the Passenger under Section 114AA of the Customs Act, 1962.

4. Aggrieved by the said order, both the respondents filed appeal before the appellate authority viz, Commissioner of Customs (Appeals), Mumbai -III who vide Order-In-Appeal No. PUN-CT-APPII-000-200 & 201-17-18 dated 08.09.2017 allowed to redeem the three Gold bars of foreign original of 995 purity totally weighing 3 kgs, valued at Rs.79,98,000/- on payment of redemption fine of 15% of the seizure value in terms of Section 125(1) of the Act with payment of appropriate Customs duty, as applicable, in terms of Section 125(2) of the Act. Penalty imposed upon Respondent no.1 and 2 under Section 112 (a) and (b) of the Customs Act was also reduced to Rs. 8,00,000/- and Rs. 2,00,000/- respectively. Penalty imposed under Section 114AA on Respondent no.1 was also reduced to Rs. 1,00,000/-.

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

5.01 The order passed by the Commissioner (Appeal-1), Pune, is not just, legal and proper to the extent of reversing the order of Adjudicating Authority and giving an option to the Passenger to redeem the smuggled Gold in lieu of confiscation as well as reduction in Penalties imposed under Section 112(a) and (b) and Section 114AA of the Act, on the grounds detailed below. The case laws relied upon by the Appellate Authority appears not to be squarely applicable to the instant case as the same are on different footings.

5.02 The Commissioner (Appeals) has erred by interpreting the Section 125 of the Customs Act, 1962, in isolation rather than interpreting harmoniously along with other relevant Sections viz. 2(33), 2(39), 11(2)(c), 11(2)(e), 11(2)(0), 11A(a), 77, 78, 79, 107, 108, 111(d), 111(f), 111(o), 111(1), 111(m), 111(n), 121, 123 of the Customs Act, 1962 read with Rules 6, Appendix D of the Baggage Rules, 1998, Regulation 3 of Customs Baggage Declaration Regulations, 2013, Para 2.26 (a) of Foreign Trade Policy 2015-20, Notification No. 12/2012-Cus and Circular No. 495/5/92-CusVI dated 10.05.1993.

5.03 The Commissioner (Appeals) has erred by not interpreting

- a) Para 3 of CBEC Circular No. 495/5/92-Cus.VI dated 10.05.1993, in appropriate manner
- b) the decision in the case of Hon'ble Madras High Court Order dated 23.08.2016 in C.M.A. No. 1631 of 2008, in the matter of Commissioner of Customs (Air), Chennai Vs. P. Sinnasamy (para 19), which had after elaborate discussion with regard to release of gold under Section 125 of the Customs Act, 1962, by harmonious reading of other provisions of Customs Act, 1962, and various judicial pronouncements, rejected the contention of the appellant that gold can be released as gold is not notified as one of the prohibited goods and held that prohibition / restriction is inbuilt in the Customs Act, 1962 Rejecting the contention of the appellant, the Hon'ble Madras High Court held that while allowing redemption by the authorities, the nature of act of smuggling and its possible impact on the economic policy framed by the Nation, is to be evaluated meticulously.
- c) the decision in the case of Om Prakash Bhatia v. Commissioner of Customs, Delhi reported in 2003 (155) ELT 423 (SC).
- d) by not considering the criminal nature of the case which is not merely the issue of tax evasion but a serious issue of smuggling of Gold which cause injury to the economy of the Country in spite of recognizing the fact of ingenious modus operandi of smuggling Gold make it prohibited goods,

liable for confiscation as well as liable for penal action as confirmed/imposed on the Passenger and Mr Digvijay by original adjudicating authority.

5.04 The applicant also relied on the Revision Order No. 33/2016-Cus dated 22.03.2016, in the case of Commissioner of Customs, IGI Airport, New Delhi vs. Shri. Raj Kumar Sabharwal, wherein it was held that the statement recorded under Section 108 of the Customs Act, 1962, before a Customs Officer has evidentiary value and is binding.

5.05 The Appellate Authority has erred in overlooking the ratio of Apex court in case of Om Prakash Bhatia Vs. CC (2003 (155) ELT 423 SC) and Board's Circular F. No. 495/5/92-Cus.VI dated 10.05.1993. It is clearly recorded in the findings especially the intent to bring foreign currency into India without declaration, evasion of Custom duty, modus operandi employed to conceal the Gold and the quantity thereof. The Passenger carried the impugned Gold by hiding the same in his socks/shoes and under the waist. The subject Gold in the form of 3 bars, totally weighing 3kgs, valued at Rs.79,89,000/- were recovered during the Passenger's personal search are prohibited in nature on account of non compliance of the statutory requirement which was rightly confiscated absolutely by the Adjudicating Authority while exercising his discretionary powers. However, the Appellate Authority had erroneously held that this case is a simple case of smuggling the Gold to make fast bucks illegally and real motive of smuggling was to quickly capitalize on this margin of profit as turnaround time to purchase the Gold in Dubai and smuggle it in India. The instant smuggled goods fall under the category of "prohibited goods" due to violation of requirements under the Act wherein option for redemption is not denied. The Appellate Authority further observed that Absolute Confiscation is warranted in cases of the goods which cannot be imported by any one, such as arms, ammunition, addictive substance and the intention behind the provisions of Section 125 is clear that import of such goods under any circumstances would cause danger to the health, welfare or morals of people as a whole. It is submitted that the list of circumstances mentioned in the findings of Appellate Authority appears to be taken from the Section 11 of the Customs Act, 1962 and the said list also contains other circumstances viz. prevention of smuggling, conservation of foreign exchange & safeguarding of balance of payments and prevention of injury to economy of the Country by the uncontrolled import or export of gold or silver specifically mentioned under Sections 11(2)(c), 11(2)(e)

and 11(2)(f) of the Customs Act, 1962. In the present case the Appellate Authority erroneously had given an option to the Passenger to redeem the smuggled gold on payment of redemption fine in lieu of confiscation under Section 125 of the Customs Act, 1962. These actions are contrary to the intention of the legislature and the Board Circulars dated 10.05.1993 and 06.03.2014, which are binding in nature on quasi-judicial authorities. Hence, the orders passed by the Appellate Authority needs to be set aside to the extent of giving an option to redeem the smuggled goods on payment of redemption fine and reduction in penalty imposed.

5.06 In view of the above the applicant requested to set aside the impugned Order-In-Appeal No. PUN-CT-APPII-200 & 201-17-18 dated 08.09.2017, passed by the Commissioner, (Appeals), Central Tax, Pune-II Pune and Allow the Application for Revision of Order-In-Appeal No. PUN-CT-APPII- 200 & 201-17-18 dated 08.09.2017, passed by the Commissioner, (Appeals), Central Tax, Pune-II and also to restore the Order in Original No.PUN-CUSTOM-000- ADC-03/16-17 dated 26.04.2016, passed by the Additional Commissioner, Customs, Pune.

6. Personal hearings in the case were scheduled for 11.08.2022, 23.08.2022, 15.09.2022 and 22.09.2022. No one appeared for the applicant and respondent. Sufficient opportunities have been accorded to the applicant and respondent to put forth and defend their case. Since, none have appeared for the applicant and respondents, the case is being taken up for a decision on the basis of evidence on record.

7.1 The Government has gone through the facts of the case and notes that respondent was carrying a large quantity of gold and had not declared the same to the Customs. Even after interception, when the Respondent No. 1 was questioned, he did not give a reasonable reply. He had given a Nil declaration and had not declared the dutiable items in his possession in the Customs declaration form submitted by him. The Respondent No. 1 had not filed a true declaration to the Customs and had clearly failed to declare the goods to the Customs at the first instance as required under Section 77 of the Customs Act, 1962. The

Quantity of the gold bars is large, of high purity and in primary form, indicating that the same is for commercial use. It also reveals that the act committed by the said respondent was conscious and pre-meditated. He had no intention to declare the gold in his possession to Customs and pay the Customs duty. Had he not been intercepted, he would have gotten away with it. The Government finds that the confiscation of the gold is therefore, justified.

7.2 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."

7.3 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.

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".

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.

9. 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. Government observes that the quantum of gold was large, of maximum purity, in primary form, of commercial quantity and it was consciously and premeditatedly not declared which reveals the intention of the said Respondent. Also, the gold was in primary form and of maximum purity which indicates that the same was for commercial use. Respondent No. 1 had not declared the impugned gold to Customs and had furnished a false declaration also. It has been categorically admitted by the Respondent No. 1 that the gold bars were concealed in his socks/shoes and below the front side of his waist to evade detection by the customs at the Pune Air Port and that he carried gold bars to India for which he was offered a healthy amount and return ticket expenses. He had to give the gold bars to Respondent 2 waiting outside the airport. This reveals the clear intention to evade duty and smuggle the gold into India. The circumstances of the case especially that it is of commercial quantity and consciously concealed, probates that the Respondent had no intention of declaring the gold to the Customs at the airport. All these have been properly considered by the Original Adjudicating Authority while confiscating the three gold bars of foreign original of 995 purity totally weighing 3 kgs, valued at Rs.79,98,000/-. Though the Advocate of the Respondents vide letter dated 19.03.2016 stated that his client had purchased three gold bars valued at from M/s Ajwa Jewellery (LLC), Dubai and produced copy of Invoice No. 23 dated 16.11.2014, he could not produce any source from where he received AED 4, 23,000/- for purchase of these gold bars.

11. The main issue in the case is the manner and quantum of the impugned gold which was attempted to be brought into the Country. The option to allow redemption of seized goods is the discretionary power of the adjudicating authority depending on the facts of each case and after examining the merits.

In the present case, the manner of concealment being conscious with clear intent, quantity being large and commercial, this being a clear attempt to smuggle gold bars in primary form, is a fit case for absolute confiscation as a deterrent to such offenders. Thus, taking into account the facts on record and the gravity of offence, the adjudicating authority had rightly ordered the absolute confiscation of the gold. But for the intuition and the diligence of the Customs Officer, the gold would have passed undetected. The redemption of the gold will encourage non bonafide and unscrupulous elements to resort to concealment and bring gold. If the gold is not detected by the Custom authorities, the passenger gets away with smuggling and if not, he has the option of redeeming the gold. Such acts of mis-using the liberalized facilitation process should be meted out with exemplary punishment and the deterrent side of law for which such provisions are made in law needs to be invoked. The absolute confiscation of the gold would act as a deterrent against such persons who indulge in such acts with impunity. Therefore, the order passed by the appellate authority is liable to be set aside and the order passed by the original adjudicating authority is liable to be upheld.

12. The Government finds that Respondent No.2 admitted that he had introduced the Respondent No. 1 to Mr Riyaz who had handed over the gold to Respondent No. 1, for the purpose of smuggling of gold bars into India and who promised to pay a healthy amount of money for the same. This substantiates the conspiracy of smuggling of gold by the Respondent No. 1 & 2. Hence the penalty imposed under section 112 (a) and (b) and under 114AA is appropriate and commensurate with the omission and commission committed by the Respondent 1 & 2. Therefore, the order passed by the appellate authority in respect of the penalty is liable to be upheld.

13. In view of the above, the Government sets aside the order passed by the appellate authority in respect of allowing redemption of gold. 3 Gold bars

weighing 3 Kg, valued at Rs.79, 98,000/- are absolutely confiscated. Penalty imposed by the Appellate authority is upheld.

14. Revision Application is allowed on above terms.


(SHRAWAN KUMAR)

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

ORDER No. H9-50 /2023-CUS (WZ) /ASRA/ DATED 01.01.2023

To,

1. The Commissioner of Customs, Pune, E-Wing, 4th Floor, 41-A, ICE-House, Sassoon Road, Opp Wadia Collage, Pune-411001.
2. Mr. Dadaso Mahatma Dusharekar, S/o Mahatma Jaiwant Dusharekar, A/p Posewadi, Taluka Khanapur, District Sangli-415307.
3. Mr. Digvijay H. Ghorpade, A/p Hanmantnagar, Behind Oil Mill, Taluka Khanapur, District Sangli-415307

Copy to:

1. The Additional Commissioner of Customs, Pune, E-Wing, 4th Floor, 41-A, ICE-House, Sassoon Road, Opp Wadia Collage, Pune-411001.
2. Sr. P.S. to AS (RA), Mumbai.
3. Guard File,
4. File Copy.
5. Notice Board.