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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. 380/72/B/WZ/2018-RA/1659

Date of Issue 04.03.2021

ORDER NO. 51/2021-CUS (WZ)/ASRA/MUMBAI DATED 02.03.2021 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, Mumbai.

Respondent : Shri Mohammed Shaub Bahadur

Subject : Revision Application filed, under Section 129DD of the Customs Act, 1962 against the Order-in-Appeal No. MUM-CUSTM-PAX-APP—171/18-19 dated 20.06.2018. passed by the Commissioner of Customs (Appeals), Mumbai-III.

ORDER

This revision application has been filed by The Pr. Commissioner of Customs Mumbai (herein after referred to as the Applicant department) against the Order in appeal No. MUM-CUSTOM-PAX-APP-171/18-19 dated 20.06.2018 passed by the Commissioner of Customs (Appeals), Mumbai-III.

2. Briefly stated the facts of the case are that the Respondent, Shri Mohammed Shaub Bahadur arrived from Dubai on 27.05.2015. The officers of Air Intelligence of Customs intercepted him at the exit gate after he had cleared himself through the green channel. In his declaration form, the total value of the dutiable goods being imported was blank. On noticing some suspicious images while X-ray screening of the respondent's baggage, its detailed examination was undertaken. The examination of the baggage resulted in the recovery of eight silver coloured gold clips concealed inside the baggage handle of the trolley bag. The officers also recovered a gold chain worn by the passenger. The silver coloured gold clips and the gold chain were weighed to be 233 grams and 142 grams totally valued at Rs. 9,59,677/- (Rupees Nine lakhs Fifty nine Thousand and Six hundred and seventy seven).

3. The Original Adjudicating Authority vide Order-In-Original No. ADC/RR/ADJN/336/2016-17 dated 14.10.2016 ordered absolute confiscation of the impugned gold collectively weighing 375 grams , and imposed penalty of Rs. 95,000/- (Rupees Ninety five thousand) under section 112 (a) and (b) of the Customs Act, 1962 on Applicant.

4. Aggrieved by the said order, the applicant filed appeal before the Commissioner (Appeals) who vide Order-In-Appeal No. MUM-CUSTOM-PAX-APP—34/18-19 dated 25.04.2018. The Appellate Authority set aside absolute confiscation and allowed the gold to be redeemed on payment of a redemption fine of Rs. 2,50,000/- (Rupees Two lakhs Fifty thousand). The penalty of Rs. 95,000/- (Rupees Ninety five thousand) imposed under Section 112 (a) & (b) of the Customs Act, 1962 was upheld.

5. Aggrieved with the above order the Applicant department has filed this revision application inter alia on the grounds that;

5.1 The personal search of the passenger resulted in the recovery of a gold chain weighing 142 grams and 233 grams of gold in the form of 8 silver coloured clips concealed in the handles of his trolley bag.

5.2 The passenger declared the "Total value of dutiable goods being imported" at column no 9 of the declaration form as "blank" with intention of smuggling the same. Further, the passenger while carrying the impugned gold had deliberately and knowingly opted for the green channel of customs (for passengers having goods within admissible free allowance) whereas he was supposed to go through Red Channel and declare the total value of the dutiable goods imported by him.

5.3 The passenger therefore failed to make a true declaration of the contents of the baggage to Customs as required under Section 77 of the Customs Act, 1962, thus rendering the goods as prohibited goods in terms of Section 2(33) of the Customs Act, 1962 and therefore the goods under seizure are liable to confiscation under Section 111(d),(1) &(m) of the Customs Act, 1962.

5.4 The passenger in his statement dated 27.05.2015 recorded under Section 108 of Customs Act, 1962 has categorically stated that he had concealed the gold and did not declare it to avoid payment of Custom's duty; Hon'ble Supreme Court in the case of K.I. Pavunny v. Asst. Collector (HQ) Central Excise Collectorate, Cochin 1997 (90) ELT 241 SC has held that: *"Even though the Customs officers have been invested with many of the powers which an officer in charge of a police station exercises while investigating a cognizable offence, they do not, thereby, become police officers within the meaning of Section 25 of the Evidence Act and so the confessional statements made by the accused persons to Customs officials would be admissible in evidence against them"*.

5.5 Original Adjudicating authority while confiscating the goods absolutely has specifically held that such concealment is nothing but ingenious concealment. The option to redeem the seized goods under Section 125 of the Customs Act, 1962 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 clever and ingenious is a fit case for absolute confiscation as a deterrent to passengers mis-using the facility of Green channel.

5.6 The passengers opting to clear themselves through Green Channel are cleared on the basis of their declaration and only a small fraction of passengers are intercepted for detailed examination, Had the passenger not been intercepted he would have made good with the 375 gms of gold valued at Rs.9,59,677/-. 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 made in law need to be invoked. Hence the Commissioner (Appeals) ought not to have allowed redemption of the impugned gold.

5.7 The resort to Section 125 of the C.A. 1962, to impose fine in lieu of confiscation cannot be exercised as to give a bonanza or profit for an illegal transaction of imports. The Division Bench considering the decision of the Supreme Court in Om Prakash Bhatia vs Commissioner of Customs 2003(6) SCC 161 came to the conclusion that the prohibition in terms of Section 2(33) of the Customs Act, 1962 was attracted in a case of this nature. Therefore, absolute confiscation was justified. This order of the Division Bench was taken up on appeal to the Supreme Court in Special Leave to Appeal (Civil) No.22072 of 2009 and the Special leave Appeal w. dismissed holding. follows:- "Applying the ratio of the judgment in the case of Om Prakash Bhatia vs. Commissioner of Customs, Delhi. reported in 2003 (6) S.C.C. 161, to the facts of the case, we find that, in the present case. the assessee did not fulfill the basic eligibility criteria, which make the imported item, prohibited goods. The discretion of allowing redemption under section 125 of the Customs Act, 1962 has to be exercised based on merits of each case. In the present case the manner of concealment being clever and ingenious is a fit case for absolute confiscation as a deterrent to passengers mis-using the facility of Green channel.

5.8 Further, Section 2(33) of the Act defines "prohibited goods" as under:— "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.". This is also made clear by this Court in Sheikh Mohd. Omer v. Collector of Customs, Calcutta and Others R(970) 2 SCC 728] wherein it was contended that the expression 'prohibition' used

in section (II (d) must be considered as a total prohibition and that the expression does not bring within its fold the restrictions imposed by clause (3) of the Import Control Order, 1955. The Court negated the said contention and held thus:— "... What clause (d) of Section I I I says is that any goods which are imported or attempted to be imported contrary to "any prohibition imposed by any law for the time being in force in this country.' is liable to be confiscated. "Any prohibition" referred to in that section applies to every type of "prohibition". That prohibition may be complete or partial. Any restriction on import or export is to an extent a prohibition. The expression "any prohibition" in section 111(d) of the Customs Act, 1962 includes restrictions. Merely because Section 3 of the Imports and Exports (Control) Act, 1947, uses three different expressions "prohibiting", "restricting" or "otherwise controlling", we cannot cut down the amplitude of the word "any prohibition" in Section 111(d) of the Act. "Any prohibition" means every prohibition. In other words all types of prohibitions. Restriction is one type of prohibition.

5.9 Moreover, when the original adjudicating authority has taken an informed decision of confiscating the subject goods absolutely and imposed personal penalty, the Commissioner (Appeals) should not have allowed redemption, without pointing out any legal infirmity in the order of the adjudicating authority. It is submitted that the appellate authorities cannot be unmindful of the great weight to be attached to the findings of the original authority, who has first-hand knowledge and is in a position to assess the facts and the credibility of circumstances from his own observations. If the original authority has acted bonafide through a speaking order, which is not illogical or suffers from procedural impropriety, the appellate authority should not take a contrary view on the same issue as held in a plethora of judicial pronouncements as detailed below:-It was held in Commissioner of Customs, Tuticorin V/s Sai Copiers [2008 (226) E.L.T. 486 (Mad.)] that any order of the lower authority could be interfered with only in circumstances in which it was demonstrated that such order was purely arbitrary, whimsical and resulting in miscarriage of justice.

5.10 It is submitted that the Hon'ble Apex Court in case of Samynathan Murugesan V. Commissioner [2010 (254) E.L.T. A15 (S.C.)], upheld the decision of Madras High Court's Judgment as reported in 2009 (247) E.L.T.

21 (Mad) of absolute confiscation of gold by the lower adjudicating authority.

5.11 On the grounds stated above, the order in Appeal passed by the Commissioner of Customs (Appeals), CSI Airport, Mumbai-III, may be set aside and the order in original upheld and/or any other order as deemed fit and proper.

7. Personal hearings in the case was scheduled on 29.08.2019, 06.09.2019, 20/28.11.2019 and 29.08.2019. In view of the change in Revisionary authority, another opportunity of personal hearing was extended on 05.02.2021, Shri Avinash Kumar, Superintendent, attended the said hearing on behalf of the Applicant department. He reiterated the points made in the written submissions and prayed that the revision application be allowed. Nobody attended the hearing on behalf of the respondent.

8. The Government has gone through the facts of the case, The officers of Customs noticing some suspicious images while X-ray screening of the respondent's baggage directed its detailed examination. The examination of the baggage resulted in the recovery of eight silver coloured gold clips concealed inside the baggage handle of the trolley bag. A personal search also resulted in the recovery of a gold chain worn by the respondent. Totally 375 grams totally valued at Rs. 9,59,677/- (Rupees Nine lakhs Fifty nine Thousand and Six hundred and seventy seven). The facts regarding the interception and subsequent detection are not in dispute. The respondent did not file any declaration as required under section 77 of the Customs Act, 1962 and was intercepted at the exit after he had cleared himself through the green channel. The confiscation of the gold plate is therefore justified.

9. The original adjudicating authority in its order dated 27.10.2017 ordered absolute confiscation of the impugned gold as the respondent is not an eligible passenger to import gold jewelry and the seized gold was disguised as clips and ingenuously concealed in the handle of the trolley bag so as to hoodwink the Customs officers. The Appellate authority has allowed redemption of the gold. The order of the Commissioner (Appeals) has in its order contended that "*I find that that the prohibition relates to two types of goods, one which cannot be imported*

by any one, such as arms, ammunition, addictive substance viz. Narcotic Drugs, wild life products etc which are categorised as 'prohibited goods'. The other category includes the goods the import/export of which is allowed subject to fulfilment of certain condition and if the conditions are complied with, such goods will not fall in the category of 'Prohibited Goods'." Accordingly, the intention behind the provisions of Section 125 is clear that import of such goods (which are prohibited in absolute terms) under any circumstances would cause danger to the health, welfare or morals of people as a whole and therefore the discretion should not be exercised. Second category includes the goods, the import/export of which is permitted subject to certain conditions and if the conditions are complied with, such goods will not fall in the category of "Prohibited goods". It is an admitted fact that the import of gold is allowed in case of certain category of persons subject to certain conditions. No permission or license from any Govt. agency or Reserve Bank of India is required for entitled persons to bring in Gold."

11. However, 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". The Honble Apex Court in the case of Sheikh Mohd. Omer V/s Collector of Customs, Calcutta and others, reported in 1983 (13) ELT 1439 (S.C.) has also held that, "*..... any goods which are imported or attempted to be imported contrary to "any prohibition*

imposed by any law for the time being in force in this country” is liable to be confiscated. “Any prohibition” referred to in that section applies to every type of “prohibition”. That prohibition may be complete or partial. Any restriction on import or export is to an extent a prohibition. The expression “any prohibition” in Section 111(d) of the Customs Act, 1962 includes restrictions.”. Therefore this contention of the Appellate authority is not based on correct appreciation of law as held by the Apex court and High Courts.

12. 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.

13. Further it is observed by the Hon'ble Supreme Court in the case of Om Prakash Bhatia Vs Commissioner of Customs, Delhi [2003 (155) E.L.T. 423 (SC)], that in matter of quasi-judicial discretion, interference by the Appellate Authority would be justified only if the lower authority's decision was illogical or suffers from procedural impropriety. It is submitted that the impugned Order in Original does not suffer from any such vice and therefore Commissioner (Appeals) should not have allowed redemption of the subject gold in the present case following the ratio of the above referred judgments. In the present case the question which arises is whether discretion as prescribed by section 125 of the Customs Act, 1962 was properly exercised. The Appellate authority has quoted the Apex Court to buttress the argument, that the lower authority's decision was illogical and suffers from procedural impropriety without explicitly pointing out the defect in the impugned Order in Original.

14. Similarly, the Appellate Authority states *“ I find that in case of Samynathan Murugeshan (supra) there is no distinction made by the Hon'ble High court in the manner of carrying the offending goods which could have an impact on the scope of section 125 of Customs Act, 1962. Otherwise also under section 125 of Customs Act, 1962 the criteria of allowing redemption is not dependent on the manner of*

carrying the offending goods by the Importer and there are no conditions attached to the discretion of allowing redemption which could have an overriding effect while interpreting the scope of section 125 of Customs Act, 1962. In other words the Hon'ble Madras High Court (supra) has not upheld the decision of Commissioner of absolute confiscation, due to any specific manner of carrying the gold i.e. ingenious concealment or otherwise." In extending the argument further, the Appellate Authority contends that concealment of the impugned gold should not be an issue while interpreting the scope of section 125 of Customs Act, 1962. Government however opines that the manner in which the gold was concealed i.e. concealed as gold clips inside the baggage handle of the trolley bag, reveals the intention of the respondent. It also revealed his criminal bent of mind and a clear intention to evade duty and smuggle the gold into India. Further, the passenger opted for the green channel. Had the passenger not been intercepted he would have escaped the law. These circumstances of the case and the clear intention of the Appellant was not at all considered by the Appellate Authority while giving him option to redeem the seized goods on payment of fine and penalty.

15. The Appellate order finally concludes, *".....I find that the adjudicating authority ignored not only the huge difference in quantity but also the fact that in case at hand there is no dispute as regards to ownership of the gold"*. It is a matter of record that the ownership of the gold has not been disputed, and ownership of the impugned gold cannot be a factor for allowing redemption of the gold, which has been attempted to be imported in such an ingenious manner. In para 7.1 the Original Adjudicating authority quotes *"The nature of concealment was such that it required special and extra efforts of first conducting a personal search of the passenger in the presence of panchas and then removing the metallic parts from the baggage handle clips. Such concealment is nothing but ingenious concealment."* The nature of concealment in this case being ingenious, gold merits absolute confiscation. The above para clearly indicates that the fact of ingenious concealment of the gold weighed in the mind of the Original adjudicating authority in not allowing redemption of the gold.

16. Government therefore opines that the manner in which the impugned gold was being brought into the Country is a relevant factor. 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 clever and ingenious is a fit case for

absolute confiscation as a deterrent to passengers misusing the facility of green channel. In support of this contention, the judgment of Hon'ble Delhi High Court in the case of Jain Exports Vs Union of India 1987(29) ELT753 is relevant wherein the Hon'ble High Court has observed that, " *the resort to Section 125 of the C.A. 1962, to impose fine in lieu of confiscation cannot be so exercised as to give a bonanza or profit for an illegal transaction of imports.*". Allowing the redemption of the gold brought in such manner, will encourage such concealment as, the passenger gets possession of the gold either way, i.e. when the gold is not detected by the Custom authorities the passenger gets away with smuggling and if it is caught he has the option of redeeming the gold. Therefore, such acts of mis-using the liberalized facilitation process should be meted out with exemplary punishment. The impugned gold therefore merits absolute confiscation. The order of the Appellate authority is therefore liable to be set aside.

17. In view of the above the Government sets aside the Order of the Appellate authority. The order of the Original Adjudicating Authority is upheld.

Shrawan
2/3/21
(SHRAWAN KUMAR)

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

ORDER No. 51 /2021-CUS (WZ) /ASRA/

DATED 02-03-2021

To,

1. Shri. Mohammed Shaub Bahadur, No. 8, 1st Main, 1st Cross 1st Stage BTMLYT, N. G.Palya, Maruthi Layout, Bangalore-560029.

Copy to:

1. The Commissioner of Customs, CSI Airport, Sahar, Mumbai.
2. C/o Ms. Nuzhat Pistawala (Advocate) 19/21, Maaz Mansion, 1st Floor, Room No. 7, 2nd Marine Street, Dhobitalao, Mumbai-400 002.
3. Sr. P.S. to AS (RA), Mumbai.
4. Guard File. ,
5. Spare Copy.