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SPEED POST



GOVERNMENT OF INDIA
MINISTRY OF FINANCE
(DEPARTMENT OF REVENUE)
8th Floor, World Trade Centre, Centre - I, Cuffe Parade,
Mumbai-400 005

F.No. 371/208/B/WZ/2020-RA/4534 Date of Issue 06.08.2023

ORDER NO. 522/2023-CUS (WZ) /ASRA/MUMBAI DATED 30.06.2023
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 : Shri. Kishore Sadashiv Naik

Respondent : Pr. Commissioner of Customs (Airport), CSMI Airport,
Mumbai.

Subject : Revision Application filed, under Section 129DD of the
Customs Act, 1962 against the Order-in-Appeal No.
MUM-CUSTOM-PAX-APP-192/2020-21 dated 24.07.2020
issued on 30.07.2020 through S/49-293/2019 passed by
the Commissioner of Customs (Appeals), Mumbai - III.

ORDER

This revision application has been filed by Shri. Kishore Sadashiv Naik (herein referred to as Applicant) against the Order-in-Appeal No. MUM-CUSTOM-PAX-APP-192/2020-21 dated 24.07.2020 issued on 30.07.2020 through S/49-293/2019 passed by the Commissioner of Customs (Appeals), Mumbai – III.

2. Brief facts of the case are that on 09.04.2018, the Officers of Customs had intercepted the Applicant at Chhatrapati Shivaji Maharaj International Airport [CSMIA], Mumbai where he had arrived from Dubai by Emirates Flight no. EK-500. The applicant had been intercepted near the exit gate. A search led to the recovery of a silver coated metallic plate which had been stuck below the lower front wheels of the trolley with the help of two side adhesive tape. The metallic plate was got assayed through a Government Approved Valuer who certified that the silver coated metallic place was made of gold having purity of 999% 24KT, weighed 600 grams and was valued at Rs. 17,08,128/-. The applicant in his statement informed that the gold plate did not belong to him and he had carried the gold plate in a concealed manner to evade Customs duty; that he had carried the same for a monetary consideration; that he knew that non-declaration of the gold and evading payment of Customs duty was an offence punishable under the Customs law.

3. After due process of investigations and the law, the Original Adjudicating Authority i.e. the Addl. Commissioner of Customs, CSMIA, Mumbai vide Order-In-Original No. ADC/AK/ADJN/426/2018-19 dated 21.01.2019 issued through S/14-5-237/2018-19/Adji (SD/INT/AIU/166/2018-APC), ordered for the absolute confiscation of the gold weighing 600 grams, valued at Rs. 17,08,128/- under Section 111 (d), (l) and (m) of the Customs Act, 1962. Further, a penalty of Rs. 1,90,000/- was imposed on the applicant under Section 112 (a) and (b) of the Customs Act, 1962.

4. Aggrieved by this Order, the applicant preferred an appeal before the appellate authority i.e. Commissioner of Customs (Appeals), Mumbai - III who vide Order-in-Appeal No. MUM-CUSTOM-PAX-APP-192/2020-21 dated 24.07.2020 issued on 30.07.2020 through S/49-293/2019 did not find any reason to interfere in the OIA passed by the AA and upheld the same in to-to.

5. Aggrieved by this Order, the applicant has filed this revision application on the undermentioned grounds of revision;

5.01. that Gold is not prohibited goods. It is submitted that gold is not a prohibited item and is only a restricted item. Prohibition relates to goods which cannot be imported or exported by any one, such as arms, ammunition, drugs etc. The intention behind the provisions of Section 125 is that import/export of such goods under any circumstances would cause danger to the health, welfare or morals of people as a whole. This would not apply to a case where import/export of goods is permitted subject to certain conditions or to a certain category of persons and which are ordered to be confiscated for the reason that the condition has not been complied with. In such a situation, the release of such goods confiscated would not cause any danger or detriment to public health. Admittedly, import/export of gold is permitted subject to certain conditions, therefore, it would not fall under the prohibited category as envisaged under the said of Section 125 of the Customs Act, 1962. that they have relied on the undermentioned case laws;

(a). In Hargovind Das K. Joshi Vs Collector of customs 1992 (61) ELT 172(SC) the Hon'ble Apex Court remanded the case to the Collector for exercising the option of redemption under section 125 of Customs Act, 1962.

(b). In Universal Traders v. Commissioner 2009 (240) E.L.T. A78 (SC) also the Apex Court allowed redemption of exported goods being not prohibited.

(c). Revision Order No. 198/2010-CUS, dated 20-5-2010 in F. No. 375/14/B/2010-RA-CUS in the case of MUKADAM RAFIQUE AHMED, [2011-270-ELT-447-GOI].

(d). etc.

5.02. that on the issue of option to redeem the gold, they have relied upon the undermentioned case laws;

(a). that the Andhra Pradesh High Court in the case of Shaikh Jamal Basha vs Government of India - 1992 (91) ELT 227(AP) has held that option to pay fine in lieu of confiscation has to be given to imported gold as the same is otherwise entitled to be imported on payment of duty.

(b). that in the case of Mohamed Ahmed Manu Vs Commissioner of Customs, Chennai - 2006 (205) ELT 383 (Tri-Chennai), the Chennai Bench of the Tribunal had allowed redemption of the confiscated gold on payment of redemption fine.

(c). that the the Government of India in the case of Mohd Zia-Ul-Haque Vs Addl Commissioner of Customs, Hyderabad vide revision order no 443/12-Cus dated 8-8-12, 2014 (214) ELT 849 (GOI) allowed the confiscated gold to be redeemed on payment of redemption fine.

(d). Collector of Custom vs. Elephanta Oil and Inds. Ltd [2003(152) ELT 02547 Supreme Court]; once imported article is re-exported as directed by the department, there is no question of levying any penalty or redemption fine.

(e). Kusum Bhai DayaBhai vs. Commr. Of Customs 1995 (79) ELT 292 Tri-Mumbai; If goods are allowed re-export on redemption, fine can be on the lower side and need not relate to margin of profit.

(f). K.K Gems vs. CC 1998-100-ELT-70-CEGAT.

(d). Etc.

5.03. that they have relied on a catena of case laws on the subject of gold not being a prohibited item and that option to redeem the same should have been granted; some of the case laws relied upon are as under;

(a). SHAIK JAMAL BASHA VERSUS. GOVERNMENT OF INDIA 1997 (91) E.L.T. 277 (A.P.); wherein it had been held that an option to pay the fine, in lieu of the confiscation of the goods, is to be given to the importer, in terms of the Second Part of Section 125 (1) of the Customs Act, 1962, read with Rule 9 of the Baggage Rules, 1978, framed under Section 79 (2) of the Customs Act, 1962.

(b). In CC (Airport), Mumbai Vs Alfred Menezes 2009 (242) ELT 334 (Bom.), the Hon'ble High Court held that Section 125(1) *ibid* clearly mandates that it is within the power of adjudicating authority to offer redemption of goods even respect of prohibited goods.

(c). In Yakub Ibrahim Yusuf 2011 (263) EL. T. 685 (Tri. Mumbai) the Tribunal held that option of redemption has to be given to person from whose possession impugned goods are recovered, even though he had *not claimed its ownership*.

(d). In VP Hameed Vs Collector of Customs Mumbai 1994(73) ELT 425 (Tri) it was held that there is no bar in allowing redemption of gold being an item notified under Section 123 of Customs Act, 1962 or for any other reason.

- (e). In T. Elavarasan Vs Commissioner of Customs (Airport), Chennai 2011 (266) ELT 167 (Mad), the Hon'ble High Court held that Gold is not a prohibited item and option is available to owner of goods or person from whom goods seized to pay -fine in lieu of confiscation.
- (f). etc.
- 5.04. that the applicant was not a carrier and that the allegations were based on assumption; that he claims ownership of the gold under absolute confiscation and prayed for its redemption on payment of reasonable fine and penalty.
- 5.05. that facts of the case of S. Murugesan vs. Commissioner -2010-254-ELT-A15-SC relied upon by the respondent could not be equated with the case of the applicant.
- 5.06. that the applicant had not committed any act of omission or commission which would be termed as a crime or organized smuggling activity, that he had never come under any adverse notice; that he had imported the small quantity of gold only for making a small profit; that absolute confiscation of the gold was too harsh, that the proceedings initiated against him be dropped and the gold ordered to be released on payment of reasonable fine and penalty.

In view of the above submissions, the applicant has prayed to the revisionary authority to allow the redemption of the gold on payment of a reasonable fine and penalty.

6. The respondent vide their written submission bearing F.No. Aircus/Review-373/2020-21 dated 23.12.2020 have stated; that applicant had admitted that he had concealed the gold plate on the wheels of trolley in order to evade detection and avoid payment of Customs duty; that applicant had admitted to having knowledge that non-declaration of the gold and evading payment of Customs duty was an offence punishable under the Customs law; that applicant had not declared the goods; that in the instant case, the offence had been committed in a premeditated and clever manner which 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 they rely on the following case laws;

- (i). Surjeet Singh Chhabra vs. UOI - 1997-89-ELT-646-SC, wherein the Apex Court had held that *'the confession, though retracted, is an admission and binds the petitioner'*.
- (ii). Apex Court's Order in the case of K.I Pavunny vs. Asstt. Collector (HQ), C.Ex, Cochin [1997-90-ELT-241-SC] on the issue that confessional statement made to Customs officials is admissible evidence.
- (iii). 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 ;
- (iv). 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.;
- (v). 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.;
- (vi). 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;
- (vii). 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 23.05.2023. Shri. Prakash Shingrani, Advocate for the applicant appeared for personal hearing on 23.05.2023 and submitted that applicant brought small quantity of gold for personal use, that there was no ingenious concealment and the applicant is not a habitual offender. He requested to allow the option to redeem the goods on nominal fine and penalty.

8. The Government has gone through the facts of the case and notes that the applicant had not declared the gold when he had entered the country. The impugned gold i.e silver coated gold plate weighing 600 grams of 24KT had been cleverly mounted on the underside of the trolley near the front wheels with the express intention of hoodwinking the Customs and evading payment of Customs duty. The quantity of gold is small and not in commercial quantity. The applicant clearly had failed to declare the goods to the Customs at the first instance, as required under Section 77 of the Customs Act, 1962. The act committed by the applicant reveals that it was conscious and pre-meditated. Had he not been intercepted; the applicant would have gotten away with the gold which had been cleverly concealed. Therefore, the confiscation of the gold was justified.

9. The Hon'ble High Court Of Madras, in the case of Commissioner Of Customs (Air), Chennai-I V/s P. Srinamasamy 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 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. The gold plate had been mounted underneath the front wheel of the trolley. There are no allegations that the applicant is a habitual offender and was involved in similar offence earlier. The quantity of gold and 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 for the aforesaid reasons, is inclined to set aside the absolute confiscation held in the OIA and grant option to release the impugned gold on payment of a redemption fine.*

14. Government notes that the penalty of Rs. 1,90,000/- imposed on the applicant under Section 112(a) and (b) of the Customs Act, 1962 is commensurate with the omissions and commissions committed and is not inclined to interfere in the same.

15. In view of the above, the Government modifies the order passed by the appellate authority and allows the applicant to redeem the impugned gold i.e. gold plate weighing 600 grams and valued at Rs. 17,08,128/- on payment of redemption fine of Rs. 3,40,000/- (Rupees Three Lakhs Forty Thousand only). Government upholds the penalty of Rs. 1,90,000/- imposed on the applicant under Section 112(a) and (b) of the Customs Act, 1962 by the OAA and upheld by the AA.

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

Shrawan
30/6/23
(SHRAWAN KUMAR)

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

ORDER No. 522/2023-CUS (WZ) /ASRA/MUMBAI DATED³⁰.06.2023

To,

1. Shri. Kishore Sadashiv Naik, Jambhalpada Chawl No. 3, Room No. 1, Kalina, Santa Cruz (E), Mumbai - 400 029.
2. Pr. Commissioner of Customs, Chhatrapati Shivaji Maharaj International Airport, T2, L2, Sahar, Andheri (E), Mumbai - 400 099.

Copy to:

1. Shri. Prakash K. Shingrani, Advocate, 12/334, Vivek Bldg, New MIG Colony, Bandra (East), Mumbai - 400 051.
2. Sr. P.S. to AS (RA), Mumbai.
3. File Copy.
4. Notice Board.