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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. 380/88/B/WZ/2018-RA/285 : Date of Issue : 19.01.2023

ORDER NO. 52/2023-CUS (WZ)/ASRA/MUMBAI DATED 18.01.2023 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, CSI Airport, Mumbai

Respondent : Mrs Shaikh Begam Jan Ayub

Subject : Revision Application filed, under Section 129DD of the Customs Act, 1962 against the Order-in-Appeal No. MUM-CUSTM-PAX-APP-509/2018-19 dated 30.08.2018 [Date of issue: 12.09.2018] [F.No. S/49-267/2016 AP] passed by the Commissioner of Customs (Appeals), Mumbai Zone-III.

ORDER

The Revision Application has been filed by the Principal Commissioner of Customs, CSI Airport, Mumbai (herein referred to as the 'Applicant-department') against the Order-in-Appeal No. MUM-CUSTOM-PAX-APP-509/2018-19 dated 30.08.2018[Date of issue: 12.09.2018] [F.No. S/49-267/2016 AP] passed by the Commissioner of Customs (Appeals), Mumbai Zone-III.

2. Brief facts of the case are that on 25.04.2015, on suspicion, the Customs Officers at the Chhatrapati Shivaji International (CSI) Airport, Mumbai intercepted the Respondent who had arrived from Dubai by Air India Flight No AI-984, at the exit gate after she had cleared herself through Customs from the Green Channel. The Respondent had left the column No 9 of the ie Total Value of Dutiable Goods' as 'blank'. The Respondent was asked whether she was carrying any contraband/dutiable goods/gold and Foreign/Indian currency either in her baggage or on her person to which she replied in the negative. On detailed examination of the checked-in-baggage owned and carried by the Respondent, some dark patches were noticed and led to the recovery of eight gold bars of 10 tolas each having foreign marking "ARG 10 TOLAS FINE GOLD 999.0" wrapped in four black adhesive tape packets concealed in the transformer of the microwave oven of "CLIKON" make. Further examination resulted in the recovery of two I-phones of 64 GB and 16GB kept in one green coloured strolley bag of "SMART POLO" make. The 08 gold bars of 10 tolas each having foreign marking "ARG 10 TOLAS FINE GOLD 999.0" and totally weighing 928 grams and valued at Rs. 22,66,602/- and one I-phone of 64 GB valued at Rs. 69,246/- and one I-phone of 16 GB valued at Rs. 43,457/- were seized under the reasonable belief that the same were

attempted to be smuggled into India in contravention of the provisions of the Customs Act, 1962

3. After following the due process of law, the Original Adjudicating Authority (OAA) i.e. Additional Commissioner of Customs, CSI Airport, Mumbai vide his Order-In-Original No. ADC/RR/ADJN/439/2015-16 dated 31.03.2016 [Date of issue: 15.04.2016] [FNo. S/14-5-273/2015-16 Adjn SD/INT/AIU/182/2015/AP 'C'] ordered for the absolute confiscation of the impugned 08 gold bars of 10 tolas each totally weighing 928 grams and valued at Rs. 22,62,602/- alongwith one I-phone of 64 GB valued at Rs. 69,246/- and one I-phone of 16 GB valued at Rs. 43,457/- under Section 111 (d), (l) & (m) of the Customs Act, 1962. Penalty of Rs. 2,50,000/- was imposed on the Respondent under Section 112(a) and (b) of the Customs Act, 1962. The microwave oven of "CLIKON" marked and black colour cellophane tape used for concealing the seized gold was confiscated under Section 119 of the Customs Act, 1962.

4. Aggrieved, with this Order, the Respondent 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-509/2018-19 dated 30.08.2018 [Date of issue: 12.09.2018] [F.No. S/49-267/2016 AP] set aside the Order of the OAA and gave the Respondent the option to redeem the impugned gold on payment of redemption fine of Rs. 4,25,000/- and upheld the personal penalty of Rs. 2,50,000/- imposed under Section 112(a) & (b) of the Customs Act, 1962.

5. Aggrieved with the above order of the Appellate Authority, the Applicant-Department has filed this revision application on the following grounds;

5.01. That the Respondent admitted to concealment, recovery and seizure of gold which was found to be ingeniously concealed inside the transformer of a microwave oven and the manner of concealment and the non-declaration

under Section 77 of the Customs Act, 1962 made the goods fit for absolute confiscation;

5.02. That the absolute confiscation of the impugned gold is correct as supported by the decision of the Hon'ble Supreme Court in the case of Samyanathan Murugesan vs. Commissioner of Customs (AIR) Chennai I[2010(254) E.L.T A 15];

5.03. That the option to allow redemption of seized good is a discretionary power of the adjudicating authority depending on the facts of each case after examining the merits, and the intention of the Respondent and the circumstances was not considered by the AA the AA has erred in granting the option;

5.04. That the ratio of the judgement in the case of Om Prakash Bhatia vs. Commissioner of Customs, Delhi [2003(155) E.L.T 423(SC)] is squarely applicable to the instant case and thus the gold should not have been released to the Respondent;

5.05. That the reference of the AA to the order of CESTAT, Chennai in the case of A. Rajkumari vs.CC Chennai [2015(321)E.L.T 540 (Tri-Chennai)] is improper;

5.06. The applicant relied upon the judgement of the Hon'ble Delhi High Court in the case of Jain Exports vs UOI [1987(29) E.L.T 753];

Under the circumstances, the Applicant-department prayed to set aside the impugned OIA and uphold the OIO.

6. Personal hearing in the case was scheduled for 15.09.2022 or 22.09.2022. Shri N.J. Heera, Advocate appeared for the personal hearing on behalf of the Respondent. He submitted that the Commissioner (Appeals) order is just, fair and reasonable and requested to maintain the same. No one appeared for the personal hearing on behalf of the Applicant-department.

7. The Government has gone through the facts of the case and observes that the Respondent had brought the eight gold bars of 10 tolas each having foreign marking "ARG 10 TOLAS FINE GOLD 999.0" wrapped in four black adhesive tape packets concealed in the transformer of the microwave oven of "CLIKON" make and two I-phones of 64 GB and 16GB kept in one green coloured strolley bag of "SMART POLO" make 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 Respondent had not disclosed that she was carrying dutiable goods. However, pursuant to detailed examination of the checked-in baggage the impugned gold wrapped in four black adhesive tape packets concealed in the transformer of the microwave oven of "CLIKON" and said two I-phones kept in one green coloured strolley bag of "SMART POLO" make were recovered from the Respondent. The Respondent had pre-planned to evade Customs duty. The confiscation of the gold and I-phones are therefore justified and thus, the Respondent had rendered herself liable for penal action.

8.1. The relevant sections of the Customs Act are reproduced below :

Section 2(33) of the Customs Act, 1962

"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 of the Customs Act, 1962

“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 Respondent in the instant case was 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."

13.1. 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 Shik 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.

13.2. 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.

14. Government observes that the aspect of allowing redemption of the gold and the other goods under confiscation, has been gone into in great detail by the Appellate Authority and has passed a reasoned, legal and judicious order. The Appellate Authority while relying on various judgements having relevance to the grant of option to redeem the goods on payment of redemption fine has at Para 18, 22 and 23 of the impugned Order-in-Appeal, has stated as under:

“18. Therefore what transpires from various judgements of honourable Courts and other forums is that gold brought by the passenger and not declared to avoid payment of duty, the option of redemption under section 125 of Customs Act, 1962 can be exercised to secure ends of justice. Appellant has pleaded to release the said gold on payment of redemption fine in terms of Section 125 of Customs Act, 1962.”

“22. The analysis of various judgments on the issue of redemption of gold under section 125 of Customs Act, 1962 make it clear that the discretion has to be exercised based on merits of each case and there cannot be any straight jacket formula to decide such cases.”

“23. I find that the adjudicating authority failed to corroborate the allegation of being carrier by corroborative independent material particularly when the appellant vide Para 6 of impugned Order had claimed the ownership of gold with purchase invoice and pleaded that her statement was not voluntary. I find that the honourable Apex Court in case of Sri Kumar Agency vs CCE, Bangalore 2008 (232) E.L.T. 577 (S.C.), Escorts Ltd vs CCE, Delhi-II 2004 (173) E.L.T. 113 (S.C.)

and CCE, Calcutta vs Alnoori Tobacco Products 2004 (170) E.L.T. 135 (S.C.) has stressed upon the concept of "Circumstantial flexibility", and held that one additional or different fact may make a world of difference between conclusions in two cases and therefore disposal of cases by blindly placing reliance on a decision, not proper."

15. Further, The Appellate Authority whilst listing the cases of his predecessors wherein redemption of gold was allowed in similar circumstances and based on facts and circumstances cum merits of each case, gave the option to redeem the goods on payment of redemption fine and on payable of applicable rate of duty.

16. In the instant case, though the impugned gold and the I-phones have been concealed by the Respondent, the quantum of gold and number of I-phones under import are not substantial and are not of commercial quantity. Besides, there are no allegations that the Respondent is a habitual offender and was involved in similar offence earlier. Also there is nothing on record to prove that the Respondent was part of an organized smuggling syndicate. Government finds that this is a case of non-declaration of impugned goods. The absolute confiscation of the impugned gold and the I-phones leading to dispossession of the Respondent of the gold and I-phones in the instant case would be harsh and not reasonable and the Order of the Appellate Authority granting an option to the Respondent to redeem the impugned gold and the I-phones on payment of suitable redemption fine is reasonable and fair.

17. The Government notes that while granting an option to redeem the gold on payment of a redemption fine, the Appellate Authority has laid an emphasis on the quantum of fine with a view to wipe out any profits accruing to the Respondent. Considering the quantum of gold and I-phones seized, Government finds the redemption fine imposed in the OIA passed by the

Appellate Authority to be legal and proper. Government is not inclined to interfere in the order passed by the Appellate Authority in this regard.

18. In view of the above discussion, Government is not inclined to interfere with the Order-in-Appeal No. MUM-CUSTOMS-PAX-APP-509/2018-19 dated 30.08.2018 [Date of issue: 12.09.2018] [F.No. S/49-267/2016 AP] passed by the Commissioner of Customs (Appeals), Mumbai Zone-III.

19. The Revision Application is decided on the above terms.


(SHRAWAN KUMAR)

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

ORDER NO. 52/2023-CUS (WZ)/ASRA/MUMBAI DATED 18.01.2023

To,

1. The Pr. Commissioner of Customs, C.S.I Airport, Terminal 2, Level-II, Sahar, Andheri (East), Mumbai 400 099.
2. Mrs Shaikh Begam Jan Ayub, A-Sector, F-2 Line, Room No 12, Cheeta Camp, Trombay, Mumbai - 400 088.

Copy to:

1. Shri N.J. Heera, Advocate, Nulwala Building, Ground Floor, 41, Mumt Road, Opp G.P.O, Fort, Mumbai 400 001.
2. The Commissioner of Customs (Appeals), Mumbai-III, 5th Floor, Avas Corporate Point, Makwana Lane, Behind S.M.Centre, Andheri Kurla Road, Andheri (East), Mumbai 400 059.
3. Sr. P.S. to AS (RA), Mumbai.
4. File copy.
5. Notice Board.