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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. 371/351/B/WZ/2022-RA / 4700 : **Date of Issue : 18.07.2023**

ORDER NO. 532/2023-CUS (WZ)/ASRA/MUMBAI DATED 13.07.2023 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 : Mr. Pardeep Naraindas Kukreja

Respondent : Pr. Commissioner of Customs, CSI, Mumbai.

Subject : Revision Application filed under Section 129DD of the Customs Act, 1962 against the Order-in-Appeal No. MUM-CUSTM-PAX-APP-110/2022-23 dated 29.04.2022 [Date of issue: 06.05.2022] [F. No. S/49-1463/2021] passed by the Commissioner of Customs (Appeals), Mumbai Zone-III.

ORDER

The Revision Application has been filed by Mr. Pardeep Naraindas Kukreja (herein referred to as the 'Applicant') against the Order-in-Appeal No. MUM-CUSTOM-PAX-APP-110/2022-23 dated 29.04.2022 [Date of issue: 06.05.2022] [F. No. S/49-1463/2021] passed by the Commissioner of Customs (Appeals), Mumbai Zone-III.

2. Brief facts of the case are that on 10.09.2019, on the basis of intelligence, the officers of Air Customs, Chatrapati Shivaji International Airport, Mumbai, intercepted the Applicant in the arrival hall of customs, holding an Indian passport, who had arrived by Flight No. AI-331 from Bangkok, after he had cleared himself through the Customs green channel. The personal search of the Applicant and examination of his baggage, led to the recovery of 02 crude cut gold bars with marking "GCAP GOLD 999.9 GOLD" wrapped with black colour tape and kept in a coffee colour Reksin pouch having written "DELBI Fashion" kept in the right side pocket of the jeans worn by the Applicant. Pursuant to being assayed, the 02 crude cut gold bars with marking "GCAP GOLD 999.9 GOLD" totally weighing 998 grams and valued at Rs. 36,03,658/- were seized under the reasonable belief that the same were attempted to be smuggled and hence liable for confiscation under the relevant 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 Order-in-Original No. ADC/VDJ/ADJN/94/2021-22 dated 30.06.2021 [Date of issue: 01.07.2021] absolutely confiscated the impugned 02 crude cut gold bars with marking "GCAP GOLD 999.9 GOLD" totally weighing 998 grams and valued at Rs. 36,03,658/- under Section 111 (d), (l) and (m) of the Customs Act, 1962. The Applicant was given an option to pay

fine of Rs. 7,00,000/- in lieu of confiscation under Section 125 of the Customs Act, 1962 alongwith applicable Customs duty as per Notification No. 26/2016-Cus dated 31.03.2016 as amended. Personal penalty of Rs. 2,00,000/- was imposed on the Applicant under Section 112(a) and (b) of the Customs Act, 1962.

4. Aggrieved with this Order-in-Original, the Respondent-department 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-110/2022-23 dated 29.04.2022 [Date of issue: 06.05.2022] [F. No. S/49-1463/2021] held that the OAA had erred by allowing the redemption of the prohibited goods and set aside the impugned Order-in-Original passed by the OAA to the said extent. No decision was taken by the Appellate Authority with respect to the penalty imposed by the OAA.

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

5.01. That Section 2(33) of the Customs Act, 1962 defines 'prohibited goods' as any goods, the import or export of which is subjected 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;

5.02. That Section 125 of the Customs Act, 1962 vests the power to grant redemption of confiscated goods and the adjudicating authority has the discretion to give an option of redemption fine in case of prohibited goods but for other goods, it is mandatory to give the option of redemption of goods on payment of fine. In case of smuggling, the Adjudicating authority, having regard to the facts and circumstances in which the goods were imported, may direct absolute confiscation of the goods or consider it fit for exercise of his

discretion to give an option to pay the redemption fine under Section 125 of the Customs Act, 1962. The Applicant has relied on the following case laws:

- (i) CC (Prev) vs. Uma Shankar Verma

5.03. That while exercising this discretionary powers under the provision of Section 125, the OAA considered and found that the Applicant to be the rightful owner of the gold;

5.04. That gold is not a prohibited item but is a restricted item and the person from whom the gold is recovered or owner of the gold was entitled for release of the seized material under Section 125 of the Customs Act, 1962;

5.05. That Board's Circular No 9/200-Cus dated 22.02.2002 states that redemption fine and penalty should be such that it is not only wipes out the margin of profit and also acts as a strong deterrent against repeat offences and the order of the OAA appears to meet the ends of justice;

5.06. That the Appeal filed by the department against the order of redemption issued by the OAA is an interference into the discretionary power of the OAA and there appears to be no jurisdictional error in the order of the OAA and neither is his finding based upon exclusion of some evidence. Discretionary power conferred under Section 125 of CA, 1962 is a special power and not an ordinary power and such special power cannot be lightly interfered by a higher authority or Court in an appeal or writ proceeding. Reliance is placed on the following decisions:

- (i) Gujarat High Court, Indian Petrochemicals Corpn. vs General Secretary on 19 March, 2008
(ii) Koshambh Multired Pvt Ltd vs UOI [2018 (361) E.L.T. 604 (Guj)]
(iii) Nocil Ltd vs. Policy Relaxation Committee [2018 (359) E.L.T. 316 (Del)]
(iv) M.K. Govinda Pillai vs. Collector of Customs and C.Ex, Cochin [1994 (71) E.L.T. 881 (Ker)]
(v) Kashish Silk Mills Pvt. Ltd. v. Union of India, [2005 (183) E.L.T. 134]
(vi) Light Engg. Corporation vs. Union of India [2007 (207) E.L.T. 40]
(vii) (New Bharat Rice Mill v. Union of India), [2008 (229) E.L.T. 502]

5.07. That Release of confiscated goods on payment of fine and penalty is such category, which cannot be considered as loss of revenue to the exchequer. If at

all it is considered as a loss to the Government exchequer (as claimed by the learned Principal Commissioner of Customs) then there would not be a provision under the Customs Act, 1962 i.e Section 125 for release of the confiscated goods on payment of fine. One factor is obviously of great significance;

5.08. Gold is not 'prohibited goods', but only 'restricted goods'. Import of gold is no longer prohibited and therefore, it is the duty on the part of the adjudicating authority, if he is of the view that it is liable for confiscation, to permit its redemption on appropriate fine. Many adjudicating and appellate authorities commit an error while differentiating between restriction and prohibition in import. One of the main objectives of prohibition of any import into India is that import of such goods should not weaken the economic status of the country. Restriction of import does not mean prohibition to import. If any goods are restricted to import, the Government fixes some sort of barriers to import, which an importer has to overcome such barriers which means, certain procedures have to be completed to import such restricted products. If any import of goods adversely affects the health of human, animal, plants and other species, such goods are prohibited to import by the government of importing country. The restriction to import any goods is decided by the government under foreign trade policy amended time to time. Reliance has been placed on the following case laws:

- (i) Yakub Ibrahim Yusuf vs. CC, Mumbai [2011 (263) E.L.T. 685 (Tri. Mumbai)]
- (ii) In Neyveli Lignite Cor Ltd vs. UOI [2009 (242) E.L.T. 487 (Mad.)]
- (iii) Hargovind Das K. Joshi vs. Collector of customs [1992 (61) ELT 172(SC)]
- (iv) Universal Traders vs. Commissioner [2009 (240) E.L.T. A78 (SC)]
- (v) Shaikh Jamal Basha vs. GOI [1992(91) E.L.T. 227 (AP)]
- (vi) CC(Airport), Mumbai vs. Alfred Menezes [2009(242) ELT 334(Bom)]
- (vii) Gauri Enterprises vs. CC, Pune [2002 (145) ELT (705) (Tri Bangalore)]

- (viii) VP Hameed vs. Collector of Customs Mumbai 1994(73) ELT 425 (Tri)
- (ix) T. Elavarasan Vs Commissioner of Customs (Airport), Chennai [2011 (266) ELT 167 (Mad)]
- (x) Kadar Mydin vs. Commissioner of Customs (Preventive), West Bengal [2011 (136) ELT 758]
- (xi) Vatakkal Moosa vs. Collector of Customs, Cochin [1994 (72) ELT (G.O.I)]
- (xii) Halithu Ibrahim vs. CC [2002-TIOL 195 CESTAT-MAD]
- (xiii) Krishnakumari vs. CC, Chennai [2008 (229) ELT 222 (Tri Chennai)]
- (xiv) S.Rajagopal vs. CC, Trichy [2007 (219) ELT 435 (Tri-Chennai)]
- (xv) M. Arumugam vs. CC, Trichirapalli [2007 (220) ELT 311 (Tri-Chennai)]
- (xvi) UOI vs. Dhanak Ramji [2009(248) ELT 127(Bom)]
- (xvii) Peringatil Hamza vs CC (Airport), Mumbai [2014 (309) ELT 259 (Tri Mumbai)]
- (xviii) R. Mohandas vs. CC, Cochin [2016 (336) ELT 399 (Ker)]
- (xix) A. Rajkumari vs. CC (Chennai) [2015(321) ELT 540(Tri-Chennai)]
- (xx) Shaik Mastani Bi vs. CC, Chennai [2017(345) E.L.T 201(Mad)]
- (xxi) Bhargav B Patel vs. CC, Mumbai [Order No. A/2388-2391/15/CB dated 04.08.2015]

5.09. That there should be consistency in favour of 'formal' justice i.e that two cases are the med (in relevant respects) should be treated in the same way and it would be inconsistent to treat them differently;

5.10. That concerns of consistency provide some justification for treating earlier decisions as sources of law rather than approaching each question anew when it arises again;

5.11. That if the earlier decision was wrong, then the persons subject to it may have been treated or less favourable than they should have been treated and if they were treated more favourable then clearly that should have been corrected;

5.12. That a lower court should honour findings of law made by the higher court that is within the appeals path of case the court hears and precedent is a legal principle or rule that is created by a court decision and is binding on or persuasive for a court or tribunal when deciding subsequent cases with similar issues or facts;

5.13. That as regards allowing redemption of the seized goods, Section 125 of the Customs Act, 1962 provides the option of redemption can be given in the case of seized goods are not prohibited and gold is not a prohibited item and can be imported and such imports are subject to certain conditions and restrictions including the necessity to declare the goods on arrival at the Customs station and make payment at the rate prescribed. Reliance has been placed on the following case laws:

- (i) Shaik Jamal Basha vs. Government of India [1992(91) ELT 277(AP)]
- (ii) Mohd Zia Ul Haque vs. Addl. Commissioner of Customs, Hyderabad [2014(214) E.L.T 849 (GOI)]
- (iii) Mohammed Ahmed Manu vs. CC, Chennai [2006(205) E.L.T 383(Tri-Chennai)]

5.14. That the Applicant has relied upon the following case laws in support of the contention that when goods are not eligible for import as per the import policy, re-export of such goods is permitted on payment of penalty and redemption fine. The Applicant has relied on the following case laws in support of their contention:

- i) CC vs. Elephanta Oil [2003(152) ELT 257 (SC)]
- ii) Collector vs. N Patel [1992 (62) ELT 674 (GO1)]
- iii) Kusumbhai Dahyabhai Patel vs. CC (P) [1995 (79) ELT 292 (CEGAT)]
- iv) K&K Gems vs. CC [1998(100) ELT 70 (CEGAT)]

5.15. That a lower court should honour findings of law made by the higher court that is within the appeals path of case the court hears and precedent is a legal principle or rule that is created by a court decision and is binding on or

persuasive for a court or tribunal when deciding subsequent cases with similar issues or facts. This decision becomes an example, or authority for judges deciding similar issues later. 'Stare decisis' is a legal doctrine that obligates courts to follow historical cases when making ruling on a similar current or future case. The rule of stare decisis is a judicial policy based on the principle that based on powerful countervailing considerations like cases should be decided alike in order to maintain stability and continuity in the law. Reliance has been placed on the following case law:

- (i) SC judgement in Bombay Dyeing and Manufacturing Company Ltd. vs. Bombay Environmental Action Group

5.16. In terms of Section 125 of the Customs Act, re-export permission has been granted in many more cases by the Addl. Commissioner. Commissioner of Customs (Appeals), GOI or CESTAT. The Applicant has relied on the following case laws in support of his contention:

- (i) Satuty Sharma –Order No 2107 dated 13.02.2002
- (ii) Jasvinder Singh- Order No MP (196) AIR/09
- (iii) Liaquat Ali Hameed vs CC, Chennai [2003(156) ELT 863(T)]
- (iv) Mohd Ramzan vs UOI [1995(75) ELT 207(GOI)]
- (v) Pradeep Kumar Bhanvarpal vs. UOI [2003(153) ELT 226]
- (vi) Dhanak M. Ramji vs. Union of India [2009 (237) E.L.T. 280 (Tri-Bom.)]
- (vii) A Rajkumari vs. Commr. of Customs (Airport-Air cargo) Chennai [2015(321) E.L.T. 540].
- (viii) Mohd Zia Ul Haque vs. Addl. Commissioner of Customs, Hyderabad [2014(214) E.L.T 849 (GOI)]

5.17. That orders must be speaking order giving clear findings of the adjudicating/appellate authority and he shall discuss each point raised by the defence and shall give cogent reasoning in case of rebuttal of such points but in the present case, the learned Appellate Authority conveniently avoided to discuss and counter each point raised by the Applicant and passed the order

against the Applicant without going into the merits of all the defense submission;

5.18. That the adjudicating/appellate authority is under obligation to take on record the submissions made by the Applicants as also the evidence produced by him and then come to a conclusion after examination in entirety along with evidence on record but in the instant case no answer is found to the Applicants defense in the Appellate proceedings;

5.19. That while exercising the judicial power, the Adjudicating /appellate Authority is bound to follow the 'principles of natural justice' which are based on justice, equity, common sense, fair play and rule of law and the authority should act without bias and should be impartial;

5.20. That had the Appellate Authority gone through each and every defense submission made by the Applicant he would have understood the infirmities in the prosecution case and would have desisted from passing such order which clearly establishes that there was no application of mind;

The Applicant has relied on the following case laws in support of their contention:

- (i) Judgement of the Supreme Court in the case of State of Punjab vs. K.R. Erry
- (ii) Liberty Oil Mills vs. UOI
- (iii) C. L. Tripathi vs. State Bank of India
- (iv) A.R. Kraipak vs. Union of India
- (v) Judgement of the Orissa High Court in the case of Chintamani Padha vs. Paika Samal
- (vi) Decision of CESTAT in the case of Sahara India TV Network vs, CCE, Noida
- (vii) JC, Income Tax, Surat vs. Saheli Leasing and Ind Ltd [2010(253) ELT 705(SC)
- (viii) CESTAT order in the case of Vikas Enterprises vs. CCE Allahabad
- (ix) K.Sharp Carbon India vs. CCEx, Kanput
- (x) UOI vs. Sri Kumar Agencies

- (xi) International Woollen Mills Ltd vs, Standard Wool (UK) Ltd
- (xii) Kranti Associates Pvt Ltd. Masood Ahmed Khan [2011(273) ELT 345(SC)]
- (xiii) Mahabir Prasad Santosh Kumar vs, State of UP [AIR 1970 SC 1302]
- (xiv) Travancore Rayons Ltd vs. UOI [AIR 1971 SC 862]
- (xv) Woolcombers of India vs, Woolcombers Workers Union and anr [AIR 1973 SC 2758]
- (xvi) Siemens Engineering and Mfg Co India Ltd vs UOI [AIR 1976 SC 1785]
- (xvii) Teststeels Ltd vs. Desai N.M
- (xviii) SSE Hari Nagar Sugar Mills Ltd vs. Shyamsundar Jhunjhunwala [AIR 1961SC 1669]
- (xix) Bhagat Raja case [AIR 1957 SC 1606]

5.21. That time and again, at every opportunity, the Apex Court and High Courts have reiterated the necessity of a reasoned order by the Tribunals and other appellate authorities. Reliance is placed on the following case laws:

- (i) Shapoorji Pallonji & Co Ltd vs, Commissioner of C.Ex, Pune I[2010-TMI-202796-Bombay High Court]
- (ii) Sant lal Gupta vs. Modern Co-operative Group Housing Society Ltd [2010-TMI-202974-Supreme Court]
- (iii) Commr. of Customs and C.Ex, Rajkot vs. Amul Industries [2010-TMI-201939-SC]

5.22. That all the abovesaid cases are applicable to the present case and a judicial or quasi judicial authority giving its decision must give reasons in support of the decision and the only qualification to this rule is where an adjudication is provided against the decision of the quasi judicial authority;

5.23. That the reasons for the decision which adversely affects one persons or property is a basic right of every litigant but he requirement that reasons be given does more than merely vindicate the right of the individual to know why a decision injurious to him has been rendered;

5.24. That if no reasons are given in the order, it would not be possible for the High Court or the Supreme Court exercising its power of judicial review to

examine whether the administrative officer has made any error of law in making the order;

5.25. That recording of reasons for each issue is one of the principles of natural justice or not but it is inevitable for providing safeguard against possible injustice and arbitrariness and provides protection to the person adversely affected. In the absence of discussion in detail of the evidence by the parties, it cannot be said that its judgement is no judgement in the eyes of the law;

5.26. That the discretionary powers of the quasi judicial authority cannot be lightly interfered. In the matter of collection of tax, if there is any order, which is prejudicial to the interest of revenue , the same is liable to be corrected That if the order of the OAA is within the parameters prescribed under the law, if the penalty imposed is not less than the minimum prescribed, when an element of discretion is vested in the authority to impose penalty between the minimum and the maximum and if the authority has exercised its discretion and imposed penalty at a particular time, the revisional authority in his revisional jurisdiction cannot enhance the penalty;

The Applicant has relied on the following case laws in support of their contention:

- (i) Sahdeo vs. Satya Ranjan Ghosh
- (ii) Durga Das vs. Nalin Chandra Nandan
- (iii) Corporation of Calcutta vs. Mulchand Agarwal

5.27. That Boards Circular No 495/5/92-Cus VI dated 10.05.1993 is only advisory in nature and the said advisory cannot be made a rule for ordering absolute confiscation of imported/smuggled gold when the gold is not prohibited goods and that Tribunals, High Courts and Supreme Courts allowed redemption of goods even in cases where there was concealment and that the

circular in question is against the spirit of Section 125 of Customs Act, 1962 and therefore not maintainable;

5.28. That the Boards Circular No. 495/5/92-Cus VI dated 10.05.1993 advises that in respect of gold seized for non-declaration, no option to redeem the same on redemption fine under Section 125 of the CA, 1962 would be given except in trivial cases where the AA is satisfied that there was no concealment of the gold in question and in the instant case nowhere there is any mention that the gold was ingeniously concealed;

5.29. That the Boards circular cannot prevail over the statute and circulars are issued only to clarify the statutory provision and it cannot alter or prevail over the statutory provision and the circular is against the spirit of Section 125 of the Customs Act, 1962 since the Circular illegally amended the provisions of Section 125 of CA, 1962 as Section 125 of CA, 1962 does not distinguish between declared and undeclared gold;

5.30. That offer of redemption fine under Section 125 is a discretion, non offer of a redemption fine in exercise of such a discretion would be in conflict with the objects and reason of the Import Control laws. The Applicant has relied upon the following case laws in support of their contention:

- (i) Mafatlal Industries [1997(89) E.L.T 247 (SC)]

5.31. That circulars issued by CBEC and CBIT do not bind the assessee and the assessee has a right to challenge the correctness of the circular before a quasi-judicial authority constituted under the relevant statute;

5.32. That the fight between the assessee and the revenue department regarding the applicability and precedential value of the circulars issued by the Board has been put to an end by issuing a clarification vide Circular No. 1006/13/2015-CX dated 21.09.2015. Also that clarificatory circulars cannot amend or substitute statutory rules. The Applicant has relied upon the following case laws in support of their contention:

- (i) Bengal Iron Corporation vs. Commercial Tax Officer
- (ii) Bhagwati Developers vs. Peerless General Finance & Investment Co.
- (iii) Cases pertaining to Paper Products, Hindustan Aeronautics Ltd, Dhiren Chemicals
- (iv) Kalyani Packaging Industry vs. UOI [1164(5) TMI 78 (SC)]
- (v) Commr of CEx vs. Ratan Melting and Wire Industries [1168(10) TMI SC]
- (vi) Bhuwalka Steel Industries vs. Bombay Iron and Steel Ltd
- (vii) Harrison and Crossfield (India) Ltd vs. Registrar of Companies
- (viii) Paper Products Ltd vs. Commr. C.Ex [1999(8) TMI 70(SC)]

5.33. That the Applicant has repeated the judgements of Tribunals, High Courts and Supreme Court, mentioned in the paras above, in support of his contention that goods imported/smuggled into India by way of concealment were allowed to be redeemed by the importer/owner of the goods;

5.34. That in the following case laws the concept of 'Circumstantial flexibility' has been stressed upon and it has been 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 is not proper; The Applicant has relied on the following case laws in support of his contention:

- (i) CCE, Calcutta vs. Alnoori Tobacco Products [2004(170) ELT 135 (SC)]
- (ii) Escorts Ltd vs. CCE, Delhi [2004 (173) ELT 113 (SC)]
- (iv) Sri Kumar Agency vs. CCE, Bangalore [2008 (232) E.L.T. 577 (S.C.)]

5.35. That the ratio of the decisions relied upon by the Department cannot be made applicable to the case of the Applicant

5.36. That the Department before the AA failed to discuss/explain as to how the facts of the case relied upon fit the factual situation of the case;

5.37. That the Decisions of Supreme Court, Tribunals and GOI relied upon by the Adjudicating Authority for ordering redemption of the gold were not taken

into consideration by the Reviewing Authority without giving any reasons and such a cryptic review order is not sustainable in law;

5.38. That Precedents are binding, that is it must be followed in later cases or merely persuasive where it may or may not be used influence later cases as judges are not bound by them and to determine if a precedent is binding or persuasive, the judge would have to consider the material facts of the case the hierarchy of the Courts. The use of binding precedent to decide cases reduces the possibility of judges making bad decisions and ensures that access to justice is rewarding to all litigants. Reliance is placed on the following cases:

- (i) E.I. Dupont India Pvt Ltd vs. UOI [2014(5) TMI 128]
- (ii) Claris Life Sciences vs UOI [2014(1) TMI 1467]

5.39. That in the present case, the AA summarily rejected all the cases relied upon by the OAA without application of mind and giving any reason therefore and passed a cryptic review order mechanically without examining the issue and it is important to discuss as to why and how case laws upon by the adjudicating authority are not applicable to the case. Reliance is placed on the following decisions

- (i) Supreme Court decision in the case of Satya Pal Singh vs. State of MP
- (ii) Supreme Court decision in the Smt Kaushnuma Begum vs. The New India Assurance Co Ltd
- (iii) Supreme Court in the case of Harminder Singh Arora vs. UOI

5.40. The GOI's orders relied upon by the Adjudicating Authority were not taken into consideration by the review authority without recording any reason thereof;

5.41. Gold is not a prohibited goods but only 'restricted goods' and import of gold is no longer prohibited and therefore it is the duty on the part of the adjudicating authority, if he is of the view that it is liable for confiscation, to permit its redemption on appropriate fine.

5.42. Gold is not a prohibited item for import and Section 125 of the Custom Act, 1962 provides that option of redemption can be given in case the seized goods are not prohibited and therefore absolute confiscation is not warranted in the instant case. Section 125 of the Customs Act, 1962 provides that the goods should be redeemed to the owner of the goods or the person from whose possession the goods were seized if the owner is not known. Further authority has discretion to order release of prohibited goods on payment of fine in lieu of confiscation.

5.43. That one of the main objectives of prohibition of any import into India is that import of such goods should not weaken the economic status of the country. Restriction of import does not mean prohibition to import. If any goods are restricted to import, the Government fixes some sort of barriers to import, which an importer has to overcome such barriers which means, certain procedures have to be completed to import such restricted products. If any import of goods adversely affects the health of human, animal, plants and other species, such goods are prohibited to import by the government of importing country. The restriction to import any goods is decided by the government under foreign trade policy amended time to time

5.44. That after extolling and analyzing the meanings, principles and differences between 'prohibition' and 'restriction', the Applicant has veered to the conclusion that foreign currency is not prohibited for import/export and therefore an option should be given to the importer/exporter for redemption of the goods, even if the importer/exporter fails to fulfil the conditions for import of gold;

5.45. That the decision in the case of Raj Grow Impex was read in isolation by the Commissioner of Customs (Appeals).

Under the circumstances, the Applicant prayed for a reasonable order for redemption of gold under absolute confiscation on payment of reasonable fine and penalty and drop further proceedings.

6. The Applicant, vide letters dated 15.11.2022 and 10.05.2023 prayed for early hearing in the matter citing that the case was made against him on 10.09.2019 and the prolonged lapse of time had caused him mental agony and undue financial hardship and that he had an excellent case on merits

7. Personal hearing in the case was scheduled for 18.05.2023. Shri Prakash Shingrani, Advocate appeared for the personal hearing on the scheduled date on behalf of the Applicant. He submitted that that Applicant brought small quantity of gold for personal use. He also informed that considering all aspects the original authority allowed option to redeem the goods. He requested to restore the Order-in-Original as the same is reasonable and legal.

8. The Government has gone through the facts of the case and observes that the Applicant had brought 02 crude cut gold bars with marking "GCAP GOLD 999.9 GOLD" totally weighing 998 grams and valued at Rs. 36,03,658/- 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 Applicant had not disclosed that he was carrying dutiable goods. However, after opting to clear through the green channel of Customs and on personal search after being intercepted, the impugned 02 crude cut gold bars with marking "GCAP GOLD 999.9 GOLD" totally weighing 998 grams and valued at Rs. 36,03,658/- was recovered from the right side pocket of the jeans worn by the Applicant and the method of carrying the gold adopted by the Applicant clearly revealed his intention not to declare the said gold and thereby evade payment of Customs Duty. The

confiscation of the impugned gold bars was therefore justified and thus the Applicant had rendered himself liable for penal action.

9.1. 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.”

9.2. 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.

10. 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”.

11. 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.

12. 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.

13. 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.”

14.1. 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 Shaik 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.

14.2. 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.

15. Government notes that the OAA in the Order-in-Original has discussed in detail the nuances of the case and decided to exercise discretion to give the Applicant the option to redeem the gold on payment of redemption fine and penalty. Para 19.3, 19.4, 19.5. and 20 of the said Order-in-Original are reproduced as under

"19.3 I find that when there are judgements favoring redemption, there are contra judgement which provide for absolute confiscation of seized gold attempted to be smuggled into India as follows:

- i. Abdul Razak Vs Union Of India reported as 2012 (275) E.L.T. 300 (Ker.) maintained by hon'ble Supreme Court in Abdul Razak v. Union of India reported as 2017 (350) E.L.T A173 (S.C).*

19.4 I find that the CBIC Circular No 495/5/92-Cus VI dated 10.05.1993 also talks about no redemption seized gold attempted to be smuggled under section 125 of the Customs Act 1962.

19.5 However I find that the case law mentioned at Para 19.3 as well as CBIC Circular No 495/5/92-Cus VI dated 10.05.1993 talks about concealment of gold in order to smuggle it into

India. I find that that this office vide letter F No SD/Adjn/Misc-23/2013-14 Adjn has clarified as to what are the cases of ingenious concealment. So, I find that ingenious concealment is one of the important aspects for deciding on redemption / non- redemption of the goods. Further, keeping in mind CBIC Circular / instructions under F. No.275/17/2015- CX. 8A, dated 11.03.2015 on the subject National Litigation Policy (NLP)-Guideline to reduce Government litigation wherein it was emphasized that Judicial discipline should be followed while deciding pending show cause notices/appeals, I proceed to decide the issue.

20. I find from the panchanama dated 11.09.2019 that the seized crude gold bars weighing 998 grams and valued at Rs. 36,03,658/- were recovered from a coffee colour Reksin pouch kept in the right side pocket of Jeans the passenger has worn. I do not find keeping seized gold in pant pocket as an ingenious concealment. The passenger has admitted the ownership of gold in statement recorded under section 108 of the Customs Act 1962 and further stated that she has purchased the seized gold from bangkok. He further stated that the monthly income from their family kirana shop is Rs 1 to 1.25 lakh. Keeping in mind above factual position in mind as well as the fact that it is not a case of an ingenious concealment, even though the charge/offence of non declaration is established against the passenger, I am of the considered opinion that under section 125 of the Customs Act 1962, the option for redemption can be granted. I find that the option to redemption has been granted and absolute confiscation is side vide Order No 12/2021-CUS (WZ)/ASRA dated 18.01.2021 by the Revision Authority, Government of India under F No 371/44/B/2015-RA/785 dated 29.01.2021. Similar view on redemption of seized gold was taken by Revision authority vide Order 41/2021-CUS (WZ)/ASRA dated 26.02.2021 issued under F No 371/41/B/15-RA dated 03.03.2021. Similar view is also held by the Revision authority vide order No 30/2021-CUS(SZ)/ASRA/MUMBAI dated 20.05.2021 under F No 380/17/B/16-RA issued on 02.06.2021. I therefore, find this case fit for redemption. I hold it accordingly under the powers vested with me under Section 125(1) of the Customs Act 1962."

16. The Government notes that the said 02 crude cut gold bars were recovered during the personal search of the Applicant. The said gold bars had not been ingeniously concealed but had been kept in the pocket of the jeans worn by the Applicant. Government observes that sometimes passengers resort to such methods to keep their valuables / precious possessions safe. There are no allegations that the Applicant is a habitual offender and was involved in similar offences 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 Customs Act, 1962 and while imposing quantum of penalty. Government notes that the Applicant has prayed for release of the gold on payment of redemption fine and for reduction in the penalty amount, which he has stated to be harsh and punitive.

17. In view of the foregoing paras, the Government finds that as the Applicant had not declared the said 02 crude cut gold bars gold bars at the time of arrival, the confiscation of the gold was justified. However, considering that the gold was not being concealed and found on his person, the Original Adjudicating Authority has rightly given the Applicant the option to redeem the seized gold on payment of redemption fine and penalty is fair and the order of Appellate Authority of setting aside the Order-in-Original and ordering absolute confiscation of the gold was harsh and not justified. Also there is nothing on record to prove that the Applicant was part of an organized smuggling syndicate. In view of the aforesaid facts, the option given to the Applicant to redeem the impugned 02 crude cut gold bars on payment of redemption fine and penalty has rightly been granted by the Original Adjudicating Authority.

18. Government is inclined to accept the averments made by the Applicant and considering that the same had not been concealed and was found on his person, Government allows the impugned 02 crude cut gold bars to be redeemed on payment of a redemption fine. Government finds the quantum of redemption fine of Rs. 7,00,000/- imposed by the Original Adjudicating Authority is appropriate.

19. Government observes that the 02 crude cut gold bars have been valued at Rs. 36,03,658/-. The Government notes that the penalty of Rs. 2,00,000/-

imposed on the Applicant under Section 112(a)& (b) of the Customs Act, 1962 is not commensurate with the omission and commission committed by the Applicant and is inclined to modify the same.

20. In view of the above, the Government modifies the impugned order of the Appellate Authority in respect of the impugned gold i.e 02 crude cut gold bars with marking "GCAP GOLD 999.9 GOLD" totally weighing 998 grams and valued at Rs. 36,03,658/-. The impugned 02 crude cut gold bars with marking "GCAP GOLD 999.9 GOLD" totally weighing 998 grams and valued at Rs. 36,03,658/- is allowed to be redeemed on payment of a redemption fine of Rs. 7,00,000/- (Rupees Seven Lakhs only). The penalty of Rs. 2,00,000/- imposed by the OAA under Section 112(a) and (b) of the Customs Act, 1962, not being commensurate with the omissions and commissions of the Applicant is revised to Rs. 3,00,000/- (Rupees Three lakhs only).

21. The Revision Application is disposed of on above terms.


(SHRAWAN KUMAR)

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

ORDER NO. 532/2023-CUS (WZ)/ASRA/MUMBAI DATED 13.07.2023

To,

1. Mr. Pardeep Naraindas Kukreja, Flat No 502, Santosh Apartment, Sector 18, Station Road, Near Old Bhaji market, Ulhasnagar, Thane 421 003
2. The Pr. Commissioner of Customs, Terminal-2, Level-II, Chhatrapati Shivaji International Airport, Mumbai 400 099.

Copy to:

1. The Commissioner of Customs (Appeals), Mumbai Zone - III, Awas Corporate Point, 5th Floor, Makwana Lane, Behind S.M.Centre, Andheri-Kurla Road, Marol, Mumbai - 400 059.

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

