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GOVERNMENT OF INDIA  
MINISTRY OF FINANCE  
(DEPARTMENT OF REVENUE)

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Mumbai-400 005

F.No. 371/228/B/2021-RA/281

Date of Issue <sup>19</sup> 01.2023

ORDER NO 3/2023-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 : Mr Rasikkumar Dahyabhai Patel

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

Subject : Revision Application filed, under Section 129DD of the Customs Act, 1962 against the Orders-in-Appeal No. MUM-CUSTM-PAX-APP/664 & 665/2019-20 [S/49-1378/2019, S246/2018/AP] dated 14.01.2021 [Date of issue: 20.01.2021] passed by the Commissioner of Customs (Appeals), Mumbai Zone-III.

**ORDER**

This Revision Application has been filed by Mr Rasikkumar Dahyabhai Patel (herein referred to as "Applicant") against the Orders-in-Appeal No. MUM-CUSTM-PAX-APP/664 & 665/2019-20 [S/49-1378/2019, S246/2018/AP] dated 14.01.2021 [Date of issue: 20.01.2021] passed by the Commissioner of Customs (Appeals), Mumbai Zone-III.

2. The facts of the case in brief are that on 14.01.2019, the officers of Customs intercepted the Applicant and Mrs. Bhanimatiben Rasikbhai Patel, who had arrived as domestic passengers from Ahmedabad by Air India Flight No. AI-985 near the exit gate. On being asked whether they were carrying dutiable goods, the Applicant replied in the affirmative and admitted to carrying 18 gold bars weighing 1705 grams. On examination of his baggage, 18 gold bars having marking of 'SUISSE 100G/999.0', 'Valcambi 100/999.0', 'Argor-HeraecusSA/Switzerland100g/ 999.0' and 'GMC/5gms/999.0/FINE Gold' were recovered. On enquiry, the Applicant showed one retail handwritten invoice in Gujarati language which did not mention any foreign marking. As no corroboration could be established between the gold recovered from the Applicant and documents produced by him, the 18 gold bars weighing 1705 grams and valued at Rs. 49,37,791/- were seized under the provisions of the Customs Act, 1962.

3. The Original Adjudicating Authority (OAA) Commissioner of Customs (Appeals), Mumbai Zone-III, vide Order-In-Original No. ADC/AK/ADJN/196/2019-20 dated 22.10.2019 [ Date of issue: 21.11.2019] [S/14-5-127/2019-20 Adjn SD/INT/AIU/167/ 2018-19 AP'C] ordered absolute confiscation of the 18 gold bars weighing 1705 grams and valued at Rs. 49,37,791/- under Section 111 (d) of the Customs Act, 1962. However, the Applicant was given the option to redeem the seized gold on payment of

redemption fine of Rs. 7,40,000/- under Section 125(1) of the Customs Act, 1962 and on payment of appropriate duty as per Section 125(2) of the Customs Act, 1962. Personal penalty of Rs. 4,90,000/- was imposed on the Applicant under Section 112(b) of the Customs Act, 1962.

4. Aggrieved by this order the Applicant and the department filed appeals before the Commissioner of Customs (Appeals), Mumbai Zone-III (AA). The Applicant in his appeal pleaded for release of the gold unconditionally. The department filed the appeal for setting aside the OIO and of absolute confiscation of the gold and imposing penalty on M/s Brightson Export Pvt Ltd under Section 114AA and/or 112 of the Customs Act, 1962. The department filed the appeal on the grounds that the impugned gold contained foreign markings and as per Section 123 of the Customs Act, 1962, the burden of proving that the goods were on the person from whom it was seized and the Applicant was not able to establish the co-relation between the recovered gold and the invoices produced. The AA vide Order-in-Appeal No. MUM-CUSTOM-PAX-APP/664 & 665/2019-20 dated 14.01.2021 [Date of issue: 20.01.2021] [S/49-1378/2019, S246/2018/AP] set aside the OIO to the extent of the option of the redemption fine allowed by the OAA and ordered for absolute confiscation of the impugned gold. The imposition of penalty under Section 112 (b) of the Customs Act, 1962 was upheld and department appeal for imposition of fine on M/s Brightson Exports Pvt Ltd was rejected.

Aggrieved by the Order, the Applicant filed an application before the Hon'ble CESTAT which was withdrawn on 06.07.2021

5. The Applicant has filed this revision application inter alia on the grounds:

5.01. That the Applicants' case has been completely ignored by the AA and that the impugned order is against the provisions of law, equity, good conscience and natural justice;

5.02. That the Order-in-Original has not set out any allegations of fraud, misrepresentation or mis-declaration on the part of the Applicant;

5.03. That the AA failed to appreciate that the Applicant was financially capable of purchasing the quantum of gold;

5.04. That the Applicant had not concealed the gold bars in any manner and the gold were not smuggled goods;

5.05. That the payment for the gold purchased was made in cheque for a sum of Rs. 28 lakhs and a receipt had been issued by G.R.Jewellers to M/s Brightson Exports Pvt Ltd for 12 gold bars of 100 gms each and 01 gold bar of 05 grams;

5.06 That the remaining 05 gold bars which the Applicant had received from his parents were originally purchased by his wife;

5.07. That the AA failed to appreciate that the gold bars were having serial number in continuation and that the receipt and payment details of the 12 gold bars were produced before Customs;

5.08. That the AA erred in not appreciating that the Applicant had visited Gujarat to meet his relatives with whom he had kept the gold and since his relatives were migrating to USA, the Applicant had decided to keep the gold bars in Bank locker in Mumbai;

5.09. That the AA had erred in not appreciating that in the statements of the representative of M/s G.R.Jewellers had admitted to selling the gold to the Applicants company and the representative of M/s Shyam Bullion confirmed that the gold bars were sold to M/s G.R. Jewellers and payments were received;

5.10. That the respondent failed to appreciate that the goods brought by the Applicant are domestic goods as the same were purchased in India and the movement of domestic goods from one place to another is neither restricted nor prohibited and that the Applicant being a domestic passenger was not supposed to make any declaration under Section 77 of the Act;

5.11. That domestic goods brought by the Applicant does not come under Section 2(23), 2(33), 2(39) read with Section 111 of the Customs Act, 1962;

5.12. That evasion of Customs duty can be done only in respect of imported goods and not in respect of goods legally purchased from the market in India;

5.13. That no reason has been assigned for imposition of penalty under Section 112(b) of the Customs Act, 1962.

6. Personal hearing in the case was scheduled for 23.09.2022 on the request of the Applicant seeking early hearing. Mr Mustafa Kachwala, Advocate appeared online for the hearing on 23.09.2022 on behalf of the Applicant. He submitted that the gold was confiscated even though the Applicant produced evidence of its legitimate purchase. He submitted that the Applicant is a senior citizen and requested to allow the application.

7.01. The Government has gone through the facts of the case. The Applicant had arrived as a domestic passenger from Ahmedabad and was intercepted on

14.01.2019 on specific information and was found to be carrying 18 gold bars with foreign marking totally weighing 1705 grams, of which the Applicant claimed to have purchased 13 gold bars from M/s G.R. Jewellers in 2011 and 05 gold bars were given to him by his parents. The Applicant produced the bill for purchase of 12 gold bars of 100 grams each and 01 gold bar of 05 grams from M/s G.R. Jewellers. No documents were produced for 05 gold bars of 100 grams each, which were claimed to have been given by his parents. The Applicant also produced payment details of Rs. 28 lakhs paid against the bill raised by M/s G. R. Jewellers for the sale of 13 gold bars.

7.02. Government further observes that while the gold bars seized from the Applicant bore specific markings, the documents submitted did not mention any markings. Government notes that in the absence of documents showing marking on the gold bars, the Applicant was unable to prove that the gold being carried by him were licitly imported into India.

7.03. Be that as it may, Government notes that the OAA, while holding the goods to be smuggled in nature and prohibited goods under Section 2(33) of the Customs Act, 1962 and to be liable for confiscation under Section 111(d) of the Customs Act, 1962, granted the Applicant the option to redeem the seized gold on payment of redemption fine under Section 125 (1) of the Customs Act, 1962 and payment of duty at baggage rate under 125(2) of the Customs Act, 1962.

7.4. Government notes that the Appellate Authority disposed off the appeal filed by the Applicant as well as the department by setting aside the Order-in-Original, to the extent of ordering for absolute confiscation of the seized gold and upholding the penalty imposed on the Applicant.

The AA at para 12 of the O-I-A observed that

*"....., I am of the opinion that since the Appellant (No.1) has not be able to establish the co-relation of the recovered gold with the invoice and has not been able to prove conclusively that the seized gold was licitly imported in the country as per the provisions of Section 123 of the Customs Act, 1962, accordingly the impugned gold become of smuggled in nature and prohibited goods under Section 2(33) of the Customs Act, 1962 and thus liable to confiscation."*

8.01. Government observes that to provide a better understanding of the instant case, it is essential to reproduce the relevant provision of Customs Act, 1962 and the same are reproduced below :

**Section 123. Burden of proof in certain cases. -**

"[(1) Where any goods to which this section applies are seized under this Act in the reasonable belief that they are smuggled goods, the burden of proving that they are not smuggled goods shall be -

(a) in a case where such seizure is made from the possession of any person, -

(i) on the person from whose possession the goods were seized; and

(ii) if any person, other than the person from whose possession the goods were seized, claims to be the owner thereof, also on such other person;

(b) in any other case, on the person, if any, who claims to be the owner of the goods so seized.]

(2) This section shall apply to gold, [and manufactures thereof], watches, and any other class of goods which the Central Government may by notification in the Official Gazette specify."

**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.”*

8.02. It is undisputed that in the instant case the Applicant, despite producing invoices purported to have been issued by the seller in respect of 13 gold bars and details of the payment made by the Applicant for the purchase of 13 gold bars, has failed to prove that the gold, though seized from the Applicant on the domestic sector, was licitly imported into India, as required under Section 123 of the Customs Act, 1962, which stipulates that the burden of proving non-smuggled nature of the goods was on the Applicant. Also 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. No such evidence was produced by the Applicant. 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 becomes liable for confiscation under Section 111(d) of the Customs Act. Government finds that the confiscation of the gold bars in the instant case was therefore justified.

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.), 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 Applicants thus liable for penalty.

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. 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.”*

13.01. 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.

13.02. Government, observing the ratios of the above judicial pronouncements, arrives at the conclusion that decision to grant the option of redemption would be appropriate to the facts and circumstances of the instant case.

14. The Government finds that the lower adjudicating authority has used its discretion correctly in releasing the seized gold which is consistent with the provisions of Section 125 of the Customs Act, 1962. The Government notes that the gold bars were recovered from the Applicant while travelling in the domestic sector. The gold bars had not been ingeniously concealed but was seized on account of the inability of the Applicant to prove that the invoice produced pertained to the seized gold bars, by way of description of the markings and period involved. The Applicant had failed in discharging the burden that the gold recovered from him were not smuggled goods, as required under the provisions of Section 123 of the Customs Act, 1962. The facts of the case indicate that it is a case of inability to prove the antecedents of purchase 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.

15. Therefore, the Government finds that the order passed by the Appellate Authority of absolute confiscation of the impugned gold deserves to be set aside and the Government for the aforesaid reasons, is inclined to provide option to redeem the goods on payment of appropriate redemption fine.

16. Government finds that the penalty of Rs. 4,90,000/- imposed on the respondent by the OAA under Section 112 (b) of the Customs Act, 1962 is commensurate with the omissions and commissions committed and is not inclined to interfere in the same.

17. For the aforesaid reasons, the Government sets aside the order passed by the Appellate Authority. The impugned gold bars weighing 1705 grams valued at Rs. 49,37,791/- are allowed to be redeemed on payment of a fine of Rs. 9,75,000/- (Rupees Nine Lakhs Seventy Five Thousand only).

18. The Revision Application is disposed of on the above terms.

  
( SHRAWAN KUMAR )

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

**ORDER No. 53 /2023-CUS (WZ) /ASRA/**

**DATED 18 01.2023**

To,

1. Mr. Rasikkumar Dahyabhai Patel, B-7, Jasmine Apartment, Malim Juma Road, Kileeshwa, Nairobi, Kenya  
**Address No. 2:** C/o Kanchwala Misar & Co, 309, 3<sup>rd</sup> Floor, Sardar Griha Building, Opposite Commissioner of Police, L.T.Marg, Mumbai 400 002.
2. Pr. Commissioner of Customs, Chhatrapati Shivaji International Airport, Terminal 2, Level-II, Sahar, Andheri (East), Mumbai 400 099.
3. The Commissioner of Customs (Appeals), Mumbai Zone -III, Awas Corporate Point, 5<sup>th</sup> Floor, Makwana Lane, Behind S.M.Centre, Andheri-Kurla Road, Marol, Mumbai - 400 059.

Copy to:

1. M/s Kanchwala Misar & Co, 309, 3<sup>rd</sup> Floor, Sardar Griha Building, Opposite Commissioner of Police, L.T.Marg, Mumbai 400 002
2. Sr. P.S. to AS (RA), Mumbai.
3. ~~File Copy.~~
4. Noticeboard.