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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. 371/19/B/WZ/2020-RA/5021 : Date of Issue 03.08.2023

ORDER NO. 3HA/2023-CUS (WZ)/ASRA/MUMBAI DATED 27.07.2023 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 : Ms. Nikhat Zainuddhin Shaikh

Respondent : Commissioner of Customs, Pune.

Subject : Revision Application filed under Section 129DD of the
Customs Act, 1962 against the Order-in-Appeal No. PUN-
CT-APPII-000-061-19-20 dated 14.10.2019 [Date of issue:
17.10.2019] [F. No. V (2) CT (A-II) 33/2019-20] passed by
the Commissioner (Appeals-II) Central Tax, Pune.

ORDER

The Revision Application has been filed by Ms. Nikhat Zainuddhin Shaikh (herein referred to as the 'Applicant') against the Order-in-Appeal No. PUN-CT-APPII-000-061-19-20 dated 14.10.2019 [Date of issue: 17.10.2019] [F. No. V (2) CT (A-II) 33/2019-20] passed by the Commissioner (Appeals-II) Central Tax, Pune.

2. Brief facts of the case are that on 07.02.2018, on the basis of suspicion, the officers of Customs, Pune, intercepted the Applicant, who had arrived by Jet Airways Flight No. 9W513 from Dubai, after she had cleared herself through the Customs green channel without filing a customs declaration. The screening of the baggage showed some suspicious articles and on opening the trolley bag, two packets containing 20 pouches of 25 grams of Grade I Filament Poshali saffron were found and personal search of the Applicant led to the recovery four mirror studded Jaipuri bangles worn by the Applicant, which on examination was found to be contain fold of 24 k purity, below the plastic mirror studded coating. The officers of customs seized the 2 packets of saffon weighing 1 kg valued at Rs. 50,000/- and four gold bangles weighing 350 gms valued at Rs. 10,88,500/- under the reasonable belief that the same were being 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, Customs, Pune, vide Order-in-Original No. PUN-CUSTOMS-000-ADC-13/2018-19 dated 30.01.2019 [Date of issue: 14.03.2019] ordered the absolute confiscation of the four gold bangles weighing 350 grams valued at Rs. 10,88,500/- and saffron weighing 1 kg valued at Rs. 50,000/- under Section 111(d), (i), (l) and (m) of the Customs Act, 1962. Personal penalty of Rs. 1,00,000/- was imposed on the Applicant under

Section 112 of the Customs Act, 1962 and penalty of Rs. 50,000/- was imposed on the Applicant under Section 114AA of the Customs Act, 1962.

4. Aggrieved by the Order, the Applicant filed an appeal before the Appellate Authority (AA) viz, Commissioner (Appeals-II), Central Tax, Pune who vide Order-in-Appeal No. PUN-CT-APPII-000-061-19-20 dated 14.10.2019 [Date of issue: 17.10.2019] [F. No. V (2) CT (A-II) 33/2019-20] upheld the order passed 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 the impugned order is bad in law and unjust

5.02. That the impugned order has been passed without giving due consideration to the documents on record and facts of the case

5.03. That the OAA ought to have appreciated that dutiable goods brought by the Applicant are neither restricted nor prohibited

5.04. That this was the first time that the Applicant had brought this type of goods and there is no previous case against any of them;

5.05. That the respondent had come to the conclusion that the acts and/or omissions on the part of the Applicant was to evade customs duty and the evasion of customs duty can be done only in respect of dutiable goods and not prohibited goods;

5.06. That once the department or respondent accepts that the goods are dutiable, the option of redemption of goods as provided under Section 125 of the Customs Act, 1962 will have to be given to the Applicant;

5.07. That a bare perusal of the sub-section (1) of Section 125 of the Customs Act, 1962 makes it crystal clear that the respondent is required to give the notice an option to pay fine in lieu of confiscation in respect of the impugned goods which even as per the respondent are dutiable goods;

5.08. That absolute confiscation of the impugned dutiable goods would mean interpreting or giving a new meaning to the said sub-section (1) of Section 125 of the Customs Act, 1962;

5.09. The Applicant has relied upon the following case laws;

- (i) Hargovind Das K. Joshi vis. Collector of Customs Civil Appeals Nos. 139-143 of 1985, decided on 6-1-1987; Absolute Confiscation of Goods by Collector without considering question of redemption on payment of fine although having discretion to do so - Matter remanded to Collector for consideration of exercise of discretion for imposition of redemption fine - Section 125 of Customs Act, 1962
- (ii) Alfred Menezes v/s. Commissioner of Cus..(C.S.I.) Airport, Mumbai. Final Order Nos. A/613-614/2008-WBZ/C-II/(SMB) and Stay Order Nos. S/298 299/2008-WBZ/C-II(SMB), dated 1-8-2008 in Application Nos. C/Stay/862 and 1063/2008 in Appeal Nos. C/531-532/2008 ; Power of adjudicating authority under provisions of Customs Act, 1952 to offer redemption fine in lieu of confiscation of prohibited / restricted goods confiscated-Section125(1) Ibid clearly mandates that it is within the power of adjudicating authority to offer redemption of goods even in respect of prohibited goods.
- (iii) T. Elavarasan Vs Commissioner of Customs (Airport), Chennai [2011 (266) ELT 167 (Mad)]
- (iv) Yakub Ibrahim Yusuf vis. Commissioner of Customs, Mumbai : Final Order No. A/362/2010-WBZ/C-II/(CSTB), dated 28-10-2010 in Appeal No. C/51/1996-Mum;
prohibited goods refers to goods like arms, ammunition, addictive drugs, whose import in any circumstance would danger or be detriment to health, welfare or morals of people as whole, and makes them liable to absolute confiscation - It does not refer to goods whose import is permitted subject to restriction, which can be confiscated for violation of restrictions, but liable to be released on payment of redemption fine since they do not cause danger or detriment to health.
- (v) Mohini Bhatia vs. Commr. Of Customs [1999(106) E.L.T 485 (Tri-Mum)]
- (vi) Universal Traders vs. Commissioner [2009 (240) E.L.T. A78 (SC)]
- (vii) Gauri Enterprises vs. CC, Pune [2002 (145) ELT (705) (Tri Bangalore)]
- (viii) Shaik Jamal Basha vs. Government of India [1997 (91) ELT 277(AP)]
- (ix) VP Hameed vs. Collector of Customs Mumbai 1994(73) ELT 425 (Tri)
- (x) Union of India v/s. Dhanak M. Ramji : Writ Petition Nos. 1397 with 1022 of 2009, decided on 4-8-2009 ; Confiscated goods Redemption of Ownership Tribunal order assailed on the ground that goods could not be released to non-owner- Finding by Tribunal that application for release of

- goods maintainable Goods not prohibited but became prohibited due to violation of law - Discretion properly exercised by Tribunal in ordering release of confiscated goods on payment of redemption fine.
- (xi) P.Sinnasamy vs. Commr. Of Customs, Chennai [2007(220)ELT 308]]
 - (xii) A Rajkumari vs. Commr. of Customs (Airport-Air cargo) Chennai [2015(321) E.L.T. 540].
 - (xiii) Kadar Mydin vs. Commissioner of Customs (Preventive), West Bengal [2011 (136) ELT 758]
 - (xiv) Sapna Sanjeev Kolhi vs. Commr. Of Customs, Airport Mumbai [2008(230) ELT 305]]
 - (xv) Vatakkal Moosa vs. Collector of Customs, Cochin [1994 (72) ELT (G.O.I)]
 - (xvi) Halithu Ibrahim vs. CC [2002-TIOL 195 CESTAT-MAD]
 - (xvii) Krishnakumari vs. CC, Chennai [2008 (229) ELT 222 (Tri Chennai)]
 - (xviii) S.Rajagopal vs. CC, Trichy [2007 (219) ELT 435 (Tri-Chennai)]
 - (xix) M. Arumugam vs. CC, Trichirapalli [2007 (220) ELT 311 (Tri-Chennai)]
 - (xx) Commr. Of C.Ex & ST, Lucknow vs, Mohd. Halim Mohd. Shamim Khan [2018(359) ELT 265(Tri-All)]-Held that only prohibited goods cannot be released on payment of redemption fine-Gold not prohibited and cannot be confiscated absolutely-Order permitting release of such gold on payment of redemption fine in lieu of confiscation upheld

Under the circumstances, the Applicant prayed that the gold be released under Section 125 of the Customs Act, 1962 on nominal redemption fine alongwith applicable duty and personal penalty be reduced substantially.

6. Personal hearing in the case was scheduled for 14.06.2023 and 05.07.2023. Shri N.J. Heera, Advocate appeared for the personal hearing on 05.07.2023 on behalf of the Applicant. He submitted that that Applicant small quantity of jewellery for personal use. He requested to provide an option to redeem on payment of reasonable fine and penalty. He submitted that the Applicant abandons saffron as the same is no longer useful. He further requested to set aside penalty under Section 114AA of the Customs Act, 1962.

7. The Government has gone through the facts of the case and observes that the Applicant had brought 2 packets of saffron weighing 1 kg valued at Rs. 50,000/- and four gold bangles weighing 350 gms valued at Rs. 10,88,500/- 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 she was carrying dutiable goods. However, while passing through the green channel of Customs and on conducting search of the baggage and personal search of the Applicant after being intercepted, the impugned 2 packets of saffron weighing 1 kg valued at Rs. 50,000/- and four gold bangles weighing 350 gms valued at Rs. 10,88,500/- was recovered from the Applicant. The gold was concealed in mirror studded Jaipuri bangles and the method of carrying the gold adopted by the Applicant clearly revealed her intention not to declare the said gold and thereby evade payment of Customs Duty. The confiscation of the gold was therefore justified and thus, the Applicant had rendered herself liable for penal action.

8.1. 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.”

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 vs. 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 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.”

12.1. 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.
- e) Judgement dated 17.02.2022 passed by the Hon’ble High Court, Rajasthan (Jaipur Bench) in D.B. Civil Writ Petition no. 12001 / 2020, in the case of Manoj Kumar Sharma vs. UOI and others

12.2. 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.

13. In the instant case, the quantum of gold under import is small and is not of commercial quantity. The impugned gold was worn by the Applicant and was recovered from the Applicant. There are no allegations that the Applicant is a habitual offender and was involved in similar offence earlier or that there

was an ingenuous concealment of gold. Also there is nothing on record to prove that the Applicant was part of an organized smuggling syndicate.

14. Government finds that this is a case of non-declaration of gold. The absolute confiscation of the impugned gold leading to dispossession of the Applicant of the gold in the instant case is therefore harsh and not reasonable. Government considers granting an option to the Applicant to redeem the gold on payment of a suitable redemption fine, as the same would be more reasonable and fair.

15. Applicant has also pleaded for reduction of the penalty imposed on her. The market value of the gold in this case is Rs. 10,88,500/-. From the facts of the case as discussed above, Government finds that the penalty of Rs. 1,00,000/- imposed on the Applicant under Section 112 of the Customs Act, 1962 is commensurate considering the omissions and commissions of the Applicant.

16. Government notes that once penalty has been imposed under Section 112 of the Customs Act, 1962, there is no necessity of imposing penalty under Section 114AA of the Customs Act, 1962. Therefore, the penalty of Rs. 50,000/- (Rupees Fifty Thousand only) imposed under Section 114AA of the Customs Act, 1962 needs to be set aside.

17. In view of the above, the Government modifies the impugned order of the Appellate Authority in respect of the gold seized from the Applicant. The impugned four gold bangles weighing 350 gms and valued at Rs. 10,88,500/- are allowed to be redeemed on payment of a fine of Rs. 2,00,000/- (Rupees Two Lakhs only). Government does not interfere with the order pertaining to the impugned 2 packets of saffron weighing 1 kg valued at Rs. 50,000/-. Government finds the penalty of Rs. 1,00,000/- imposed under Section 112 of the Customs Act, 1962 is fair and does not interfere with the same. The penalty

imposed on the applicant under Section 114AA of the Customs Act, 1962 is set aside.

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

Shrawan
27/7/23
(SHRAWAN KUMAR)

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

ORDER NO. *SHH* /2023-CUS (WZ)/ASRA/MUMBAI DATED *27* .07.2023

To,

1. Ms. Nikhat Zainuddhin Shaikh, Room No. 4, 52, Jumma Masjid Compound, Chawl No.1 , Shrikant Palkar Marg, Chira Bazar, Mumbai 400 002
2. The Commissioner of Customs, Pune, 'ICE' House, 41/A, Sassoon Road, Pune 411 001.

Copy to:

1. The Commissioner (Appeals-II), Central Tax, Pune, 2nd Floor, 'F' Wing, GST Bhavan, 41/A, Sassoon Road, Pune 411 001.
2. Shri N.J. Heera, Advocate, Nulwala Building, Ground Floor, 41, Mint Road, Opp. G.P.O, Fort , Mumbai 400 001
3. Sr. P.S. to AS (RA), Mumbai.
4. File copy.
5. Notice Board.