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SPEED POST



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

F.No. 371/10/B/WZ/2021-RA | 6.20 : Date of Issue 04.07.2023

ORDER NO. 349/2023-CUS (WZ)/ASRA/MUMBAI DATED 28.07.2023 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. Kunal Ashok Sachanandani

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

Subject : Revision Application filed under Section 129DD of the Customs Act, 1962 against the Order-in-Appeal No. MUM-CUSTM-PAX-APP-552/2020-21 dated 26.11.2020 [Date of issue: 11.12.2020] [F. No. S/49-1309/2020] passed by the Commissioner of Customs (Appeals) Mumbai Zone - III.

ORDER

The Revision Application has been filed by Mr. Kunal Ashok Sachanandani (herein referred to as the 'Applicant') against the Order-in-Appeal No. MUM-CUSTM-PAX-APP-552/2020-21 dated 26.11.2020 [Date of issue: 11.12.2020] [F. No. S/49-1309/2020] passed by the Commissioner of Customs (Appeals) Mumbai Zone – III

2. Brief facts of the case are that on 17.12.2019, the officers of Air Customs, CSI Airport, Mumbai, intercepted the Applicant, an Indian national, who had arrived from Guangzhou by Flight No. WB-501, after he had passed through the Customs Green Channel. The personal search of the Applicant resulted in the recovery of 02 Suisse gold (weighing 10 grams each) having 24KT purity and 05 'Royal Mint gold' (weighing 8 grams each) collectively weighing 60 grams and valued at Rs. 2,03,940/-. Pursuant to the Applicant opting for waiver of show cause notice, the case was adjudicated and the Original Adjudicating Authority i.e the Deputy Commissioner of Customs, Uniform 'A' Batch, CSI Airport, Mumbai vide Order-in-Original No. Aircus/49/T2/1348/2019 dated 17.11.2019 confiscated the impugned gold under Section 111(d) of the Customs Act, 1962, with an option to redeem the same on payment of a fine of Rs. 21,000/- under Section 125(1) of the Customs Act, 1962. Penalty of Rs. 10,000/- was imposed on the Applicant under Section 112 (a) and (b) of the Customs Act, 1962.

3. Aggrieved by the Order, 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-CUSTM-PAX-APP-552/2020-21 dated 26.11.2020 [Date of issue: 11.12.2020] [F. No. S/49-1309/2020] set aside the order passed by the OAA to the extent of ordering

absolute confiscation of the impugned gold. The penal action under Section 112(a) and (b) of the Customs Act, 1962 was upheld.

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

4.01. That the AA erred in not appreciating that absolute confiscation of small quantity of gold with the applicant was part of his bonafide baggage;

4.02. That there is no allegation or evidence to show that applicant misdeclared the goods to the customs or intentionally carried the goods for the purpose of evasion of customs duty or for commercial gain contrary to the provision of FTP;

4.03. That the act of the applicant in carrying a small quantity of gold without the knowledge of the same being beyond free admissible free allowance is to be treated in the nature of procedural and condonable lapse on the part of the Applicant and the absolute confiscation of the gold is not warranted;

4.04. That the discretion exercised by the adjudication authority under Section 125(1) should not be disturbed by the Appellate Authority;

4.05. The Applicant has placed reliance on the following decisions

(i) Commissioner vs. Alfred Menezes [2009 (242) ELT 334(Bom)]

(ii) Commissioner vs. Dharmesh Pansuriya [2018(363) ELT 555 (Tri)]

4.06. That the AA has erred in not appreciating that gold is not prohibited item per se but restricted item as per FTP/ITC (HS) and there is a distinction between 'restricted' and 'prohibited' and the decision of the OAA in giving option to the applicant for redemption of the goods is legal and proper and required no interference. The Applicant has relied upon the following case laws in support of their contention:

(i) In RE: Mohd. Zia Ul Haque [2014(314) ELT 849(GOI)]

(ii) R.N. Palaksha [2019(370) ELT 590(Tri-Bang)]

4.07. That the reliance placed on Boards Circular No. 495/5/92-CusVI dated 10.05.1993 by the AA in support of absolute confiscation is highly misplaced

Under the circumstances, the Applicant prayed that the OIA be set aside to the extent of the absolute confiscation of the goods and the OIO be restored and option to pay redemption fine in lieu of confiscation under Section 125(1) of the Customs Act, 1962 be granted.

5. Personal hearing in the case was scheduled for 05.07.2023. Shri Rahul Gajera, Advocate appeared online for the personal hearing on 05.07.2023 on behalf of the Applicant. He submitted that that Applicant brought small quantity of gold for personal use. He further submitted that the Applicant is not a habitual offender and gold was not ingeniously concealed. He further submitted that Original Authority has rightly used discretion and the Appellate Authority has erred in absolutely confiscating the gold. 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.

6. The Government has gone through the facts of the case and observes that the Applicant had brought 02 Suisse gold (weighing 10 grams each) having 24KT purity and 05 'Royal Mint gold' (weighing 8 grams each) collectively weighing 60 grams and valued at Rs. 2,03,940/- 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 passing through the green channel of Customs and on personal search of the Applicant after being intercepted, the impugned 02 Suisse gold (weighing 10 grams each) having 24KT purity and 05 'Royal Mint

gold' (weighing 8 grams each) collectively weighing 60 grams and valued at Rs. 2,03,940/- were recovered from the Applicant. The fact that the gold was recovered from the Applicant after he had passed the Customs Green channel 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 himself liable for penal action.

7.1. 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.”

7.2. 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.

8. 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”.

9. 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.

10. 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.

11. 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. There is no allegation that the Applicant is a habitual offender and was involved in similar offence earlier or that there was an ingenious 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 that the order of the Original Adjudicating Authority in granting an option to the Applicant to redeem the gold on payment of a suitable redemption fine is reasonable and fair and needs to be restored.

15. Applicant has also pleaded for reduction of the penalty imposed on him. The market value of the gold in this case is Rs. 2,03,940/-. From the facts of the case as discussed above, Government finds that the penalty of Rs.

10,000/- imposed on the Applicant under Section 112 (a) and (b) of the Customs Act, 1962 is commensurate considering the omissions and commissions of the Applicant.

16. In view of the above, the Government modifies the impugned order of the Appellate Authority to the extent of setting aside the absolute confiscation of the gold seized from the Applicant and restores the Order-in-Original No. Aircus/49/T2/1348/2019 dated 17.11.2019. As ordered by the Original Adjudicating Authority, the impugned 02 Suisse gold (weighing 10 grams each) having 24KT purity and 05 'Royal Mint gold' (weighing 8 grams each) collectively weighing 60 grams and valued at Rs. 2,03,940/- are allowed to be redeemed on payment of a fine of Rs. 21,000/- (Rupees Twenty One Thousand only). Government finds the penalty of Rs. 10,000/- imposed under Section 112 (a) & (b) of the Customs Act, 1962 is fair and does not interfere with the same.

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


(SHRAWAN KUMAR)

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

ORDER NO. 349 /2023-CUS (WZ)/ASRA/MUMBAI DATED 28.07.2023

To,

1. Mr. Kunal Ashok Sachanandani, B/82, Shree Krishna Towers, Near B.D. Patel House, Sardar Patel Colony, Ahmedabad 380 014
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 Rahul Gajera, Advocate, 2A Shitalbaugh Society, Lane Opposite Induben Kharkhrawala, Near Girish Cold Drinks, C.G.Road, Ahmedabad 380 006.
3. Sr. P.S. to AS (RA), Mumbai.
4. File copy.
5. Notice Board.

