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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. 371/50/B/WZ/2021-RA / 6008 : Date of Issue 04.08.2023

ORDER NO. 556 /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. Shaikh Raees Hussain

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-CUSTOM-PAX-APP-633/2020-21 dated 24.12.2020 [Date of issue: 08.01.2021] [F. No. S/49-635/2020] passed by the Commissioner of Customs (Appeals) Mumbai Zone - III.

ORDER

The Revision Application has been filed by Mr. Shaikh Raees Hussain (herein referred to as the 'Applicant') against the Order-in-Appeal No. MUM-CUSTM-PAX-APP-633/2020-21 dated 24.12.2020 [Date of issue: 08.01.2021] [F. No. S/49-635/2020] passed by the Commissioner of Customs (Appeals) Mumbai Zone – III.

2. Brief facts of the case are that on 05.03.2020, the officers of Air Customs, CSI Airport, Mumbai, intercepted the Applicant, an Indian national, who had arrived from Dubai by Flight No. 6E-1769, who was found to be in possession of one 24KT gold chain weighing 58 grams, valued at Rs. 2,25,136/-. 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, CSI Airport, Mumbai vide Order-in-Original No. Aircus/49/T2/1658/2020 UNI-'B' dated 05.03.2020 absolutely confiscated the gold chain weighing 58 grams and valued at Rs. 2,25,136/- under Section 111(d) of the Customs Act, 1962. Penalty of Rs. 10,000/- was imposed on the Applicant under Section 112(b) (ii) of the Customs Act, 1962.

4. Aggrieved by the Order, the Applicant 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-633/2020-21 dated 24.12.2020 [Date of issue: 08.01.2021] [F. No. S/49-635/2020] 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 he could not deposit the RA fees due to Covid, the airport authorities did not give entry pass for pay the fees;

5.02. That the Applicant had not contravened any provisions of the Customs Act, 1962 and had no malafide intention to hid anything from Customs to avoid payment of duty;

5.03. That the gold chain was a gift to his wife from his brother in law and that he also requested to pay duty and the gold chain was not concealed in any manner and was worn by him;

5.04. That the gold chain belonged to him and gold jewellery was neither banned nor restricted under the Baggage Rules (Amendment), 2016;

5.05. That he was not a frequent visitor and had brought the gold for the first time and he had claimed the ownership of the gold as it was meant for his wife's personal use;

5.06. The Applicant has relied upon the following case laws to further his contention that there were similar cases where undeclared gold bars and gold jewellery were allowed to the green channel passenger on fine for clearance in India.

- (i) Sanjiv Kohli vs. CC of Customs, Mumbai [2008(230) ELT 305]
- (ii) UOI vs. Dhanak Ramji [2009(248) ELT 127(Bom)]

5.07. That no import licence was required for import of the gold jewellery;

5.08. That the Applicant has suffered economically, mentally and physically and deserves leniency by way of ordering the release of gold on duty only without taking penal action;

5.09. That the Applicant was not a carrier for somebody else but he was the actual owner of all the gold jewellery and it was not the case of the department that the Applicant was engaged in any racket of smuggling of gold.

Under the circumstances, the Applicant prayed that the gold be released under Section 125 of the Customs Act, 1962 on nominal redemption fine and personal penalty be ordered to be waived/reduced.

6. The Respondent-department, vide letter dated 28.04.2021 filed their written submissions to the revision application. The Respondent-department prayed that the appeal filed by the Applicant be rejected and the OIA passed by the Appellate Authority be upheld, on the following grounds:

6.01. That the Applicant did not declare the gold on his own and the gold was detected only after he was intercepted by the officers of Customs and personal search of the Applicant resulted in the recovery of gold;

6.02. That had the Applicant had not filed any declaration and had he not been intercepted, he would have made good with the gold;

6.03. That the offence was committed in a premeditated manner which clearly indicates mensrea and the Applicant had deliberately not declared the gold to Customs in order to evade customs duty;

6.04. That the Applicant admitted to possession, non-declaration, carriage and recovery of seized gold and was attempted to be cleared without having been declared before customs, and when offending goods are seized along with inculpatory statement, the statement has to be relied upon as decided in Surjeet Singh Chhabra vs. UOI [1997(89) ELT 646(SC)] and K.I.Pavunny vs. Asstt. Collector (HQ), C.Ex, Cochin [1997(90) ELT 241 SC]

6.05. The Respondent-department relied upon the following case laws and circulars in support of their contention:

- (i) Abdul Razak vs UOI [2012(275) E.L.T 300(Ker) (DB)
- (ii) Decision of the Hon'ble Madras High Court in the case of CC (Air) vs. P Sinnasamy.
- (iii) Om Prakash Bhatia vs. CC, Delhi [(2003)6 SC 161]
- (iv) Baburaya Narayan Nayak vs. CC, Bangalore [2018(364) E.L.T 811 (Tri-Bang)
- (v) Board's Circular No 495/5/92-Cus.VI dated 10.05.1993

The Applicant, vide letter dated 14.04.2023, requested for early hearing in the case citing that the case was pending for more than two years and the

confiscation had caused significant mental trauma to his wife and the chain was not acquired with the intention of monetary gain but was a gift from his brother-in-law.

7. Personal hearing in the case was scheduled for 04.07.2023 or 18.07.2023. Mr. Shaikh Raees Hussain, the Applicant appeared for the hearing on 04.07.2023 and submitted that he brought small quantity of gold chain for personal use. He submitted that he was wearing the chain and there was no concealment and that he was not a habitual offender. He submitted additional written submissions.

8. The Applicant in his additional written submissions reiterated his earlier contentions and further submitted that he was a honest businessman and requested to refrain from imposing a heavy redemption fine on the confiscated gold as it exceeded his financial capabilities and requested for leniency.

9. The Government has gone through the facts of the case and observes that the Applicant had brought one 24KT gold chain weighing 58 grams, valued at Rs. 2,25,136/- 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 being intercepted, the Applicant was found to be in possession of the 24KT gold chain weighing 58 grams, valued at Rs. 2,25,136/- which was worn by him and was recovered from the Applicant. The fact that the Applicant passed the green channel wearing the gold chain clearly revealed his 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.

10.1. 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.”

10.2. 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.

11. 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”.

12. 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.

13. 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.

14. 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.”

15.1. 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

15.2. 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.

16. 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.

17. 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.

18. Applicant has also pleaded for reduction of the penalty imposed on him. The market value of the gold in this case is Rs. 2,25,136/-. 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 (b) (ii) of the Customs Act, 1962 is commensurate considering the omissions and commissions of the Applicant.

19. 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 24KT gold chain weighing 58 grams, valued at Rs. 2,25,136/- is allowed to be redeemed on payment of a fine of Rs. 40,000/- (Rupees Forty Thousand only). Government finds the penalty of Rs. 10,000/- imposed under Section 112 (b) (ii) of the Customs Act, 1962 is fair and does not interfere with the same.

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

Shrawan
28/7/23
(SHRAWAN KUMAR)

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

ORDER NO. 556 /2023-CUS (WZ)/ASRA/MUMBAI DATED 28.07.2023

To,

1. Mr. Shaikh Raees Hussain, C/o Vimal C. Jha, Advocate, 112, 1st Floor, Chawla Complex, Sector 15, CBD Belapur, Navi Mumbai 400 614
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 O.P.Rohira, Advocate, 148/301, Uphaar, 10th Road, Khar (West), Mumbai 400 052
3. Sr. P.S. to AS (RA), Mumbai.
4. File copy.
5. Notice Board.

