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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. 371/273/B/WZ/2020-RA | 4908 : Date of Issue 03.08.23

ORDER NO. 562 /2023-CUS (WZ)/ASRA/MUMBAI DATED 31.07.2023
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.

(i). F.No. 371/273/B/WZ/2020-RA

Applicant : Shri. Ramesh Jain

Respondent : Pr. Commissioner of Customs, Chhatrapati Shivaji
Maharaj International (CSMI) Airport, Mumbai.

Subject : Revision Applications filed, under Section 129DD of the
Customs Act, 1962 against the Order-in-Appeal F.No.
MUM-CUSTM-PAX-APP-417 & 418/2020-21 dated
09.10.2020 and issued on 13.10.2020 through F.Nos.
S/49-1137/2019(D) and S/49-1404/20191455/2021
passed by the Commissioner of Customs (Appeals),
Mumbai-III.

ORDER

This revision application has been filed by Shri. Ramesh Jain [herein after referred to as the Applicant; against the Order-in-Appeal F.No. MUM-CUSTOM-PAX-APP-417 & 418/2020-21 dated 09.10.2020 and issued on 13.10.2020 through F.Nos. S/49-1137/2019(D) and S/49-1404/20191455/2021 passed by the Commissioner of Customs (Appeals), Mumbai-III.

2(a). Briefly stated facts of the case are that on 14.06.2018, the Customs Officers at CSMI Airport, Mumbai had a specific information received from the Customs, Delhi International Airport (DIA), that the Applicant who was travelling to Mumbai from Hong Kong via Delhi by Air India Flight No. AI-317 dated 14.06.2018 was carrying two gold bars. Accordingly, the Customs Officers of CSMI Airport, Mumbai followed the applicant from the Aircraft to the Arrival hall of CSMI Airport. However, sensing that he was being followed, the applicant approached the Customs Red Channel and declared that he was carrying two gold bars of 1000 grams each. At this juncture, personal search of the applicant was conducted and also his baggage was examined in presence of panchas. However, nothing incriminating was recovered. Scrutiny of his passport revealed that the applicant was returning back from Hong Kong after a stay of just one day / one night. The applicant revealed that he was in possession of only Rs. 400/- and did not possess any foreign currency. Since, the applicant was carrying 2000 grams of gold in the form of 2 bars, was returning to India after a short stay abroad and did not possess any foreign currency, he was handed over to the AIO for further investigations.

2(b). The two gold bars were assayed and the Government Approved Valuer certified that the 2 gold bars collectively weighing 2000 grams, were of 24KT 999% purity and valued at Rs. 56,85,830/- The same were seized under Seizure Memo No. 248/2018 dated 14.06.2018 under the reasonable belief that

the same were being smuggled into India and were liable for confiscation under the provisions of the Customs Act, 1962.

2(c). In his statement recorded under Section 108 of the Customs Act, 1962, the applicant revealed that he was working at Noida for last 20 years and used to get a monthly salary of Rs. 25,000/-; that on 14.06.2018, on his arrival at Delhi Airport by Air India Flight No. 317 which was en-route to Mumbai airport, he was informed by the airline staff that those travelling to Mumbai would be required to deboard at Delhi Airport and proceed to another aircraft of Air India for onward flight to Mumbai; that during the security check at Delhi Airport, the security officials found two unmarked gold bars inside the HP shoulder bag carried by applicant; that the security officials detained him at Delhi Airport and took his statement; that the security officials informed the Customs Officers at Delhi Airport; that the applicant was allowed to proceed to Mumbai by Air India No. AI-317; that upon landing at Mumbai, he noticed that he was being followed by two persons whom he assumed were Customs Officers; that he panicked and changed his mind from going to the green channel and went to the red channel; that the two gold bars were not purchased by him and was promised a monetary consideration of Rs. 20,000/- for carrying the gold bars; that he was supposed to hand over the gold bars to a domestic passenger but since he was detected by the security officials at DIA, the domestic passenger had not come forward to collect the gold bars; that he did not possess a tax invoice for the gold bars;

2(d). Arrival / departure details for the period from 01.01.2017 to 14.06.2018, indicated that the applicant had travelled abroad 14 times from New Delhi Airport and had arrived at either New Delhi / Mumbai Airports.

3. The Original Adjudicating Authority i.e. Addl. Commissioner of Customs, CSMI Airport, Mumbai by vide his Order-In-Original i.e. OIO No. ADC/AK/ADJN/181/2019-20 dated 30.09.2019 issued on 14.10.2019

through F.No. S/14-5-308/2018-19/Adjn – SD/INT/AIU/271/2018-AP'A' ordered for the confiscation of the impugned 2 gold bars, totally weighing 2000 grams and valued at Rs. 56,85,830/- under Section 111(d) of the Customs Act, 1962 recovered and seized from the applicant. However, an option to redeem the impugned 2 nos of gold bars on payment of a fine of Rs. 10,25,000/- under Section 125(1) of the Customs Act, 1962 was granted to the applicant. Also, a penalty of Rs. 7,40,000/- was imposed on the applicant under Section 112 (a) and (b) of the Customs Act, 1962.

4. Aggrieved by the said order, the applicant as well as the respondent filed appeals before the Appellate Authority (AA) i.e Commissioner of Customs (Appeals), Mumbai - III who vide his Order-in-Appeal F.No. MUM-CUSTOM-PAX-APP-417 & 418/2020-21 dated 09.10.2020 and issued on 13.10.2020 through F.Nos. S/49-1137/2019(D) and S/49-1404/20191455/2021 set aside the OIO dated 30.10.2019 passed by the OAA and ordered for the absolute confiscation of the impugned gold under Section 111(d), (l) and (m) of the Customs Act, 1962. The penalty amount imposed by the OAA was upheld. i.e. In other words, the appeal filed by the respondent (i.e. department) was allowed and the appeal filed by the applicant was rejected.

5. Aggrieved with the above order, the Applicant has filed this revision application before the Revisionary Authority, Mumbai inter alia on the following grounds of revision;

5.01. that the gold could not be said to be smuggled; that it was on record that the gold had been duly declared at the red channel counter; that the gold had been seized within the Customs bonded area and not outside; they have relied upon Cestat case in respect of Prakash Chandra Shantilal vs. Commr. of Customs, Ahmedabad -2013-290-ELT-125-Tri-Ahd.; '*goods when brought int India from a place outside India till they are cleared for home consumption are treated as imported goods – Only when brought out of customs area with payment of duty and seized they become smuggled goods.*'; that the case of Baburaya Narayan Nayak vs. Commr. of Customs, Bangalore – 2018-364-ELT-811-Tri-Ban relied upon by the

AA was not applicable in the instant case as in the cited case the gold had been seized in the town and not in Customs bonded area.; that they have relied upon the case of UOI vs. Imtiaz Iqbal Pothiwala passed by the Hon'ble Bombay High Court on 16.10.2018 wherein it was held that *'We are of the view that in the absence of evidence in the form of regular books of account, Registration under the Income Tax and Sales Tax, etc cannot ipso facto lead to the conclusion that the seized gold bars, are smuggled gold bars. These may lead to proceedings for breaches of other Acts but it does not follow from it that the gold bars are smuggled goods. In fact, if a person in possession of the stolen gold is able to establish that it had come into India after a proper declaration and compliance of the Act, no confiscation under the Act, can arise. Proceedings under the Indian Penal Code may be initiated by the police for theft, but it would not be reason of theft become smuggled goods. Moreover, smuggling as defined under section 2(39) of the Act, is an act of omission which will render goods liable to confiscation under Sections 111 of the Act for Import and 113 of the Act for Exports. On reading sections 111 and 113 of the Act, not keeping proper books of account, or not being registered with the Income Tax and / or Sales Tax Authorities is not an omission which renders the goods liable for confiscation i.e. smuggled goods.'*

- 5.02. that the cases relied upon by the AA in the OIA was not applicable to his case.; that there were numerous pronouncements of the High Courts which clearly held that declaration of goods under Section 77 of the Act and request under Section 80 of the Customs Act, would remove the goods from the purview of Section 111 of the Act.
- 5.03. that they have relied upon the CEGAT case of Mohammed bin Ahmed vs. Collector of Customs on 26-12-1984 wherein it was held *'The bona fide baggage comes into picture only for the purpose of claiming free allowance. As a matter of fact the expression 'baggage' is interpreted as 'luggage'. It permits temporary detention of baggage at the request of the passenger of the goods which are dutiable, and the import of which are prohibited provided a true declaration had been made. In the circumstances, and having regard to the fact that there was a true declaration and also the request for detention, the authorities below have committed an error in law in holding that the appellant was not entitled for detention of gold which he had brought.'*
- 5.04. that they have relied upon the case of Umesh Kumar Singh vs. Collector of Customs passed by CEGAT Eastern Bench, Calcutta on 04.06.1992 wherein it was held, *'I have considered the submissions of both sides. From the inventory of goods it is seen that the appellant chose the red channel.*

Therefore, he wanted to declare the goods under Section 77 of the Customs Act, 1962. It was at that time, the baggage was checked and item no. 1 to 40 were found in the baggage. In such circumstances, there is not question of smuggling of goods into the country. He has chosen the red channel where he wanted to declare the goods. In the decision reported in 1981 ECR ID, the Madras High Court had held that since the petitioner had not imported or attempted to import the goods into the country, the goods cannot be confiscated. In this case, since the petitioner chose the red channel, it is clear about his intention to declare the goods and the question of contravention of Section 111(d) of the Customs Act, 1962, does not arise.'

- 5.05. that they have relied upon the case of Ahamed Gani Natchiar vs. Commr. of Customs, Chennai dated 08.06.2020.
- 5.06. that the statement recorded under Section 108 of the Customs Act, 1962 was inapplicable; that the applicant had been beaten, tortured and humiliated; that his toe had got fractured; that concerned documentary evidence was attached; this shows that the statement of the applicant was not voluntary.
- 5.07. that the gold had been kept in the baggage; that there was no ingenious concealment; that gold had been declared at the red channel; that there was no evidence to show on record that the applicant was involved in an act of organized smuggling;
- 5.08. that import of gold was not prohibited; that items such as pornographic and obscene materials, Maps and literature where India's external boundary have been shown incorrectly, NDPS substances; counterfeit goods etc are prohitied.; that they have relied on the undermentioned cases on the issue;
- (a). Commr. of Customs Preventive vs. Uma Shankar Verma – 2000-120-ELT-322-CAL;
- (b). Yusuf Ibrahim Yusuf vs. Commr. of Customs, Mumbai – 2011-263-ELT-685-Tri-Mum.;
- (c). Dhanak Madhusudan Ramji vs. Commr. of Customs (Airport), Mumbai – 2009-237-ELT-280-Tri-Mum
- 5.09. Revision Order no. 214/18-Cus dated 05.12.2018 in respect of Manoj Kumar wherein it was held that the allegation that the applicant was not the owner of the gold, was found untenable.

Under the circumstances, the applicant has prayed to the Revision Authority to set aside the OIA passed by the AA and to restore the OIO passed by the OAA

or to allow re-export of the gold and to set aside the penalty imposed or to reduce the same.

6. The respondent vide their written submission bearing F.No. Aircus/Review-25/2020-21 dated 22.04.2021 have stated; that applicant had got suspicious that he was being followed and therefore went to the red channel and had declared the gold; that he was coming only after a day's stay at Hong Kong; that he was not in possession of any foreign currency for payment of duty; that the applicant was not eligible to bring 2 kgs of gold; that he had admitted that he was not the owner of the gold and had carried the same for a monetary consideration of Rs. 20,000/-; that he had admitted that he was supposed to hand over the gold bars to a domestic passenger on the Delhi - Mumbai leg but since the security officials at DIA had found out about the gold with the applicant, he had not come forward to collect the gold bars; that he had smuggled same quantity of gold on 3 occasions in the past. That declaration was made by the applicant to dodge the authorities as he could not escape from the clutches of the law and he was compelled; that the offence was committed in a pre-meditated and clever manner indicating mensrea and had he not been intercepted he would have taken away the gold without payment of Customs duty; that they rely on the following case laws;

(i). Surjeet Singh Chhabra vs. UOI - 1997-89-ELT-646-SC, wherein the Apex Court had held that *'the confession, though retracted, is an admission and binds the petitioner'*.

(ii). Apex Court's Order in the case of K.I Pavunny vs. Asstt. Collector (HQ), C.Ex, Cochin [1997-90-ELT-241-SC] on the issue that confessional statement made to Customs officials is admissible evidence

(iii). Abdul Razak vs. UOI - 2012(275)ELT 300(Ker)(DB) passed by the Division Bench of the Hon'ble High Court, Kerala, on the issue that appellant did not have right to get the confiscated gold ;

(iv). Commissioner of Customs (Air) vs. P. Sinnasamy, passed by Hon'ble Madras High Court, it is held that non-fulfilment of conditions tantamount to prohibition.;

(v). Om Prakash Bhatia vs. Commissioner of Customs, Delhi – 2003(6) SC 161 of the Apex Court, it is held that non-fulfilment of conditions tantamount to prohibition.;

(vi). Cestat Order in respect of Baburaya Narayan Nayak vs. Commissioner of Customs, Bangalore – 2018(364) ELT 811 (Tri-Bang), upheld absolute confiscation as evidence of licit purchase had not been provided;

(vii). Board's Circular no. 495/5/92-Cus.VI dated 10.05.1993 which specifies that in r/o gold seized for non-declaration, no option to redeem the same on redemption fine under Section 125 of the Customs Act, 1962, should be given, except in very trivial cases where the adjudicating authority was satisfied that there was no concealment of the gold in question.

Therefore, under the circumstance of the case, the respondent has prayed to the Revision Authority to reject the revision application filed by the applicant and to uphold the OIA passed by the AA.

7(a). Personal hearing in the case was scheduled for 11.05.2023, 18.05.2023. Shri. S.S. Arora, Advocate appeared for personal hearing on 18.05.2023 and submitted that Commissioner (Appeals) has not considered the submission of applicant and passed an order which is not proper. He requested to restore order of the Original Authority. He requested time of 10 days to make additional submissions.

7(b). The applicant made additional written submissions on 26.05.2023. Therein, the applicant has reiterated earlier submissions and emphasized on the para nos. 19.1, 19.2, 19.3 of the OIO dated 30.09.2019 passed by OAA. Also, the applicant has laid emphasis on para nos. 14, 15 of the OIA passed

by AA. Applicant has reiterated that the golds had been gifted by Ms. Puja Jain who is a citizen of USA. The premise taken by the AA that the confiscated gold did not belong to the applicant was not tenable in the light of Section 125 of the Customs Act, 1962 which gives an option of redemption of confiscated goods to the owner or where such owner was not known, the said option is to be given to the person from whose possession or custody such goods had been seized.

8. Government has gone through the facts of the case. Government notes that the applicant was a frequent traveler and on this trip was returning back after a stay of only one day/ one night. He was carrying substantial quantity of gold which was in primary form i.e. 2 bars of 1 Kg each. The applicant was not eligible to import gold by virtue of having stayed abroad only for a day/night. The applicant did not have any money in his possession nor did he possess any invoice evidencing the purchase of the gold which was in primary form. All these indicate that the applicant did not have any intention to declare the gold bars in his possession. Considering the circumstance of the case, Government finds that the confiscation of the gold was 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.), 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. Once goods are held to be prohibited, Section 125 still provides discretion to consider release of the goods on redemption fine. 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. Government notes that while absolutely confiscating the gold bars, the AA at para nos. 24 & 26 of the OIA, the AA has observed as under;

"24. I observe that the contention made by the appellant as stated at Para 11 is purely of technical in nature and the verification of the same is not possible at appeal stage. I observe that the appellant in his statement recorded under Section 108 of the Customs act, 1962 admitted that the seized gold bars were not purchased by him nor he had any purchase invoice or foreign currency to pay the requisite duty. I observe that the appellant had innumerable opportunities wherein he could have submitted the proof of ownership of the seized gold to the adjudicating authority but failed to submit the same which itself is a proof that at the time of interception and till the case was adjudicated, the appellant did not have any kind of legal documents to prove his ownership on the seized gold. As no such contention was raised before the adjudicating authority and therefore as per Rule 5(1) of Customs Appeals Rules, 1982 no new evidence can be put up before the Appellate Authority:

"The appellant shall not be entitled to produce before the [Commissioner] (Appeals) any evidence, whether oral or documentary, other than the evidence produced by him during the course of proceedings before the adjudicating authority"

26. I observe that there is enough evidences on record to indicate that the appellant had smuggled the goods and the appellant could not give any justification. I observe that the lower authority while deciding the case did not verify the evidences made by the investigation agency which confirmed that the gold brought by the appellant Shri Ramesh Jain were smuggled into and the explanation given by the appellant did not match with his income resources nor the appellant had the purchase invoice or any documents for licit acquisition and financing of the seized gold.

13. Government finds that the AA has gone into the details of the case and considering the evidence, has concluded that the act committed by the applicant

was deliberate and in contravention of the Baggage Rules. OAA has used his discretion in setting aside the Original Order passed by the OAA where the gold had been released. The option to allow redemption of seized goods is the discretionary power of the adjudicating / appellate authority depending on the facts of each case and after examining the merits. Government finds that the OIA passed by the AA holding the 2 gold bars for absolute confiscation is proper, legal and judicious and is not inclined to interfere in the same.

14. Government finds that the penalty of Rs. 7,40,000/- imposed on the applicant under Section 112(a) and (b) of the Customs Act, 1962 by the OAA and upheld by the AA is commensurate with the omissions and commissions committed.

15. In view of the above, Government upholds the OIA passed by the AA as the same is legal and judicious and finds that the revision application filed by the applicant fails.

16. Revision Application filed by the applicant is dismissed.


(SHRAWAN KUMAR)

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

ORDER No. 562/2023-CUS (WZ) /ASRA/MUMBAI DATED 31.07.2023

To,

1. Shri. Ramesh Jain, 57-D, Metro Apartments, Sector - 71, Noida (UP)-201301.
2. Pr. Commissioner of Customs, Chhatrapati Shivaji Maharaj International Airport, Level - II, Terminal - 2, Sahar, Andheri East, Mumbai - 400 099.

Copy to:

3. S.S Arora & Associates, B1/71, Safdarjung Enclave, New Delhi - 110029.
4. Sr. P.S. to AS (RA), Mumbai.
5. File Copy.
6. Notice Board.