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GOVERNMENT OF INDIA
MINISTRY OF FINANCE
(DEPARTMENT OF REVENUE)

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F.No. 371/20/B/WZ/2020-RA | 6032 : **Date of Issue** 04.08.2023

ORDER NO. 565 /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.

Applicant : Shri Sudheep Alumthodi

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-586/2019-20 dated 11.10.2019 [F. No. S/49-537/2018] passed by the Commissioner of Customs (Appeals), Mumbai Zone-III

ORDER

The Revision Application has been filed by Shri Sudheep Alumthodi (herein referred to as the 'Applicant') against the Order-in-Appeal No. MUM-CUSTOM-PAX-APP-586/2019-20 dated 11.10.2019 [F. No. S/49-537/2018] passed by the Commissioner of Customs (Appeals), Mumbai Zone-III

2. Brief facts of the case are that on 15.12.2017, the officers of Air Customs, CSI Airport, Mumbai, intercepted the Applicant, who had arrived by Jet Airways Flight No. 9W-541 from Dubai, after he had cleared himself through the Customs green channel. Personal search of the Applicant resulted in the recovery of 05 foreign marking yellow coloured metallic bars purported to be gold which was wrapped with black coloured adhesive cellophane tape and kept inside the left side pocket of the shirt worn by him. Pursuant to being assayed, the said 01 gold bar of 995% purity weighing 1000 grams and 04 gold bars of 999% purity weighing 464 grams, collectively weighing 1464 grams and collectively valued at Rs. 39,40,788/- were seized 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 of Customs, CSI Airport Mumbai, vide Order-in-Original No. ADC/AK/ADJN/271/2018-19 dated 26.09.2018 ordered the absolute confiscation of the 05 gold bars collectively weighing 1464 grams and collectively valued at Rs. 39,40,788/- under Section 111(d), (l) and (m) of the Customs Act, 1962. Personal penalty of Rs. 4,50,000/- was imposed on the Applicant under Section 112 (a) and (b) of the Customs Act, 1962. The black coloured adhesive cellophane tap which was used for concealment and wrapping the seized gold was absolutely confiscated under Section 119 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-CUSTOM-PAX-APP-586/2019-20 dated 11.10.2019 [F. No. S/49-537/2018] 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-Section 125(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, ammution, 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 the Applicant had brought some quantity of gold for personal use. He further submitted that gold was not concealed and applicant is not a habitual offender. He requested to provide an option to claim the gold on payment of reasonable redemption fine and penalty.

7. The Government has gone through the facts of the case and observes that the Applicant had brought 01 gold bar of 995% purity weighing 1000 grams and 04 gold bars of 999% purity weighing 464 grams, collectively weighing 1464

grams and collectively valued at Rs. 39,40,788/- 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. The gold was of high purity and was in primary form indicating that the same was for commercial use. However, after being intercepted, on intelligence, the impugned gold which was wrapped in black coloured adhesive cellophane tape to avoid detection and kept in the shirt worn by him was recovered from the Applicant and the method of carrying the gold adopted by the Applicant clearly revealed his intention not to declare the said gold and thereby evade payment of Customs Duty. The nature of concealment and non declaration reveals the mindset of the Applicant to not only evade duty but smuggle the gold. It also reveals that the act committed by the Applicant was conscious and pre-meditated. The Applicant was given an opportunity to declare the dutiable goods in his possession but having confidence that he would be clear himself, he passed through the Customs Green channel and had he not been intercepted, the Applicant would have gotten away with the gold. The confiscation of the gold was therefore justified and thus, the Applicant had rendered himself liable for penal action.

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 ‘respondent’ thus, liable for penalty.

10. Once goods are held to be prohibited, Section 125 still provides discretion to consider release of 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.”

11.1 Government observes that besides the quantum of gold and its high purity, which indicates that the same was for commercial use, the manner in which it was attempted to be brought into the country is vital. The impugned gold was wrapped with black coloured adhesive cellophane tape and not declaring the same despite being kept on his person reveals the intention of the Applicant. It also revealed his criminal bent of mind and a clear intention to evade duty and smuggle the gold into India. The purity and primary form of the gold indicated that the same was for commercial use. Government notes from the records that it had come to light that the Applicant was a man little means, that he was not the owner of the gold and it was handed over to him at Dubai and was a frequent flyer which further suggests that the Applicant was a carrier for a syndicate, entrusted with smuggling of the gold. The Appellate Authority at para 7 of the Order-in-Appeal has observed as under :

“6. I find that the passenger had opted for green channel, which is meant for passenger who have nothing dutiable to declare or are carrying goods within their free allowance, in reasonable quantity. I find that once passenger opts for Green Channel, he/she is not supposed to have any dutiable goods however, in the case at hand the passenger has been found in possession of 1464 gms of

foreign marked Gold bars of 995% & 999% purity and worth approx. 40 lakh which suggest that the intention of the appellant is nothing but to evade the customs duty and smuggle the impugned gold into India in contravention of the para 2.20 of foreign trade policy read with Baggage Rule, 1998. I find that the appellant in his statement dated 15.12.2017 recorded u/s 108 of the Customs Act, 1962 had admitted that he was not the owner of the impugned gold bars; that he was doing mason work in Kerala and his monthly income was around 15,000/- per month; that he did not have any bank account; that the impugned gold handed over to him in Dubai by some Miku, for further delivery in Mumbai for monetary consideration of Rs. 12,000/-. I observe that the appellant passenger is a frequent traveller and had travelled 9 times abroad in a span of three months. I find that no explanation has been offered regarding his purpose for frequent visits abroad and as to how the finances were arranged for his Air tickets which clearly suggest that the appellant was working as carrier for some organized smuggling racket and had been involved in this type of activities in past also. I find that there is nothing brought on record about the licit acquisition of the impugned gold and the appellant passenger failed to explain how he arranged the finance in abroad to purchase the gold bars. The fact of the case discussed above clearly suggests that the appellant is not the owner of the impugned gold and he has been carrying the impugned gold bar for somebody else acting as a carrier for monetary consideration.”

11.2. The aforesaid circumstances of the case probates that the Applicant had no intention of declaring the gold to the Customs at the airport. All these have been properly considered by the Original Adjudicating Authority while ordering the absolute confiscation of the gold and has been rightly vetted by the Appellate Authority.

12. The main issue in the case is the manner in which the impugned gold was being brought into the Country. The option to allow redemption of seized goods is the discretionary power of the adjudicating authority depending on

the facts of each case and after examining the merits. In the present case, the non-declaration and manner of trying to clear the gold and the quantity and type of gold being for commercial use, this being a clear attempt to brazenly smuggle the impugned gold by the Applicant who stated that he was not the owner of the gold implying by his acts that he was a carrier for an organised smuggling syndicate, is a fit case for absolute confiscation as a deterrent to such offenders. Thus, taking into account the facts on record and the gravity of offence, the adjudicating authority had rightly ordered the absolute confiscation of the impugned gold. But for the intuition and the diligence of the Customs Officer, the gold would have passed undetected. The redemption of the gold will encourage non bonafide and unscrupulous elements to resort to concealment and bring gold. Such acts of misusing the liberalized facilitation process should be meted out with exemplary punishment and the deterrent side of law for which such provisions are made in law needs to be invoked. Government is in agreement with the order of the OAA and vetted by the Appellate Authority, ordering absolute confiscating of the impugned gold. The absolute confiscation of the gold would act as a deterrent against such persons who indulge in such acts with impunity.

13. Government finds that the penalty of Rs. 4,50,000/- imposed on the Applicant by the OAA under Section 112(a) & (b) of the Customs Act, 1962 is commensurate with the omissions and commissions committed by the Applicant.

14. For the aforesaid reasons, the Government is inclined not to interfere with the Order-in-Appeal No. MUM-CUSTOM-PAX-APP-586/2019-20 dated 11.10.2019 [F. No. S/49-537/2018] passed by the Commissioner of Customs (Appeals), Mumbai Zone-III and upholds the same.

15. The Revision Application is dismissed as being devoid of merit.

Shrawan
31/7/23
(SHRAWAN KUMAR)

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

ORDER NO. 565/2023-CUS (WZ)/ASRA/MUMBAI DATED 31.07.2023

To,

1. Shri Sudheep Alumthodi, Alumthodi House, Irimbilyam, Valiyakunnu, PO Mallapuram, Kerala 676552
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 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.

