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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. 371/170/B/WZ/2019-RA/356 : Date of Issue : 20.01.2023

ORDER NO. 56 /2023-CUS (WZ)/ASRA/MUMBAI DATED 19.01.2023 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 Jayeshkumar Kantilal Modhpatel

Respondent : Pr. Commissioner of Customs, Ahmedabad.

Subject : Revision Application filed, under Section 129DD of the Customs Act, 1962 against the Order-in-Appeal No. AHD-CUSTM-000-APP-199-18-19 dated 21.01.2019 [F.No. S/49-66/CUS/AHD/2018-19] passed by the Commissioner of Customs (Appeals), Ahmedabad.

ORDER

The Revision Application has been filed by Shri Jayeshkumar Kantilal Modhpatel (herein referred to as the 'Applicant') against the Order-in-Appeal No. AHD-CUSTOM-000-APP-199-18-19 dated 21.01.2019 [F.No. S/49-66/CUS/AHD/ 2018-19] passed by the Commissioner of Customs (Appeals), Ahmedabad.

2. Brief facts of the case are that on 28.09.2017, the Customs Officers at the Sardar Vallabhbhai Patel International Airport, Ahmedabad intercepted the Applicant who had arrived from Kuwait via Dubai by Emirates Flight No. EK-538 after he had opted for the Green channel. The Applicant was asked whether he had anything to declare to which he replied in the negative. As the Applicant denied having any dutiable goods, he was asked to pass through the Door Metal Frame Detector. As a beep sound was heard, on questioning, the Applicant took out a wallet from which one yellow metallic bar with the marking '1KILO GOLD' was recovered. The gold bar weighing 222.550 grams having a purity of 0.995 and having a market value of Rs. 6,79,890/- and tariff value of Rs. 6,27,311/- was seized.

3. The Original Adjudicating Authority (OAA) i.e. Additional Commissioner of Customs, Ahmedabad vide Order-In-Original (OIO) No. 11/ADC-MSC/SVPIA/O & A/2018-19 dated 17.05.2018 [(DOI: 18.05.2018),(VIII/10-76/SVPIA/O & A/2017)] ordered for the absolute confiscation of the impugned gold bar weighing 222.550 gms having tariff value of Rs. 6,27,311/- and market value of Rs. 6,79,890/- under Section 111 (d), (i), (l) & (m) of the Customs Act, 1962. A penalty of Rs. 2,75,000/- was imposed on the Applicant under Section 112(a) and (b) of the Customs Act, 1962.

4. Aggrieved with this Order, the Applicant filed an appeal before the Appellate Authority (AA) viz, Commissioner of Customs (Appeals), Ahmedabad who vide Order-in-Appeal No. AHD-CUSTM-000-APP-199-18-19 dated 21.01.2019 [F.No. S/49-66/CUS/AHD/ 2018-19] 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 ex-facie untenable in law and suffers from legal infirmity and is liable to be set aside;
- 5.02. That even though the OAA had observed that the Applicant had produced sufficient documents to establish that the gold brought by the Applicant did not amount to an act of smuggling, the OAA proceeded to confiscate that gold;
- 5.03. That the provisions of Section 125 of the Customs Act, 1962 are not Applicant in the instant case as the said Section stipulates that confiscation of goods is authorised only if the goods are prohibited and option for redemption should be given to the owner;
- 5.04 That in the absence of the provisions and findings under what provisions the goods have been classified as prohibited, the absolute confiscation was beyond the provisions of Section 125 of the Act;
- 5.05. That the gold was brought for personal consumption and the only lapse was non declaration which is merely procedural and condonable and provisions of Section 111(i) and (m) are not applicable;
- 5.06. That despite there being only a small difference between the tariff value and the market value of the seized gold, the imposition of

heavy penalty is arbitrary especially considering that this was the first time that the Applicant had violated the Customs Act, 1962;

5.07. That the Applicant had at the related time requested the officers that he was prepared to pay the duty on the gold which was not accepted by the officers and that it was imperative for the officers to demand duty which was not done;

5.08. That the absolute confiscation of goods can be made only when the goods are prohibited and there has been no discussion in the OIA about the provisions under which the goods were 'prohibited';
The Applicant has relied upon the following case laws in support of their contention:

- i) Mohammed Husain Ayyub Chilwan – Order of Commissioner Appeals [2017(358) E.L.T 1275(Commr. Appl)]
- ii) Sheikh Jamal Basha vs. GOI [1997(91) E.L.T. 277(A.P)]
- iii) J.S Gujral vs. CC, Customs Chennai [2017(358) E.L.T. 383(Tri-Chennai)]
- iv) CC. Lucknow vs. Mohd. Nayab and Imtiyaz Idris [2017(357) E.L.T. 213(Tri-All)]
- v) Haja Mohideen Abdul Jaleel vs. UOI [2017(346) E.L.T. 321(Mad)]
- vi) CC (Prev), Lucknow vs, Mazaharul Haq [2016(341) E.L.T. 450(Tr-All)]

5.09. That the judgement relied upon by the Adjudicating Authority are not applicable in this case as the AA has failed to give specific findings as to why and that where the conditions that were required to be fulfilled by the Applicants and as such the conclusions happen to be derived from assumptions and presumptions;

5.10. That the provisions of Section 112(b) of the CA, 1962 can be made applicable only where the person know or has reason to believe that the goods are liable to confiscation under Section 111, which is not there in the instant case.

Under the circumstances, the Applicant prayed that the proceedings initiated for confiscation of gold and imposition of penalty be dropped in the interest of justice.

6. Personal hearing in the case was scheduled for 04.08.2022 or 26.08.2022. Shri Anil Gidwani, Advocate appeared online for the personal hearing on 26.08.2022 on behalf of the Applicant. He submitted that the quantity of gold was small and was not for commercial purpose and that the Applicant was not a habitual offender. He requested to release the goods on nominal redemption fine and reduce the penalty as the same was excessive.

7. The Government has gone through the facts of the case, and observes that the Applicant had brought the gold bar weighing 222.550 grams 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, pursuant to detailed examination of the baggage after interception after he had cleared himself through the Green channel, the gold bar was recovered from the wallet carried by 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.

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 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. 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.”

13.1. 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 Shik 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.

13.2. 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.

14. In the instant case, the quantum of gold under import is small and is not of commercial quantity. The impugned gold was recovered from the wallet being carried by the Applicant. Government observes that sometimes passengers resort to such methods to keep their valuables / precious possessions safe. There are no allegations that the Applicant is a habitual offender and was involved in similar offences earlier. Also there is nothing on record to prove that the Applicant was part of an organized smuggling syndicate.

15. Government finds that this is a case of non-declaration of gold. The absolute confiscation of the gold bar, 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.

16. Applicant has also pleaded for reduction of the penalty imposed on him. The value of the gold in this case is Rs. 6,79,890/-. From the facts of the case as discussed above, Government finds that the penalty of Rs. 2,75,000/- imposed on the Applicant under Section 112(a) & (b) of the Customs Act, 1962 is harsh and excessive and needs to be reduced to be commensurate to the omissions and commissions of the Applicant.

17. In view of the above, the Government modifies the impugned order of the Appellate Authority in respect of the gold bar seized from the Applicant. The gold bar, totally weighing 222.550 grams, having a tariff value of Rs. 6,27,311/- and market value of Rs. 6,79,890/- is allowed to be redeemed on payment of a fine of Rs. 1,25,000/- (Rupees One Lakh Twenty Five Thousand

only). The penalty of Rs. 2,75,000/- imposed under Section 112(a) and (b) of the Customs Act, 1962 is reduced to Rs. 75,000/- (Rupees Seventy Five Thousand only).

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

Shrawan
19/1/23
(SHRAWAN KUMAR)

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

ORDER NO. 56/2023-CUS (WZ)/ASRA/MUMBAI DATED 19.01.2023

To,

1. Shri. Jayeshkumar Modhpatel, At & PO Chithodda, Taluka Vijaynagar, District, Sabarkantha 383 462
2. The Pr. Commissioner of Customs, Custom House, near All India Radio, Navrangpura, Ahmedabad 380 009.

Copy to:

1. Shri Anil Gidwani, 412/A, Ratna High Street, Naranpura Char Rasta, Naranpura, Ahmedabad - 380 013
2. The Commissioner of Custom (Appeals), Ahmedabad, Mrudul Tower, Behind Times of India, Ashram Road, Ahmedabad 380 009
3. Sr. P.S. to AS (RA), Mumbai.
4. File copy,
5. Notice Board.