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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. 371/210/B/2020-RA | 5060 : Date of Issue 04.08.2023

ORDER NO. 578/2023-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.

Applicants : Shri Mohammed Ameeru Rahiman Thalangara Usman

Respondent : Commissioner of Customs (Appeals), Mumbai Zone-III.

Subject : Revision Application filed, under Section 129DD of the
Customs Act, 1962 against the Order-in-Appeal No. MUM-
CUSTM-PAX-APP-202/2020-21 dated 24.07.2020 [S/49-
337/2019] [DOI: 30.07.2020] passed by the Commissioner
of Customs (Appeals), Mumbai Zone-III.

ORDER

The Revision Application has been filed by Shri Mohammed Ameeru Rahiman Thalangara Usman (herein referred to as the "Applicant") against the Order-in-Appeal No. MUM-CUSTM-PAX-APP-202/2020-21 dated 24.07.2020 [S/49-337/2019] [DOI: 30.07.2020] passed by the Commissioner of Customs (Appeals), Mumbai Zone-III.

2. Brief facts of the case are that on 10.08.2017, the applicant viz Shri Mohammed Ameeru Rahiman Thalangara Usman holding Indian Passport No. Z 2066944 issued at Riyadh, arrived at CSI Airport, Mumbai from Bahrain by Jet Airways Flight No. 9W 591. The Applicant was intercepted by the Officers of Customs, CSI Airport, Mumbai after he had opted for green channel of Customs. The personal search of the Applicant resulted into the recovery of 8 gold bars of 24KT of 10 Tolas each marked as 'AL Ethiad G DUBAI UAE' weighing 934 grams valued at Rs. 24,77,907/-, wrapped in black coloured adhesive tapes kept in the front right pocket of his Jeans. The same were seized by the officers in the reasonable belief that the same was smuggled into India in a clandestine manner in contravention of the provisions of the Customs Act, 1962. On conclusion of the investigation Show Cause Notice was issued on 07-02-2018.

3. The Original Adjudicating Authority (OAA) viz the Additional Commissioner of Customs, CSI Airport, Mumbai, vide his OIO no. ADC/AK/ADJN/465/2018-19 dated 25.02.2019 ordered absolute confiscation of the impugned 8 gold bars of 24KT of 10 Tolas weighing 934 grams valued at Rs. 24,77,907/- under Section 111 (d), (l) and (m) of Customs Act, 1962 and a penalty of Rs 2,75,000/- under section 112(a) & (b) of the Customs Act, 1962 was also imposed on the applicant.

4. Aggrieved, with this Order, the Applicant filed an appeal before the Appellate Authority (AA) viz, Commissioner of Customs (Appeals), Mumbai-III, who vide Order-in-Appeal No. MUM-CUSTOM-PAX-APP-202/2020-21 dated 24.07.2020 [S/49-337/2019] [DOI: 30.07.2020] upheld the order passed by the OAA.

5. Aggrieved with the above order, the Applicants have made an exhaustive submission of case laws and have submitted their submissions made before the lower authorities etc. They have filed these revision applications on the following main points:

5.01. That Gold is not prohibited item for import. Therefore absolute confiscation is not warranted in this case.

5.02. That the Petitioner was not a carrier and that the allegation was based on assumption.

5.03. That the Petitioner claimed ownership of the gold under absolute confiscation and prayed for redemption on payment of reasonable fine and penalty.

5.04. The applicant concluded by submitting that he did not commit any act of omission or commission which can be termed as crime or manifesting of an organized smuggling activity. He imported the gold only for making a small profit. He submitted that he is from a respectable family and a law abiding citizen/businessman and has never come under any adverse remarks. He also submitted that he imported the gold only for making small profits and therefore the absolute confiscation and penalty imposed of Rs.2,75,000/- is too harsh.

Under the circumstances, the applicant has prayed to the Revision Authority to release the gold on payment of a reasonable redemption fine and penalty.

6. Personal hearing in the case was scheduled on 07.07.2023. Shri. Prakash Shingrani, Advocate for the applicant appeared for personal hearing and submitted that the applicant brought some quantity of gold for personal use. He further submitted that gold was not ingeniously concealed and applicant is not a habitual offender. He also pointed out that applicant was working in Saudi Arabia for more than six months, hence he was eligible to bring gold upto 1 kg with concessional rate of duty. He requested to allow re-export of goods if concessional rate is not accepted by releasing goods on reasonable fine and penalty.

7. The Government has gone through the facts of the case and notes that the applicant had not declared the gold while availing the green channel facility. The impugned gold had been wrapped in black coloured adhesive tapes and kept in the front right pocket of his Jeans. The applicant clearly had failed to declare the goods to the Customs as required under Section 77 of the Customs Act, 1962. Had he not been intercepted, the applicant would have gotten away with the gold. The Government finds that the confiscation of the impugned gold was therefore justified.

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.

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" in terms of Section 2(33) and hence it is liable for confiscation under Section 111(d) of the Customs Act, 1962.

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 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 pretense. 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. In a recent judgement dated 17.02.2022 passed in D.B. Civil Writ Petition no. 12001 / 2020, in the case of Manoj Kumar Sharma vs. UOI and others, the Hon'ble High Court, Rajasthan (Jaipur Bench) at paras 15, 16 and 17 held as under;

“15. The second area of concern is applicability of Section 125 of the Act. Sub-section (1) of Section 125 provides that whenever confiscation of any goods is authorized by the Act the officer adjudging it may in the case of any goods, the importation or exportation whereof is prohibited under the Act or under any other law for the time being in

force and shall in 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. This provision thus comes in two parts. The first part covers the cases where importation or exportation of the goods is prohibited under the Act. In such a case discretion is given to the competent authority to offer redemption fine in lieu of confiscation. The second part covers a case where importation or Not exportation of the goods is not prohibited. In such a case there is a mandate to offer redemption fine in lieu of confiscation as the officer thinks fit. In the present case all three authorities have provided for absolute confiscation of the goods without any facility of payment of redemption fine. This in our view was not correct. This is exactly what the Andhra Pradesh High Court has held in case of Shaik Jamal Basha Vs. Government of India reported in 1997 (91) ELT 277 (AP). The Division Bench of the High Court in the context of Section 125 of the Customs Act had held as under:-

"3. But, all the same; we find the petitioner is entitled to a different relief. The order of confiscation is made under Section 111 of the Customs Act, 1962 on account of concealment. Section 125 requires that whenever confiscation of any goods is authorised by the Act, the officer adjudging it may, in the case of any goods, the importation or exportation whereof is prohibited under the 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 an option to pay in lieu of confiscation such fine as the said officer thinks fit. Rule 9 of the Baggage Rules, 1978 framed under Section 79(2) of the Customs, Act, 1962 lists Gold in any form other than ornaments in Appendix B of the Rules as articles which shall not be imported free of duty. Hence gold in the form other than ornaments is entitled to be imported on payment of duty. Attempt to import gold unauthorisedly will thus come under the second part of Section 125(1) of the Act where the adjudging officer is under mandatory duty to give option to the person found guilty to pay (fine) in lieu of confiscation, Section 125 of the Act leaves option to the officer to grant the benefit or not so far as goods whose import is prohibited but no such option is available in respect of goods which can be imported, but because of the method of importation adopted, become liable for confiscation....."

16. This view may seem incongruent with the view expressed by Gujarat High Court in case of Bhargavraj Rameshkumar Mehta (supra) which we have also followed in this judgment but flavours of Section 112 and 125 of the Customs Act are entirely different. Section 112 of the Act pertains to penalty for improper importation of goods. Section 125 on the other hand pertains to option to pay fine in lieu of confiscation. As noted sub-section (1) of Section 125 comes in two parts. Whenever confiscation of goods is authorized under the Act, as per sub-section (1) of Section 125 the adjudicating officer has a discretion to offer redemption fine in lieu of confiscation in case of goods importation or exportation whereof is prohibited. In all other cases there is a statutory mandate on the adjudicating officer to offer such redemption fine. If the interpretation of Section 112 and 125(1) is not reconciled as above, this latter portion of sub-section (1) of Section 125 which covers all cases except where the importation or exportation of the goods is prohibited, would become otiose.

17. Learned counsel for the respondents however heavily relied on the decision of Supreme Court in case of Om Prakash Bhatia Vs. Commissioner of Customs, Delhi reported in AIR 2003 SC 3581. Our attention was drawn to paragraph 9 and 10 of the judgment. However in our view this decision does not hold anything contrary to what we have observed in connection with Section 125 of the Customs Act. In fact it was a case in which the Supreme Court had confirmed the view of the Customs authorities of offering redemption fine in lieu of confiscation.”

13. In Custom Appeal No.7 of 2019 decided on 06.07.2022, in the case of Commissioner of Customs, Aliganj, Lucknow vs. Rajesh Jhamatmal Bhat, the Hon'ble High Court of Allahabad, Lucknow Bench at para 21 & 22 of the Order, [2022(382)ELT 345(All)], held as under;

“21. Section 125 of the Act deals with confiscation of two separate categories of goods. It provides that in the case of goods, the importation or exportation whereof is prohibited under the Act or under any other law for the time being in force, the Officer adjudicating **may** give an option to pay in lieu of confiscation such fine as the said officer thinks fit. However, in case of any other goods, the officer adjudicating **shall** give an option to pay in lieu of confiscation such fine as the said officer thinks fit. The Commissioner (Appeals) has held that the gold is not a prohibited item, it should be

offered for redemption in terms of Section 125 of the Act and this finding has not been assailed by the Appellants in this Appeal.

22. *In view of the aforesaid discussion, our answer to the first substantial question of law framed in this Appeal is that the Additional Commissioner, Customs (P.) Commissionerate, Lucknow had passed the order of confiscation of gold without taking into consideration the fact the gold is not a prohibited item and, therefore, it should be offered for redemption in terms of Section 125 of the Act and thus the Customs Excise & Service Tax Appellate Tribunal, Allahabad has not committed any error in upholding the order dated 27-8-2018 passed by 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."*

Further, in the above cited case, department had filed a review application which was dismissed [2023(7) Centax 236(All)].

14. 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. Thus, Adjudicating authority can allow redemption under Section 125 of any goods which are prohibited either under the Customs Act or any other law on payment of fine.

15 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 allowed the option of redemption under Section 125 of the Customs Act, 1962. Government places reliance on some of the judgements as under:

- a) 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.
- b) 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...*"
- c) 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.

Government, observing the ratios of all 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, Government, notes that the impugned gold was not ingeniously concealed, they were found from the front right pocket of the applicant's Jeans. A case that the Applicant was habitual offender had not

been established by the department. The quantum of the gold does not suggest the act to be one of organized smuggling by a syndicate. Considering the issue of parity and fairness as mentioned above, Government finds that this is a case of non-declaration of gold. Considering the afore-stated facts, various judgements submitted by applicant, absolute confiscation is not warranted and allowing redemption of gold on fine would be judicious and reasonable. Government observes that the applicant has made a request of re-export at the time of personal hearing. Considering the quantity of gold, the same not being concealed in an ingenious manner, applicant being a NRI staying in UAE, the absolute confiscation of the same was harsh and not justified. Government for the aforesaid reasons, is inclined to set aside the absolute confiscation held in the OIA and considers granting an option to the Applicant to re-export the Gold on payment of a suitable redemption fine, as the same would be more reasonable and judicious.

17.1 In view of the above facts, Government is inclined to modify the absolute confiscation upheld by the AA and allow the impugned impugned 8 gold bars of 24KT of 10 Tolas weighing 934 grams valued at Rs. 24,77,907/- to be re-exported on payment of redemption fine.

17.2 Government finds that the penalty of Rs.2,75,000/- imposed on the Applicant for the gold valued at Rs. 24,77,907/- under Section 112(a) & (b) of the Customs Act, 1962 is appropriate and commensurate to the omissions and commissions of the Applicant.

18.1 In view of the above, the Government sets aside the impugned order of the Appellate authority and allows the applicant to redeem the impugned 8 gold bars of 24KT of 10 Tolas weighing 934 grams valued at Rs. 24,77,907/- for re-export on payment of redemption fine of Rs.4,80,000/- (Rupees Four Lakh Eighty Thousand Only).

18.2 The penalty of Rs. 2,75,000/- imposed under Section 112(a) and (b) of the Customs Act, 1962 is appropriate and commensurate with the omissions and commissions of the Applicant, Government does not feel it necessary to interfere with the imposition of the same and is sustained..

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

Shrawan
31/7/23
(SHRAWAN KUMAR)

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

ORDER NO. 578/2023-CUS (WZ)/ASRA/MUMBAI DATED 31.07.2023

To,

1. Shri Mohammed Ameeru Rahiman Thalangara Usman, Rahmaniya Manzil, PO-Thalangara, Distt.-Kasargod, Kerala-671122.
2. The Pr. Commissioner of Customs, C.S.I Airport, Terminal 2, Level-II, Sahar, Andheri (East), Mumbai 400 099.
3. The Commissioner of Customs (Appeals), Mumbai-III, 5th Floor, Avas Corporate Point, Makwana Lane, Behind S. M. Centre, Andheri Kurla Road, Andheri (East), Mumbai 400 059.

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1. Shri. Prakash K. Shingrani, Advocate, 12/334, Vivek, New MIG Colony, Bandra (East), Mumbai - 400 051.
2. Sr. P.S. to AS (RA), Mumbai.
3. File Copy.
4. Notice Board.

