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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. 380/60/B/WZ/2019-RA

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Date of Issue 20.01.2023

ORDER NO. 57/2023-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 : Pr. Commissioner of Customs, CSMI Airport, Mumbai.

Respondent : Shri. Amanulla

Subject : Revision Application filed, under Section 129DD of the
Customs Act, 1962 against the Order-in-Appeal Nos.
MUM-CUSTM-PAX-APP-81/2019-20 dated 30.04.2019
[(DOI : 20.05.2019)(S/49-500/2016)] passed by the
Commissioner of Customs (Appeals), Mumbai – III.

ORDER

This Revision application has been filed by Pr. Commissioner of Customs, CSMI Airport, Mumbai (herein referred to as Applicant) against the Order in Appeal Nos. MUM-CUSTOM-PAX-APP-81/19-20 dated 30.04.2019 [(DOI: 20.05.2019)(S/49-500/2016)] passed by the Commissioner of Customs (Appeals), Mumbai – III against Shri Amanulla (hereinafter referred to as the Respondent).

2. Briefly stated the facts of the case are that on 07.09.2016 the Officers of the AIU intercepted the Respondent holding Indian Passport No. H8686448 was intercepted on his arrival at CSMI Airport, Mumbai from Bahrain onboard Flight No. GF/64/07.09.2016. The respondent had cleared himself and his baggage through the green channel. Personal search of the Respondent resulted into recovery of one gold bar weighing 112 grams having value of Rs. 3,25,483/-. The gold was concealed in the cavity of his floater sandals.

3. The Original Adjudicating Authority (OAA) viz, Deputy Commissioner of Customs, Mumbai vide Order-In-Original No. AirCus/49/T2/283/2016/'C' dated 07.09.2016 ordered for the absolute confiscation of One gold bar weighing 112 grams and valued at Rs 3,25,483/- under Sections 111(d), (i) & (l) of the Customs Act, 1962. A penalty of Rs. 50,000/- was imposed on the respondent under Section 112(a) and (b) of the Customs Act, 1962.

4. Aggrieved by the said order, the respondent had filed an appeal before the Appellate Authority (AA) viz, Commissioner of Customs (Appeals), Mumbai-III who vide his Order-In-Appeal Nos. MUM-CUSTOM-PAX-APP-81/19-20 dated 30.04.2019 [(DOI: 20.05.2019) (S/49-500/2016)] allowed the respondent to redeem the impugned gold bar on payment of a redemption fine

of Rs. 50,000/-, however he upheld the penalty of Rs. 50,000/- imposed on the Respondent.

5.1 Aggrieved with the above order, the Applicant has filed this revision application on the following grounds;

5.2 That the passenger had tried to import the impugned goods without making a declaration under Section 77 of the Customs Act, 1962 by clearing himself through Customs Green Channel which is meant for the passengers carrying goods within the free allowance under Baggage Rules, 2016 and tried to evade Customs duty on the dutiable goods in excess of his free allowance. Thus the seized goods cannot be treated as bonafide baggage of the passenger in terms of Notification No.12/2012-Cus dated 17.03.2012 read with Rule 3 and 5 of the Baggage Rules, 2016 and hence their importation was in violation of Para 2.26 of the Foreign Trade Policy (2015-20). Therefore goods become prohibited in terms of Section 2(33) of the Customs Act, 1962. The impugned goods are, therefore, liable for confiscation u/s 111 (d), (1) & (m) of the Customs Act, 1962 and the Passenger liable for penalty u/s 112 (a) & (b) of the Customs Act, 1962.

5.3 That the manner in which the gold was brought i.e. concealed in the cavity of his floater sandals, indicated the greed and criminal mindset of the passenger. The Passenger in his oral submission before the Adjudicating Authority interalia stated and admitted mode of concealment, carriage, non-declaration and recovery of the said gold. In the present case the gold being carried for monetary benefit and the manner of the carriage being ingenious, this is fit case for absolute confiscation of seized gold as a deterrent punishment to passengers. In view of the above the order of the Commissioner Appeals is not legal and proper.

5.4 That the Commissioner (Appeals) has also erred in granting the release of seized gold by imposing Redemption Fine under Section 125 of the Customs Act, 1962. In this regard, it is to state that, the option to redeem the seized goods under Section 125 of the Customs Act, 1962 is the discretionary power of the Adjudicating authority depending on the facts of each case and after examining the merits. Thus, taking into account the facts on record and the gravity of the offence, the lower Adjudicating Authority had rightly ordered the absolute confiscation of the impugned gold. The passenger had concealed the gold in the cavity of his floater sandals, which clearly shows his intention to evade duty on dutiable goods and smuggle the same into India. Had the passenger not been intercepted he would have escaped with the impugned

goods; such acts of mis-using the liberalized Passenger facilitation process should be appropriately punished and the deterrent provisions of law need to be invoked. Considering the fact that the impugned gold was concealed by the passenger and he failed to declare the same, the Commissioner (Appeals) ought not to have allowed redemption of the impugned goods. The same should have been confiscated absolutely.

5.5 That in terms of Section 126 of the Customs Act, 1962, on confiscation property of the confiscated goods vests in the Central Government. Hence, in such cases of smuggling of a liquid commodity like Gold, the Central Government is liable to recover its entire value without any loss of deduction. Hence, the allowance of any redemption of confiscated gold for a fine which is lower than the value of the gold is not permitted in law. Such undeclared, concealed goods are Prohibited goods which are absolutely confiscate in terms of Section 2(33) read with Section 2(39) and Section 111(d).(1) & (m) of the Customs Act, 1962 Reliance was placed on the following decisions for the above submission:

- (a) Jagson International Ltd. Vs CC, Delhi 2006(199)ELT 553(TY2015(323)ELT 243(SC)
- (b) Malabar Diamond gallery Pvt. Ltd. Vs. ADG DRI, Chennai 2016(341) ELT 65(Mad.)
- (c) Sheikh Md. Omer Vs. CC, Culcutta 1983(13)ELT 1439(SC)
- (d) CC, Kolkatta Vs. M/s. Grand Prime Ltd 2003(155) ELT 417(SC)
- (e) Om Prakash Bhatia Vs. CC, Delhi 2003(155) ELT 423(SC)
- (f) Md. Akhtar Vs. CCE & Cus. 2015(323) ELT 136(Pat.)
- (g) Ram Kumar Vs. CC, Delhi 2015(320) ELT 368 (Del.)

Applicant prayed to the revisionary authority to set aside the order of the appellate authority and to restore the OIO or pass any order as deemed fit.

6. Personal hearing in the case was scheduled for 13.09.2022, 27.09.2022, 13.10.2022 and 20.10.2022. Shri N. J. Heera, Advocate, appeared for the hearing and submitted that the quantity of gold was very small and applicant is a law abiding person. He requested to maintain Commissioner Appeal's Order

7. The Government has gone through the facts of the case, and observes that the respondent had failed to declare the goods to the Customs at the first instance as required under Section 77 of the Customs Act, 1962. The

respondent had not disclosed that he was carrying any dutiable goods. The gold was concealed in the cavity of his floater sandals. The confiscation of the gold is therefore justified and thus, the Respondent had rendered himself liable for penal action.

7.1. 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.”

7.2. 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.

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

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 'Applicant' 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. 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.

12.1 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.

12.2 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.

13. In the instant case, the quantum of gold involved is small and is not of commercial quantity. The quantum of the same does not suggest the act to be one of organized smuggling by a syndicate. Government, notes that the impugned gold were not ingeniously concealed, it was concealed in the cavity of his floater sandals. Government notes that at times travellers resort to such safe keeping for safety reasons to avoid theft of their valuables. Further, there were no allegations that the Respondent is a habitual offender and was involved in similar offences earlier. The facts of the case indicate that it is a case of non-declaration of gold, rather than a case of smuggling for commercial considerations. Considering the seriousness of the misdemeanour, Government notes that the appellate authority has used his discretion under Section 125 of the Customs Act, 1962 in granting an option to the respondent

to redeem the gold bars on payment of a redemption fine. The Appellate Authority has in his Order justified the redemption which is as under:

“11. The analysis of various judgments on the issue of redemption of gold under section 125 of Customs Act, 1962 make it clear that the discretion has to be exercised based on merits of each case and there cannot be any straight jacket formula to decide such cases. I find that right from the interception the appellant had pleaded that the gold belongs to him. I find that the appellant passenger brought the impugned gold after 18 months and 20 days of staying abroad. Besides, there is nothing on record to suggest that the appellant passenger was part of any repeated and organized smuggling racket. The records of the case suggest that he was working abroad i.e. Saudi Arabia for the last 4 years and purchased gold from his personal savings.

12. I find that the appellant had claimed the ownership immediately on interception and also explained how he arranged finances abroad. There is absolutely no credible material to allege that he was carrier or habitual offender or was part of any organized smuggling racket. I find that the hon'ble Apex Court in case of Sri Kumar Agency vs CCE, Bangalore 2008 (232) E.L.T. 577 (S.C.), Escorts Ltd vs CCE, Delhi-11 2004 (173) EL.T. 113 (S.C.) and CCE, Calcutta vs Alnoori Tobacco Products 2004 (170) EL.T. 135 (S.C.) has stressed upon the concept of "Circumstantial flexibility", and held that one additional or different fact may make a world of difference between conclusions in two cases and therefore disposal of cases by blindly placing reliance on a decision, not proper.

13. In view of above decisions of various judicial forums and the fact that order-in-original does not substantiate that passenger is a habitual offender or professional smuggler, I give an option to redeem the goods on payment of fine and on payment of applicable rate of duty. As far as the quantum of fine is concerned,.....”

In view of the above, Government notes that the AA has rightly and judiciously used his discretion in allowing the respondent to redeem the impugned single gold bar. Government too is inclined to agree with the same.

14. Government finds that the penalty of Rs. 50,000/- imposed on the respondent by the OAA under Section 112(a) & (b) of the Customs Act, 1962 is commensurate with the omissions and commissions committed and is not inclined to interfere in the same.

15. For the aforesaid reasons, Government is in agreement with the OIA passed by the AA and does not find it necessary to interfere in the same.

16. Revision Application filed by the applicant is dismissed of on above terms.

Shrawan
19/11/23
(SHRAWAN KUMAR)

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

ORDER NO. 57/2023-CUS (WZ)/ASRA/MUMBAI DATED 19.01.2023

To,

1. Pr. Commissioner of Customs, CSI Airport, Terminal - 2, Level - 2, Andheri East, Mumbai - 400 099.
2. Shri. Mr. Amanulla, 479, Mugdom Colony, Shabanam Street, Bhatkal - 581 354

Copy to:

1. Advani Sachwani & Heera, Advocates, Nulwala Building, 41 Mint Road, Fort, Opp. G.P.O. Fort, Mumbai 400 001].
2. P.S. to AS (RA), Mumbai.
3. File Copy.
4. Notice Board.