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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. 371/164/B/WZ/2022-RA/485 : Date of Issue : 18.01.2024

ORDER NO. 58/2024-CUS (WZ)/ASRA/MUMBAI DATED 18.01.2024
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 : Mr Rafiq Mahamad Kudrate

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-1426/2021-22 dated 03.01.2022
[Date of issue 05 01 2022] [F. No. S/49-1174/2020]
passed by the Commissioner of Customs (Appeals),
Mumbai Zone-III

ORDER

The Revision Application has been filed by Mr Rafiq Mahamad Kudrate (herein referred to as the 'Applicant') against the Order-in-Appeal No. MUM-CUSTOM-PAX-APP-1426/2021-22 dated 03.01.2022 [Date of issue: 05.01.2022] [F. No. S/49-1174/2020] passed by the Commissioner of Customs (Appeals), Mumbai Zone-III

2. Brief facts of the case are that on 12.11.2018, during the screening of the baggage of the Applicant on the Baggage Screening Machine, suspicious image was noticed and the Applicant alongwith his baggage was diverted to the customs counter. On being asked whether he was carrying any gold or dutiable goods, the Applicant replied in the negative. Not being satisfied with the answer, the baggage was screened on the BSM and three suspicious images were noticed on the screen of the BSM. On opening the bag, it was found to contain personal effects and three perfume bottles were found. As the perfume bottles weighed heavier than normal, the Applicant was once again asked whether he was carrying any gold in the bag to which he again replied in the negative. The base of the perfume bottles was broken and three square shaped plates, purportedly to be gold, coated with chrome were recovered.

2.1. Pursuant to being examined and assayed, the recovered 'Square shaped plates coloured with chrome colour' and certified to be crude gold, having 999 purity and collectively weighing 350 grams and valued at Rs 10,30,113/- were seized under the reasonable belief that the same were being smuggled into India and hence liable to confiscation under the Customs Act, 1962.

3. The Applicant, in his statement, stated that he was in the profession of driving and earned Rs 15,000/-; that the seized gold did not belong to him and he was given a parcel by his cousin's friend, whom he did not know, that the to and fro tickets were arranged by his cousin; that his cousin and

his friend informed him that someone would call him at Mumbai Airport; that he did not know that the parcel contained gold plates; that he admitted possession, carriage, knowledge, non declaration, concealment and recovery of the impugned gold, that he was aware that import of gold without declaration and payment of duty is an offence punishable under the law

4. After following the due process of law, the Original Adjudicating Authority i.e Joint Commissioner of Customs, CSI Airport, Mumbai, vide Order-in-Original No JC/GKG/ADJN/05/2020-21 dated 01 10.2020 [Date of issue. 08 10.2020], absolutely confiscated the impugned 'Square shaped gold plates coloured with chrome colour' having 24Kt purity, collectively weighing 350 grams and valued at Rs 10,30,113/- under Section 111 (d), (l) and (m) of the Customs Act, 1962. A penalty of Rs. 1,00,000/- was imposed on the Applicant under Section 112 (a) and (b) of the Customs Act, 1962. The three perfume bottles used for concealing the gold were confiscated under Section 119 of the Customs Act, 1962. The Applicant neither filed a reply to the show cause notice nor sought personal hearing in the instant case.

5. Aggrieved with this 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-1426/2021-22 dated 03.01.2022 [Date of issue: 05.01.2022] [F. No. S/49-1174/2020] upheld the order passed by the OAA.

6. Aggrieved with the above order of the Appellate Authority, the Applicant has filed this revision application on the following grounds.

6.01. That the impugned order is bad in law and unjust and has been passed without giving due consideration to the documents on the records and facts of the case

6.02 That the dutiable goods brought by the Applicant are neither prohibited or restricted;

6.03. That the Applicant had no previous cases and this was the first time that he had brought the goods,

6.04 That the Applicant was the owner of the goods and was ready to pay Customs duty and other dues,

6.05. That once the department accepts that the goods are dutiable, the option of redemption of goods as provided under Section 125 will have to be given to the Applicant;'

6.06 That the facts and circumstances in the present case, absolute confiscation of the impugned dutiable goods would only mean interpreting or giving a new meaning to said sub section (1) of section 125 of the Customs Act, 1962 That redemption of dutiable goods on payment of fine in lieu of confiscations which is what the legislature in its collective wisdom has proposed vide sub section (1) of Section 125 of Customs Act, 1962,

6.07. The Applicant has relied upon the following cases in support of their contention that gold is not a prohibited item and the same is restricted and therefore it should not be confiscated absolutely and option to redeem the same on redemption fine ought to be given to the person from whom it is recovered

- (i) Hargovind Das K. Joshi vs Collector of customs [1992 (61) ELT 172(SC)
- (ii) Alfred Menezes vs CC, Mumbai [2011(236) E.L T 587(Tri-Mum)
- (iii) T Elavarasan Vs Commissioner of Customs (Airport), Chennai [2011 (266) ELT 167 (Mad)]
- (iv) Yakub Ibrahim Yusuf vs CC, Mumbai [2011 (263) E L T 685 (Tri Mumbai]
- (v) Mohini Bhatia vs CC, Mumbai [1999(106) E L T (Tri-Mum)]
- (vi) Shaikh Jamal Basha vs. Government of India – [1992 (91) ELT 227(AP)]
- (vii) Gauri Enterprises vs CC Pune [2002(145) E.L T. 706(Tri-Bang)]
- (viii) Universal Traders vs Commissioner [2009 (240) E L T A78 (S C)]
- (ix) Shaik Jamal Basha vs Government of India [1997 (91) ELT 277(AP)]
- (x) VP Hameed vs. Collector of Customs Mumbai [1994(73) ELT 425 (Tri)]
- (xi) P. Sinnasamy vs CC, Chennai [2007(220) E L T. 308 (Tri-Chennai)]
- (xii) Union of India vs Dhanak M Ramji [2009 (248) E L T 127 (Bom)]
- (xiii) A Rajkumari vs CC Chennai [2015 (321) E L T 540(Tri Chennai)]

- (xiv) Kadar Mydin vs Commissioner of Customs (Preventive), West Bengal [2011 (136) ELT 758]
- (xv) Sapna Sanjeeva Kolhi v/s Commissioner of Customs, Airport, Mumbai [2008(230)E L.T. 305]
- (xvi) Vatakkal Moosa vs Collector of Customs, Cochin [1994 (72) ELT (G.O.I)]
- (xvii) Halithu Ibrahim vs CC [2002-TIOL 195 CESTAT-MAD]
- (xviii) Krishnakumari vs CC, Chennai [2008 (229) ELT 222 (Tri Chennai)]
- (xix) S Rajagopal vs CC, Trichy [2007 (219) ELT 435 (Tri-Chennai)]
- (xx) M Arumugam vs CC, Trichirapalli [2007 (220) ELT 311 (Tri-Chennai)]
- (xxi) CCEx, Lucknow vs. Mohd Halim Mohd Shamim Khan [Final Order No A/71054/2017-SM(BR) [2018(359) E.L T 265(Tri-All)]

Under the circumstances, the Applicant prayed that the goods be released under Section 125 of the Customs Act, 1962 on nominal redemption fine alongwith applicable duty, personal penalty be reduced substantially or any other order as deem fit and proper may be issued.

7 Personal hearing in the case was scheduled for 20.10.2023 or 29.10.2023. No one appeared for the personal hearing on the scheduled dates on behalf of the Applicant and the Respondent. Shri N.J.Heera, Advocate, vide letter dated 17.10 2023, filed on behalf of the Applicants, submitted that they were reiterating the written submissions on the said issue and requested to release the gold chain on nominal redemption fine.

8. The Government has gone through the facts of the case and observes that the Applicant had brought 'Square shaped gold plates coloured with chrome colour' having 24Kt purity, collectively weighing 350 grams and valued at Rs. 10,30,113/- 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, after screening his baggage and noticing suspicious images and thereafter examining the contents of the baggage, the impugned 'Square shaped gold plates coloured with chrome colour' having 24Kt purity,

collectively weighing 350 grams was recovered after breaking the base of the perfume bottles being carried by the Applicant in his baggage. The manner in which the gold was attempted to be brought into the country revealed his intention to not to declare the said gold and thereby evade payment of Customs Duty. The confiscation of the gold was therefore justified and thus the Applicant had rendered himself liable for penal action.

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

- (i) 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* "
- (ii) The Hon'ble High Court of Judicature at Madras, in the judgment in the case of Shaik 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.
- (iii) 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...*"
- (iv) 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.
- (v) Judgement dated 17.02.2022 passed by the Hon'ble High Court, Rajasthan (Jaipur Bench) in D.B. Civil Writ Petition no. 12001 / 2020, in the case of Manoj Kumar Sharma vs. UOI and others.

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 view of the foregoing paras, the Government finds that as the Applicant had not declared the 'Square shaped gold plates coloured with chrome colour' at the time of arrival, the confiscation of the same was justified. Though the gold was concealed in a clever manner, the quantum of gold under import is small and is not of commercial quantity. There are no allegations that the Applicant is a habitual offender and was involved in similar offence earlier or 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 in the form of plates. The absolute confiscation of the impugned 'Square shaped gold plates coloured with chrome colour' leading to dispossession of the Applicant of the same in the instant case is therefore harsh and not reasonable. Under the circumstances, the seriousness of the misdemeanour is required to be kept in mind when using discretion under Section 125 of the Customs Act, 1962 and while imposing quantum of penalty. In view of the aforesaid facts, the option of release of the 'Square shaped gold plates coloured with chrome colour' on payment of redemption fine should have been allowed. Considering the above facts, Government is inclined to modify the absolute confiscation and allow the impugned 'Square shaped gold plates coloured with chrome colour' to be released on payment of a redemption fine.

16 Applicant has also pleaded for waiver of the penalty imposed on him. The market value of the gold in this case is Rs 10,30,113/-. From the facts of the case as discussed above, Government finds that the penalty of Rs 1,00,000/- imposed on the Applicant under Section 112 (a) and (b) of the Customs Act, 1962 is commensurate to the omissions and commissions of the Applicant and needs no interference.

17 In view of the above, the Government modifies the Order-in-Appeal No MUM-CUSTOMS-PAX-APP-1426/2021-22 dated 03.01.2022 [Date of issue

05.01.2022] [F No S/49-1174/2020] passed by the Commissioner of Customs (Appeals), Mumbai Zone-III and allows the Applicant to redeem the impugned 'Square shaped gold plates coloured with chrome colour' having 24Kt purity, collectively weighing 350 grams and valued at Rs 10,30,113/-, on payment of a redemption fine of Rs. 2,00,000/- (Rupees Two Lakhs only). The penalty of Rs 1,00,000/- imposed by the OAA and upheld by the Appellate Authority, being commensurate to the omissions and commissions of the Applicant is sustained.

18 The Revision Application is disposed of on the above terms

(SHRAWAN KUMAR)

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

ORDER NO. 58/2024-CUS (WZ)/ASRA/MUMBAI DATED 18.01.2024

To,

- 1 Mr. Rafiq Mahamad Kudrate, Room No. 17-B, Karle, Borlipanchtan, Tal Shriwardhan, Dist. Raigad, Maharashtra 402 403
- 2 The Pr. Commissioner of Customs, C.S.I Airport, Terminal 2, Level-II, Sahar, Andheri (East), Mumbai - 400 099.

Copy to:

1. 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
2. Shri N.J Heera, Nulwala Building, 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.

