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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. 371/76/B/WZ/2021

6191

: Date of Issue : 12.08.2023

ORDER NO. 590 /2023-CUS (WZ) / ASRA / MUMBAI/ DATED 6.08.2023
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. Noman Jalil Paroba

Respondent : Pr. Commissioner of Customs, CSMI (Airport), Mumbai.

Subject : Revision Application filed, under Section 129DD of the
Customs Act, 1962 against the Order-in-Appeal No. MUM-
CUSTM-PAX-APP-1420/2019-20 dated 28.01.2021
issued on 10.02.2021 through F.No. S/49-306/2019
passed by the Commissioner of Customs (Appeals)
Mumbai-III.

ORDER

This revision application has been filed by Shri. Noman Jalil Paroba (hereinafter referred to as the Applicant) against the Order-In-Appeal no. MUM-CUSTM-PAX-APP-1420/2019-20 dated 28.01.2021 issued on 10.02.2021 through F.No. S/49-306/2019 passed by the Commissioner of Customs (Appeals) Mumbai-III.

2. Briefly stated facts of the case are that the applicant had arrived at CSMI Airport, Mumbai from Dubai on 14.02.2019 and was intercepted by Customs Officers after he had cleared himself through the Green channel facility. Applicant had failed to declare the dutiable goods in his possession. A buckle made of gold, weighing 170 grams, valued at Rs. 5,21,191/- was recovered from the possession of the applicant. Earlier, the applicant had arrived on board Indigo Airlines Flight No. 6E-006 and the duration of his stay abroad was of 4 days.

3. The Original adjudicating authority (OAA) viz. Asstt. / Dy. Commr, CSMI Airport, Mumbai vide Order-In-Original no. Air Cus/49/T2/287/2019'A' dated 14.02.219, ordered for the absolute confiscation the gold buckle, totally weighing 170 grams and valued at Rs. 5,21,191/- under Section 111(d), (l) and (m) of the Customs Act, 1962. A penalty of Rs 20,000 under Section 112(a)(i) of the Customs Act, 1962 was imposed on the applicant.

4. Aggrieved by this order, the applicant filed an appeal with the Commissioner of Customs (Appeals) Mumbai-III, who vide his Order-In-Appeal no. MUM-CUSTM-PAX-APP-1420/2019-20 dated 28.01.2021 issued on 10.02.2021 through F.No. S/49-306/2019 held that the OAA had rightly

confiscated the seized gold absolutely and did not find any reason to interfere in the OIO passed by the OAA and accordingly, dismissed the appeal.

5. The Applicant has filed this Revision Application inter alia on the following grounds of revision, that;

5.01. that Gold is not prohibited goods. It is submitted that gold is not a prohibited item and is only a restricted item. Prohibition relates to goods which cannot be imported or exported by any one, such as arms, ammunition, drugs etc. The intention behind the provisions of Section 125 is that import/export of such goods under any circumstances would cause danger to the health, welfare or morals of people as a whole. This would not apply to a case where import/export of goods is permitted subject to certain conditions or to a certain category of persons and which are ordered to be confiscated for the reason that the condition has not been complied with. In such a situation, the release of such goods confiscated would not cause any danger or detriment to public health. Admittedly, import/export of gold is permitted subject to certain conditions, therefore, it would not fall under the prohibited category as envisaged under the said of Section 125 of the Customs Act, 1962. that they have relied on the undermentioned case laws;

(a). In Hargovind Das K. Joshi Vs Collector of customs 1992 (61) ELT 172(SC) the Hon'ble Apex Court remanded the case to the Collector for exercising the option of redemption under section 125 of Customs Act, 1962.

(b). In Universal Traders v. Commissioner 2009 (240) E.L.T. A78 (SC) also the Apex Court allowed redemption of exported goods being not prohibited.

(c). Revision Order No. 198/2010-CUS, dated 20-5-2010 in F. No. 375/14/B/2010-RA-CUS in the case of MUKADAM RAFIQUE AHMED, [2011-270-ELT-447-GOI].

(d). In Kusumbhai Dahyabhai Patel vs. CC (P), Ahmedabad, 1995-79-ELT-292, Tribunal had allowed the re-export of gold considering that the applicant was a foreigner.

(e). In Gauri Enterprises Vs CC, Pune 2002 (145) ELT (705) (Tri Bangalore) the CESTAT held that if similar goods have been released on fine earlier, selective absolute confiscation is not called for as absolute confiscation should be an exception rather than a rule.

(f). In CC (Airport), Mumbai Vs Alfred Menezes 2009 (242) ELT 334 (Bom.), the Hon'ble High Court held that Section 125(1) ibid clearly mandates that it is within the power of adjudicating authority to offer redemption of goods even respect of prohibited goods.

(g). In Yakub Ibrahim Yusuf 2011 (263) EL. T. 685 (Tri. — Mumbai) the Tribunal held that option of redemption has to be given to person from whose possession impugned goods are recovered, even though he had not claimed its ownership.

(h). In Shaik Jamal Basha Vs Government of India 1997 (91) ELT 277(AP) the Hon'ble High Court held that Gold is allowed for import on payment of duty and therefore Gold in the form other than ornaments imported unauthorisedly can be redeemed

(i). etc.

5.02. that the decisions of Tribunals, High Courts etc relied upon by the applicant had been summarily rejected by the AA without proper application of mind; that the factual situation of the case of the applicant was as per the case laws on which reliance had been placed; that the order of the AA was vitiated on account of bias, violations of principles of natural justice and fair play; that therefore, the impugned O-i-A was not sustainable. On this issue they have relied upon the following case laws;

(a). Supreme Court in the case of CCE, Calcutta Vs Alnoori Tobacco Products [2004 (170) ELT 135 (SC)] has stressed the need to discuss, how the facts of decision relied upon fit factual situation of a given case.

(b). Hon'ble Supreme Court in its judgment in the case of Escorts Ltd. Vs CCE, Delhi [2004 (173) ELT 113 (SC)].

(c). Apex Court in the case of CC (Port), Chennai Vs Toyota Kirloskar [2007 (213) ELT 4 (SC)],

(d). etc.

5.03. that the decision relied upon by the AA were not applicable to the case of the applicant; that the AA had failed to discuss as to how the facts of the cases relied upon by him, factually fit the case of the applicant.

5.04. that the applicant claimed ownership of the goods and that redemption of the gold on reasonable fine and penalty ought to be allowed.

5.05. that the applicant has placed reliance on a wide gamut of case laws

some

of which are mentioned below;

(a). that the the Government of India in the case of Mohd Zia-Ul-Haque Vs Addl Commissioner of Customs, Hyderabad vide revision order no

443/12-Cus dated 8-8-12, 2014 (214) ELT 849 (GOI) allowed the confiscated gold to be redeemed on payment of redemption fine.

(b). Collector of Custom vs. Elephanta Oil and Inds. Ltd [2003(152) ELT 02547 Supreme Court]; once imported article is re-exported as directed by the department, there is no question of levying any penalty or redemption fine.

(c). Kusum Bhai DayaBhai vs. Commr. Of Customs 1995 (79) ELT 292 Tri-Mumbai; If goods are allowed re-export on redemption, fine can be on the lower side and need not relate to margin of profit.

(d). In T. Elavarasan Vs Commissioner of Customs (Airport), Chennai 2011 (266) ELT 167 (Mad), the Hon'ble High Court held that Gold is not a prohibited item and option is available to owner of goods or person from whom goods seized to pay -fine in lieu of confiscation.

(e). etc.

In view of the above submissions, the applicant has prayed to the revisionary authority to allow the redemption of the gold on payment of a reasonable fine and penalty.

6. A personal hearing in the case was scheduled for 25.07.2023. Shri. Prakash Shingrani, Advocate for the applicant appeared on 25.07.2023 and submitted that applicant brought small quantity of gold for personal use. He further stated that the applicant is not a habitual offender. He requested to allow redemption of goods on nominal fine and penalty.

7. The Government has gone through the facts of the case and notes that the applicant had failed to declare the goods in his possession as required under Section 77 of the Customs Act, 1962. The applicant had not disclosed that he was carrying dutiable goods and had he not been intercepted would have walked away with the impugned buckle made of gold without declaring the same to Customs. By his actions, it was clear that the applicant had no intention to declare the impugned gold to Customs and pay Customs duty on it. The Government finds that the confiscation of the gold buckle was therefore, justified.

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 '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 the 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. The quantity 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. 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. 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. Absolute confiscation of the gold is harsh and unreasonable. Government is

therefore, inclined to set aside the OIA and allow the gold to be redeemed on payment of a fine.

12. The penalty of Rs. 20,000/- imposed by the OAA under Section 112 of the Customs Act, 1962 is commensurate to the omissions and commissions committed by the applicant. Government is not inclined to interfere in the same.

13. For the aforesaid reasons, the Government modifies the OIA to the extent of allowing the redemption of the gold buckle, weighing 170 grams and valued at Rs. 5,21,191/- on payment of a fine of Rs. 1,00,000/- (Rupees One Lakh only). The personal penalty of Rs. 20,000/- imposed by the OAA and upheld by the AA is found to be appropriate.

14. Revision Application filed by the applicant is decided on the above terms.

Shrawan Kumar
16/08/23
(SHRAWAN KUMAR)

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

ORDER No. 590/2023-CUS (WZ) /ASRA/MUMBAI DATED 16.08.2023

To,

1. Shri. Noman Jalil Paroba, Mumbra, Thane. (As address is incomplete and full address is not available on the records, service through Noticeboard and his Counsel).
2. Pr. Commissioner of Customs, Chhatrapati Shivaji Maharaj International Airport, Terminal 2, Level - II. Sahar, Mumbai 400 099.

Copy to:

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