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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. 371/256/B/2020-RA / 6228 :

Date of Issue: 10.08.2023

ORDER NO. 592/2023-CUS (WZ)/ASRA/MUMBAI DATED 17.08.2023
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.

Applicants : Shri Mohammed Farhan Mohamed.

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-CUSTOM-PAX-APP-196/2020-21 dated 27.07.2020
[F.No. S/49-376/2019] [Date of issue: 30.07.2020]
passed by the Commissioner of Customs (Appeals),
Mumbai-III.

ORDER

This Revision Application has been filed by Shri Mohammed Farhan Mohamed (herein referred to as the "Applicant") against the Order-in-Appeal No. MUM-CUSTOM-PAX-APP-196/2020-21 dated 27.07.2020 [F.No. S/49-376/2019] [Date of issue: 30.07.2020] passed by the Commissioner of Customs (Appeals), Mumbai-III.

2. Brief facts of the case are that on 03.04.2019, the Customs Officers of CSI Airport Mumbai, intercepted one passenger Shri Mohammed Farhan Mohamed the applicant, holding Indian passport on arrival from Dubai by Flight No. EK-506, after he had cleared himself through Green channel of Customs, CSI Airport, Mumbai. During personal search the Officers recovered 01 gold bar weighing 116 grams valued at Rs.3,38,604/- and 02 cut piece of gold weighing 50 grams valued at Rs.1,45,950/-, totally weighing 166 grams and totally valued at Rs.4,84,554/-. 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.

3. The Original Adjudicating Authority (OAA) viz the Assistant/Dy. Commissioner of Customs, AIU, C.S.I. Airport, Mumbai, vide his OIO No. Aircus-49/06-16/2019 Batch 'A' dated 03-04-2019 ordered absolute confiscation of the recovered ie 01 gold bar weighing 116 grams valued at Rs.3,38,604/- and 02 cut piece of gold weighing 50 grams valued at Rs.1,45,950/-, totally weighing 166 grams and totally valued at Rs.4,84,554/- under Section 111 (d), (l) and (m) of Customs Act, 1962. A personal penalty of Rs 30,000/- under section 112 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-196/2020-21 dated 27.07.2020 [F.No. S/49-376/2019] [Date of issue: 30.07.2020] upheld the order passed by the OAA.

5. Aggrieved by this Order, the applicant has filed this revision application on the undermentioned grounds of revision;

5.01. that the impugned OIA is bad in law and unjust; has been passed without giving due consideration to the documents on record and facts of the case,

5.02. that the lower authorities ought to have appreciated that dutiable goods brought in by the Appellant are neither restricted nor prohibited,

5.03. that the applicant had brought this type of goods for first time and there was no previous case registered against him,

5.04. that the Show Cause Notice issued by the Respondent clearly revealed that the impugned goods/ gold were dutiable goods and not prohibited goods; that the acts and/or omissions on the part of the applicant to evade Customs duty could only be done in respect of dutiable goods and not prohibited goods; that once the department or respondent had accepted that the goods are dutiable, then the option to redeem the goods as provided under Section 125 of the Customs Act, 1962 should be granted to the applicant.

5.03. The applicant has relied upon the undermentioned cases to defend their case;

(a). Hargovind Das K Joshi v/s. Collector of Customs [1992 (61) ELT 172 SC], Absolute confiscation of goods without considering question of redemption on payment of fine although having discretion to do so under Section 125, matter remanded back.

(b). Alfred Menezes v/s. Commissioner of Customs (Mumbai) [2011 (236) ELT 587 (Tri-Mumbai)], Section 125(1) ibid clearly mandates that it is within the power of the adjudicating authority to offer redemption of goods even in respect of prohibited goods.

(c). T. Elvarasan v/s. Commr. Of Customs (Airport), 2011-266-ELT-167-Tri-Madras on the issue of gold chains brought from Singapore and

- seized on the ground of non-declaration on arrival; passenger living abroad for more than 6 months and entitled to import gold; gold not prohibited item option to redeem the goods; impugned gold ordered to be released provisionally subject to adjudication proceedings.
- (d). Yakub Ibrahim Yusuf v/s. Commissioner of Customs, Mumbai [Final Order No. A/362/2010-WBZ-II/(CSTB) dated 28.10.2010 in Appeal no. C/51/1996-Mum] [2011-263-ELT-685-Tri-Mumbai]. Term prohibited goods refers to goods like arms, ammunition, addictive drugs, whose import in any circumstance would danger or be detriment to health, welfare or morals of people as whole and makes them liable to absolute confiscation.
- (e). Mohini Bhatia vs. Commr. Of Customs [1999-106-ELT-485-Tri-Mumbai on prohibited goods and restricted goods. Gold was not included in the part II of restricted item.
- (f). In Universal Traders vs. Commissioner [2009-240-ELT-A78-SC], the apex court allowed redemption of exported goods being not prohibited.
- (g). In Gauri Enterprises vs. C.C Pune [2002-145-ELT-706-Tri-Bang], held that if similar goods had been released on fine earlier, selective absolute confiscation was not called for, Absolute Confiscation should be exception rather than a rule.
- (h). In Shaik Jamal Basha v. Government of India 1997 (91) ELT 277 (A.P.) 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 unauthorized can be redeemed.
- (i). In VP Hameed v. Collector of Customs, Mumbai - 1994 (73) ELT 425 (Tri.) it was held that there is no bar in allowing redemption of gold being an item notified under Section 123 of Customs Act, 1962 or for any other reason.
- (j). In P. Sinnasamy v. Commissioner of Customs, Chennai 2007 (220) ELT 308 (Tri-Chennai), the Hon'ble Court allowed redemption of absolutely confiscated gold observing that option to redeem the gold to be given as there is no bar against such option by reason of goods being an item notified under Section 123 of Customs Act, 1962 or for any other reason.
- (k). In Union of India Vs Dhanak M. Ramji - 2009 (248) ELT 127 (Bom.) affirmed vide 2010 (252) ELT A102 (S C) it was held that gold is not a

prohibited item and discretion of redemption can be exercised to the person from whom it was recovered.

- (l). In *Kadar Mydin v. Commissioner of Customs (Preventive)*, West Bengal - 2001 (136) ELT 758 it was held that in view of the liberalised gold policy of the Government, absolute confiscation is unwarranted and redemption can be allowed.
- (m). In *Sapna Sanjeev Kohli v. Commissioner of Customs, Airport, Mumbai* - 2008 (230) ELT. 305 the Tribunal observed that the frequent traveller was aware of rules and regulations and absolute confiscation of gold jewellery not warranted which may be cleared on payment of redemption fine.
- (n). In *Vatakkal Moosa v. Collector of Customs, Cochin* 1994 (72) ELT. 473 (G.O.I.); it was held that absolute confiscation is not warranted and redemption of gold should be allowed.
- (o). *Halithu Ibrahim v. CC* [2002-TIOL 195-CESTAT-MAD. = 2002 (148) ELT 412 (Tribunal)]; it was held that absolute confiscation is not warranted and redemption of gold should be allowed.
- (p). *Krishnakumari v. CC, Chennai* - 2008 (229) ELT 222 (Tri-Chennai) ; it was held that absolute confiscation is not warranted and redemption of gold should be allowed.
- (q). *S. Rajagopal v. CC, Trichy* - 2007 (219) ELT 435 (Tri-Chennai); it was held that absolute confiscation is not warranted and redemption of gold should be allowed.
- (r). *M. Arumugam v. CC, Tiruchirappalli*, 2007 (220) ELT 311 (Tri-Chennai); it was held that absolute confiscation is not warranted and redemption of gold should be allowed.
- (s). In the *COMMR. OF C. EX. & S.T., LUCKNOW VI MOHD. HALIM MOHD. SHAMIM KHAN* Final Order No. A/71054/2017-SM(BR), dated 13-9-2017 in Appeal No. C/70595/2016, reported in 2018 (359) E.L.T 265 (Tri-All.) ; Only prohibited goods cannot be released on payment of redemption fine Gold not being prohibited goods, cannot be confiscated absolutely - Order permitting release of such gold on payment of redemption fine in lieu of confiscation upheld.

Under the circumstances, the applicant has prayed that in view of the aforesaid case laws, the gold be released on payment of nominal redemption

fine as per Section 125 of the Customs Act, 1962; that the personal penalty may be reduced; or pass any other order as deemed fit and proper.

6. Personal hearing in the matter was scheduled for 27-07-2023. Shri N. J. Heera, Advocate of the applicant appeared for the hearing and submitted that the applicant brought small quantity of gold for personal use. He requested to release the goods on nominal fine and penalty.

7. The Government has gone through the facts of the case, and observes that the applicant had failed to declare the gold while availing the green channel facility. The applicant clearly had failed to declare the goods to the Customs as required under Section 77 of the Customs Act, 1962. By not declaring the gold carried by him, the applicant clearly revealed his intention not to declare the gold and pay Customs duty on it. 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 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.”

12. 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.

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.

14. 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.

15. Government observes that the quantity of gold was not substantial, which indicates that the same was not for commercial use. The Applicant claimed ownership of the impugned gold. There are no other claimants of the said gold. There is no allegation 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.

16.1 The absolute confiscation of the gold, leading to dispossession of the applicant of the gold in the instant case is therefore, harsh and not reasonable. 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 redeem the Gold on payment of a suitable redemption fine, as the same would be more reasonable and judicious.

16.2 Government finds that the penalty of Rs.30,000/- imposed on the Applicant for the gold valued at Rs. 4,84,554/- under Section 112(a) & (b) of the Customs Act, 1962 is appropriate and commensurate to the omissions and commissions of the Applicant.

17.1 In view of the above, the Government modifies the impugned order passed by the Appellate authority and allows the applicant to redeem the impugned gold viz. 01 gold bar weighing 116 grams valued at Rs.3,38,604/- and 02 cut piece of gold weighing 50 grams valued at Rs.1,45,950/-, totally weighing 166 grams and totally valued at Rs.4,84,554/- on payment of redemption fine of Rs.95,000/- (Rupees Ninety-five Thousand Only).

17.2 The penalty of Rs. 30,000/- imposed under Section 112(a) and (b) of the Customs Act, 1962 being 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.

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. 592/2023-CUS (WZ)/ASRA/MUMBAI DATED 17.08.2023

To,

1. Shri Mohammed Ferhan Mohamed, Mavalli Near Madrassa Tanverul Islam Street Murdeshwar Bhatkal Uttara Kannada, Karnataka-581350
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.

Copy to:

1. Advocate N. J. Heera, Nulwala Building, Ground Floor, 41, Mint Road, Opp. G.P.O. Fort, Mumbai-400001
2. Sr. P.S. to AS (RA), Mumbai.
3. File Copy.
4. Notice Board.