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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. 371/218/B/WZ/2020-RA / 6239

Date of Issue 21.08.2023

ORDER NO. 595 /2023-CUS (WZ) /ASRA/MUMBAI DATED
19 .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. Nishant Jayesh Doshi

Respondent : Pr. Commissioner of Customs (Airport), 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-237/2020-21 dated 31.07.2020
issued on 04.08.2020 through S/49-855/2019 passed by
the Commissioner of Customs (Appeals), Mumbai - III.

ORDER

This revision application has been filed by Shri. Nishant Jayesh Doshi (herein referred to as Applicant) against the Order-in-Appeal No. MUM-CUSTOM-PAX-APP-237/2020-21 dated 31.07.2020 issued on 04.08.2020 through S/49-855/2019 passed by the Commissioner of Customs (Appeals), Mumbai – III.

2. Brief facts of the case are that on 23.08.2019, the Officers of Customs had intercepted the Applicant at Chhatrapati Shivaji Maharaj International Airport [CSMIA], Mumbai where he had arrived from Sharjah onboard Air Arabia Flight No. G9-406. The applicant had opted for the green channel and had failed to declare the goods in his possession. Applicant was found wearing a pair of silver coated gold kadas and a silver coated gold chain. The two silver coated gold kadas and silver coated gold chain were of 24 kts and totally weighed 194 grams and valued of at ₹ 6,59,959/- were recovered from the applicant. The applicant stated that the gold was mistakenly coloured silver by the jeweller and that he had no intention of concealing it.

3. After due process of investigations and the law, the Original Adjudicating Authority i.e. the Deputy Commissioner of Customs, CSMIA, Mumbai vide Order-In-Original No. AirCus/T2/49/049/2019-C dated 23.08.2019, ordered for the absolute confiscation of the two silver coated gold kadas and silver coated gold chain were of 24 kts and totally weighed 194 grams and valued of at ₹ 6,59,959/- under Section 111 of the Customs Act, 1962. Further, a penalty of ₹ 70,000/- was imposed on the applicant under Section 112 of the Customs Act, 1962.

4. Aggrieved by this Order, the applicant preferred an appeal before the appellate authority i.e. Commissioner of Customs (Appeals), Mumbai – III, who vide Order-in-Appeal No. MUM-CUSTOM-PAX-APP-237/2020-21 dated

31.07.2020 issued on 04.08.2020 through S/49-855/2019 held that the gold had been rightly absolutely confiscated and did not find any reason to interfere in the OIO passed by the OAA and upheld the same in toto.

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

5.01. that no valid seizure was made and no seizure order had been issued and hence, the confiscation of the goods was not sustainable and penalty could not be imposed; that they rely on instruction no. 01/2017 issued by the Board under F.No. 591/04/2016-Cus(AS) dated 8-2-2017 wherein clear instructions had been given that whenever goods were seized, the proper officer was required to pass an appropriate order like seizure memo/order etc clearly mentioning the reasons to believe the goods were liable for confiscation; that no such seizure memo had been issued and only a detention memo had been issued; that on this issue they rely on the under mentioned case laws;

(a). Patna High Court in the case of UOI vs. Md. Mazid @ Md. Tufani dated 20.07.2011 wherein it was held that a confiscation proceedings has to be preceded by a valid seizure.

(b). Bombay High Court in the case of Arvind Trading Company and Otrs vs. State of Maharashtra dated 05.08.1991 wherein it was held that seizure of goods was a condition precedent before order of confiscation could be passed

(c). Gujarat High Court in the case of Manilal Bhanabhai Patel vs. Kaul and otrs dated 3.9.1974; AIR-1976-Guj.-134 wherein it was held that the liability to confiscation should precede the act of seizure.

5.02. 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). etc.

5.03. that on the issue of option to redeem the gold, they have relied upon the undermentioned case laws;

(a). that the Andhra Pradesh High Court in the case of Shaikh Jamal Basha vs Government of India - 1992 (91) ELT 227(AP) has held that option to pay fine in lieu of confiscation has to be given to imported gold as the same is otherwise entitled to be imported on payment of duty.

(b). that in the case of Mohamed Ahmed Manu Vs Commissioner of Customs, Chennai - 2006 (205) ELT 383 (Tri-Chennai), the Chennai Bench of the Tribunal had allowed redemption of the confiscated gold on payment of redemption fine.

(c). 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.

(d). 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.

(e). 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.

- (f). In CC vs. Elephanta Oil 2003-152-ELT-257-SC it was held that even if goods are confiscated and goods are allowed to be re-exported, penalty can be imposed.
- (g). Etc.
- 5.04. that they have relied on a catena of case laws on the subject of gold not being a prohibited item and that option to redeem the same should have been granted; some of the case laws relied upon are as under;
- (a). SHAIK JAMAL BASHA VERSUS. GOVERNMENT OF INDIA 1997 (91) E.L.T. 277 (A.P.); wherein it had been held that an option to pay the fine, in lieu of the confiscation of the goods, is to be given to the importer, in terms of the Second Part of Section 125 (1) of the Customs Act, 1962, read with Rule 9 of the Baggage Rules, 1978, framed under Section 79 (2) of the Customs Act, 1962.
- (b). 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.
- (c). 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.
- (d). In VP Hameed Vs 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.
- (e). 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.
- (f). etc.
- 5.05. that the case against the applicant had been pre-judged at the stage of detention itself and hence, the same was not sustainable.
- 5.06. that the applicant claimed ownership of the gold under absolute confiscation and prayed for its redemption on payment of reasonable fine and penalty.

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. The respondent vide their written submission bearing F.No. Aircus/Review-376/2020-21 dated 23.12.2020 have stated; that applicant had opted for the green channel and was wearing the silver coated kadas and chain; that the applicant had not declared the gold; that applicant was a frequent traveller and had admitted to bringing the gold for monetary gain; that the applicant had admitted to having knowledge; possession, non-declaration and recovery of the gold; that as per Section 77 of the Customs Act, 1962, the owner of the baggage shall make a declaration to the Customs of the contents in the baggage; that the applicant had not made any declaration; that non-declaration of the gold and evading payment of Customs duty was an offence punishable under the Customs law; that applicant had not declared the goods; that in the instant case, the offence had been committed in a premeditated and clever manner which indicated mensrea; that had the applicant not been intercepted, she would have gone away without payment of duty; that the applicant had deliberately not declared the gold to Customs in order to evade Customs duty; that applicant had admitted to possession, non-declaration, carriage and recovery of the seized gold, that they rely on the following case laws;

(i). Surjeet Singh Chhabra vs. UOI – 1997-89-ELT-646-SC, wherein the Apex Court had held that *'the confession, though retracted, is an admission and binds the petitioner'*.

(ii). Apex Court's Order in the case of K.I Pavunny vs. Asstt. Collector (HQ), C.Ex, Cochin [1997-90-ELT-241-SC] on the issue that confessional statement made to Customs officials is admissible evidence

(iii). Abdul Razak vs. UOI – 2012(275)ELT 300(Ker)(DB) passed by the Division Bench of the Hon'ble High Court, Kerala, on the issue that appellant did not have right to get the confiscated gold ;

(iv). Commissioner of Customs (Air) vs. P. Sinnasamy, passed by Hon'ble Madras High Court, it is held that non-fulfilment of conditions tantamount to prohibition.;

(v). Om Prakash Bhatia vs. Commissioner of Customs, Delhi – 2003(6) SC 161 of the Apex Court, it is held that non-fulfilment of conditions tantamount to prohibition.;

(vi). Cestat Order in respect of Baburaya Narayan Nayak vs. Commissioner of Customs, Bangalore – 2018(364) ELT 811 (Tri-Bang), upheld absolute confiscation as evidence of licit purchase had not been provided;

(vii). Board's Circular no. 495/5/92-Cus.VI dated 10.05.1993 which specifies that in r/o gold seized for non-declaration, no option to redeem the same on redemption fine under Section 125 of the Customs Act, 1962, should be given, except in very trivial cases where the adjudicating authority was satisfied that there was no concealment of the gold in question.

Therefore, under the circumstance of the case, the respondent has prayed to the Revision Authority to reject the revision application filed by the applicant and to uphold the OIA passed by the AA.

7. Personal hearing in the case was scheduled for 07.07.2023. Shri. Prakash Shingrani, Advocate for the applicant appeared for personal hearing on 07.07.2023 and submitted that applicant is NRI and brought two gold kadas and one gold chain for personal use. He further submitted that jewellery was not ingeniously concealed and applicant is not a habitual offender. He requested to give option to redeem the goods on nominal fine and penalty for re-export as applicant normally resides in UAE.

8. 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, he would have walked away with the impugned two silver coated gold kadas and silver coated gold chain of 24 kts and totally weighing 194 grams and valued of at ₹ 6,59,959/- without declaring the same to Customs. Also, the gold jewellery had been silver coated. By his actions, it was clear that the applicant had no intention to declare the impugned gold to Customs and pay duty on it. The Government finds that the confiscation of the gold was therefore, justified.

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. 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. The Government notes that the quantity of gold was small, the applicant has claimed ownership of the gold. The applicant was wearing the gold jewellery. There are no allegations that the Applicant 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. Under the circumstances, the seriousness of the misdemeanor is required to be kept in mind when using discretion under Section 125 of Customs Act, 1962 and while imposing quantum of penalty. During the personal hearing, the applicant has prayed that the absolute confiscation of the gold jewellery be set aside and the same be allowed for re-export on the basis that he is a NRI and normally resides at UAE. To validate his claim of NRI status at the time of seizure of the gold jewellery, the applicant has furnished a copy of his residence status issued by UAE Authorities. Moreover, it is observed that in his prayer before the AA, the applicant had sought and prayed for re-shipment of the gold which was denied.

13. In view of the foregoing paras, the Government finds that as the applicant had not declared the gold jewellery i.e. two gold kadas and chain at the time of arrival, the confiscation of the same was justified. However, considering the quantity of gold, no past history, applicant being NRI, the absolute confiscation of the same was harsh and not justified. In view of the aforesaid facts and considering that the applicant being a NRI, option to re-export the impugned gold jewellery on payment of redemption fine should have been allowed. Considering the above facts, Government is inclined to modify the absolute confiscation upheld by the AA and allow the impugned gold jewellery i.e. two gold kadas and a gold chain, totally weighing 194 grams

and valued of at ₹ 6,59,959/- to be re-exported on payment of a redemption fine.

14. Government finds that the penalty of ₹ 70,000/- imposed on the applicant under Section 112 of the Customs Act, 1962 is commensurate with the omissions and commissions committed and is not inclined to interfere in the same.

15. In view of the above, the Government modifies the order passed by the appellate authority and allows the applicant to redeem the impugned gold jewellery i.e. i.e. two gold kadas and a gold chain, totally weighing 194 grams and valued of at ₹ 6,59,959/- for re-export on payment of a redemption fine of ₹ 1,25,000/- (Rupees One Lakh Twenty-Five Thousand only). The penalty of ₹ 70,000/- imposed on applicant under Section 112 of the Customs Act, 1962 by the OAA and upheld by the AA is sustained.

16. Revision Application is disposed of on the above terms.


(SHRAWAN KUMAR)

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

ORDER No. 395/2023-CUS (WZ) /ASRA/MUMBAI DATED 17.08.2023

To,

1. Shri. Nishant Jayesh Doshi, 9, Ruby Terrace, Near Vishal Hall, Sir. M.V Road, Andheri (East), Mumbai – 400 069.
2. Pr. Commissioner of Customs, Level – II, Terminal – 2, Chhatrapati Shivaji Maharaj International Airport, Sahar, Andheri (E), Mumbai – 400 099.

Copy to:

1. 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.