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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. 380/13/B/2017-RA / 546

Date of Issue 14.02.22

ORDER NO. 61/2022-CUS (W2)/ASRA/MUMBAI DATED 02.02.2022
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 : Commissioner of Customs, Pune.

Respondent : Smt. Mangal Kiran Sarmalkar

Subject : Revision Application filed, under Section 129DD of the
Customs Act, 1962 against the Order-in-Appeal No. PUN-
EXCUS-001-414-2016 dated 14.02.2017
[V2PI/442/CUS/2016/909] passed by the Commissioner
(Appeals), Central Excise, Pune-I.

ORDER

This revision application has been filed by Commissioner of Customs, Pune (herein after referred to as the Applicant) against the Order-In-Appeal No. PUN-EXCUS-001-414-2016 dated 14.02.2017 passed by the Commissioner (Appeals), Central Excise, Pune-I.

2. Brief facts of the case are that the respondent on arrival at Pune International Airport from Dubai by Spice Jet International Flight No. SG-52 dated 28.10.2015 was intercepted at the exit gate by the Customs Officers as the Door Frame Metal Detector (DFMD) through which she had passed indicated presence of some metallic objects on her person. To the query whether she was carrying any dutiable goods, the respondent had replied in the negative. Also, the applicant submitted a Customs Declaration Form declaring that she did not possess any dutiable goods / contraband. On examination and personal search of the respondent, two square shaped packets wrapped in black coloured adhesive tapes were found concealed in the pockets of the blue coloured denim shorts worn by the applicant underneath her clothes. Upon opening these packets, 18 gold biscuits of 24 carats purity, totally weighing 2099.83 grams and valued at Rs. 56,77,940/- were recovered and seized in the reasonable belief that the same were attempted to be smuggled into India without declaration and payment of Customs duty and were liable for confiscation under the provisions of the Customs Act, 1962.

3. After due process of the law, the Original Adjudicating Authority, viz Additional Commissioner Of Customs, Customs Commissionerate, Pune vide Order-In-Original No. PUN-CUSTM-000-ADC-11/16-17 dated 20.10.2016 ordered the absolute confiscation of the two gold bars valued at Rs. 56,77,940/- under Section 111(1) and 111 (m) of the Customs Act, 1962 and a penalty of Rs. 6,00,000/ was also imposed on the respondent under section of 112 (a) and

(b) of Customs Act, 1962. Also, a penalty of Rs. 1,50,000/- was imposed on the respondent under Section 114AA of the Customs Act, 1962.

4. Aggrieved by the said order, the respondent filed an appeal before the Commissioner of Customs (Appeals), Mumbai-III who vide Order-In-Appeal No. PUN-EXCUS-001-414-2016 dated 14.02.2017 allowed to redeem the 18 gold biscuits, totally valued at Rs. 56,77,940/- on payment of a redemption fine of Rs. 14,10,000/- [Rupees Fourteen Lakhs Ten Thousand Only] and the Order-In-Original No. PUN-CUSTM-000-ADC-11/16-17 dated 20.10.2016 was modified to that extent.

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

- 5.1. that the Order-in-Appeal is not legal and proper, mainly on the following grounds:
- 5.2. that the case laws cited by the appellate authority in the order-in-appeal are squarely not applicable to the facts of the instant case.
- 5.3. that the appellate authority had erred in interpreting Section 125 of the Customs Act, 1962 in isolation rather than interpreting it harmoniously alongwith other relevant Sections viz 2(33), 2(39), 11(2)(c), 11(2)(e), 11(2)(f), 11A(a), 77, 78, 79, 107, 108, etc of the Customs Act, 1962, Baggage Rules, 1998, Foreign Trade Policy 2015-20, Notification No. 12/2012 -CUS, Circular No. 495/5/92-Cus VI dated 10.05.1993 etc.
- 5.4. that various cases laws have been cited by the applicant on the use of discretionary powers under Section 125 of the Customs Act, 1962, to buttress their case.
- 5.5. that the respondent had stated that the gold did not belong to her and she was carrying the same for monetary consideration; that the respondent's tickets had been booked by somebody else was confirmed from the investigations;

Applicant has prayed to set aside the order passed by the appellate authority and to restore the order passed by the original adjudicating authority or pass any order as deemed fit.

6. Personal hearings in the case were scheduled online on 07.11.2019 / 21.11.2021. After, change of the revisionary authority, personal hearing in the online video conferencing mode was scheduled for 16.09.2021 / 23.09.2021, 26.10.2021 / 02.11.2021 and 02.12.2021. Shri. Dhananjay Kadam, Deputy Commissioner, Pune Customs appeared online on 03.12.2021 and reiterated submissions already made. He submitted that redemption of gold was wrongly allowed by the Commissioner (Appeals) as facts of the case warranted absolute confiscation. He requested to restore the Order-in-Original. None appeared for the respondent.

7. The Government has gone through the facts of the case and notes that the Respondent had not declared the gold to the Customs even though the DFMD had indicated presence of metal on her person. Thereafter, she was asked whether she was carrying any dutiable items she had adamantly replied in the negative. Further, the Respondent had not filed a true declaration to the Customs and had revealed that the value of the dutiable goods in her possession was of Nil value. The respondent had clearly failed to declare the goods to the Customs at the first instance as required under Section 77 of the Customs Act, 1962. Further, the respondent had cleverly concealed the gold inside the garments worn by her. The same reveals the mindset of the respondent to evade the duty. It also reveals that the act committed by the respondent was conscious and pre-meditated. The respondent did not intend to declare the gold in her possession to Customs. Had she not been intercepted, the respondent would have gotten away with it. The Government finds that the confiscation of the gold is 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 Respondent 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. Government observes that the quantum of gold was large, of commercial quantity and it was cleverly, consciously and premeditatedly concealed which reveals the intention of the Respondent. It also revealed her clear intention to evade duty and smuggle the gold into India. The circumstances of the case especially that it is of commercial quantity and cleverly concealed, probates that the Respondent had no intention of declaring the gold to the Customs at the airport. All these have been properly considered by the Original Adjudicating Authority while absolutely confiscating the two gold bars.

12. The main issue in the case is the quantum and manner in which the impugned gold was being brought into the Country. The option to allow redemption of seized goods is the discretionary power of the adjudicating authority depending on the facts of each case and after examining the merits. In the present case, the manner of concealment being clever with conscious intent, quantity being large and commercial, this being a clear attempt to smuggle gold bars in primary form, is a fit case for absolute confiscation as a deterrent to such offenders. Thus, taking

into account the facts on record and the gravity of offence, the adjudicating authority had rightly ordered the absolute confiscation of the gold. But for the intuition and the diligence of the Customs Officer, the gold would have passed undetected. Hon'ble Delhi High Court in the case of Jain Exports Vs Union of India 1987(29) ELT753 has observed that, "*the resort to Section 125 of the C.A. 1962, to impose fine in lieu of confiscation cannot be so exercised as to give a bonanza or profit for an illegal transaction of imports.*". The redemption of the gold will encourage non bonafide and unscrupulous elements to resort to concealment and bring gold. If the gold is not detected by the Custom authorities, the passenger gets away with smuggling and if not, he has the option of redeeming the gold. Such acts of mis-using the liberalized facilitation process should be meted out with exemplary punishment and the deterrent side of law for which such provisions are made in law needs to be invoked. The absolute confiscation of the gold would act as a deterrent against such persons who indulge in such acts with impunity. Therefore, the order passed by the appellate authority is liable to be set aside.

13. The Government finds that the penalty of Rs. 6 lakhs imposed under section 112 (a) and (b) is appropriate and commensurate with the omission and commission committed by the Respondent and the appellate authority has upheld the same. The Government does not find it necessary to interfere in the same.

14. Government notes that a penalty of Rs. 1,50,000/- was also imposed on the respondent under Section 114AA of the Customs Act, 1962 for having made a false / incorrect declaration under Section 77 of the Customs Act, 1962. However, the Government observes that once penalty has been imposed under section 112(a) / (b) of the Customs Act, 1962, then there is no necessity of imposing penalty under section 114AA of the Customs Act, 1962. Therefore, the Government sets aside the penalty of Rs. 1,50,000/- (Rupees One Lakh Fifty thousand only) imposed under section 114AA of the Customs Act, 1962.

15. In view of the above, the Government sets aside the order passed by the appellate authority and restores the order-in-original passed by the Original Adjudicating Authority to the extent of absolute confiscation of the 18 gold biscuits and penalty of Rs. 6 Lakhs imposed on the Respondent under Section 112 (a) and (b) of the Customs Act, 1962. The Government sets aside the penalty of Rs. 1,50,000/- (Rupees One Lakh Fifty thousand only) imposed under Section 114AA of the Customs Act, 1962 by the lower authorities.

16. Revision Application is allowed on above terms.

Shrawan
10/2/22
(SHRAWAN KUMAR)

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

ORDER No. 61/2022-CUS (WZ) /ASRA/

DATED 02.02.2022

To,

1. Commissioner of Customs, ICE House, 41/A, Sassoon Road, Pune - 411 001.
2. Smt. Mangal Kiran Sarmalkar, 443/13, Nachiket CHS, Ambedkar Marg, Sector - 4, Charkop, Kandivali (West), Mumbai - 400 067.

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