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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. 371/104/B/WZ/2022-RA/6488 : Date of Issue : ~~08.2023~~
04.09.2023

ORDER NO. 625/2023-CUS (WZ)/ASRA/MUMBAI DATED 30.08.2023 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 : Mr. Mushtaque Ahmed Haroon

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-1425/2021-22 dated 03.01.2022 [Date of issue: 05.01.2022] [F. No. S/49-929/2020] passed by the Commissioner of Customs (Appeals), Mumbai Zone-III.

ORDER

The Revision Application has been filed by Mr. Mushtaque Ahmed Haroon (herein referred to as the 'Applicant') against the Order-in-Appeal No. MUM-CUSTM-PAX-APP-1425/2021-22 dated 03.01.2022 [Date of issue: 05.01.2022] [F. No. S/49-929/2020] passed by the Commissioner of Customs (Appeals), Mumbai Zone-III.

2. Brief facts of the case are that on 07.09.2020, the officers of Air Customs, Chatrapati Shivaji International Airport, Mumbai, intercepted the Applicant after he had cleared himself through the Customs Green channel. The Applicant was found to be in possession of one crude gold chain of 24K purity, weighing 200 grams and valued at Rs. 9,33,660/-.

3. The case was adjudicated after the Applicant requested for waiver of show cause notice and the Original Adjudicating Authority (OAA) i.e. Deputy Commissioner of Customs, CSI Airport, Mumbai, vide Order-in-Original No. Air Cus/49/T2/1697/2020/UNI-C dated 07.09.2020 ordered the absolute confiscation of the impugned crude gold chain weighing 200 grams and valued at Rs. 9,33,660/-, under Section 111 (d), (l) and (m) of the Customs Act, 1962. Penalty of Rs. 50,000/- was imposed on the Applicant under Section 112 of the Customs Act, 1962.

4. Aggrieved by the 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-CUSTM-PAX-APP-1425/2021-22 dated 03.01.2022 [Date of issue: 05.01.2022] [F. No. S/49-929/2020] rejected the appeal and upheld the Order-in-Original.

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

5.01. That the Applicant submitted that 2 days prior to his departure, i.e. on 31-8-2020 he visited Precious Cargo Customs Clearance Centre, BKC, Bandra for obtaining an Export Certificate for his gold chain weighing 199.56 grams, however, he was not allowed entry into PCCCC because of the pandemic situation at its peak and was informed that entry for visitors was banned due to pandemic situation and the observations of the AA that Applicant failed to produce any corroborative evidence is not correct.

5.02. That on the date of departure i.e. on 2-9-2020, after clearing immigration, the Applicant went to the Customs Counter at departure for declaring the gold chain which he was wearing but as not one was at the counter for nearly 30-40 minutes at the Counter, he left as he was getting delayed for the flight, he left for boarding the flight and the observations of AA of it being a mere excuse is not correct;

5.03. That the Applicant was in Sharjah only for 5 days as he had to return as his wife was hospitalised due to Covid;

5.04. That the gold chain under absolute confiscation is Indian made and there is no proof that it is of foreign origin and the case was made by Customs on the basis of assumption and presumption of the investigation that the gold chain was foreign made and imported into India by evading Customs duty. That in the present case, possession of high value jewellery cannot be made "prima facie evidence" and considered as sufficient evidence for penal action for the offence of any alleged smuggling committed by him since the petitioner had properly explained the nature and origin of the jewellery, procurement, possession, transportation and carriage to the satisfaction of the Customs Officers and therefore no penalty under Section 112 of CA, 1962 can be imposed. The Applicant has relied on the following case laws in support of their contention:

- (i) M/s. Ajay Industrial Corporation v. CCE, Delhi - 2009 (237) E.L.T. 175 (Tri.-Del.)
- (ii) M/s. Shree Jagdamba Castings (P) Ltd. v. CCE, Bhopal, 2006 (206) E.L.T. 695 (Tri.-Del.)

5.05. That in a criminal case, the onus of proof lying upon the accused person is to prove his case only by preponderance of probability and it is not necessary for the accused to prove his case beyond reasonable doubt and that when on the basis of evidence on record, two views could be taken-one in favour of the accused and other against the accused, the view in favour of the accused has to be taken into consideration;

5.06. When the defendant comes forward with enough evidence to defeat the applicability of the presumption, the presumption should completely drop out of the picture. When the applicability of the presumption has been defeated, the Adjudicating Authority or the Judge may not regard the facts as "strong evidence" of the presumed fact;

5.07. The rules provide that once the applicability of a presumption is defeated, it drops out of the trial. In the case of facts establishing guilt or innocence or elements of the offense charged, the presumption is defeated by the presence of evidence which the judge believes does not permit a reasonable adjudicator, on the basis of all the evidence, to find the presumed fact beyond a reasonable doubt;

5.08. That in the present case, there is ample evidence to prove that the jewellery under confiscation is of Indian origin and thus there is no mens rea and in the absence of an allegation of mens rea and a clear proof, no penalty under Section 112 of the Customs Act, 1962 can be imposed on the Applicant;

5.09. The authority who issued the impugned OIO failed to reveal that the requisite mens rea whatsoever for evading Customs duty on the gold chain had been established. The Applicant has relied upon the following case laws in support of his contention;

- (i) Merck Spares vs Collector Of Central Excise [1983 (13) ELT 1261 Tri Del]
- (ii) Gurcharan Singh v. The State of Punjab

5.10. That the direct evidence in the form of the Tax invoice dated 02-08-20 submitted herewith substantiate a definite conclusion regarding the country of origin i.e India of the subject jewellery and it was not smuggled. The burden of proving that it is of foreign origin was on Customs and the Customs have not been able to discharge this burden;

5.11. That the fact that the Applicant did not carry the licit documents cannot be a ground to hold that the gold chain was smuggled into India and therefore liable for confiscation. Reliance is placed by the Applicant on the decisions in the following cases:

- (i) Naveed Ahmed Khan vs Commissioner of Customs [2005 (182) ELT 494 Tri Bang
- (ii) CEGAT Bangalore T.V. Mohammed vs Commissioner of Customs... on 30 January, 2006
- (iii) Rajkumari vs Collector of Customs (Appeals) 1992 (62) ELT 666 (Gol),

5.12. That as per the clarification issued by the Government of India under F. No. 495/19/93-Cus. VI, dated 06.10.1994 issued by Ministry of Finance (Department of Revenue), there is no restriction on the export of any goods including gold jewellery as baggage so long as they constitute the bonafide baggage of the passenger and so long as the personal gold jewellery being exported through the mode of baggage constitutes bonafide baggage of the passenger, there should be no value restrictions on its export;

5.13. That the Applicant was simply wearing the gold chain on his person and did not adopt any method of concealment and therefore, there was no mis-declaration of the jeweller and the gold chain under absolute confiscation is his bonafide personal baggage. The non-declaration which entails confiscation under Section 111(1) should be conscious and intentional non-declaration and would not take within its ambit mere unintentional omissions such as not

declaring the gold chain worn on his person which was not at all concealed but was visible to the naked eye. Since the gold chain was worn by him it was not concealed and therefore it cannot be said that there had been no effective declaration on his part. Accordingly, the gold chain worn on his person was not liable for confiscation under Section 111(1) of the Customs Act, 1962.

5.14. That any goods, not only gold or articles of gold when assume the characteristics of smuggled goods, they qualify to be treated as prohibited depending on the facts and circumstances of a case. In the present case, the jewellery was worn without concealment. Hiding or concealing of items in unusual and ingenious manner like rectum concealment, shoe sole concealment, false bottom concealment, concealment inside mixie, concealment ins refrigerator/TV/motor etc. of the kind are held to be concealment done consciously. These kinds of concealments have been recognized as concealment by interpreting law and facts. The Applicant has relied on the following case laws in support of his contention:-

- (i) DRI v. Pushpa Lekhumal Tolani [2017 (353) E.L.T. 129 (S.C.)]
- (ii) Pushpa Lekhumal Tolani v. Addl. Commr. of Customs [2008 (227) E.L.T. 368 (Del.)]
- (iii) Mohammad Hussain Ayyub Chilwan [2017 (358) E.L.T. 1275 (Commr Appeals)]
- (iv) Yakub Ibrahim Yusuf v. CC, Mumbai [2011 (263) E.L.T. 685 (Tri-Mum)]
- (v) Vigneshwaran Sethuraman v. UCI [2014 (308) E.L.T. 394 (Ker.)]
- (vi) Mohd Zia Haque [2014 (314) E.L.T. 849 (GOI)]
- (vii) Kanta Maggo Versus Collector of Customs, Bombay - 1994 (69) E.L.T. 556 (Tribunal),

5.15. That in the gold chain was only detained under Detention Receipt DR no DR-002338/2020 dated 7-9-2020 and thus no valid seizure was made and there was no seizure order issued by the Customs Officer. That there is a lot of difference between the terms 'detention' and 'seizure'. Therefore, confiscation of the gold chain is not sustainable and penalty imposed is not sustainable. When no seizure memo/order is issued, the said omission would vitiate the confiscation. The Applicant has relied on the following case laws in support of his contention:

- (i) Gujarat High Court in the case of Manilal Bhanabhai Patel vs Kaul And Ors. [1974: AIR 1976 Guj 134]
- (ii) Allahabad High Court in the case of L. Kashi Nath Seth vs Collector, Central Excise [1978 - AIR 1979 All 128]
- (iii) Patna High Court in the case of Union of India & ors vs Md.Mazid (@ Md.Tufani
- (iv) Bombay High Court in the case of Dina Baldev Pathak vs Collector of Customs and Ors. [(1961) 63 BOMLR 873]
- (v) Bombay High Court decision in the case of Dhiraj Pal Amrit Lal Mehta
- (vi) Bombay High Court in the case of Arvind Trading Company And Ors. vs State of Maharashtra And Ors.

5.16. That the Applicant submits that unless the gold chain is seized it cannot be confiscated and what is required to satisfy the condition of the Act is, the physical act of seizure by issuing a seizure memo/order. It therefore becomes necessary to consider whether the undeclared gold chain detained by the Officer was validly seized as per the instruction no 01/2017 issued by the Board under F.NO. 591/04/2016-cus (AS) dated 8-2- 2017. That when confiscation is not sustainable, no penalty could be and the gold chain is liable to be released to the Applicant The Applicant has relied on the following case laws in support of his contention.

- (i) Asst. Collector of Customs v. Mukbulhussein Ibrahim-10 GLR 662,

5.17. That Gold chain in the instant case clearly satisfies this definition of jewellery under the Customs Tariff Act, 1975. There is no mention in the definition that crude jewellery is not to be considered as jewellery.

5.18. Gold is not 'prohibited goods' but only a 'restricted goods' and is not liable for absolute confiscation. Import of gold is no longer prohibited and therefore it is the duty of the adjudicating authority, if he is of the view that it is liable to confiscation, to permit its redemption on appropriate fine. That if the goods are restricted to import, the Government fixes some sort of barrier to import and the importer has to overcome such procedures which

have to be completed. That restriction to import any goods is decided by the government under foreign trade policy amended from time to time.

5.19. That Gold is not a prohibited item for import and Section 125 of the Custom Act, 1962 provides that option of redemption can be given in case the seized goods are not prohibited and therefore absolute confiscation is not warranted in the instant case. Section 125 of the Customs Act, 1962 provides that the goods should be redeemed to the owner of the goods or the person from whose possession the goods were seized if the owner is not known. Further authority has discretion to order release of prohibited goods on payment of fine in lieu of confiscation. The Applicant has relied upon the undermentioned case laws;

- (i) Commr. Of Customs (Prev) vs. India Sales International [2009 (241) E.L.T. 182(Cal)].
- (ii) Yakub Ibrahim Yusuf vs. CC, Mumbai [2011(263) ELT 685(Tri. Mumbai)
- (iii) Neyveli Lignite Corporation Ltd vs. UOI [2019(242) ELT 487(Mad)]

5.20. That there are series of judgements where redemption of absolutely confiscated gold has been allowed The Applicant has relied on the following case laws:

- (i) Hargovind Das K. Joshi vs. Collector of customs [1992 (61) ELT 172(SC)]
- (ii) Universal Traders vs. Commissioner [2009 (240) E.L.T. A78 (SC)]
- (iii) Gauri Enterprises vs. CC, Pune [2002 (145) ELT (705) (Tri Bangalore)]
- (iv) CC (Airport), Mumbai vs. Alfred Menezes [2009 (242) ELT 334 (Bom)]
- (v) Shaik Jamal Basha vs. Government of India [1997 (91) ELT 277(AP)]
- (vi) VP Hameed vs. Collector of Customs Mumbai 1994(73) ELT 425 (Tri)
- (vii) T. Elavarasan Vs Commissioner of Customs (Airport), Chennai [2011 (266) ELT 167 (Mad)]
- (viii) Kadar Mydin vs. Commissioner of Customs (Preventive), West Bengal [2011 (136) ELT 758]
- (ix) Sapna Sanjeeva Kolhi v/s Commissioner of Customs, Airport, Mumbai
- (x) Vatakkal Moosa vs. Collector of Customs, Cochin [1994 (72) ELT (G.O.I)]
- (xi) Halithu Ibrahim vs. CC [2002-TIOL 195 CESTAT-MAD]
- (xii) Krishnakumari vs. CC, Chennai [2008 (229) ELT 222 (Tri Chennai)]
- (xiii) S.Rajagopal vs. CC, Trichy [2007 (219) ELT 435 (Tri-Chennai)]

- (xiv) M. Arumugam vs. CC, Trichirapalli [2007 (220) ELT 311 (Tri-Chennai)]
- (xv) Union of India vs. Dhanak M. Ramji [2009 (248) E.L.T. 127 (Bom.)]
- (xvi) Peringatil Hamza vs CC (Airport), Mumbai [2014 (309) ELT 259 (Tri Mumbai)]
- (xvii) R. Mohandas vs. CC, Cochin [2016 (336) ELT 399 (Ker)]
- (xviii) A Rajkumari vs. Commr. of Customs (Airport-Air cargo) Chennai [2015(321) E.L.T. 540].
- (xix) Shaik Mastani Bi vs. CC, Chennai [2017(345) E.L.T 201(Mad)]
- (xx) Bhargav Patel vs CC, Mumbai [Appeals NO C/381/10]
- (xxi) Gauri Enterprises vs. CC, Pune [2002(145) E.L.T 705 (Tri-Bang)]
- (xxii) Om Prakash Bhatia vs. Commr. Of Customs Delhi [2003(155) E.L.T.423(SC)]
- (xxiii) Commr. of Customs vs Rajesh Pawar [2020(372) ELT 1425(Cal)]
- (xxiv) Commr. of CEx.& ST, Lucknow vs. Islahuddin Khan [2018(364)ELT 168(Tri-All)]
- (xxv) Barakathnisa vs. Pr. Commr. of Customs, Chennai-I [2018(361) ELT 418(Mad)]
- (xxvi) Commr. of C.Ex & ST, Lucknow vs. Mohd Halim Mohd. Shamim Khan [2018(359) ELT 265(Tri-All)]

5.21. That the decisions relied upon by the AA cannot be made applicable to the case of the Applicant;

5.22. That in a common law system, judges are obliged to make their rulings as consistent as reasonably possible with previous judicial decisions on the same subject and precedent that must be applied or followed is known as a binding precedent;

5.23. That under the doctrine of stare decisis, a lower court should honour findings of law made by the higher court that is within the appeals path of case the court hears and precedent is a legal principle or rule that is created by a court decision. This decision becomes an example, or authority for judges deciding similar issues later. That while applying the ratio of one case to that of the other, the decisions of the Hon'ble Supreme Court are always required to be borne in mind;

5.24. That in a common law system, judges are obliged to make their rulings as consistent as reasonably possible with previous judicial decisions on the same subject. Under the doctrine of stare decisis, a lower court must honour

findings of law made by a higher court. Simply put, it binds courts to follow legal precedents set by previous decisions;

5.25. That while applying the ratio of one case to that of the other, the decisions of the Hon'ble Supreme Court are always required to be borne in mind. The Applicant has relied upon the following case laws in support of their contention:

- (i) CCE, Calcutta vs. Alnoori Tobacco Products [2004(170) ELT 135 (SC)]
- (ii) Escorts Ltd vs. CCE, Delhi [2004 (173) ELT 113 (SC)].
- (iii) CC (Port), Chennai vs. Toyota Kirloskar [2007 (213) ELT 4 (SC)]
- (iv) E.I. Dupont India Private Limited vs. UOI - [2014 (5) TMI 128]
- (v) Clari's Life Sciences Limited vs. Union of India-[2014 (1) TMI 1467]
- (vi) Waman Rao vs. Union of India [(1981) 2 SCC 362]
- (vii) Manganese Ore (India) Ltd. vs. Regional Asstt, CST[(1976) 4 SCC 124]
- (viii) Ganga Sugar Corpn. vs. State of U.P. [(1980) 1 SCC 223]
- (ix) Union of India v. Raghubir Singh, [(1989) 2 SCC 754]
- (x) Krishena Kumar vs. Union of India, [(1990) 4 SCC 207]
- (xi) Union of India & Anr. vs. Paras Laminates (P) Ltd, [(1990) 4 SCC 453]
- (xii) Hari Singh vs. State of Haryana
- (xiii) SC judgement in Bombay Dyeing and Manufacturing Company Ltd. vs. Bombay Environmental Action Group
- (xiv) Islamic Academy of Education vs. State of Karnataka
- (xv) Sri Kumar Agency vs. CCE, Bangalore [1968(232) ELT 577(SC)]

5.26. That in the instant case the Commissioner (Appeals) should have examined the judgements/decisions relied upon by the Applicant, facts of the cases, legal issues involved in the cases, arguments raised and cases cited by the parties, legal reasoning that is relevant to resolve those issues, judicial opinions given by the Courts, ruling of the court on questions of law, the result of the case, the court's order, and which party was successful and the applicability of ratio of the said judgements in the case being dealt:

- (i) Bombay Dyeing and Mfg Co vs BEAG
- (ii) CIT vs. Sun Engineering Works (P) Ltd
- (iii) Madhav Rao Scindia vs. Union of India

5.27. That the decisions relied upon by the Commissioner of Customs (Appeals) are not applicable to the instant case;

5.28. That as regards allowing redemption of the seized goods, Section 125 of the Customs Act, 1962 provides the option of redemption can be given in the case of seized goods are not prohibited and gold is not a prohibited item and can be imported and such imports are subject to certain conditions and restrictions including the necessity to declare the goods on arrival at the Customs station and make payment at the rate prescribed. Reliance has been placed on the following case laws:

- (i) Shaik Jamal Basha vs. Government of India [1992(91) ELT 277(AP)]
- (ii) Mohd Zia Ul Haque vs. Addl. Commissioner of Customs, Hyderabad [2014(214) E.L.T 849 (GOI)]
- (iii) Mohammed Ahmed Manu vs. CC, Chennai [2006(205) E.L.T 383(Tri-Chennai)]

5.29. That the Applicant has relied upon the following case laws in support of the contention that when goods are not eligible for import as per the import policy, re-export of such goods is permitted on payment of penalty and redemption fine. The Applicant has relied on the following case laws in support of their contention:

- i) CC vs. Elephanta Oil [2003(152) ELT 257 (SC)]
- ii) Collector vs. N Patel [1992 (62) ELT 674 (GOI)]
- iii) Kusumbhai Dahyabhai Patel vs. CC (P) [1995 (79) ELT 292 (CEGAT)]
- iv) K&K Gems vs. CC [1998(100) ELT 70 (CEGAT)]

5.30. That as held in the case of Commissioner of Customs vs. Atul Automation Pvt Ltd, wherein the Hon'ble Supreme Court clearly distinguished between what is prohibited and what is restricted and held that restricted

goods can be redeemed on payment of fine, in the instant case gold should not be considered as prohibited goods and order of absolute confiscation is not sustainable;

5.31. That Circular No 495/5/92-Cus-IV dated 10.05.1993 conflicts with the statute and the scheme contemplated under Section 125 of the Customs Act, 1962;

5.32. That Circular No 495/5/92-Cus-IV dated 10.05.1993 is only advisory in nature and the advisory cannot be made a rule for ordering confiscation of gold. The Applicant has relied on the following case laws in support of their contention:

- (i) Carista Herbal Products (P) Ltd vs. Commr. of C.Ex, Pondicherry [2019(370) ELT 223(Mad)]
- (ii) UOI vs. Amalgamated Plantations Pvt Ltd [2016(340) ELT 310(Gau)]

5.33. That perusal of Section 125 leaves no manner of doubt that if the goods are prohibited, then the option is with the Customs Authority to confiscate without giving any option to pay fine in lieu thereof but when the goods are not prohibited then the customs authority has no other option but to grant an option to pay a fine in lieu of confiscation and Section 125 does not distinguish between declared and undeclared gold. The Applicant has relied upon the following case laws in support of their contention:

- (i) Mafatal Industries [1997(89) E.L.T 247 (SC)]

5.34. That circulars issued by CBEC and CBIT do not bind the assessee and the assessee has a right to challenge the correctness of the circular before a quasi-judicial authority constituted under the relevant statute;

5.35. That the fight between the assesseees' and the revenue department regarding the applicability and precedential value of the circulars issued by the Board has been put to an end by issuing a clarification vide Circular No. 1006/13/2015-CX dated 21.09.2015. Also that clarificatory circulars cannot

amend or substitute statutory rules. The Applicant has relied upon the following case laws in support of their contention:

- (i) Bengal Iron Corporation vs. Commercial Tax Officer
- (ii) Bhagwati Developers vs. Peerless General Finance & Investment Co.
- (iii) Cases pertaining to Paper Products, Hindustan Aeronautics Ltd, Dhiren Chemicals, Indian Oil
- (iv) Kalyani Packaging Industry vs. UOI [1164(5) TMI 78 (SC)]
- (v) Commr of CEx, Bolpur vs. Ratan Melting and Wire Industries [1168(10) TMI SC]
- (vi) Bhuwalka Steel Industries vs. Bombay Iron and Steel Ltd
- (vii) Harrison and Crossfield (India) Ltd vs. Registrar of Companies
- (viii) Etc...

5.36. That as submitted in earlier paras, the Boards Circulars are binding on the revenue authorities till the provision of the circular are not proved contrary to law by the High Court or Supreme Court and the Board circulars are not to be relied upon once they are declared as contrary to the provisions of law by the Courts;

5.37. That pronouncement of a law by a higher judicial forum is binding on a lower court, especially where the particular determination not only disposes of the case but also decides a principle of law;

5.38. That binding decisions on identical questions of law are repeatedly ignored by lower authorities despite clear and specific and authoritative pronouncements to this effect by higher authorities/Courts;

5.39. That the CBEC issued circular No 201/01/2014-CX-6 dated 26.06.2014 instructing adjudicating authorities to follow decisions of higher appellate authorities/Courts scrupulously to avoid unnecessary litigation as well as adverse observations of the High Courts;

5.40. That the Applicant claims ownership of the goods and prays for redemption of the gold chain;

Under the circumstances, the Applicant prayed that the gold chain under absolute confiscation may be ordered to be released to him unconditionally and further proceedings against him may be dropped.

The Advocate for the Applicant vide letter dated 29.05.2023 requested for grant of early hearing in the matter.

6. Personal hearing in the case was scheduled for 11.07.2023. Shri Prakash Shingrani, Advocate appeared for the personal hearing on the scheduled date on behalf of the Applicant. He submitted that the Applicant brought small quantity of gold jewellery for personal use. He further submitted that the gold jewellery was not concealed and that the Applicant was not a habitual offender and requested to allow redemption of goods on reasonable fine and penalty. No one appeared for the personal hearing on behalf of the Respondent.

6.1. The Advocate for the Applicant vide letter dated 13.07.2023 submitted that during the personal hearing, by mistake, he had requested for redemption of gold. He further submitted that the Applicant is a NRI national and requested to allow for re-shipment. He submitted the Resident Identity card issued to the Applicant by the Federal Authority for Identity & Citizenship, Customs and Port Security, UAE.

7. The Government has gone through the facts of the case and observes that the Applicant had brought one crude gold chain of 24 K purity, weighing 200 grams and valued at Rs. 9,33,660/- 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 clearing himself through the green channel of Customs and on being intercepted, one crude gold chain of 24K purity, weighing 200 grams and valued at Rs. 9,33,660/- was recovered from the Applicant and revealed his intention not to declare the said gold and thereby evade payment

of Customs Duty. The confiscation of the gold jewellery 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 (f) 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 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 Jhamatmai 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 Shaik Mastani Bi vs. Principal Commissioner of Customs, Chennai-1 [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.
- e) 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.
- f) The Hon'ble High Court, Madras on 08.06.2022 in WP no. 20249 of 2021 and WMP No. 21510 of 2021 in r/o. Shri. Chandrasegaram Vijayasundarm + 5 others in a matter of Sri Lankans wearing 1594 gms of gold jewellery upheld the Order no. 165 - 169/2021-Cus (SZ) ASRA, Mumbai dated 14.07.2021 in F.No. 380/59-63/B/SZ/2018-RA/3716, wherein Revisionary Authority had ordered for restoration of OIO wherein the adjudicating authority had ordered for the confiscation of the gold jewellery but had allowed the same to be released for re-export on payment of appropriate redemption fine and penalty.

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 one crude gold chain of 24 K purity, weighing 200

grams and valued at Rs. 9,33,660/- at the time of arrival, the confiscation of the same was justified. However, Applicant is a NRI and resides in the United Arab Emirates and the quantum of gold jewellery under import is small and is not of commercial quantity. The impugned gold jewellery recovered from the Applicant was not concealed in an ingenious manner. 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 jewellery. The absolute confiscation of the impugned gold jewellery leading to dispossession of the Applicant of the same in the instant case is therefore harsh and not reasonable. In view of the aforesaid facts and considering that the Applicant is a Non Resident Indian, 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 and allow the impugned one crude gold chain of 24 K purity, weighing 200 grams and valued at Rs. 9,33,660/- to be re-exported on payment of a redemption fine.

16. Applicant has also pleaded for setting aside the penalty imposed on him. The market value of the gold in this case is Rs. 9,33,660/-. From the facts of the case as discussed above, Government finds that the penalty of Rs. 50,000/- imposed on the Applicant under Section 112 of the Customs Act, 1962 is commensurate to the omissions and commissions of the Applicant.

17. In view of the above, the Government modifies the Order-in-Appeal No. MUM-CUSTOM-PAX-APP-1425/2021-22 dated 03.01.2022 [Date of issue: 05.01.2022] [F. No. S/49-929/2020] passed by the Commissioner of Customs

(Appeals), Mumbai Zone-III and allows the Applicant to redeem the impugned one crude gold chain of 24K purity, weighing 200 grams and valued at Rs. 9,33,660/-, for re-export, on payment of a redemption fine of Rs. 1,80,000/- (Rupees One Lakh Eighty Thousand only). The penalty of Rs. 50,000/- imposed on the Applicant under Section 112 of the Customs Act, 1962 by the OAA and upheld by the AA is sustained.

18. The Revision Application is disposed of on the above terms.

Shrawan
30/8/23
(SHRAWAN KUMAR)

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

ORDER NO. 625/2023-CUS (WZ)/ASRA/MUMBAI DATED 30.08.2023

To,

1. Mr. Mushtaque Ahmed Haroon, C/o Shri Prakash K. Shingrani, Advocate, 12/334, Vivek, New MIG Colony, Bandra (East), Mumbai-400 051
2. The Pr. Commissioner of Customs, Terminal-2, Level-II, Chhatrapati Shivaji International Airport, Mumbai 400 099,

Copy to:

1. The Commissioner of Customs (Appeals), Mumbai Zone - III, Awas Corporate Point, 5th Floor, Makwana Lane, Behind S.M.Centre, Andheri-Kurla Road, Marol, Mumbai - 400 059.
2. Shri Prakash K. Shingrani, Advocate, 12/334, Vivek, New MIG Colony, Bandra (East), Mumbai-400 051
3. Sr. P.S. to AS (RA), Mumbai.
4. File copy.
5. Notice Board.

