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F.No. 371/07/B/WZ/2020-RA:
F.No. 371/08/B/WZ/2020-RA / 6511
F.No. 371/09/B/WZ/2020-RA

Date of Issue : 07.08.2023

ORDER NO. ⁶²⁷⁻⁶²⁹ /2023-CUS (WZ)/ASRA/MUMBAI DATED 31.08.2023 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 No. 1 : Shri Sandeep Ochani
Applicant No. 2 : Shri Kishore Ghanshamdas Dhankani
Applicant No. 3 : Shri Rakesh Ashok Kateja

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-
CUSTM-PAX-APP-562, 563, 564/ 2019-20 dated 27.09.
2019 [Date of issue: 11.10.2019] passed by the
Commissioner of Customs (Appeals), Mumbai Zone-III.

ORDER

These separate Revision Application have been filed by Shri Sandeep Ochani, Shri Kishore Ghanshamdas Dhankani and Shri Rakesh Ashok Kateja (herein referred to as the 'Applicant No. 1' 'Applicant No. 2' and 'Applicant No. 3' respectively individually or 'Applicants' when mentioned together) against the Order-in-Appeal No. MUM-CUSTOM-PAX-APP-562, 563, 564/ 2019-20 dated 27.09.2019 [Date of issue: 11.10.2019] passed by the Commissioner of Customs (Appeals), Mumbai Zone-III.

2. Brief facts of the case are that on 28.01.2018, the three Applicants, all holding Indian passports, arrived from Bangkok by Flight No. TG 2335 and reported to the Red Channel to declare the televisions brought by them. As some suspicious dark images were noticed during the screening of the baggage, detailed examination was conducted and it resulted in the recovery of gold as under:

2.1. Detailed examination of the check-in-baggage and television set carried by Applicant No. 1 resulted in the recovery of 13 gold links weighing 128 grams which were stitched on 13 nos. of childrens' trousers kept in the bag and 06 gold sticks weighing 271 grams which were concealed in the metal stand of the television set.

2.2. Detailed examination of the check-in-baggage and television set carried by Applicant No. 2 resulted in the recovery of 12 gold links weighing 153 grams which were stitched on 12 nos. of childrens' trousers kept in the bag and 06 gold sticks weighing 270 grams which were concealed in the metal stand of the television set.

2.3. Detailed examination of the check-in-baggage and television set carried by Applicant No. 3 resulted in the recovery of 12 gold links weighing 158 grams which were stitched on 12 nos. of childrens' trousers kept in the bag and 06

gold sticks weighing 270 grams which were concealed in the metal stand of the television set.

3. Pursuant to being assayed, the 399 grams of gold recovered from Applicant No. 1 valued at Rs. 11,04,017/-, 423 grams of gold recovered from Applicant No. 2 valued at Rs. 11,70,424/- and 428 grams of gold recovered from Applicant No. 3 valued at Rs. 11,84,259/- were seized in the reasonable belief that the same were being smuggled into India and hence liable to confiscation under the provisions of the Customs Act, 1962.
4. After following the due process of law, the Original Adjudicating Authority (OAA) i.e. Additional Commissioner of Customs, CSI Airport, Mumbai vide Order-In-Original (OIO) No. ADC/AK/ADJN/514/2018-19 dated 27.03.2018 ordered for the absolute confiscation of the impugned gold collectively weighing 1250 grams valued at Rs. 34,58,700/- under Section 111 (d), (l) & (m) of the Customs Act, 1962. A penalty of Rs. 1,20,000/-, Rs. 1,25,000/- and Rs. 1,30,000/- respectively was imposed on the Applicants under Section 112(a) and (b) of the Customs Act, 1962.
5. Aggrieved, with this Order, the Applicants filed separate appeals before the Appellate Authority (AA) viz, Commissioner of Customs (Appeals), Mumbai Zone-III who vide Order-in-Appeal No. MUM-CUSTM-PAX-APP-562, 563, 564/2019-20 dated 27.09.2019 [Date of issue: 11.10.2019] passed by the upheld the order passed by the OAA.
6. Aggrieved with the above order of the Appellate Authority, the three Applicants have filed these separate revision applications. The grounds of appeal being common in the three applications are as under:
 - 6.01. That the impugned order is bad in law and unjust
 - 6.02. That the impugned order has been passed without giving due consideration to the documents on record and facts of the case

6.03. That the OAA ought to have appreciated that dutiable goods brought by the Applicants are neither restricted nor prohibited

6.04. That this was the first time that the Applicant had brought this type of goods and there is no previous case against any of them;

6.05. That the respondent had come to the conclusion that the acts and/or omissions on the part of the Applicant was to evade customs duty and the evasion of customs duty can be done only in respect of dutiable goods and not prohibited goods;

6.06. That once the department or respondent accepts that the goods are dutiable, the option of redemption of goods as provided under Section 125 of the Customs Act, 1962 will have to be given to the Applicant;

6.07. That a bare perusal of the sub-section (1) of Section 125 of the Customs Act, 1962 makes it crystal clear that the respondent is required to give the notice an option to pay fine in lieu of confiscation in respect of the impugned goods which even as per the respondent are dutiable goods;

6.08. That absolute confiscation of the impugned dutiable goods would mean interpreting or giving a new meaning to the said sub-section (1) of Section 125 of the Customs Act, 1962;

The Applicant has relied upon the following case laws;

- (i) Hargovind Das K. Joshi vis. Collector of Customs Civil Appeals Nos. 139-143 of 1985, decided on 6-1-1987; Absolute Confiscation of Goods by Collector without considering question of redemption on payment of fine although having discretion to do so - Matter remanded to Collector for consideration of exercise of discretion for imposition of redemption fine - Section 125 of Customs Act, 1962
- (ii) Alfred Menezes v/s. Commissioner of Cus..(C.S.I.) Airport, Mumbai. Final Order Nos. A/613-614/2008-WBZ/C-II/(SMB) and Stay Order Nos. S/298 299/2008-WBZ/C-II(SMB), dated 1-8-2008 in Application Nos. C/Stay/862 and 1063/2008 in Appeal Nos. C/531-532/2008 ; Power of adjudicating authority under provisions of Customs Act, 1952 to offer redemption fine in lieu of confiscation of prohibited / restricted goods confiscated-Section125(1) Ibid clearly mandates that it is within the power of adjudicating authority to offer redemption of goods even in respect of prohibited goods.

- (iii) T. Elavarasan Vs Commissioner of Customs (Airport), Chennai [2011 (266) ELT 167 (Mad)]
- (iv) Yakub Ibrahim Yusuf vis. Commissioner of Customs, Mumbai : Final Order No. A/362/2010-WBZ/C-II/(CSTB), dated 28-10-2010 in Appeal No. C/51/1996-Mum;
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 - It does not refer to goods whose import is permitted subject to restriction, which can be confiscated for violation of restrictions, but liable to be released on payment of redemption fine since they do not cause danger or detriment to health.
- (v) Mohini Bhatia vs. Commr. Of Customs [1999(106) E.L.T 485 (Tri-Mum)]
- (vi) Universal Traders vs. Commissioner [2009 (240) E.L.T. A78 (SC)]
- (vii) Gauri Enterprises vs. CC, Pune [2002 (145) ELT (705) (Tri Bangalore)]
- (viii) Shaik Jamal Basha vs. Government of India [1997 (91) ELT 277(AP)]
- (ix) VP Hameed vs. Collector of Customs Mumbai 1994(73) ELT 425 (Tri)
- (x) Union of India v/s. Dhanak M. Ramji : Writ Petition Nos. 1397 with 1022 of 2009, decided on 4-8-2009 ; Confiscated goods Redemption of Ownership Tribunal order assailed on the ground that goods could not be released to non-owner- Finding by Tribunal that application for release of goods maintainable Goods not prohibited but became prohibited due to violation of law - Discretion properly exercised by Tribunal in ordering release of confiscated goods on payment of redemption fine.
- (xi) P.Sinnasamy vs. Commr. Of Customs, Chennai [2007(220)ELT 308]]
- (xii) A Rajkumari vs. Commr. of Customs (Airport-Air cargo) Chennai [2015(321) E.L.T. 540].
- (xiii) Kadar Mydin vs. Commissioner of Customs (Preventive), West Bengal [2011 (136) ELT 758]
- (xiv) Sapna Sanjeev Kolhi vs. Commr. Of Customs, Airport Mumbai [2008(230) ELT 305]]
- (xv) Vatakkal Moosa vs. Collector of Customs, Cochin [1994 (72) ELT (G.O.I)]
- (xvi) Halithu Ibrahim vs. CC [2002-TIOL 195 CESTAT-MAD]
- (xvii) Krishnakumari vs. CC, Chennai [2008 (229) ELT 222 (Tri Chennai)]
- (xviii) S.Rajagopal vs. CC, Trichy [2007 (219) ELT 435 (Tri-Chennai)]
- (xix) M. Arumugam vs. CC, Trichirapalli [2007 (220) ELT 311 (Tri-Chennai)]

- (xx) Commr. Of C.Ex & ST, Lucknow vs, Mohd. Halim Mohd. Shamim Khan [2018(359) ELT 265(Tri-All)]-Held that only prohibited goods cannot be released on payment of redemption fine-Gold not prohibited and cannot be confiscated absolutely-Order permitting release of such gold on payment of redemption fine in lieu of confiscation upheld

Under the circumstances, the Applicants prayed that the gold be released under Section 125 of the Customs Act, 1962 on nominal redemption fine alongwith applicable duty and personal penalty be reduced.

7. Personal hearing in the case was scheduled for 05.07.2023. Shri N.J. Heera, Advocate appeared for the personal hearing on the scheduled date on behalf of the Applicants. He submitted that that applicants individually brought small quantity of gold for personal use and are not habitual offenders. He requested to provide an option to redeem these goods on reasonable fine and penalty.

8. The Government has gone through the facts of the case and observes that the Applicants had used an ingenious method to smuggle the gold into the country. The Applicant No. 1 had brought the 13 gold links weighing 128 grams which were concealed in the buttons stitched on thirteen childrens' trousers which was kept in the bag and also recovered 06 gold sticks weighing 271 grams which were concealed in the metal stand of the television and collectively valued at Rs. 11,04,017/-, Applicant No. 2 had brought the 12 gold links weighing 153 grams which were concealed in the buttons stitched on twelve childrens' trousers which was kept in the bag and also recovered 06 gold sticks weighing 270 grams and which were concealed in the metal stand of the television and collectively valued at Rs. 11,70,424/- and Applicant No. 3 had brought the 12 gold links weighing 158 grams which were concealed in the buttons stitched on

twelve childrens' trousers which was kept in the bag and also recovered 06 gold sticks weighing 270 grams which were concealed in the metal stand of the television and collectively valued at Rs. 11,84,259/-. It suggests that the Applicants were part of a syndicate which was involved in smuggling the gold clandestinely into the country. But for the alertness of the staff of Customs, the gold would have escaped detection. All the three Applicants had failed to declare the goods to the Customs at the first instance as required under Section 77 of the Customs Act, 1962. The Applicants had not disclosed that they were carrying dutiable goods. It was only when they declared the television sets and scanning of the television sets revealed some suspicious dark images and after detailed examination was conducted that the impugned gold which was ingeniously concealed was recovered from the Applicants and the method of carrying the gold adopted by the Applicants clearly revealed their intention not to declare the impugned gold and thereby evade payment of Customs Duty. The confiscation of the gold was therefore justified and thus, the Applicants had rendered themselves liable for penal action.

9. Government observes that 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.), 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 Applicants thus liable for penalty.

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, is 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. Government observes that the Applicants had concealed the gold in an ingenuous manner to smuggle the impugned gold i.e. the gold was concealed in the metal stand of the television sets carried by them and also concealed in the buttons stitched on childrens' trousers. The Applicants had used identical methods to smuggle the gold. This indicates that the Applicants was part of a syndicate engaged in the smuggling of gold and evading payment of duty. It also revealed their criminal bent of mind and a clear intention on the part of the Applicants to evade duty and smuggle the gold into India. The redemption of the gold would be an incentive to smuggle gold with impunity, pay the fine and get away.

13. Further, the Appellate Authority at para 6 of the impugned Order-in-Appeal has stated as under:

"I find that appellant no. 1 in his statement recorded under Section 108 of Customs Act, 1962 had inter alia admitted that that the seized gold was purchased by him from a shop at Pahurat in Bangkok; that he was in the business of computer repairing and his monthly income was around 20,000/- per month. Appellant no. 2 in his statement recorded under Section 108 of Customs Act, 1962 had inter alia admitted that he was doing business of bringing garments and televisions from Bangkok and selling in India for past six years and travelled 10-12 times from Bangkok to Mumbai. I find that all the appellants admitted in their statements that they had taken loan to purchase the gold from their friends and relatives in Mumbai and converted into foreign currency in illegal manner from grey market and did not declare the same at the time of departure before the Customs. All these details brought on record during investigation goes to suggest that all the three appellants was arrived from same flight and carried almost same quantity of gold in same manner and the concealment was done in premeditated and ingenious manner which was hard to detect during routine checks and surveillance. I find that all the three appellant had reported to the Red Channel of Customs to declare Television set carried by them and detail examination of the same resulted into the recovery of impugned gold which suggests that the appellants had tried to mislead the department to smuggled the impugned gold into India without paying the applicable Customs Duty. I observe from the findings of the adjudicating authority that the appellant No. 1 and 3 are frequent flyer and had visited 10 times abroad in a span of three

*months and admittedly they are involved into the business of carrying garments and television sets from Bangkok. At the time of interception all the appellants concealed the impugned gold into the television sets and boy's trousers which clearly suggests that they had been involved in such type of gold smuggling on previous occasions also and are habitual offenders or professional smugglers.**

14. Though the option to allow redemption of the 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 and ingenious with a clear attempt to smuggle the gold collectively weighing 1250 grams, it is a fit case for absolute confiscation which would act as a deterrent to such offenders. Thus, taking into account the facts on record and the novel and ingenious modus operandi, the Original Adjudicating Authority had rightly ordered and the Appellate Authority has rightly echoed the absolute confiscation of the impugned gold. But for the intuition and the diligence of the Customs Officers, the gold would have passed undetected. The redemption of the gold will encourage such concealment as, 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. Government thus concurs with the findings of the lower authorities and holds that the absolute confiscation of the gold to be in order.

15. Government finds that the penalty of Rs. 1,20,000/-, Rs. 1,25,000/- and Rs. 1,30,000/- respectively imposed on the three Applicants under Section 112(a) and (b) of the Customs Act, 1962 is commensurate with the omissions and commissions committed is inclined to uphold the same.

16. In view of the above, the Government upholds the Orders-in Appeal Nos. MUM-CUSTM-PAX-APP-562, 563, 564/ 2019-20 dated 27.09.2019 [Date of issue: 11.10.2019] passed by the Commissioner of Customs (Appeals), Mumbai Zone-III and is not inclined to interfere with the same.

17. The Revision Applications are dismissed.

Shrawan
31/8/23
(SHRAWAN KUMAR)

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

627-
ORDER NO. 629/2023-CUS (WZ)/ASRA/MUMBAI DATED 31.08.2023

To,

1. Shri. Sandeep Ochani, S/o Shri Jagdish Ochani, 54-55/B, Parshavanath Nagar, RTO road, Indore 452 009.
2. Shri Kishore Ghanshamdas Dhankani, Barrak No. 712, Room No.3, Near Central Hospital, Ulhasnagar Thane 421 003.
3. Shri Rakesh Ashok Kateja, S/o Ashok Jagan Kateja, Flat NO B-28, 4th Floor, Seema Apartments, Khemani Road, Ulhasnagar, Thane 421 002
4. 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 N.J Heera, Advocate, Nulwala Building, Ground Floor, 41, Mint Road, Opp.G.P.O. Fort, Mumbai 400 001.
3. Sr. P.S. to AS (RA), Mumbai.
4. File copy.
5. Notice Board.

