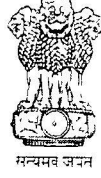


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GOVERNMENT OF INDIA  
MINISTRY OF FINANCE  
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Mumbai-400 005

F.No. 371/507/B/2022-RA

698

Date of issue: 30.01.2024

ORDER NO. 65/2024-CUS (WZ)/ASRA/MUMBAI DATED 24.01.2024 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. Asif Khan

Respondent : Commissioner of Customs, Pune.

Subject : Revision Application filed under Section 129DD of the Customs Act, 1962 against the Order-in-Appeal No. PUN-CT-APP II-(VNT)-128-2022-23 dated 19-09-2022 [Date of issue: 19-09-2022] [F.No. V(2) CT(A-II)/68/2021-22GAPPL/COM/CUSP/170/2022] passed by the Commissioner of Customs (Appeals), Central Tax, Pune.

**ORDER**

This Revision Application has been filed by Mr Asif Khan (herein referred to as the 'Applicant') against the Order-in-Appeal No. PUN-CT-APP II-(VNT)-128-2022-23 dated 19-09-2022 [Date of issue: 19-09-2022] [F.No V(2) CT(A-II)/68/2021-22GAPPL/COM/CUSP/170/2022] passed by the Commissioner of Customs (Appeals), Central Tax, Pune

2. Brief facts of the case are that on 18.08 2017, on intelligence, the applicant holding passport No N5937836 on arrival from Abu Dhabi by jet Airways flight No 9W513 was intercepted by Customs officers at Pune International Airport while attempting to pass through the green channel without filing customs declaration. The applicant has been questioned whether he was carrying any dutiable goods, the applicant replied in negative. Further applicant's hand bag and trolley bags were screened on the X-ray machine and the same revealed presence of some suspicious goods concealed in brown coloured trolley bag. Accordingly, examination of the applicant's baggage was carried out in the presence of two independent witnesses under a panchanama. Thorough examination of the brown coloured trolley bag after cutting inner lining thereof resulted in recovery of a rhodium coated white coloured metallic wire suspected to be of gold found concealed therein. The bag also contained a hair dresser and one AC inverter, examination whereof resulted in recovery of three rhodium plated cylindrical rods and one rhodium plated cuboid found concealed therein respectively, suspected to be made of gold. Examination of the items viz metallic wires, rhodium plated cylindrical rods and rhodium plated cuboid is said to have been carried out by Government valuer Shri Dinesh N Kalra of M/s Hero Kalra Gems Jewellers (Registration No CAT VIII/547) who reported the respective items recovered to be made of gold having purity of 24K. As per the valuer's certificate/report

bearing no. 882 dated 18-08-2017, all items put were reported to be collectively weighing 1674 62 gms and valued at Rs 49,55,200/- The items were seized under the provisions of the Customs Act, 1962 under reasonable belief that the same were attempted to be smuggled into India in contravention of the provisions of the Act Statement of the applicant were recorded on 18.08.2017 under Section 108 of the Customs Act, 1962 , wherein the he stated that he was working as forklift operator/ driver with water base shipping and Mr. Ali bhai at Dera, Dubai who was working as a transporter has asked him to carry a trolley bag which contained gold to India for monetary benefit of Rs. 12,000/-

3. After following the due process of law, the Original Adjudicating Authority (OAA) i.e. Additional Commissioner of Customs, Pune, vide Order-In-Original (OIO) No. PUNE-CUSTOMS-000-ADC-11-17/18 dated 28.03.2018 ordered for the absolute confiscation of the impugned gold items weighing 1674 62 gms and valued at Rs. 49,55,200/- under Section 111 (d), (l) and (m) of the Customs Act, 1962. A penalty of Rs. 4,50,000/- was imposed on the Applicants under Section 112(a) and (b) and a penalty of Rs.25,000/- under Section 114AA of the Customs Act, 1962

4. Aggrieved, with this Order, the Applicant filed an appeal before the Appellate Authority (AA) viz, Commissioner of Customs (Appeals), Central Tax, Pune who vide Order-in-Appeal No PUN-CT-APP II-(VNT)-128-2022-23 dated 19-09-2022 [Date of issue: 19-09-2022] [F.No. V(2) CT(A-II)/68/2021-22GAPPL/COM/CUSP/170/2022] passed by the Commissioner of Customs (Appeals), Central Tax, Pune. upheld the order passed by the OAA.

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

5.01 That the impugned order is bad in law and unjust,

5.02. That the impugned order has been passed without giving due consideration to the documents on record and facts of the case and is ex-facie, illegal and de-hors the provisions of law as contemplated in the Customs Act,1962,

5.03 That the OAA ought to have appreciated that dutiable goods brought by the Applicants is neither restricted nor prohibited,

5.04 That the foundation of seizure being without jurisdiction , is not sustainable in law

5.05. 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;

5.06 That once the department 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,

5.07 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;

5.08 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 1992(61) E.I.T.172(S C.), 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) Yakub Ibrahim Yusuf vis. Commissioner of Customs, Mumbai 2011(263) e L T.685(Tri -Mumbai)
- (iii) Shaik Jamal Basha vs. Government of India [1997 (91) ELT 277(AP)
- (iv) VP Hameed vs Collector of Customs Mumbai 1994(73) ELT 425 (Tri)
- (v) 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.

Under the circumstances, the Applicant prayed that set aside the impugned order and release the gold without any penalty or fine sine its town seizure and it's already duty paid.

6. Personal hearing in the case was scheduled for 07 09.2023 or 14.09.2023. Vide email dated 13 09 2023 Shri Vinayak Kalgekar, Advocate of the Applicant requested for to attend the personal hearing through virtual mode on 13 09 2023. During personal hearing through virtual mode, he submitted that the gold is restricted item He further submitted that though gold was concealed there was no intention and requested to allow redemption of gold on reasonable fine and penalty.

7 The Government has gone through the facts of the case and observes that the Applicant had brought the weighing 1674.62 gms having purity of 24K and valued at Rs. 49,55,200/- which was recovered from trolley bags from the Applicant during intercepted by the Customs officers From the statement dated 18 08.2017 it is cleared that Applicant 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 The gold was of very high purity and was in primary form, indicates that the same was for commercial use However, after being intercepted by Customs officer, Pune, on intelligence, the impugned gold was recovered from the Applicant The nature of concealment reveals the mindset of the Applicant to not only evade duty but smuggle the gold. It also reveals that the act committed by the Applicant was conscious and pre-meditated. The Applicant was an option to declare and pay Customs duty during his arrival at Airport. However the Applicant has not declare nor paid the custom duty Had he not been intercepted by the Customs officer, Pune, the Applicant would have gotten away with the gold The confiscation of the gold was therefore justified and thus, the Applicant had rendered himself liable for penal action.

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 Applicant 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 ”*

11.1 Government observes that besides the quantum of gold, which indicates that the same was for commercial use, the purity and primary form of the gold indicated that the same was for commercial use. Government notes from the records that it had come to light that the Applicant had stated that he was not the owner of the gold which further suggests that the Applicant was a carrier for a syndicate entrusted with smuggling of the gold.

11.2 The aforesaid circumstances of the case and ingenious concealment, probates that the applicant 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 ordering the absolute confiscation of the gold and has been rightly upheld by the Appellate Authority.

12 The main issue in the case is the 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, conscious and ingenious, type of gold being for commercial use, this being a clear attempt to brazenly smuggle the impugned gold by the Applicant who stated that he was not the owner of the gold, 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



impugned gold. The redemption of the gold will encourage non bonafide and unscrupulous elements to resort to concealment and bring 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 is in agreement with the order of the OAA absolutely confiscating the impugned gold. The absolute confiscation of the gold would act as a deterrent against such persons who indulge in such acts with impunity.

13. Government finds that the penalty of Rs 4,50,000/- imposed on the Applicant by the OAA under Section 112(a) & (b) of the Customs Act, 1962 is commensurate with the omissions and commissions committed by the Applicant. Penalty of Rs 25,000/- imposed on the applicant under Section 114 of the Customs Act is set aside as the same is not required in the infacts of instant case once penalty under section 112 has been imposed.

14. For the aforesaid reasons, the Government is inclined not to interfere with the Order-in-Appeal No. PUN-CT-APP II-(VNT)-128-2022-23 dated 19-09-2022 [Date of issue: 19-09-2022] [F.No V(2) CT(A-II)/68/2021-22GAPPL/COM/CUSP/170/2022] passed by the Commissioner of Customs (Appeals), Central Tax, Pune and upholds the same except for setting aside penalty of Rs 25,000/- under Section 114 of the Customs Act, 1962.

15. The Revision Application is disposed of on above terms.

  
( SHRAWAN KUMAR )

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

ORDER NO. 65 /2024-CUS (WZ)/ASRA/MUMBAI DATED 01 01 2024

To,

- 1 Mr. Asif Khan , Kazaba Purva Mohalla, Miya Tola Pirasah, Dist- Unnaw, Uttar-Pradesh-209825
- 2 The Commissioner of Customs, Pune, GST Bhawan. 41/A, Sasson Road. Pune-411001

Copy to

- 1 The Commissioner of Customs (Appeals), Pune, 2<sup>nd</sup> Floor, 'F' Wing , GST Bhawan, 41/A, Sasson Road, Pune-411001.
2. Shri Vinayak Kalgekar, 177A, Jul Apartment, Flat No 1, Next to Shelar TVS Showroom, Parvati -Pune-411009
- 3 Sr. P S to AS (RA), Mumbai
- 4 File copy
5. Notice Board.