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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. 371/227/B/2021-RA/6805 : Date of Issue : 14.09.2023

ORDER NO. 667/2023-CUS (WZ)/ASRA/MUMBAI DATED 14.09.2023 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 Shah Kunal Arinkumar

Respondent : Pr. Commissioner of Customs, Ahmedabad.

Subject : Revision Application filed under Section 129DD of the Customs Act, 1962 against the Order-in-Appeal No. AHD-CUSTOM-000-APP-779-20-21 dated 26.02.2021 [Date of issue: 26.02.2021] [F. No. S/49-785/CUS/AHD/2019-20] passed by the Commissioner of Customs (Appeals), Ahmedabad.

ORDER

The Revision Application has been filed by Shri Shah Kunal Arinkumar (herein referred to as the 'Applicant') against the Order-in-Appeal No. AHD-CUSTM-000-APP-779-20-21 dated 26.02.2021 [Date of issue: 26.02.2021] [F. No. S/49-785/CUS/AHD/2019-20] passed by the Commissioner of Customs (Appeals), Ahmedabad.

2.1 Brief facts of the case are that on 24.03.2019, on suspicion, the officers of Customs at the Sardar Vallabhbhai Patel International Airport (SVPIA), Ahmedabad intercepted the Applicant who had arrived from Dubai by Indigo Flight No 6E 72, when he was about to exit the Customs green channel. His baggage was scanned through the X ray machine and nothing objectionable was found. The Applicant was asked to walk through the Door Frame Metal Detector (DFMD) after removing all the metallic substances worn by him. It was noticed that the Applicant had hidden yellow metal as buckle of belt made of raw gold. Pursuant to be being assayed, the gold belt buckle with black Rhodium coating, totally weighing 233.400 grams and valued at Rs. 7,76,522/- (Market value) and Rs. 6,81,295/- (Tariff Value) were seized under the reasonable belief that the said goods were smuggled into India and were liable for confiscation under the provisions of the Customs Act, 1962

3. After following the due process of law, the Original Adjudicating Authority (OAA) i.e. Assistant Commissioner of Customs, SVPI Airport, Ahmedabad vide Order-in-Original No. 22/AP/MM-AC/SVPIA/2019 dated 12.01.2020 [Date of issue: 29.01.2020] ordered the absolute confiscation of the impugned one gold belt buckle weighing 233.400 grams and made of 24 Kt purity and having a tariff value of Rs. 6,81,295/- and market value of Rs. 7,76,522/- under the provisions of Section 111 (d), (i) and (l) of the Customs

Act, 1962. A penalty of Rs. 2,00,000/- was imposed on the Applicant under Section 112 (a) and (b) of the Customs Act, 1962.

4. Aggrieved with the Order-in-Original, the Applicant filed an appeal before the Appellate Authority (AA) viz, Commissioner of Customs (Appeals), Ahmedabad, who vide Order-in-Appeal No. AHD-CUSTOM-000-APP-779-20-21 dated 26.02.2021 [Date of issue: 26.02.2021] [F. No. S/49-785/CUS/AHD/2019-20] upheld the order of the OAA and rejected the appeal.

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 order of the lower authority is contrary to the law, weight of evidence and violates the principles of natural justice;

5.02. That the lower authority ought to have seen that the Applicant was not allowed to declare the goods under section 77 of Customs Act;

5.03. The lower authority has committed a grave error in upholding the absolute confiscation of the goods because the gold is not a prohibited item and the lower authority has no right in law to uphold absolute confiscation of the said good. The Applicant has relied upon the following case laws in support of his contention

- (i) Neyveli Lignite Corporation Limited vs. UOI [2009 (242) E.L.T. 487 (Mad)]
- (ii) Commissioner of C.Ex. and S.T. Surat-1 vs. Dharmendra Pansuriya [2018 (363) E.L.T. 555 (Tri- Ahmd.)]
- (iii) Alam Vs. Comm. Of Customs. C.Ex and S.T. (Appeals), Meerut-1 [2018 (364) E.L.T. 392 (Tri-All.)]
- (iv) IN RE: Ranmeet Bhatin [2018 (364) E.L.T. 1144 (G.O.I)]
- (v) Comm. Of Customs (Preventive) Lucknow vs. Ibrahim Abdullah Rahiman [2018 (363) E.L.T. 534 (Tri-All)]
- (vi) In Re: Mohd. Zia Ul Haque [2014 (314) EL.T. 849 (G.O.I.)]
- (vii) Mridul Agrawal vs. Commissioner of Customs, Lucknow [2018 (362) E.L.T. 847 (Tri-All.)]
- (viii) In Re: Jatinder Singh-2018 (361) E.L.T. 958 (G.O.L.)

5.04. The lower authority ought to have seen that he has not crossed the customs barrier and was intercepted at the Metal scanner itself and had not gone to green Channel;

5.05. That it is not a violation if he goes to green channel and the Applicant was well within the customs barrier and in arrival hall itself and under the circumstances the import itself not completed;

5.06. The lower authority ought to have seen that he was working there and eligible to import gold and he had purchased the gold out of his hard earned money for his personal use;

5.07. That the rule and practice is the officer has to send the passenger to red channel when a passenger approached green channel with dutiable goods or suspected. But in this case it was not so and thus the Applicant was well within the line and therefore the import itself not completed. The Applicant has relied on the following case laws in support of his contention

- (i) K.R.Ahmed Shaw Vs Asst Collector of Custom [1981 (152) ELT 11].

5.08. That the Applicant was inside the arrival hall and was yet to submit his declaration before the Customs officials and did not try to go through the green channel and the Applicant was intercepted before he could go to the customs table for declaration and thus no opportunity was given to him for declaration and clearance of the goods. The Applicant has relied on the following case laws in support of his contention

- (i) Union of India and Others vs. Khalil Kecherim of Teheran [1983 ELT 94].
- (ii) A.G. Syed Moosa vs. Commissioner of Customs [2001 (46) RLT 186]
- (iii) J.V.Gokul & Co. vs. The Asst. Collector sales tax and ors [AIR 1960 SC 595]
- (iv) State of Trav., Co. vs. S.V.C Factory [AIR1953 SC 335]

5.09. That as the Applicant was intercepted before the declaration and he was not allowed to cross the customs barrier and therefore the goods did not cross the customs barrier, the import itself not completed in this case. Thus the Applicant has an option under section 80 of the Customs Act to request for Detention and re-export the goods.

5.10. That the officers have to apprise the change in the notification and permit the passenger to detain the goods in warehouse and allowed re export.

5.11. That the import of gold is not prohibited and is only regulated. The Applicant has relied on the following case law

- (i) Yakub Ibrahim Yusuf vs. Commissioner of Customs (Mumbai) [2011 (263) ELT 685]

5.12. That section 125 of the Customs Act is enacted for the reason to allow the importer or exporter to redeem the goods on payment of fine after confiscation and nowhere in the Act says absolute confiscation is necessary if the goods are not declared or concealed or misdeclared and the adjudicating authority should exercise the section 125 of the Customs Act after passing the confiscation order.

5.13. That the Applicant is eligible passenger to import gold and therefore the import of gold by him is not prohibited and can be released on payment of duty, RF and penalty. The Applicant has relied on the following case law

- (i) Hargovind Das K. Joshi & ors Vs Collector of Customs [1982(2) SCC 230]
- (ii) Sapna Sajeew Kohli vs CC, Airport, Mumbai [2008(230) E.L.T. 305 (Tri Mumbai)]
- (iii) Sapna Sajeew Kohli vs CC, Airport, Mumbai [2010(253) E.L.T.A52 (S.C)]

5.14. That the lower authority ought to have seen that even if the gold is concealed also the offer to redeem the goods should have been given. The Applicant has relied on the following case laws

- (i) Calcutta High Court in Suresh Bhosle vs. Commissioner of Customs in G.A. No. 450 of 2008 dated 3 November 2008
- (ii) T. Elavarasan Vs Commissioner of Customs, Chennai [2011 (266) E.L.T. 167 (Mad)]
- (iii) Uma Balasaraswathi Vs Collector of Customs, [1988 (37) ELT 106 (Tribunal)]

5.15. That ongoing through the provisions of Section 111(d) of the Customs Act, 1962 the said provisions are applicable only to those goods which are as prohibited goods and not to those goods which are considered as prohibited goods because of certain infractions on the part of the importer or the passenger and in the instant case is not sustainable. The Applicant has relied on the following case laws

- (i) Commissioner vs. Mohd. Halim Mohd. Shamim Khan [2018 (359) E.L.T. 269 (Tribunal - All.)]
- (ii) Rajendra Bajaj vs. Commissioner of Customs (CSI Airport), Mumbai [2010(252) ELT 529 (Tri Mumbai)]
- (iii) Hindustan Steel Ltd. vs. State of Orissa [1978(2) ELT (J 159) (S.C.)]
- (iv) Hon ble Tribunal in Krishnakumari vs. Commissioner of Customs, Chennai [2008(229) E.L.T. 222 (Tri- Chennai)]
- (v) Government of India Revision Authority Order in F.No.373/48/B/2006-RA of Bepari Salcem
- (vi) Re Jatinder Singh [2018(361) 958(GOI)]
- (vii) Escorts Herion Ltd., Vs Commissioner of Customs, [1999 (107) ELT 599]
- (vii) A.K.Jewellers vs Commissioner of Customs Mumbai.
- (viii) K & K Gems vs. Commissioner of Customs [1998 (100) ELT 70]
- (ix) Chordia Gems Vs Commissioner of Customs, Jaipur [2002 (144) ELT 70]
- (x) An order of GOI made in 373/75/B/2002-RA.Cus dated 21.10.2002
- (xi) Alukkas exporters vs Commissioner of Customs, [2002 (145) ELT 227]

5.16. That the lower authorities ought to have seen that once the goods are redeemed under section 125 of the Customs Act, the Applicant is absolute owner of the goods and is at liberty to clear the goods for home consumption or to re export the goods;

5.17. That the lower authority ought not to have imposed higher penalty of the 50% of the value of the goods when there is no mens rea on the part of the Applicant;

5.18. That the lower authority ought to have seen that when the Applicant was not given opportunity to declare before the proper officer and therefore him right was curtailed by the authorities and thereby his right of exercising the section 80 of Customs Act was also curtailed;

5.19. The lower authority ought to have allowed to redeem the goods and permit him to clear the goods on payment of concessional rate of duty or re-export the goods as per the request of the Applicant;

5.20. The lower authority ought to have seen that once the redemption fine is paid and the confiscated goods are redeemed the importer becomes the full owner of the goods and it is open to him to deal with the goods as he desires either to use it in domestic consumption or to export the same;

5.21. That the lower authority ought to have seen that there are lot of decisions that Sec 125 of the Customs Act, 1962 does not prohibit reshipment or export under section 74 of Customs Act, 1962.

Under the circumstances, the Applicant prayed that the order of absolute confiscation be set aside and the Applicant be permitted to clear the gold by paying concessional rate of duty or re-export the gold on payment of minimum redemption fine as there is no profit, release the gold buckle of belt on payment of duty and set aside the penalty or reduce the penalty.

6. Personal hearing in the case was scheduled for 09.08.2023. Shri I.N Pathan, the Advocate for the Applicant, vide E mail, forwarded a letter dated 07.08.2023 wherein he interalia stated that he was unable to physically attend the hearing on 09.08.2023 due to personal difficulties and requested that the grounds of application be considered as submissions/arguments of the personal hearing. In the E mail he further stated that the Applicant was residing in Dubai since more than 6 years and requested for re-export of the impugned gold article on reasonable fine and reduction of penalty and attached the copy of the UAE Resident Identity card, visa and passport of the Applicant. No one appeared for the personal hearing on behalf of the Respondent.

7. The Government has gone through the facts of the case and observes that the Applicant had brought one gold belt buckle weighing 233.400 grams and made of 24 Kt purity and having a tariff value of Rs. 6,81,295/- and market value of Rs. 7,76,522/- 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, on being intercepted, gold belt buckle weighing 233.400 grams and made of 24 Kt purity and having a tariff value of Rs. 6,81,295/- and market value of Rs. 7,76,522/- was recovered from the Applicant and it revealed his intention not to declare the said gold buckle and thereby evade payment of Customs Duty. The confiscation of the gold buckle 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 (i) 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 buckle "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 a 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 Jhamatmal 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-I [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.

13.2. Further, The Hon'ble High Court, Madras, in a judgement passed on 08.06.2022 in WP No. 20249 of 2021 and WMP No. 21510 of 2021 in respect of Shri. Chandrasegaram Vijayasundaram and 5 others in a matter of Sri Lankans collectively 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.

13.3. 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 the gold belt buckle weighing 233.400 grams and made of 24 Kt purity at the time of arrival, the confiscation of the same was justified. However, Applicant is a Non Resident Indian and the quantum of gold under import is small and is not of commercial quantity. The impugned gold belt buckle weighing 233.400 grams 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. Government notes that the applicant, who is a Non Resident Indian, has prayed that the absolute confiscation be set aside and he be allowed to re-export the impugned gold belt buckle.

15. Government finds that this is a case of non-declaration of gold jewellery. The absolute confiscation of the impugned gold belt buckle weighing 233.400 grams 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, Government considers granting an option to the Applicant to re-export the impugned gold belt buckle on payment of redemption fine, as the same would be more reasonable and fair. Considering the above facts, Government is inclined to modify the absolute confiscation and allow the impugned gold belt buckle weighing 233.400 grams and made of 24 Kt purity to be re-exported on payment of a redemption fine.

16. The Applicant has also pleaded for reduction of the penalty imposed on him. The market value of the gold in this case is Rs. 7,76,522/-. From the facts of the case as discussed above, Government finds that the penalty of Rs. 2,00,000/- imposed on the Applicant under Section 112 (a) & (b) of the

Customs Act, 1962 is excessive taking into account the quantum of gold and the omissions and commissions of the Applicant.

17. In view of the above, the Government modifies the Order-in-Appeal No. AHD-CUSTOM-000-APP-779-20-21 dated 26.02.2021 [Date of issue: 26.02.2021] [F. No. S/49-785/CUS/AHD/2019-20] passed by the Commissioner of Customs (Appeals), Ahmedabad and allows the Applicant to redeem the impugned gold belt buckle weighing 233.400 grams and made of 24 Kt purity and having a tariff value of Rs. 6,81,295/- and market value of Rs. 7,76,522/-, for re-export, on payment of a redemption fine of Rs. 1,25,000/- (Rupees One Lakh Twenty Five Thousand only). The penalty of Rs. 2,00,000/- imposed on the Applicant under Section 112 (a) & (b) of the Customs Act, 1962 by the OAA, being excessive, is reduced to Rs. 75,000/- (Rupees Seventy Five Thousand only).

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


(SHRAWAN KUMAR)

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

ORDER NO. 667 /2023-CUS (WZ)/ASRA/MUMBAI DATED 14.09.2023

To,

1. Shri Shah Kunal Arinkumar, 203, Simandhar Flats, Laxminarayan Society, Near Bank of Baroda, Usmanpura, Gujarat 380 013
2. The Pr. Commissioner of Customs, Custom House, Ahmedabad, 1st Floor, Custom House, Near All India Radio, Income Tax Circle, Navrangpura, Ahmedabad 380 009

Copy to:

1. The Commissioner of Customs (Appeals), Ahmedabad, 7th Floor, Mrudul Tower, Behind Times of India, Ashram Road, Ahmedabad 380 009.

2. Shri I.N Pathan, Advocate, F/102, Hyatt Residency, Nr. Kadri Party Plot, Sarkhej, Ahmedabad 380 055
3. Sr. P.S. to AS (RA), Mumbai.
4. File copy.
5. Notice Board.

