

REGISTERED
SPEED POST

GOVERNMENT OF INDIA
MINISTRY OF FINANCE
(DEPARTMENT OF REVENUE)

8th Floor, World Trade Centre, Centre – I, Cuffe Parade,
Mumbai-400 005

F.No. 380/84/B/WZ/2018-RA / 596 : Date of Issue : ~~01.2023~~
01.02.2023

ORDER NO. 67 / 2023-CUS (WZ)/ASRA/MUMBAI DATED 30.01.2023 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 : Commissioner of Customs, CSI Airport, Mumbai

Respondent : Mr Mohammed Yasar Ballor Ibrahim

Subject : Revision Application filed, under Section 129DD of the
Customs Act, 1962 against the Order-in-Appeal No.
MUM-CUSTM-PAX-APP-94/18-19 dated 16.05.2018
[Date of issue: 16.05.2018] [F.No. S/49-293/2016] passed
by the Commissioner of Customs (Appeals), Mumbai Zone-
III.

ORDER

The Revision Application has been filed by the Commissioner of Customs, CSI Airport, Mumbai (herein referred to as the 'Applicant') against the Order-in-Appeal No. MUM-CUSTOM-PAX-APP-94/18-19 dated 16.05.2018 [Date of issue: 16.05.2018] [F.No. S/49-293/2016] passed by the Commissioner of Customs (Appeals), Mumbai Zone-III.

2. Brief facts of the case are that on 23.08.2014, the Customs Officers at the Chhatrapati Shivaji International (CSI) Airport, Mumbai intercepted the Respondent who had arrived from Dubai by Air India Flight No AI-984 near the exit gate after he had cleared himself through the Green Channel. The Respondent had left column No. 9 i.e 'Total Value of Dutiable Goods being imported' as "Blank". The Respondent was asked whether he was carrying any contraband/dutiable goods/gold and Foreign/Indian currency in his baggage or on his person to which he replied in the negative. The Respondent was asked to pass through the metal detector door frame which beeped and gave a positive signal for presence of some metal on the person of the Respondent. Personal search of the Respondent led to the recovery of two gold bars of 01 Kg each and 02 gold bars of 10 tolas each concealed in the pant worn by the Respondent.

The said 02 gold bars of 01kg each and 02 gold bars of 10 tolas each, totally weighing 2232 grams and valued at Rs. 58,23,846/- were seized under the reasonable belief that the same were attempted to be smuggled into India in contravention of the provisions of the Customs Act, 1962.

The Respondent in his statement admitted that the gold did not belong to him and he was unaware of the actual owner of the gold and that he had not declared the gold to avoid payment of Customs duty and he tried to smuggle

the gold for monetary considerations. The Respondent admitted the knowledge, possession, concealment, carriage, non-declaration and recovery of the impugned gold.

3. 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 No. ADC/RR/ADJN/419/2015-16 dated 28.03.2016 [F. No. S/14-5-661/2014-15 Adjn SD/INT/AIU/610/2014 AP 'D'] ordered for the absolute confiscation of the impugned 02 gold bars of 01kg each and 02 gold bars of 10 tolas each, totally weighing 2232 grams and valued at Rs. 58,23,846/- under Section 111 (d), (l) & (m) of the Customs Act, 1962. Penalty of Rs. 6,00,000/- was imposed on the Respondent under Section 112(a) and (b) of the Customs Act, 1962.

4. Aggrieved, with this Order, the Respondent 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-94/18-19 dated 16.05.2018 [Date of issue: 16.05.2018] [F.No. S/49-293/2016] set aside the Order of the OAA and gave the Respondent the option to redeem the impugned gold on payment of redemption fine of Rs. 11,00,000/- and upheld the personal penalty under Section 112(a) & (b) of the Customs Act, 1962. The AA also ordered that the payment of duty and other charges, if any, be paid under Section 125(2) of the Customs Act, 1962.

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

5.01. That the recovery of 2232 grams of gold concealed in the Applicants' pants in the form of 02 gold bars of 01 kg each and 02 gold bars of 10 tolas each clearly indicated the premeditated intention of smuggling the same into India;

5.02. That the Applicant had admitted knowledge, recovery, non-declaration, concealment, possession and carriage of the gold and that the gold bars did not belong to him and that the entire act was to evade payment of duty and was done for a monetary consideration. The said confessional statement made by the Applicant before the Customs officials would be admissible as evidence against him as held in the case of K.I.Pavunny vs. Asst Collector (HQ), CEx, Cochin [1997(90) E.L.T.241 SC];

5.03. That the gold cannot be treated as the bonafide baggage and its import is in violation of Para 2.20 of the FTP (2009-14) making it liable for confiscation under Section 111(d) of the Customs Act, 1962 in view of the confessional statement of the Applicant;

5.05. That the option to redeem the seized goods under Section 125 of the said Act is the discretionary power of the adjudicating authority depending on the facts and circumstances of the case and after examining the merits and in the modus operandi of gold smuggling, such acts of misusing the liberalized facilitation process should be meted out with exemplary punishment and the deterrent side of law for which such provisions were made in law needs to be invoked. That the AA ought not to have allowed redemption of the gold;

5.06. That the ratio of the judgement in the case of Abdul Razzak vs. UOI [2012(275) E.L.T. 300(Ker)] is applicable to this case;

5.07. That the judgement of the Hon'ble Delhi High Court in the case of Jain Exports vs. UOI [1987(29) E.L.t. 753] was applicable to the instant case;

5.08. That prohibition in terms of Section 2(33) of the Customs Act, 1962 was attracted in the case of this nature and therefore absolute confiscation was

justified as held by the Division Bench of the Supreme Court in the judgement in the case of Om Prakash Bhatia vs. Commr. Customs [2003(6) SCC161];

5.09. That the OAA had taken an informed decision of confiscating the goods absolutely and imposition of penalty and the AA cannot be unmindful of the great weight to be attached to the finding of the OAA;

5.10. That if the OAA had acted bonafide through a speaking order which is not illogical or suffers from Procedural impropriety, the AA should not take a contrary view as held in the following case laws:

- (i) Shaikh Mohd. Omer vs. CC Calcutta and ors [[1970 2 SCC728]
- (ii) CC. Tuticorin vs. Sai Copiers [2008(226) E.L.T 486]
- (iii) Om Prakash Bhatia vs CC, Delhi [2003(155) E.L.T 423(SC)]

5.11. That as held in the case of Commissioner of Customs, Tuticorin vs. Sai Copiers [2008(226) E.L.t. 486 Mad], the order of the lower authority could be interfered with only in circumstances in which it was demonstrated that such order was purely arbitrary, whimsical and resulting in miscarriage of justice and the OIO does not suffer from any such vice and therefore redemption should not have been allowed by the AA;

5.12. That the reference of the AA to the order of CESTAT, Chennai in the case of A. Rajkumari vs. CC Chennai [2015(321)E.L.T 540 (Tri-Chennai)] is improper;

5.13. That since the goods confiscated was being smuggled without declaring to Customs and are of high value, AA has erred in allowing redemption of the goods.

Under the circumstances, the Applicant-department prayed to set aside the impugned OIA and uphold the OIO.

6. The Respondent filed his written submissions on the following grounds:

6.1. That the order passed by the AA is a well reasoned order and the justification/rationale for permitting the redemption of impugned goods is well founded and is based on solid grounds and sound principles of law;

6.2. That even though Section 125 is clear on the point of redemption and the AA had given reasoned order before passing thhe impugned order, there are a number of judgements passed in various forums wherein the goods were ordered to be released

- (i) Birla Corporation Ltd. vs. Commissioner of C.Ex, [2005 (186) ELT 266 (SC)]
- (ii) Commissioner of C.Ex vs. Jain Vanguard Polybutlene Ltd [2010(256) E.L.T. 523(Bom)]
- (iii) Nirma Ltd vs. CCE, Nasik [2012(276) E.L.T. 283 (Tri-Ahmd)]
- (iv) Gauri Enterprises vs. CC, Pune [2002(145) E.L.T 706(Tri-Bang)]
- (v) A. Rajkumari vs. CC (Aiport), Mumbai [2015(321) E.L.T. 540(Tri-Chennai)]

6.3 That in similar cases, gold was allowed to be release on redemption fine by Joint Secretary (RA)

- (i) CC, New Delhi vs. Niraj Kumar
- (ii) Abdul Sattar vs. UOI
- (iii) Commissioner of Customs, Kandla vs. Deluxe Exports-Order No2065-2076/2000-WBZ/C-II dated 25.07.2000
- (iv) R.Mohandas vs. CC, Cochin – WP (c) No 24074 and 39096 of 2015 decided on 29.02.2016

- (v) Yakub Ibrahim Yusuf vs. CC, Mumbai-Final Order No.A/362/2010-AWBZ/C-II/(CSTB) dated 28.10.2010
- (vi) UOI vs. Dhanak Ramji -Writ Petition No 1397 with 1022 of 2009 decided on 04.08.2009.

7. Personal hearing in the case was scheduled for 29.08.2019 or 03.09.2019, 16.09.2019 or 11.08.2022 or 23.08.2022 or 15.09.2022 or 22.09.2022. Shri N.J. Heera, Advocate appeared on 22.09.2022 for the personal hearing on behalf of the Respondent. He submitted that the Commissioner (Appeals) order is legal and reasonable and requested to maintain the same. No one appeared for the personal hearing on behalf of the Applicant-department.

8. The Government has gone through the facts of the case and observes that the Respondent had brought 02 gold bars of 01kg each and 02 gold bars of 10 tolas each, totally weighing 2232 grams and valued at Rs. 58,23,846/- by concealing in the pant worn by him 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 Respondent had not disclosed that he was carrying dutiable goods. However, pursuant to detailed questioning after interception, the impugned gold which was concealed in his pants was recovered from the Respondent and the method of carrying the gold adopted by the Respondent clearly revealed his intention not to declare the said gold and thereby evade payment of Customs Duty. The Respondent had pre-planned to avoid detection and thereby to evade Customs duty. The confiscation of the gold was therefore justified and thus, the Respondent had rendered himself liable for penal action.

9.1. The relevant sections of the Customs Act are reproduced below :

Section 2(33) of the Customs Act, 1962

“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 of the Customs Act, 1962

“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.”

9.2. 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.

10. 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”.

10.1. Further, in para 47 of the said case the Hon'ble High Court has observed “*Smuggling in relation to any goods is forbidden and totally prohibited. Failure to check the goods on the arrival at the customs station and payment of duty at the rate prescribed, would fall under the second limb of section 112(a) of the Act, which states omission to do any act, which act or omission, would render such goods liable for confiscation.....*”. Thus, failure to declare the goods and failure to comply with the prescribed conditions has made the impugned gold “prohibited” and therefore liable for confiscation and the Respondent in the instant case was 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 Jhamatnal 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 Shik 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.

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. Government observes that the aspect of allowing redemption of the gold has been gone into in great detail by the Appellate Authority and has passed a reasoned, legal and judicious order. The Appellate Authority while relying on various judgements having relevance to the grant of option to redeem the goods on payment of redemption fine has at Para 21,22 and 23 of the impugned Order in Appeal, stated as under:

"21. Therefore what transpires from various judgements of honourable Courts and other forums is that gold brought by the passenger and not declared to avoid payment of duty, the option of redemption under section 125 of Customs Act, 1962 can be exercised to secure ends of justice. In the case at hand, Appellant has pleaded to release the said gold on payment of redemption fine in terms of Section 125 of Customs Act, 1962.

22. The analysis of various judgments on the issue of redemption of gold under section 125 of Customs Act, 1962 make it clear that the discretion has to be exercised based on merits of each case and there cannot be any straight jacket formula to decide such cases. I find that in the case at hand the passenger had denied all allegations made in the SCN of having being acted as carrier vide letter dated 31.03.2015 and contended that there was no ingenious concealment as he gold has been found in pant pockets which is normal manner of carrying valuable

things. I find that in the Appeal submissions and during adjudication proceedings the appellant pleaded that the gold belongs to him and he had questioned his typed statement and denied having made any such averments. Besides, the department found nothing incriminating from the call data records to suggest that he was in contact with any person at Dubai or Mumbai to smuggling gold or was part of any repeated and organised smuggling racket. There are no investigations or findings with regard to the person who was supposed to collect the gold outside CSI Airport Mumbai or for whom the passenger has been alleged to carry the gold.

23. I find that the adjudicating authority ignored the fact that the passenger had denied all allegations in writing and claimed redemption of gold. The department failed to corroborate the allegation of being carrier even from the CDR collected from the mobile service provider and was able to intercept the person who allegedly had to collect gold at Mumbai Airport. I find that the honourable Apex Court in case of *Sri Kumar Agency vs CCB, Bangalore 2008 (232) T 577 (S.C.)*, *Escorts Ltd vs CCB, Delhi-11 2004 (173) E.L.T. 113 (S.C.)* and *CCE, Calcutta va Alnoori Tobacco Products 2004 (170) E.L.T. 135 (S.C.)* has stressed upon the concept of "**Circumstantial flexibility**", and held that **one additional or different fact may make a world of difference between conclusions in two cases and therefore disposal of cases by blindly placing reliance on a decision, not proper.**"

15. In the instant case, though the quantum of gold under import is not small, the gold has not been concealed ingeniously by the Respondent, and, there are no allegations that the Respondent is a habitual offender and was involved in similar offence earlier. Also as discussed by the Appellate Authority, there is nothing on record to prove that the Respondent was part of an organized smuggling syndicate. Government notes that at times, passengers adopt innovative methods to bring valuables and attempt to evade payment of duty, thus making the goods liable to confiscation. Government finds that this is a case of non-declaration of gold. The absolute confiscation

of the impugned gold leading to dispossession of the Respondent of the gold in the instant case would therefore be harsh and not reasonable and the Order of the Appellate Authority granting an option to the Respondent to redeem the gold on payment of suitable redemption fine is reasonable and fair.

16. The Government notes that while granting an option to redeem the gold on payment of a redemption fine, the Appellate Authority has laid an emphasis on the quantum of fine with a view to wipe out any profits accruing to the Respondent. Considering the quantum of gold seized, Government finds the redemption fine imposed in the OIA passed by the Appellate Authority to be legal and proper and does not merit interference by the Government.

17. In view of the above discussion, Government is inclined not to interfere with the Order-in-Appeal No. MUM-CUSTOM-PAX-APP-94/18-19 dated 16.05.2018 [Date of issue: 16.05.2018] [F.No. S/49-293/2016] passed by the Commissioner of Customs (Appeals), Mumbai Zone-III and upholds the same.

18. The Revision Application is decided on the above terms.


(SHRAWAN KUMAR)

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

ORDER NO. 67/2023-CUS (WZ)/ASRA/MUMBAI DATED 30.01.2023

To,

1. The Pr. Commissioner of Customs, C.S.I Airport, Terminal 2, Level-II, Sahar, Andheri (East), Mumbai - 400 099.
2. Mr. Mohammed Yasar Ballor Ibrahim, Balloor House, H.No. 2/82, Mogral Puthur Post, Kasargod, Kerala 671124.

Copy to:

1. Shri N.J. Heera, Advocate, Nulwala Building, Ground Floor, 41, Mint Road, Opp G.P.O, Fort, Mumbai 400 001.

2. The Commissioner of Customs (Appeals), Mumbai-III, 5th Floor, Avas Corporate Point, Makwana Lane, Behind S.M.Centre, Andheri Kurla Road, Andheri (East), Mumbai 400 059.
3. Sr. P.S. to AS (RA), Mumbai.
4. File copy.
5. Notice Board.