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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. 371/98/B/2021-RA/6999 : Date of Issue: 26.09.2023

ORDER NO. 683/2023-CUS (WZ)/ASRA/MUMBAI DATED 25.09.2023
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.

Applicants : Mr. Safi Salim Angariya

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-704/2020-21 dated 28.01.2021
[F.No. S/49-938/2019] [Date of issue: 08.02.2021]
passed by the Commissioner of Customs (Appeals),
Mumbai-III.

ORDER

This Revision Application has been filed by Mr. Safi Salim Angariya (herein referred to as the "Applicant") against the Order-in-Appeal No. MUM-CUSTOM-PAX-APP-704/2020-21 dated 28.01.2021 [F.No. S/49-938/2019] [Date of issue: 08.02.2021] passed by the Commissioner of Customs (Appeals), Mumbai-III.

2. Brief facts of the case are that on 11.12.2018, Shri Javed Mulla, Passenger service agent from M/s Celebinas had come for clearance of 8 bags belonging to Mr. Safi Salim Angariya, the Applicant holder of Indian Passport No. P 5423994 from DS-V warehouse of Customs at CSMI airport, Mumbai. The applicant had arrived from Kuwait by Jet Airways flight No. 9W 0571 on 05.12.2018, however his baggage had not arrived. The baggage arrived only on 9.12.2018 by flight No. J9 401 and the same were deposited in the DS-V warehouse of Customs at CSMI airport, Mumbai. The officers of Customs deputed for Baggage Screening Machine, being suspicious about the contents of the baggage informed the agent that the bags will be cleared only after detailed examination. The detailed examination conducted in the presence of the punchas and the applicant resulted in the recovery of assorted cosmetic goods totally valued at Rs.3,40,954/- and 09 pieces of silver coloured buttons affixed on 9 jean pants, totally weighing 399 grams. The Government Approved Valuer assayed the 9 silver coloured buttons and certified that the buttons were gold totally weighing to 399 grams having purity of 999% (24KT), and collectively valued at Rs.11,30,816/-. The recovered cosmetics and the gold buttons were seized by the officers under the reasonable belief that the same were smuggled into India in contravention of the provisions of the Customs Act, 1962. On conclusion of the investigation Show Cause Notice was issued on 10-04-2019.

3. The Original Adjudicating Authority (OAA) i.e. Additional Commissioner of Customs, C.S.I. Airport, Mumbai, vide his Order-In-Original (OIO) no. ADC/AK/ADJN/130/2019-20 dated 14.08.2019 ordered for the absolute confiscation of the seized assorted cosmetics valued at Rs.3,40,954/- and the gold buttons, totally weighing 399 grams, having purity of 999% (24KT) and collectively valued at Rs.11,30,816/-, under Section 111 (d), (l) and (m) of the Customs Act, 1962. A penalty of Rs. 1,50,000/- was imposed on the Applicant under Section 112(a) and (b) 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), Mumbai-III, who vide Order-in-Appeal No. MUM-CUSTOM-PAX-APP-704/2020-21 dated 28.01.2021 [F.No. S/49-938/2019] [Date of issue: 08.02.2021] upheld the order passed by the OAA.

5. Aggrieved with the above order, the Applicants have filed Revision Application wherein they have made an exhaustive submission of case laws and have submitted copies including their submissions made before the lower authorities etc. They have also submitted that they do not have any claim over the cosmetics under absolute confiscation. They have filed this revision applications on the following main points:

5.01. That Notification No.50/2017 dated 30-06-2017 is only an exemption notification and that they did not claim the said exemption;

5.02. That Gold is not prohibited item for import and the gold imported by them was not liable for absolute confiscation;

- 5.03. That the decisions of Tribunals, High Court etc relied upon by the petitioner were rejected by the Adjudicating authority without proper application of mind; that factual situation of the case of the applicant fits in with the decisions on which reliance was placed; that the order of the Appellate Authority is not sustainable on account of bias violations of principles of natural justice and fair play;
- 5.04. That the Petitioner claimed ownership of the goods and redemption of the gold on reasonable fine and penalty;
- 5.05. That the penalty of Rs.1,50,000/- imposed on the applicant is disproportionate to the value of the gold imported by him and imposition of heavy penalty is not sustainable
- 5.06. The applicant concluded by submitting that it was a single and solitary incident of an alleged act of smuggling and can never be justifiable ground for absolute confiscation of the goods; that the act of the applicant cannot be termed as crime or manifesting of an organized smuggling activity; that he committed the mistake only with an intention to save little money and for making a small profit and that he was not a habitual offender. The applicant submitted that he is from a respectable family and a law abiding citizen and has never come under any adverse remarks

Under the above circumstances of the case, the applicants prayed to Revision Authority for a reasonable order for redemption of the gold on payment of reasonable fine and penalty. The applicant also submitted that he does not have any claim over the cosmetics under absolute confiscation.

6. Personal hearing in the case was scheduled on 02.08.2023. Shri. Prakash Shingrani, Advocate for the applicant appeared for personal hearing and submitted that the applicant brought small quantity of gold for personal purpose. He further submitted that applicant is not a habitual offender. He requested to release of gold on reasonable redemption fine and penalty.

7. The Government has gone through the facts of the case and notes that the Applicant tried to clear his baggage (which had arrived later) through Passenger service Agent without making any declaration of the contents of his baggage as required under Section 77 of the Customs Act, 1962. Detailed examination of the baggage resulted in the recovery of assorted cosmetics valued at Rs.3,40,954/- and 9 silver coloured buttons affixed on 9 jean pant which were actually gold buttons, totally weighing 399 grams, having purity of 999% (24KT) and collectively valued at Rs.11,30,816/-. The Applicant did not file any declaration as required under section 77 of the Customs Act, 1962. The Applicant had affixed the silver coloured button on the pant to pass it off as a button of the pant which indicates that he did not have any intention to declare the same. The manner in which the gold was kept reveals the mindset of the Applicant to not declare the gold and to evade duty. The Applicant did not declare the dutiable goods in his possession even when he was called by the authorities for examining the baggage. Had the officers not detected during screening of the baggage, the Applicant would have gotten away with the assorted cosmetics and gold concealed in the form of a silver coloured button of jean pant. Thus the confiscation of the assorted cosmetics and silver coloured gold buttons is therefore justified and the Applicant has rendered himself liable for penal action. This revision application is only against the confiscation of the gold and hence the decision is limited to the same.

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.

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. 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. 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.

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 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. In the instant case, the quantum of gold involved is small and is not of commercial quantity. The impugned ‘silver coloured button’ was recovered

from the Jeans kept in the baggage of the Applicant. Government observes that though the gold was concealed in a clever manner, the quantum of the same does not suggest the act to be one of organised smuggling by a syndicate. There is no allegation that the Applicant is a habitual offender and was involved in similar offences earlier.

15. Government finds that this is a case of non-declaration of gold. The absolute confiscation of the silver coloured gold button, leading to dispossession of the Applicant of the gold in the instant case is therefore harsh and not reasonable. Government considers granting an option to the Applicant to redeem the gold on payment of a suitable redemption fine, as the same would be more reasonable and fair.

16. Government finds that the penalty of Rs. 1,50,000/- imposed on the Applicant under Section 112(a) & (b) of the Customs Act, 1962 is for the value of the seized goods amounting to Rs.14,71,770/- (value of impugned gold i.e Rs.11,30,816/- and the value of the assorted cosmetics i.e Rs.3,40,954/-). From the facts of the case as discussed above, Government finds that the penalty of Rs. 1,50,000/- imposed on the Applicant under Section 112(a) & (b) of the Customs Act, 1962 is appropriate and commensurate to the omissions and commissions of the Applicant.

17.1 In view of the above, the Government modifies the impugned order passed by the Appellate authority and allows the applicant to redeem the impugned gold viz. the 9 silver coloured gold buttons, totally weighing 399 grams, having purity of 999% (24KT) and collectively valued at Rs.11,30,816/- on payment of a fine of Rs. 2,20,000/- (Rupees Two Lakh Twenty Thousand only).

17.2 The penalty of Rs. 1,50,000/- imposed under Section 112(a) and (b) of the Customs Act, 1962 being appropriate and commensurate with the omissions and commissions of the Applicant, Government does not feel it necessary to interfere with the imposition of the same.

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

Shrawan
25/9/23
(SHRAWAN KUMAR)

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

ORDER NO. 683/2023-CUS (WZ)/ASRA/MUMBAI DATED 25.09.2023

To,

1. Shri Safi Salim Angariya, 301/C1, 3rd floor, Chistiya Nagar Soc., Shadi Mahal Road, Amrut Nagar, Mumbra, Thane-400612.
2. The Pr. Commissioner of Customs, C.S.I Airport, Terminal 2, Level-II, Sahar, Andheri (East), Mumbai 400 099.
3. 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.

Copy to:

1. Shri. Prakash K. Shingrani, Advocate, 12/334, Vivek, New MIG Colony, Bandra (East), Mumbai - 400 051.
2. Sr. P.S. to AS (RA), Mumbai.
3. File Copy.
4. Notice Board