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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. 371/173/B/2020-RA | 7081

Date of issue: 21.09.23

ORDER NO. 686/2023-CUS (WZ)/ASRA/MUMBAI DATED 26.09.2023
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 : Mr. Omar Mahmud Mohammed Ahmed Elhadi
Respondent : Pr. Commissioner of Customs, CSMI, Mumbai
Subject : Revision Application filed under Section 129DD of the
Customs Act, 1962 against the Order-in-Appeal No. MUM-
CUSTM-PAX-APP-783/2019-20 dated 27.12.2019 [Date of
issue: 02.01.2020] [F. No. S/49-219/2019] passed by the
Commissioner of Customs (Appeals), Mumbai Zone-III.

ORDER

This Revision Application is filed by Mr. Omar Mahmud Mohammed Ahmed Elhadi (herein referred to as the 'Applicant') against the Order-in-Appeal (OIA) No. MUM-CUSTOM-PAX-APP-783/2019-20 dated 27.12.2019 [Date of issue: 02.01.2020] [F. No. S/49-219/2019] passed by the Commissioner of Customs (Appeals), Mumbai Zone-III.

2. Brief facts of the case are that on 28.01.2019, the officers of Air Intelligence Unit, Mumbai Customs, Chhatrapati Shivaji Maharaj International Airport, Mumbai, intercepted the Applicant, holding a Sudanese passport, who had arrived by Saudia Airlines Flight No. SV-772 from Jeddah, after he had cleared himself through the Customs green channel. The personal search of the Applicant led to the recovery of two gold bars totally weighing 182 grams and valued at Rs.5,45,853/-.

3. The case was adjudicated after waiver of show cause notice and the Original Adjudicating Authority (OAA) i.e. Deputy/Assistant Commissioner of Customs 'A' Batch, CSMI Airport, Mumbai vide Order-in-Original (OIO) dated 28.01.2019 ordered the absolute confiscation of the impugned 02 gold bars totally weighing 182 grams and valued at Rs.5,45,853/- under Section 111 (d) of the Customs Act, 1962. A penalty of Rs.40,000/- was imposed on the Applicant under Section 112 of the Customs Act, 1962.

4. Aggrieved, the Applicant filed an appeal before the Appellate Authority (AA) who vide impugned OIA upheld the order of the OAA and rejected the appeal.

5. Hence, the Applicant has filed the instant revision application on the following grounds:

- i. that there is no engineered concealment and the value of goods is only Rs. 5,45,853/- which is not a commercial quantity.
- ii. That the Applicant is an owner. The Applicant has submitted the invoice which was not appreciated at the appeal stage even. It is pertinent to

- note that at the time of Adjudication sufficient time was not given to the passenger as the order was passed immediately.
- iii. It is pertinent to note the Currency is not tenable in India. Many times there is no availability of Dollars in Sudan. Hence, the applicant had no other option than to buy the gold. That, he is a small-time businessman who has lost all his savings by investing in gold which was seized by Customs. That there is no restriction to come to India for making purchases.
 - iv. That the Applicant has no antecedents. He has not carried any gold on his previous visits. The quantity seized is small quantity. He is not a frequent flyer.
 - v. Even if he is a foreign national, he is a tourist as per Baggage Rules, 2016 as amended in 2017 clause 3 (h). That it is obligatory to allow re-export of goods allowed as free allowance and as Foreign Trade (Exemption from the application of certain rules) Amendment Order 2017. That the offence took place in 2017.
 - vi. That Gold is not 'prohibited goods' neither a 'restricted goods'. As per Baggage Rules 1993 as amended in 2016, Resident or a foreigner residing in India or a Tourist of Indian/ Foreign origin not being an infant arriving from any country other than Nepal, Bhutan or Myanmar, shall be allowed clearance free of duty articles in his bonafide baggage, that is to say - (a) used Personal effects and Travel Souvenir, and (b) articles other than those mentioned in Annexure 1,(5) Gold or Silver in any form other than ornaments, upto the value of fifteen thousand rupees if these are carried on the person or in the accompanied baggage of the passenger. However As per Notification 26/2016 any article the value of which exceeds the Duty-free allowance admissible to such passenger or member of crew under the Baggage Rules 2016 is chargeable with duty 35% ad valorem and it is also applicable to gold in any form.
 - vii. That the notification 50/2017 states that in the public interest, Central Government have exempted certain category from IGST and criteria for

concession of Duty it nowhere states that a Passenger is completely banned from carrying gold. Condition 41 lays down that if a person comes to India after a period of one year on declaration can be exempted from ad valorem duty. It lays down the criteria that on declaration a person can be given concession in Duty and at that stage his eligibility to avail the same is considered. On the other hand, even if passenger is not eligible but has made declaration in that case the gold is redeemed to him at 38%. In the cases where there is no declaration in that case passenger can be charged upto 70%. This Duty, Penalty is levied as per sec 28 wherein the proper officer can charge Duty, Penalty and Fine in the span of one year and subsequently Sec 125 is invoked. It means that Gold or Silver above duty free allowance is chargeable with duty and this renders gold dutiable goods in the ambit of Customs Act, 1962. As per notification 50/2017 is concerned it states not more than 1 kg by eligible Passenger is chargeable at 10% but does not emphasize that tourist of Indian origin or foreign origin are banned from importing gold for personal use. From the above notification it is clear that gold is also a dutiable goods and not prohibited. The quantity possessed by the Applicant is below commercial quantity and was for his personal use. The Prohibited Goods are well defined in *Yakub Ibrahim Yusuf vs. CC, Mumbai 2011(263) ELT 685 (Tri Mumbai)*.

- viii. Order of Absolute Confiscation not Sustainable: Gold is not a prohibited item. It is only restricted item as is held in Section 125 does not provide for absolute confiscation of goods which are contraband and since gold is not a contraband item the Applicant is entitled to have the goods released on payment of redemption fine and duty. Section 125 of the Act empowers the adjudicating authority to release the goods to its rightful owner or the person from whose possession the goods has been seized, on payment of redemption fine in lieu of confiscation.
- ix. The Applicants are relying upon following case laws:
- V.P Hameed Vs CC, Bombay reported in 1994(73)ELT 425 (T).
 - Kamlesh Kumar Vs CC reported in 1993 (967) ELT 1000 (GOI).
 - Shaikh Jamal Basha Vs GOI and Others.

- Mohit Thakor Vs Collector, reported in 1994 ELT 865.
- P. Sinnasmy Versus Commissioner of Customs, Chennai 200792200 ELT 308.
- Vattakal Moosa Vs Collector of Customs Cochin, 1994(72)ELT 473.
- T.Elaverasan Vs Commissioner of Customs Reported In 2011 E.L.T 167(Mad)
- Vigneswaransethuram Vs Union of India Oct 2006 Kerala High Court

On the above grounds, the Applicant prayed to set aside the impugned OIA & OIA and redemption of gold may be granted on payment of reasonable fine.

6. Personal hearing in the case was scheduled for 03.08.2023. Ms. Shabana Pathan, Advocate appeared for the personal hearing on the scheduled date on behalf of the applicant. She submitted that the applicant is a foreign national and had brought small quantity of gold for personal purpose. She requested to allow redemption of gold on fine and penalty for re-export. 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 two gold bars totally weighing 182 grams and valued at Rs.5,45,853/- 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, after clearing himself through the green channel of Customs and on being intercepted, two gold bars totally weighing 182 grams and valued at Rs.5,45,853/-, were recovered from the Applicant and revealed his intention of not to declare the said gold and thereby evade payment of Customs Duty. The confiscation of the gold 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 “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 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.
- f) The Hon'ble High Court, Madras on 08.06.2022 in WP no. 20249 of 2021 and WMP No. 21510 of 2021 in r/o. Shri. Chandrasegaram Vijayasundarm + 5 others in a matter of Sri Lankans 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.

13.2. 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 view of the foregoing paras, the Government finds that as the Applicant had not declared two gold bars totally weighing 182 grams and

valued at Rs.5,45,853/- at the time of arrival, the confiscation of the same was justified. However, Applicant is a foreign national and resides in Sudan and the quantum of gold under import is small and is not of commercial quantity. The impugned gold 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. Further, there is nothing on record to prove that the Applicant was part of an organized smuggling syndicate.

15. Government finds that this is a case of non-declaration of gold. The absolute confiscation of the impugned gold 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 foreign national, option to re-export the impugned gold on payment of redemption fine should have been allowed. Considering the above facts, Government is inclined to modify the absolute confiscation and allow the impugned two gold bars totally weighing 182 grams and valued at Rs.5,45,853/- to be re-exported on payment of a redemption fine.

16. Applicant has also pleaded for setting aside the penalty imposed on him. The market value of the gold in this case is Rs.5,45,853/-. From the facts of the case as discussed above, Government finds that the penalty of Rs. 40,000/- imposed on the Applicant under Section 112 of the Customs Act, 1962 is commensurate to the omissions and commissions of the Applicant.

17. In view of the above, the Government modifies the Order-in-Appeal No. MUM-CUSTM-PAX-APP-783/2019-20 dated 27.12.2019 [Date of issue: 02.01.2020] [F. No. S/49-219/2019] passed by the Commissioner of Customs (Appeals), Mumbai Zone-III and allows the Applicant to redeem the impugned two gold bars totally weighing 182 grams and valued at Rs. 5,45,853/-, for re-export, on payment of a redemption fine of Rs.1,05,000/-. The penalty of Rs. 40,000/- imposed on the Applicant under Section 112 of the Customs Act, 1962 by the OAA and upheld by the AA is sustained.

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

Shrawan
26/9/23
(SHRAWAN KUMAR)
Principal Commissioner & ex-officio
Additional Secretary to Government of India

ORDER NO. 686/2023-CUS (WZ)/ASRA/MUMBAI DATED 26.9.23

To,

1. Mr. Omar Mahmud Mohammed Ahmed Elhadi,
c/o. Adv. Ms. Shabana Pathan, Ekta Nagar,
Room No.9, Gala Nagar, Achole Road,
Nalasopara East - 401 209.
2. The Pr. Commissioner of Customs,
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Copy to:

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2. Sr. P.S. to AS (RA), Mumbai.
3. Guard file.

