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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. 371/128/B/2020-RA / 7393 : Date of Issue: 12.10.2023

ORDER NO. 733 /2023-CUS (WZ)/ASRA/MUMBAI DATED 12.10.2023
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 : Shri Mohammed Rafeeq.

Respondent : Commissioner of Customs, ICE House, 41/A, Sassoon
Road, Pune- 411001.

Subject : Revision Application filed, under Section 129DD of the
Customs Act, 1962 against the Order-in-Appeal No. PUN-
CT-APPII-000-102-19-20 dated 03.01.2020 issued on
15.01.2020 through F.No. V(2)CT(A-II)97/2019-20 passed
by the Commissioner of Customs (Appeals-II), Pune.

ORDER

This Revision Application has been filed by Shri Mohammed Rafeeq (herein referred to as the "Applicant") against the Order-in-Appeal No. PUN-CT-APPII-000-102-19-20 dated 03.01.2020 issued on 15.01.2020 through F.No. V(2)CT(A-II)97/2019-20 passed by the Commissioner of Customs (Appeals), Pune.

2. Brief facts of the case are that Shri Mohammed Rafeeq, the applicant holding an Indian Passport Number K 7975842, had arrived on 10-04-2018 at Pune International Airport from Dubai. On suspicion, the Customs officers at the Pune International Airport intercepted the applicant, while he was about to exit after he had opted for green channel. The applicant was asked whether he was carrying any contraband or gold either in his baggage or in-person, to which he replied in negative. However, detailed examination resulted in the recovery of one packet of paste (purported to be gold) from the applicant's Trousers, the paste was melted and yellow metal in the form of gold bar was extracted. The Government Approved Valuer certified that it was gold with a purity of 23.92 KT weighing 374.04 grams and valued at Rs.11,70,745/-. This impugned gold was seized under the provisions of Customs Act, 1962, on the reasonable belief that the said goods were smuggled into India and liable for confiscation. Accordingly Show Cause Notice was issued on 05.10.2018.

3. After due process of law, the Original Adjudicating Authority (OAA), viz, Additional Commissioner, Customs, Pune vide OIO No. PUN-Customs-000-ADC-15/2018-19 dated 28-02-2019 ordered for the absolute confiscation of the impugned gold weighing 374.04 grams with a purity of Rs.23.92 KT and valued at Rs.11,70,745/- under Sections 111(d), 111(i) & 111(l) of the Customs Act, 1962 and a penalty of Rs. 1,00,000/- under Section 112 (a) &

(b) of the Customs Act, 1962 and a penalty of Rs.50,000/- under section 114AA of the Customs Act, 1962 was imposed on the applicant.

4. Aggrieved by the said order, the applicant preferred an appeal before the appellate authority (AA) viz, Commissioner of Customs (Appeals-II), Pune, who vide Order-In-Appeal No. PUN-CT-APP11-000-102-19-20 dated 03.01.2020 issued on 15.01.2020 did not find any reason to interfere with the Order-in-Original passed by the OAA and upheld the same.

5. Aggrieved by the Appellate Authority's Order, the applicant has filed an application for condonation of delay in filing the present revision application and the said revision application is filed on the undermentioned grounds:

5.1 That the applicant had kept the said packet of Gold paste belonged to him and were kept for safety purpose in the safety pocket of his trouser;

5.2 That the gold was brought by him for his own personal use and from his own personal savings;

5.2 That the applicant was holding foreign currency to pay if he was asked to pay duty on it and he was willing to pay the same;

5.3 That the applicant informed the Customs officer that he had brought gold in the form of paste and wanted to declare the same but the officers did not allow him to do it;

5.4 That the applicant was not acting as a carrier for anybody; that there was no foreign markings on the gold pieces; that the gold cannot be said to be concealed when it was found from the watch pocket of the applicant;

5.5 That the gold paste were not in commercial quantity which shows that it is meant for personal use;

5.6 That the Orders passed by the lower authorities are contrary in nature with the earlier decisions which allowed the gold to be re-exported or released on payment of fine, duty and personal penalty;

5.7 That the order passed by the Appellate authority is illegal, bad in law and requires to be quashed and set aside.

6. Personal hearing in the matter was scheduled for 07-08-2023. Ms Shivangi Kherajani, Advocate, appeared for the hearing on behalf of the Applicant. The Advocate submitted that the applicant brought gold paste. She further submitted that manner of concealment should not influence the confiscation. She requested to allow redemption of gold on reasonable fine and penalty.

7.1 Government observes that the applicant has filed for condonation of delay. Applicant has stated that the OIA was received by him on 20.01.2020 and that there was delay in filing the application due to the disruption caused by COVID. Government observes that the applicant was required to file the revision application within 3 months i.e. by 19.04.2020. Considering, the further extension of 3 months which can be condoned, the applicant was required to file the revision by 18.07.2020. The applicant had filed the revision application on 03.07.2020 which is within the extendable period and hence the Government condones the delay and goes into the merits of the case.

7.2 The Government has gone through the facts of the case, and observes that the applicant had failed to declare the impugned gold paste carried by him 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 the dutiable goods. By not declaring the gold carried by him, the applicant clearly revealed his intention not to declare the gold and pay Customs duty on it. The Government finds that the confiscation of the impugned gold was therefore justified.

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" in terms of Section 2(33) and hence it is liable for confiscation under Section 111(d) of the Customs Act, 1962.

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.

11.1 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 pretense. 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.**

11.2 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. Thus, Adjudicating authority can allow redemption under Section 125 of any goods which are prohibited either under the Customs Act or any other law on payment of fine.

12.1 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.

12.2 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.

13. In the instant case, the quantum of gold involved is small which indicates that the same was not for commercial purpose and moreover it was found on person. It does not suggest the act to be one of organized smuggling by a syndicate. Government, notes that the impugned gold were not ingeniously concealed, in fact, it was recovered from pant worn by the applicant. The applicant has claimed ownership of the gold. Government, notes

that there were no allegations that the Applicant is a habitual offender or that he was involved in similar offences earlier. Considering the quantity of gold, the same not being concealed in an ingenious manner, the absolute confiscation of the same was not justified.

13.1 Government observes that the applicant has requested to allow the option of redemption the seized gold. In view of the above facts, Government is inclined to modify the absolute confiscation upheld by the AA and allow the impugned gold weighing 374.04 grams with a purity of Rs.23.92 KT and valued at Rs.11,70,745/- to be redeemed on payment of redemption fine.

13.2 The Government finds that the penalty of Rs. 1,00,000/- imposed on the applicant under Section 112(a) & (b) of the Customs Act, 1962 for the goods valued at Rs.11,70,745/- is appropriate and commensurate with the omission and commission committed and does not find it necessary to interfere in the same.

13.3 Government notes that once penalty has been imposed under Section 112(a) & (b) of the Customs Act, 1962, there is no necessity of imposing penalty under Section 114AA of the Customs Act, 1962. Therefore, the penalty of Rs. 50,000/- (Rupees Five thousand only) imposed under Section 114AA of the Customs Act, 1962 is liable to be set aside.

14.1 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 weighing 374.04 grams with a purity of Rs.23.92 KT and valued at Rs.11,70,745/- on payment of redemption fine of Rs. 2,25,000/- (Rupees Two Lakh Twenty-five Thousand only).

14.2 The Government finds that the penalty of Rs. 1,00,000/- imposed on the applicant under Section 112(a) & (b) of the Customs Act, 1962 is appropriate and commensurate with the omission and commission committed.

14.3 The penalty of Rs. 50,000/- imposed on the applicant under Section 114AA of the Customs Act, 1962 is set aside.

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


(SHRAWAN KUMAR)

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

ORDER NO. 733 /2023-CUS (WZ)/ASRA/MUMBAI DATED 2.10.2023

To,

1. Shri Mohammed Rafeeq, Rizwan Manzil, Highway Complex, P.O. Uppala, District-Kasrgod, Kerala-671322.
2. The Commissioner of Customs, ICE House, 41/ A, Sassoon Road, Pune- 411001.
3. The Commissioner (Appeals-II), Central Tax, Pune, 2nd Floor, 'F' wing, GST Bhavan, 41/A, Sassoon Road, Pune- 411001.

Copy to:

1. Ms. Shivangi Kherajani, Advocate, 501, Savtri Navbahar CHS Ltd. ,19th Road, Khar West, Mumbai-400052.
2. Sr. P.S. to AS (RA), Mumbai.
3. File Copy.
4. Notice Board.

