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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. 371/157/B/WZ/2022-RA / SAC : Date of Issue : 29.01.2024

ORDER NO. 75 /2024-CUS (WZ/SZ)/ASRA/MUMBAI DATED 24.01.2024
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.

(i). F.No. 371/157/B/WZ/2022-RA

Applicant : Shri. Asharaf Khan

Respondent : Pr. Commissioner of Customs, CSMI Airport, Mumbai
400 099.

Subject : Revision Application filed, under Section 129DD of the
Customs Act, 1962 against the Order-in-Appeal No.
No. MUM-CUSTM-PAX-APP-1132/2021-22 dated
30.11.2021; DOI : 03.12.2021 issued through F.No. S/49-
983/2020 passed by the Commissioner of Customs (Appeals),
Mumbai – III.

ORDER

This revision application has been filed by Shri. Asharaf Khan (hereinafter referred to as the Applicant) against the Order-in-Appeal No. MUM-CUSTOM-PAX-APP-1132/2021-22 dated 30.11.2021; DOI : 03.12.2021 issued through F.No. S/49-983/2020 passed by the Commissioner of Customs (Appeals), Mumbai - III.

2. Brief facts of the case are that the applicant was intercepted by Customs Officers on 27.01.2020 at the CSMI Airport, Mumbai having earlier arrived Jeddah onboard Indigo Airlines Flight No. 6E-1832. Applicant had opted for the green channel. A gold bar weighing 140 grams, of 24KT purity, valued at Rs. 4,98,540/- was recovered from the possession of the applicant which had been kept concealed in a packet. Applicant had produced an invoice which was in Arabic and was unable to disclose the source of the funds. He disclosed that the gold had been purchased in cash and that his duration of stay abroad was for 22 days.

3. The Original Adjudicating Authority (OAA), viz, Dy. Commissioner of Customs, CSMI Airport, Mumbai vide her Order-In-Original F.No. Air Cus/49/T2/1559/2020-B dated 27.01.2020 ordered for the absolute confiscation of the 1 gold bar, weighing 140 grams and valued at Rs. 4,98,540/- under Section 111(d) of the Customs Act, 1962 and a penalty of Rs. 50,000/- under Section 112 (b)(ii) 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), Mumbai -

III, vide Order-In-Appeal No. MUM-CUSTOM-PAX-APP-1132/2021-22 dated 30.11.2021; DOI : 03.12.2021 issued through F.No. S/49-983/2020 refrained from interfering in the order passed by OAA and disposed of the appeal, upholding the impugned OIO.

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 passed by the appellate authority was bad in law and unjust; that the OIA has been passed without due consideration to the documents on record and facts of the case; that the goods were neither restricted nor prohibited was not appreciated by the AA; that no previous case has been registered against applicant; that evasion of Customs duty can be done only in respect of dutiable goods and not on prohibited goods; that option to redeem the goods under Section 125 of the Customs Act, 1962 ought to have been granted by the AA; that various judgements passed by the Apex Court, High Courts, Tribunal have held that gold was neither restricted nor prohibited and therefore it should not be confiscated absolutely.

5.02. to buttress their case, the applicant has relied upon the following case laws;

(i). Hargovind Das K Joshi v/s. Collector of Customs [1992 (61) ELT 172 SC], Absolute confiscation of goods without considering question of redemption on payment of fine although having discretion to do so under Section 125, matter remanded back.

(ii). Alfred Menezes v/s. Commissioner of Customs (Mumbai) [2011 (236) ELT 587 (Tri-Mumbai)], Section 125(1) ibid clearly mandates that it is within the power of the adjudicating authority to offer redemption of goods even in respect of prohibited goods.

(iii). T. Elvarasan v/s. Commr. Of Customs (Airport), 2011-266-ELT-167-Tri-Madras on the issue of gold chains brought from Singapore and seized on the ground of non-declaration on arrival; passenger living abroad for more than 6 months and entitled to import gold; gold

not prohibited item option to redeem the goods; impugned gold ordered to be released provisionally subject to adjudication proceedings.

(iv). Yakub Ibrahim Yusuf v/s. Commissioner of Customs, Mumbai [Final Order No. A/362/2010-WBZ-II/(CSTB) dated 28.10.2010 in Appeal no. C/51/1996-Mum] [2011-263-ELT-685-Tri-Mumbai]. *Term prohibited goods refers to goods like arms, ammunition, addictive drugs, whose import in any circumstance would danger or be detriment to health, welfare or morals of people as whole and makes them liable to absolute confiscation.*

(v). Mohini Bhatia vs. Commr. Of Customs [1999-106-ELT-485-Tri-Mumbai on prohibited goods and restricted goods. Gold was not included in the part II of restricted item.

(vi) In Universal Traders vs. Commr. – 2009-240-ELT-A78(S.C), also, the Apex Court had allowed redemption of exported goods being not prohibited.,

(vii). In Gauri Enterprises vs. CC., Pune – 2002-145-ELT-706(Tri-Bang), had held that if similar goods have been released on fine earlier, selective absolute confiscation was not called for and absolute confiscation should be an exception rather that a rule.,

(viii). In Shaik Jamal Basha vs. GOI – 1997-91-ELT-277(AP), the Hon'ble High Court had held that gold was allowd for import on payment of duty and therefore, gold in the form other than ornaments imported unauthorizedly could be redeemed.,

(ix). Etc.

Applicant has prayed that the impugned gold be released under Section 125 of the Customs Act, 1962 on nominal RF alongwith applicable duty and personal penalty be reduced or to pass any other order as deemed fit.

6. Personal hearing in the case was scheduled for 12.10.2023, 19.10.2023. Shri. N.J Heera, Advocate for the applicant through his letter dated 17.10.2023 stated; that the personal hearing has been granted for 19.10.2023; applicant was carrying only 140 grams of 24 KT gold bar valued at Rs. 4,98,540/-;

reiterated their written submission and requested to release the impugned gold on nominal redemption fine.

7. The Government has gone through the facts of the case and notes that the applicant had failed to declare the goods in his possession as required under Section 77 of the Customs Act, 1962. The applicant had not disclosed the dutiable goods in his possession and had he not been intercepted would have walked away with the impugned gold bar without declaring the same to Customs. By his actions, it was clear that the applicant had no intention to declare the impugned gold to Customs and pay Customs duty on it. The Government finds that the confiscation of the gold bar weighing 140 grams was therefore, justified.

8. 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".

9 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.

10. 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 the 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.

11. The quantity of the gold under import is small and is not of commercial quantity. The gold bars had been kept in a packet by the applicant. Government notes that at times travellers resort to such safe keeping for safety reasons to avoid theft of their valuables. There are no allegations that the applicant is a habitual offender and was involved in similar offence earlier. The facts of the case indicate that it is a case of non-declaration of gold, rather than a case of smuggling for commercial considerations. Under the circumstances, the seriousness of the misdemeanour is required to be kept in mind when using discretion under Section 125 of the Customs Act, 1962 and while imposing quantum of penalty.

12. The absolute confiscation of the gold, leading to dispossession of the applicant of the gold in the instant case is therefore, harsh and not reasonable. Government is inclined to allow the impugned gold to be redeemed on payment of a redemption fine.

13. Accordingly, Government modifies the impugned OIO dated 27.01.2020 passed by the OAA as under;

(a). the absolute confiscation of the impugned gold bar weighing 140 grams of 24 KT purity, valued at Rs. 4,98,540/- is set aside and the same is allowed to be redeemed on payment of a redemption fine of Rs. 1,00,000/- (Rupees One Lakh only).

(b). the penalty of Rs. 50,000/- (Rupees fifty thousand only) imposed on the applicant under Section 112(b)(ii) of the Customs Act, 1962 is appropriate and commensurate with the omission and commission committed and the same does not merit interference.

14. Revision Application is disposed of on the above terms.

Shrawan Kumar
24/01/24
(SHRAWAN KUMAR)

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

ORDER NO. 75 /2024-CUS (WZ)/ASRA/MUMBAI DATED 24.01.2024.

To,

1. Shri. Asharaf Khan, Gulshan Nagar, Hazrat Khan Shah Ward, Gali No. 1, Khandwa, Madhya Pradesh, PIN : 450-001.
2. Pr. Commissioner of Customs, Chhatrapati Shivaji Maharaj International Airport, Terminal 2, Level - II. Sahar, Mumbai 400 099.

Copy to:

1. A.M Sachwani / V.M Advani / N.J Heera / R.R Shah, Advocates, Nulwala Bldg, Ground Floor, 41 Mint Road, Opp. G P.O, Fort, Mumbai - 400 001.
2. Sr. P.S. to AS (RA), Mumbai
3. File Copy.
4. Notice Board.