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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. 371/280(I & II)/B/2020-RA

7509

Date of issue: 18.10.2023

ORDER NO. ⁷⁶³⁻764 /2023-CUS (WZ)/ASRA/MUMBAI DATED 16.10.2023
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.

Applicant : 1. Mr. Dafalla Yousif Dafalla Hamadelnil
2. Mrs. Raga Saad Elsheikh Elmamsour
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-337 & 338/2020-21 dated 16.09.2020 [F.
No. S/49-578 & 579/2019] passed by the Commissioner of
Customs (Appeals), Mumbai Zone-III.

ORDER

These Revision Applications are filed by Mr. Dafalla Yousif Dafalla Hamadelnil and Mrs. Raga Saad Elsheikh Elmamsour (herein referred to as the 'Applicant-I' & Applicant-II' respectively) against the Order-in-Appeal (OIA) No. MUM-CUSTM-PAX-APP-337 & 338/2020-21 dated 16.09.2020 [F. No. S/49-578 & 579/2019] passed by the Commissioner of Customs (Appeals), Mumbai - III.

2. Brief facts of the case are that on 17.04.2018, the officers of AIU, Mumbai Customs, Chhatrapati Shivaji Maharaj International Airport, Mumbai, intercepted the Applicant-I & Applicant-II, both holding Sudanese passport, who had arrived by Air Arabia Flight No. G9-621 from Sharjah, after they had cleared through the Customs Green Channel. On enquiry, the applicants were found to be a married couple. A personal search of the Applicant-I led to the recovery of assorted gold jewellery totally weighing 1009 grams valued at Rs.28,72,502/- from two plastic pouches which were concealed in front pockets of the jeans worn by him. Personal search of Applicant-II did not yield anything incriminating.

3. The case was adjudicated after issuance of show cause notice dated 27.09.2018 and the Original Adjudicating Authority (OAA), i.e. Additional Commissioner of Customs, CSML Airport, Mumbai vide Order-in-Original (OIO) No. ADC/AK/ADJN/490/2018-19 dated 18.03.2019 ordered absolute confiscation of the impugned assorted gold jewellery totally weighing 1009 grams valued at Rs.28,72,502/- under Section 111 (d) of the Customs Act, 1962 and imposed a penalty of Rs.2,00,000/- on Applicant-I and Rs.1,00,000/- on Applicant-II 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 Applicants have filed the instant revision applications mainly on the following grounds:

- i. That Applicant No. I and II are owners and visited India for medical checkup of Applicant no. II, who is wife of Applicant no. I. She has a lump in throat and for treatment, the family decided to send her to India. At that time, she could not consult the doctor and neither avail medical treatment in India and had to return without proper medication. The Applicant no. I could not submit the relevant document at the time of adjudication because he was without a lawyer and was not aware that the document can be submitted at the time of hearing.
- ii. That as per the para 13 of order-in-Appeal, the description of the receipt does not match. Fact is they have submitted one receipt at the time of investigation. But the receipt was on the name of owner of shop the investigating agencies confronted him that it is fake document as the receipt showed the name of owner of the shop i.e., Ibrahim Mohammed Qaily. Applicants had to get new receipts displaying the name of the shop Dan Jewellery to avoid confusion. However, there was delay in submitting the invoice. At the time of adjudication, the applicants were without lawyer and being a lay person were unaware that the receipt can also be submitted at the time of hearing at adjudication stage. Hence it is unjust on the part of the Appeal authority to challenge his ownership just because there was delay in submitting the invoice on the day of hearing at appeal stage.
- iii. That under sec 123 it is for the Applicant to prove that the goods seized are not smuggled goods. That under Foreign Trade (Regulation and Development) Act 1992 there is a provision which states that the owner be given an opportunity and under same Act Sec 5 gives power to the government to make notification. However, notifications are not penal sections they are only guiding principle. 50/2017 comes to play when there is declaration under sec 77 of the Customs Act which entitles a person for exemption of advalorem duty on clearing eligibility criteria i.e. if he has come after the duration of one year or six months. However, the beauty of this notification nowhere it makes injustice to others the law is very clear that even if declaration is made by foreign national, he

can be charged with duty after scrutiny under sec 123 because the said notifications does not bar an owner even if a foreign national from paying duty hence to deny the benefit to foreign national under these circumstances will be encroachment upon the right of an individual. Further, it is pertinent to note under normal practice of laws in cases of non-declaration is the goods are confiscated and after scrutiny the opportunity under sec 28 of the Customs Act is exercised and Redemption is granted under sec 125 of the Customs Act 1962

- iv. The Appeal Authority has rejected the case placing reliance on an order passed in 2009 (Para 12 of O-in-A). However, many cases were redeemed after 2009 and before 2018 by the same authority. This itself shows injustice on the part of the Appeal Authority against the Applicant. Hence in the interest of justice the opportunity to take possession of goods be given.
- v. Goods are not prohibited but dutiable goods.
- vi. That Appeal Authorities failed to understand that under Foreign Trade (Regulation and Development) Act 1992 as amended Appeal has power to redeem the goods even if there is IEC defaults. In case of gold being dutiable and exempted from application of IEC code by Foreign Trade (Exemption from Application of certain rules) order 1993 as amended in 2017 can be redeemed under sec 125 of the customs Act 1962.
- vii. That as per para 9 and 10 of order-in-Appeal, there is ingenious concealment in the case as the gold jewellery was found in the pocket of jeans and the Applicants have purposely concealed the goods. It is pertinent to note that there is no change of form or engineered concealment. If he really wanted to make profit, he would have carried the goods in a concealed manner and in more sophisticated manner like (rectum concealment or in any gadget). However here there is no such act. His monthly income reaches above 800USD. He is not a Carrier as there is nothing brought on record by the investigating agency to prove his nexus with any smuggling activity or they acted as a carrier.

- viii. That it is the findings of the Adjudicating authority as per Para 13 and Para 8 that *for re-export declaration under section 77 is not made* however even if the declaration is made it is only after adjudication the said re-export/ home consumption as per the request is allowed. The sec 80 itself provides that temporary detention can be made on request of Passenger even if it is declared hence in any case whether declared or not declared there is provision of temporary detention only.
- ix. Further, as per para 18 of O-in-O the medical requirement cannot mitigate the offence However the adjudicating authority and Appeal Authority failed to understand that the offence took place for the need of medical treatment itself. The offence is such that it attracts only pecuniary liability and passenger never denied to pay the fine and penalty. The sale proceeds were for medical treatment hence that itself is one of the personal uses and that it was jewellery not bars. That since Applicant No. II has availed treatment in Sudan, *applicants are asking for re-export.*
- x. *Penalty imposed under sec 112 (a) and (b) is not applicable since the goods are not prohibited goods but dutiable as per customs Act 1962. The penalty imposed can only be the duty evaded and absolute confiscation will be bad in law. The confiscation under sec 111 (d)(l) and (m) cannot be made as the goods seized are neither under any prohibition nor it is a case of misdeclaration under sec 77 hence under sec 112 (a) and (b)*
- xi. 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 provides 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.
- xii. The Applicants are relying upon following case laws:

- T. Elavarasan Vs Commissioner of Customs reported in 2011(266) E.L.T 167(Mad)
- Vigneswaran Sethuram Vs Union of India Oct 2006 Kerala High Court
- Kusum Dahyabhai Patel vs CC Ahmedabad 1995 (79) ELT 292
- Afzal Agency vs CESTAT 2006 (205) ELT (KAR)
- Kadar Mydin v/s Commissioner of Customs (Preventive) West Bengal 2001 (136) ELT 754
- Dhanmak Madhusudan Ramji v/s commissioner of customs (Airport) Mumbai reported in 2009 (237) ELT 280 Tri. Mumbai
- Vakil Moosa Vs Collector of Customs Cochin,1994 (72) ELT 473 (GOI)
- Shaikh Jamal Basha Vs GOI and Others.

On the above grounds, the Applicant prayed to set aside the impugned OIO & OIA and allow redemption of gold on payment of fine.

6.1 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 applicants are foreign nationals and had brought small quantity of gold. She further submitted that Applicant-I had brought the gold for treatment of Applicant-II. She further submitted that gold was kept in the pocket which should not be considered as concealed. She also submitted that purchase invoice was submitted before Commissioner (Appeals). She requested to allow redemption of gold on fine and penalty, for re-export.

6.2 The Respondent has vide letter dated 22.04.2021, put forth, inter alia, following submissions:

- i. As per Section 77 of the Customs Act, 1962, the owner of baggage shall, for the purpose of clearing it, makes a declaration of its content to the Customs. In the instant case, the applicants, had not made any declaration under Section 77 to the Customs Act, 1962, thus, intent of evasion of Customs duty was apparent. The passenger did not declare the gold on her own and the Assorted Gold Jewellery was detected only after she was intercepted by the officers of Customs after she had

cleared herself through Customs Green Channel. Had the passenger not been intercepted, she would have made good with Assorted Gold Jewellery.

- ii. In the instant case, the offence was committed in a premeditated and clever manner which clearly indicates mens rea and if she was not intercepted, the Gold would have been taken without payment of Customs duty.
- iii. In the case of Abdul Razak Vs. Union of India reported in 2012 (275) ELT 300 (Ker) (DB), the Hon'ble Division Bench of Kerala High Court did not find any merit in the appellant's case that he has the right to get the confiscated gold released on payment of redemption fine and duty under Section 125 of the Act.
- iv. The Hon'ble Madras High Court, in the case of Commissioner of Customs (Air) Vs. P. Sinnasamy, cited the above observation of the Hon'ble Division Bench of Kerala High Court and held that even though gold is not an enumerated prohibited item and thus, can be imported, but when such import is subject to restrictions, including the necessity to declare the goods on arrival at the Customs Station and make payment of duty at the rate prescribed, release of the smuggled goods cannot be ordered and held that when there is a violation of statutory prohibitions, mentioned in Sections 11 and 11A of the Customs Act, 1962 or any other law, for the time being in force or restrictions imposed, such restrictions would also encompass the expression, any prohibition.
- v. Reference is also invited to the judgement in the case of Om Prakash Bhatia vs. commissioner of Customs, Delhi (2003) 6 SC 161 wherein the Hon'ble Supreme Court had held that on account of the non-fulfilment of conditions of import of gold as a part of baggage of a pax —whether ineligible or eligible (intercepted while walking through Green Channel), the conditions precedent which act as a restriction, become a prohibition with reference to that pax. In other words, non-fulfilment of conditions of imports tantamount to prohibition.

- vi. The passenger has not produced any purchase invoice to prove the licit acquisition and financing of the seized goods. Section 123 of the Customs Act, 1962 casts a burden on the person from whom the gold has been seized to lead the evidence that the seized goods have not been smuggled. In the instant case, the passenger could not produce any licit document for lawful purchase/financing of the seized gold. There is no scope at all for the ineligible to go out of the purview of Section 123 of the Customs Act, 1962.
- vii. In this regard attention is invited to the judgement i.e., 2018 (364(E.L.T. 811 (Tri- Bang) Baburaya Narayan Nayak Vs. Commissioner of Customs, Bangalore wherein the CESTAT, South Zonal Bench, Bangalore has upheld the order of the adjudicating authority wherein the adjudicating authority had absolutely confiscated the silver bars since the appellant had not produced any evidence regarding the licit possession of the said goods.
- viii. Board's Circular No. 495/5/92-Cus.VI dated 10.05.1993 specifies that in respect of gold seized for non-declaration, no option to redeem the same on redemption fine under Section 125 of the Customs Act, 1962, should be given except in very trivial cases where the adjudicating authority is satisfied that there was no concealment of the gold in question. In the instant case, the gold was not declared and concealed. Thus, the Adjudicating Authority was right in ordering absolute confiscation of the seized gold in the light of the aforesaid Board's Circular.

Based on these submissions the respondent has prayed that the appeal filed by the Applicant be rejected and the Order-in-Appeal No. MUM- CUSTM-PAX-APP-337 & 338/2020-21 dated 16.09.2020 passed by the Commissioner of Customs (Appeals), Mumbai be upheld.

7. The Government has gone through the facts of the case and observes that the Applicants had brought assorted gold jewellery totally weighing 1009 grams 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 Applicants had not disclosed that they were carrying dutiable goods. However, after clearing through the green channel of Customs and on being intercepted, assorted gold jewellery totally weighing 1009 grams valued at Rs.28,72,502/- kept in two plastic pouches which were concealed in front pockets of the jeans worn by him, were recovered from the Applicant-I and it 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 Applicants had rendered themselves 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. 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. The Government finds that the Applicants are Sudanese nationals and were caught with gold jewellery. It is noted that there have been several instances where Sudanese nationals were found indulging in carrying undeclared gold. As the Applicants had not declared assorted gold jewellery totally weighing 1009 grams valued at Rs.28,72,502/- kept in two plastic pouches which were concealed in front pockets of the jeans worn by the Applicant-1 at the time of arrival, the confiscation of the same was justified. Government agrees with the findings of OAA that being Sudanese nationals, the applicants are not 'eligible passengers' in terms of Notification No. 50/2017-Cus dated 30.06.2017 and that the quantity of impugned gold cannot be treated as bonafide baggage of passenger in terms of said Notification. Government also observes that applicant-II had admitted in her statement that she was aware

that her husband (applicant-I) was carrying the impugned gold in concealed manner and that she herself had advised applicant-I to conceal the gold to avoid detection by customs and duty thereon.

13. In view of the foregoing paras, the Government finds that as the applicant-I had not declared the gold at the time of arrival and applicant-II was complicit in this unlawful act, therefore absolute confiscation of the same was justified. Considering the above facts, Government is not inclined to modify the absolute confiscation upheld by the AA.

14. Applicant has also pleaded for setting aside the penalty imposed on him. The market value of the gold in this case is Rs.28,72,502/-. From the facts of the case as discussed above, Government finds that the penalty of Rs.2,00,000/- on Applicant-I and Rs.1,00,000/- on Applicant-II under Section 112 of the Customs Act, 1962 is commensurate to the omissions and commissions of the Applicant and is not inclined to interfere in the same.

15. In view of the above, the Government upholds the order of absolute confiscation of gold passed by the appellate authority. The penalty of Rs.2,00,000/- on Applicant-I and Rs.1,00,000/- on Applicant-II imposed under Section 112 of the Customs Act, 1962 by the OAA and upheld by the AA is sustained.

16. The Revision Applications are disposed of on the above terms.


(SHRAWAN KUMAR)
Principal Commissioner & ex-officio
Additional Secretary to Government of India

ORDER NO. ⁷⁶³⁻
764 /2023-CUS (WZ)/ASRA/MUMBAI DATED 16.10.23

To,

1. Mr. Dafalla Yousif Dafalla Hamadelnil & Mrs. Raga Saad Elsheikh Elmamsour, c/o. Adv. Ms. Shabana Pathan, Ekta Niwas, Room No.9, Gala Nagar, Achole Road, Nalasopara East - 401 209.
2. The Pr. Commissioner of Customs, Terminal-2, Level-II, Chhatrapati Shivaji Maharaj International Airport, Mumbai - 400 099.

Copy to:

1. Adv. Ms. Shabana Pathan, Ekta Niwas, Room No.9, Gala Nagar, Achole Road, Nalasopara East - 401 209.
2. Sr. P.S. to AS (RA), Mumbai.
3. Guard file.

