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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. 371/161/B/2021-RA /2483 : Date of Issue: 18 .10.2023

ORDER NO. 769/2023-CUS (WZ)/ASRA/MUMBAI DATED 18.10.2023 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 Mir Gulam Abbas

Respondent : Commissioner of Customs (Appeals), Mumbai Zone-III.

Subject : Revision Application filed, under Section 129DD of the Customs Act, 1962 against the Order-in-Appeal No. MUM-CUSTM-PAX-APP-18/2021-22 dated 05.04.2021 [S/49-445/2020] [DOI: 15.04.2021] passed by the Commissioner of Customs (Appeals), Mumbai Zone-III.

ORDER

This Revision Application has been filed by Shri Mir Gulam Abbas (herein referred to as the "Applicant") against the Order-in-Appeal No. MUM-CUSTM-PAX-APP-18/2021-22 dated 05.04.2021 [S/49-445/2020] [DOI: 15.04.2021] passed by the Commissioner of Customs (Appeals), Mumbai Zone-III.

2. Brief facts of the case are that on 08-03-2020, the Customs Officers intercepted viz Shri Mir Gulam Abbas, the applicant holding Indian Passport No. K-9836538 at CSI Airport, Mumbai who had arrived from Dubai by Indigo Airlines Flight No. 6E 1769, after he had cleared himself through the green channel. The personal search of the Applicant resulted into the recovery of one crude gold chain weighing 75 grams and valued at Rs.2,96,258/-. The same were seized by the officers in the reasonable belief that the same was smuggled into India in a clandestine manner in contravention of the provisions of the Customs Act, 1962.

3. The Original Adjudicating Authority (OAA) viz the Deputy Commissioner of Customs, Airport, Mumbai vide Order-In-Original No. AirCus/T2/49/1665/2020 'Uni A' dated 08-03-2020 ordered absolute confiscation of the impugned gold i.e. one crude gold chain weighing 75 grams and valued at Rs.2,96,258/- under Section 111 (d), (l) and (m) of Customs Act, 1962 and a penalty of Rs 30,000/- under section 112(a) & (b) of the Customs Act, 1962 was also imposed on the applicant.

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-CUSTM-PAX-APP-18/2021-22 dated

05.04.2021 [S/49-445/2020] [DOI: 15.04.2021] upheld the order passed by the OAA.

5. Aggrieved with the above order, the Applicants have made an exhaustive submission of case laws and have submitted copies including their submissions made before the lower authorities etc. They have filed these revision applications on the following main points:

5.01. That Gold is not prohibited item and hence the gold is not liable for absolute confiscation;

5.02 That the decisions relied upon by the Appellate Commissioner are not applicable to the case of the applicant;

5.03 That Circular No. 495/5/92-Cus-IV dated 10-05-93 cannot be relied upon for not allowing redemption and that Circular cannot prevail over statutory provision;

5.04. That the penalty of Rs. 30,000/- imposed on the applicant is disproportionate to the value of the gold imported by him and hence is not sustainable;

5.05. That the applicant claimed ownership and redemption of the gold on reasonable fine and penalty;

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; and that he was not a habitual offender and had committed the mistake only with the intention to save a little money and

to make some profit. 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 circumstances, the applicant has prayed to the Revision Authority for redemption of the 01 crude gold chain on payment of reasonable fine and penalty.

6. Personal hearing in the case was scheduled on 17.08.2023. Shri. Prakash Shingrani, Advocate for the applicant appeared for personal hearing and submitted that the applicant brought small quantity of gold for personal use. He requested to allow redemption of the same on nominal fine and penalty.

The Advocate vide letter dated 05th September, 2023, further submitted that the applicant is a NRI usually residing in UAE, he enclosed his proof of NRI status and requested to allow re-export of impugned gold.

7. Government observes that the applicant had failed to declare the impugned gold i.e. one crude gold chain weighing 75 grams and valued at Rs.2,96,258/- 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. Government finds that the confiscation of the impugned goods 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.

9.1 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.

9.2 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.

9.3 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."

10. 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.

11.1 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.

11.2 Government observing the ratio 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.

12. In the instant case, the quantum of gold involved is small and is not of commercial quantity. The quantum of the same does not suggest the act to be one of organized smuggling by a syndicate. Government, notes that the impugned gold were not ingeniously concealed. The applicant claimed that the gold was for personal use and further, there were no allegations that the Applicant is a habitual offender and was involved in similar offences 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. The absolute confiscation of the gold, is therefore harsh and disproportionate. The applicant submitted his desire to take it back. Considering the quantity of gold, the same not being concealed in an ingenious manner, applicant being a NRI staying in UAE, the absolute confiscation of the same was not justified.

13.1 In view of the above facts, Government is inclined to modify the absolute confiscation upheld by the AA and allow the impugned gold i.e. one crude gold chain weighing 75 grams and valued at Rs.2,96,258/- to be re-exported on payment of redemption fine.

13.2 Government finds that the value of the impugned gold is Rs.2,96,258/- under Section 112(a) & (b) of the Customs Act, 1962 and the penalty imposed is Rs.30,000/-, which is appropriate and commensurate to the omissions and commissions of the Applicant.

14.1 In view of the above, the Government modifies the impugned order of the Appellate authority and allows the applicant to redeem the impugned gold i.e. one crude gold chain weighing 75 grams and valued at Rs.2,96,258/- for re-export on payment of redemption fine of Rs.60,000/- (Rupees Sixty Thousand Only).

14.2 The penalty of Rs. 30,000/- imposed by the OAA, under Section 112(a) and (b) of the Customs Act, 1962, and upheld by the AA being appropriate and commensurate with the omissions and commissions of the Applicant, is sustained.

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

Shrawan 18/10/23

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

ORDER NO. 769/2023-CUS (WZ)/ASRA/MUMBAI DATED 18.10.2023

To,

1. Shri Mir Gulam Abbas, Rehman Manzil, 17/1 3rd Cross, Annapalaya, Bangalore, Karnataka-560047
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.