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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. 371/281/B/2020-RA / 7498 Date of issue: 18.10.2023

ORDER NO. 773/2023-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.

Applicant : Mr. Mohammed Haneefa Ibrahim
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-341/2020-21 dated 16.09.2020 [Date of
issue: 16.09.2020] [F. No. S/49-576/2019] passed by the
Commissioner of Customs (Appeals), Mumbai Zone-III.

ORDER

This Revision Application is filed by Mr. Mohammed Haneefa Ibrahim (herein referred to as the 'Applicant') against the Order-in-Appeal (OIA) No. MUM-CUSTOM-PAX-APP-341/2020-21 dated 16.09.2020 [Date of issue: 16.09.2020] [F. No. S/49-576/2019] passed by the Commissioner of Customs (Appeals), Mumbai Zone-III.

2. Brief facts of the case are that on 29.11.2017, the officers of AIU, Customs, Chhatrapati Shivaji Maharaj International Airport, Mumbai, intercepted the Applicant, who had arrived by Indigo Flight No. 6E-082 from Muscat, after he had cleared himself through the Customs Green Channel. A personal search of the Applicant resulted in recovery of five foreign marking gold bars totally weighing 580 grams and valued at Rs.15,74,236/-, which were wrapped with black coloured adhesive tape and stuck to the sole of both his feet using a medicated adhesive tape and concealed under socks worn by him. The recovered gold bars were seized and after completion of investigation, a Show Cause Notice dated 14.05.2018 was issued.

3. The case was adjudicated and the Original Adjudicating Authority (OAA) i.e. Additional Commissioner of Customs, CSMI Airport, Mumbai vide Order-in-Original (OIO) No. ADC/AK/ADJN/439/2018-19 dated 28.01.2019 ordered *absolute confiscation of the seized gold bars totally weighing 580 grams valued at Rs.15,74,236/- under Section 111 (d) of the Customs Act, 1962. A penalty of Rs.1,75,000/- 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.

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

- i. that the Applicant is an owner and is claiming possession and ownership. He has submitted receipts in his name and the quantity he owns. That under Sec 123 it is for the owner to prove that the goods in possession are not smuggled hence he has given details of his income and at the same time have submitted the invoices at the time of investigation. Remaining documents he submitted to the Appeal authority. The Bank Statement of Oman proves that he is not involved into any smuggling and is gainfully employed. The Appeal Authority without any scrutiny of the document blindly upheld the contention of order-in-original which is not sustainable and must be discarded. It is pertinent to note that there is no Modus Operandi of any kind hence in the interest of justice both the order should be set aside.
- ii. that the findings in para 8 and 9 of Order-in-Appeal is without base and the Appeal Authority failed to understand that Petitioner/ Applicant has retracted the earlier statement by way of retraction letter 20.12.2017. As per order-in -original para 6 the Petitioner/Applicant has explained the fact that Gold is Restricted and not Prohibited hence to deny Redemption to such dutiable goods will not be compliance of the Customs Act. Honorable Supreme court in Commissioner of Customs v/s M/s. Atul Automation held distinction between what is restricted and what is prohibited and upheld the order of Honorable High Court granting Redemption with Fine and penalty under Sec 112 (a) of the Customs Act 1962. Notification 50/2017 being exemption notification does not ban others from importing gold. In one of the case Sri Exports vs Hyderabad Customs on 27 November 2018 redemption was granted on the same lines. The quantity is not commercial quantity.
- iii. As per para 2 of order-in-original, he has bought this gold after paying himself. He has been working in Oman for 18 years and has paid for gold in cash from his savings. The said gold was purely for jewellery as around that time his daughter's marriage was scheduled and same took place around that time. He has submitted the wedding card. At the time of adjudication, the statement of Bank of Oman was not available, hence

he submitted the same at hearings during appeal. Hence, when the said gold is not for commercial purpose it can be redeemed by the proper officer under sec 125 of the customs act.

- iv. That under sec 28 the proper officer can charge duty not levied within one year on goods bought for personal use and in this case the gold was for jewellery to be gifted to Applicant's daughter who got married around that time. That sec 28 is the machinery for demand and collection of Customs Duty. It is applicable to all kind of cases under the Customs Act 1962. Hence the opportunity to pay duty is completely in accordance with law. That the Petitioner being owner has been denied opportunity to pay the same by both the Authorities.
- v. 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.
- vi. 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 uptill 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 ambits of Customs Act, 1962. As per notification 50/2017, not more than 1 kg of gold imported 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).

- vii. 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.
- viii. 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)

– Vigneswaran Sethuram Vs Union of India Oct 2006 Kerala High Court

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

5.2 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 it was detected only after he was intercepted by the officers of Customs after he had cleared herself through Customs Green Channel. Had the passenger not been intercepted, he would have made good with gold.
- 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-CUSTOM-PAX-APP-341/2020-21 dated 16.09.2020 passed by the Commissioner of Customs (Appeals), Mumbai be upheld.

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 had brought small quantity of gold for personal use. She further submitted that the applicant is owner of gold and has no past record of any offence. She requested to allow redemption of gold on reasonable fine and penalty. No one appeared for the personal hearing on behalf of the Respondent.

7. Government has gone through the facts of the case and observes that the Applicant had brought five foreign marking gold bars totally weighing 580 grams but 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, five foreign marking gold bars totally weighing 580 grams and valued at Rs.15,74,236/- concealed under socks worn by him, 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. Government observes that the applicant holds an Indian passport, and is working in Oman since last 18 years and had returned back after a continuous stay of at least 11 months (as apparent from para 3 of impugned OIO) and

therefore was eligible to bring upto 1 kg gold at concessional duty in terms of Notification No. 50/2017-Cus dated 30.06.2017. Government observes that gold brought by such eligible persons is not prohibited provided that payment of the concessional duty is made through foreign currency. Further, considering that the Applicant was earning approximately INR 80,000/-, his claim that he had bought the impugned gold for making jewellery for his daughter's wedding, appears feasible. In addition, the applicant has claimed that the relevant invoices and bank statements were submitted by him with AA. However, the lower authorities had not allowed redemption of the impugned gold.

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. However, Government observes that once goods are held to be prohibited, Section 125 of the Customs Act, 1962 still provides discretion to consider release of goods on redemption fine. A plain reading of this section denotes that the Adjudicating Authority is bound to give an option of redemption when goods are not subjected to any prohibition. However, in case of prohibited goods also

there is no bar on the Adjudicating Authority to allow 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.

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 even in prohibited goods. 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. In view of the foregoing paras, the Government finds that as the applicant had not declared the gold at the time of arrival, the confiscation of the gold was justified. However, the absolute confiscation of the same was not justified in view of the aforesaid facts and option to redeem the same on payment of redemption fine should have been allowed.

13. Government finds that the applicant by virtue of his continuous stay abroad, was eligible to bring upto 1 kg of gold at concessional rate of duty to be paid in foreign currency and the import of gold for such person had not been prohibited. Having held that the confiscation was justified and that the applicant was eligible to bring gold at concessional rate of duty, Government allows the impugned gold to be redeemed on payment of appropriate redemption fine.

14. Applicant has also pleaded for setting aside the penalty imposed on him. The market value of the gold in this case is Rs. 15,74,236/-. From the facts of the case as discussed above, Government finds that the penalty of Rs.1,75,000/- imposed on the Applicant under Section 112 of the Customs Act, 1962 commensurate with the omissions and commissions of the Applicant.

15. In view of the above, the Government modifies the Order-in-Appeal No. MUM-CUSTOM-PAX-APP-341/2020-21 dated 16.09.2020 [Date of issue: 16.09.2020] [F. No. S/49-576/2019] passed by the Commissioner of Customs (Appeals), Mumbai Zone-III and allows the Applicant to redeem the impugned five foreign marking gold bars totally weighing 580 grams and valued at Rs.15,74,236/-, on payment of a redemption fine of Rs.3,00,000/-. The impugned gold will be allowed to be cleared at concessional rate of duty as per the conditions therein, if the applicant is found to be eligible person. The penalty of Rs.1,75,000/- imposed on the Applicant under Section 112 of the Customs Act, 1962 by the OAA and upheld by the AA is sustained.

16. 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. 773/2023-CUS (WZ)/ASRA/MUMBAI DATED 18.10.23

To,

1. Mr. Mohammed Haneefa Ibrahim,
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,
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Copy to:

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