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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. 371/163/B/WZ/2022-RA/7595 : Date of Issue 13.10.2023

ORDER NO. 776/2023-CUS (WZ)/ASRA/MUMBAI DATED 13.10.2023 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. Nikash Ahuja

Respondent : Pr. Commissioner of Customs, CSI Airport, Mumbai.

Subject : Revision Application filed under Section 129DD of the Customs Act, 1962 against the Order-in-Appeal No. MUM-CUSTOM-PAX-APP-1157/2021-22 dated 06.12.2021 [Date of issue: 07.12.2021] [F. No. S/49-1186/2020] passed by the Commissioner of Customs (Appeals), Mumbai Zone-III.

ORDER

The Revision Application has been filed by Mr. Nikash Ahuja (herein referred to as the 'Applicant') against the Order-in-Appeal No. MUM-CUSTOM-PAX-APP-1157/2021-22 dated 06.12.2021 [Date of issue: 07.12.2021] [F. No. S/49-1186/2020] passed by the Commissioner of Customs (Appeals), Mumbai Zone-III.

2. Brief facts of the case are that on 03.11.2020, the officers of Air Customs, Chatrapati Shivaji International Airport, Mumbai, intercepted the Applicant, an Indian passport holder, who had arrived by Flight No. UK-202 from Dubai after a stay of 4 days, after he had opted for the Customs green channel and did not declare any gold in his possession. The Applicant had brought One gold chain of 24K purity, weighing 58 grams and valued at Rs.2,59,254/-.

3. The case was adjudicated after waiver of show cause notice and the Original Adjudicating Authority (OAA) i.e. Assistant Commissioner of Customs, 'A' Batch, CSI Airport, Mumbai, vide Order-in-Original No. Air Cus/T2/49/2536/2020 "A" Batch dated 03.11.2020 ordered the absolute confiscation of the impugned One gold chain of 24K purity, weighing 58 grams and valued at Rs.2,59,254/-under Section 111 (d) of the Customs Act, 1962. A penalty of Rs. 15,000/- was imposed on the Applicant under Section 112 of the Customs Act, 1962.

4. Aggrieved with this Order, the Applicant filed an appeal before the Appellate Authority (AA) viz, Commissioner of Customs (Appeals), Mumbai Zone-III who vide Order-in-Appeal No. MUM-CUSTOM-PAX-APP-1157/2021-22 dated 06.12.2021 [Date of issue: 07.12.2021] [F. No. S/49-1186/2020] upheld the order passed by the OAA.

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 OAA as well as the AA failed to appreciate that the gold belonged to the Applicant and was his personal gold and also that the gold chain worn by him was to be gifted to his father on his birthday as he was *returning to India on the same day as his fathers birthday*

5.02. That the OAA and AA failed to appreciate that the gold was purchased by his own money which he carried to Dubai for his expenses and he informed that if required his declaration be recorded but his submissions were not considered;

5.03. That oral declaration be considered as declaration and need not be always in writing;

5.04. That the Applicant was also holding foreign currency to pay if he was asked to pay duty on it and was ready and willing to pay duty and even if he had less money for payment of the duty, he could have arranged and called from his family members;

5.05. That the Applicant informed the officers that he was wearing the gold chain and the fact was mentioned to the OAA also;

5.06. That at the time of waiving of his show cause notice, the Applicant mentioned above his signature "Brought gold for personal use only" but surprisingly in the records of personal hearing, it is stated that "Pax appeared before me. He said he brought the Gold chain for monetary benefit. Nothing more to say", and the same are contrary to each other and that the Applicant has been wrongly considered as being involved in smuggling activities and hence tried to evade customs duty.

5.07. That the gold chain belonged to the Applicant was he not acting as a carrier for anybody;

5.08. That if the gold jewellery on the person of the Applicant cannot be considered nor does it amount to concealment;

5.09. That the gold jewellery was not in commercial quantity and the quantity itself shows that it was meant for personal use;

5.10. That the gold chain was in the form of jewellery as was to be given to his father with love and affection on his birthday;

5.11. That the AA and the OAA have passed orders which are contrary in nature to the earlier decisions taken by them wherein such quantity of gold jewellery used to be released on payment of reshipment fine and personal penalty;

5.14. That the AA and the OAA have gone on the basis of presumptions and assumptions only;

5.16. That the AA has confirmed the penalty without clinching and cogent evidence and has passed an illegal order which needs to be set aside;

5.17. That the OAA and the AA have passed the order which is otherwise illegal and bad in law.

Under the circumstances, the Applicant prayed that the Order-in-Appeal and Order-in-Original be set aside and the seized gold chain be released without payment of any fine or duty instead of absolute confiscation and penalty be waived absolutely or any other order as deemed fit may be issued.

6. Personal hearing in the case was scheduled for 01.08.2023. Mrs Shivangi Kherajani, Advocate appeared for the personal hearing on the scheduled date on behalf of the Applicant. The Advocate for the Applicant submitted that the Applicant had brought one gold chain for personal use. She requested to allow redemption of the gold jewellery on nominal fine and penalty. No one appeared for the personal hearing on behalf of the Respondent.

7. The Government has gone through the facts of the case and observes that the Applicant had brought One gold chain of 24K purity, weighing 58 grams and valued at Rs.2,59,254/- 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 Applicant had not disclosed that he was carrying dutiable goods. However,

after opting to clear through the green channel of Customs and after being intercepted, the impugned one gold chain of 24K purity, weighing 58 grams and valued at Rs. 2,59,254/- was recovered from the Applicant. The gold chain was worn by the Applicant and it revealed his intention 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.

8.1. 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. 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.

12. 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

14. In view of the foregoing paras, the Government finds that as the Applicant had not declared the gold chain at the time of arrival, the confiscation of the same was justified. However, the quantum of gold under import is small and is not of commercial quantity. The impugned gold chain recovered from the Applicant was not concealed in an ingenious manner. There are no allegations that the Applicant is a habitual offender and was involved in similar offence earlier or there is nothing on record to prove that the Applicant was part of an organized smuggling syndicate.

15. Government finds that this is a case of non-declaration of gold in the form of jewellery. The absolute confiscation of the impugned gold chain leading to dispossession of the Applicant of the gold in the instant case is therefore harsh and not reasonable. In view of the aforesaid facts the option of release of the gold chain on payment of redemption fine should have been allowed. Considering the above facts, Government is inclined to modify the absolute confiscation and allow the impugned gold chain to be released on payment of a redemption fine.

16. Applicant has also pleaded for waiver of the penalty imposed on him. The market value of the gold in this case is Rs. 2,59,254/-. From the facts of the case as discussed above, Government finds that the penalty of Rs. 15,000/- imposed on the Applicant under Section 112 of the Customs Act, 1962 is commensurate to the omissions and commissions of the Applicant.

17. In view of the above, the Government modifies the Order-in-Appeal No. MUM-CUSTOMS-PAX-APP-1157/2021-22 dated 06.12.2021 [Date of issue: 07.12.2021] [F. No. S/49-1186/2020] passed by the Commissioner of Customs (Appeals), Mumbai Zone-III and allows the Applicant to redeem the impugned one gold chain of 24K purity, weighing 58 grams and valued at Rs.2,59,254/-

, on payment of a redemption fine of Rs. 50,000/- (Rupees Fifty Thousand only). The penalty of Rs. 15,000/- imposed by the OAA and upheld by the Appellate Authority is sustained.

18. The Revision Application is disposed of on above terms.

Shrawan Kumar
19/10/23

(SHRAWAN KUMAR)

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

ORDER NO. 776/2023-CUS (WZ)/ASRA/MUMBAI DATED 19.10.2023

To,

1. Mr Nikash Ahuja, Flat No. F-602, 6th Floor, Jai Vayu Vihar Ridge ST, Hiranandani, Powai, Mumbai 400 076
2. The Pr. Commissioner of Customs, Terminal-2, Level-II, Chhatrapati Shivaji International Airport, Mumbai 400 099.

Copy to:

1. The Commissioner of Customs (Appeals), Mumbai Zone - III, Awas Corporate Point, 5th Floor, Makwana Lane, Behind S.M.Centre, Andheri-Kurla Road, Marol, Mumbai - 400 059.
2. Mrs Kiran Kanal/Mrs Shivangi Kherajani, Advocates, 501, Savitri Navbahar CHS Ltd, 19th Road, Khar (West), Mumbai 400 052.
3. Sr. P.S. to AS (RA), Mumbai.
4. File copy.
5. Notice Board.

