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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. 371/253/B/2021-RA / 2658 Date of issue: 26.10.2023

ORDER NO. 785/2023-CUS (WZ)/ASRA/MUMBAI DATED 25.10.2023
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 : Mrs. Memunabibi Mohammed Hanif Jabbha
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-1800 & 1801/2020-21 dated 18.03.2021
[Date of issue: 22.03.2021] [F. No. S/49-1399/2019 & S/49-
55/2020] passed by the Commissioner of Customs
(Appeals), Mumbai Zone-III.

ORDER

This Revision Application is filed by Mrs. Memunabibi Mohammed Hanif Jabbha (herein referred to as the 'Applicant') against the Order-in-Appeal (OIA) No. MUM- CUSTM-PAX-APP-1800 & 1801/2020-21 dated 18.03.2021 [Date of issue: 22.03.2021] [F. No. S/49-1399/2019 & S/49-55/2020] passed by the Commissioner of Customs (Appeals), Mumbai Zone-III.

2. Brief facts of the case are that on 19.11.2019, the officers of AIU, Customs, Chhatrapati Shivaji Maharaj International Airport, Mumbai, intercepted the Applicant, who had arrived by Air India Flight No. AI-932 from Jeddah, after she had cleared through the Customs Green Channel. A personal search of the Applicant resulted in recovery of two crude gold bangles totally weighing 100 grams and valued at Rs.3,39,840/-.

3. The case was adjudicated after waiver of show cause notice and the Original Adjudicating Authority (OAA) i.e., Assistant Commissioner of Customs 'C' Batch, CSMI Airport, Mumbai, vide Order-in-Original (OIO) dated 20.11.2019 ordered confiscation of the impugned two crude gold bangles totally weighing 100 grams and valued at Rs.3,39,840/- under Section 111(d), (l) & (m) of the Customs Act, 1962 with an option to redeem it on payment of fine of Rs. 25,000/- under Section 125(1) of the Customs Act, 1962.

4. Aggrieved, the Applicant filed an appeal before the Appellate Authority (AA), for releasing the gold without duty and fine. The Department also filed an appeal for absolute confiscation and imposition of personal penalty under section 112 of the Customs Act, 1962. The AA, vide impugned OIA, while allowing the appeal of the Department, rejected the appeal of the Applicant and ordered absolute confiscation of impugned gold and imposition of personal penalty of Rs.25,000/- on the Applicant under section 112(a) & (b) of the Customs Act, 1962.

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

- i. that she is an old lady and she is illiterate person and she was traveling for the first time, due to which was alien to the Customs Declaration laws.
- ii. that her husband was apprehended by the Customs Department for non-declaration of 235 grams of Gold vide file No. Aircus/49/989/2018 'D', and customs duty redemption fine and penalty on the same has been paid. The Applicant submits that the Gold which was brought by her husband out of 135 grams was sold and the remaining was converted in to 2 crude bangles in Gujrat. The invoice of conversion charges/making charges was produced before the Lower authorities. The same has not given importance while passing the order.
- iii. that the duty, fine and penalty of these 2 converted crude bangles which were seized has already been paid by her husband to the Customs Department.
- iv. that no evidence has been brought on record to prove mens-rea. The penalty imposed in a casual manner under section 112(a) and 112 (b) deserves to be set aside.
- v. that there is nothing incriminating brought on record by the Department in relation to allegation of smuggling is concerned, in fact the Applicant has sufficiently discharged the Burden of Prove casted upon her under section 123 of the Customs Act, 1962 by producing relevant documents on record, However, the lower Authority has not given weightage to the documents relied/produced and has rejected the submission advanced by the Applicant without cogent reasoning.
- vi. That there is nothing incriminating brought on record by the Department in relation to allegation of smuggling is concerned, in fact the Applicant has sufficiently discharged the Burden of Prove casted upon her under section 123 of the Customs Act, 1962 by producing relevant documents on record, However, the lower Authority has not given weightage to the documents relied/produced and has rejected the submission advanced by the Applicant without cogent reasoning.

- vii. that Hon'ble Court in the case of Milton Plastics Ltd. reported in 2017 (347) ELT 258 (Bom.) has been pleased to held that where the adjudication order fails to consider and discuss the important contentions raised by the Applicant, the same is unsustainable in the law. The Applicant submits that in the present case, the Adjudicating Authority has not considered the entire facts and circumstances of the case while passing an order. In this case, the important aspect of the submitting the invoice by the Applicant has not been considered. the veracity and genuineness of the invoice receipt was not given utmost important while passing the order.
- viii. that in the Case of Jamal Basha v GOI reported in 1997 (91) ELT 227 (AP HC DB) it was held that since gold is otherwise eligible for import, it is mandatory to give option to pay fine. Absolute confiscation cannot be ordered even if the gold was found concealed- same view was taken in the case of Shaik Shahabuddin v. CC. reported in 2001 (137) ELT 127 (CEGAT).
- ix. that the Lower Authority didn't consider the important and vital provision i.e., Section 125 of the Act, while passing an order. The Section 125 of the Act is the most essential provision while dealing and considering the goods in question, it is staggering and astonishing to note that Section 125 of the Act has not given any importance while considering and passing of the order.
- x. that in the case of Yakub Yusuf v. CC reported in 2001 (127) ELT 543 (CEGAT), It was held that prohibited goods are only those which are absolutely prohibited. Since gold is not absolutely prohibited for import, it is mandatory to give an option to pay fine. The Applicant submits that the aforesaid judgements are crystal clear that option to pay fine in lieu of confiscation as per mandate given under section 125 of the Act. The Lower Authority didn't consider the judgements mentioned above, while passing an order.
- xi. That in the case of C.C v. Alfred Menezes (2009) SCC Online Bom 2257. it was held that in case of prohibited goods the authority has discretion

- to release confiscated goods on payment of redemption fine. If he exercises the option, it cannot be faulted, which was later confirmed in Alfred Menezes v. C.C (2009) 236 ELT 587 (CESTAT MUMBAI).
- xii. that in the case of Arumugam v Commissioner of Customs 2007 SCC OnLine CESTAT 2820 it was held as follows: in Section 125 of the Customs Act, which provides for option for redemption of goods confiscated under Section 124, against payment of fine, does not discriminate between gold and other goods. In other words, it is not mandatory that gold items, found to be liable for confiscation under Section 111 of the Customs Act, should be absolutely confiscated.
- xiii. That in the case of S. Rajagopal Versus Commissioner of Customs, Trichi reported in 2007 SCC OnLine CESTAT 2203 it was held that illicit/import of gold did not need to be visited with a penalty of such severity as absolute confiscation and heavy personal penalties. We find that this Tribunal has been allowing the persons from whom foreign gold was seized and confiscated to redeem the same on payment of a reasonable redemption fine.
- xiv. That in the case of Fasih Chaudhary v. Director General, Doordarshan and others reported in 1989 1 SCC 89, the Hon'ble Supreme Court held that exercise of discretion should be legitimate, fair and without any aversion, malice or affection. Nothing should be done which may give the impression of favoritism or nepotism. While fair play in action in such matters is an essential requirement, free play in the joint is also an essential requirement, free play in the joint is also a necessary concomitant for an administrative body functioning in an administrative sphere or quasi-administrative as the present one.
- xv. that in so far as imposing of penalty is concerned, the burden lies upon the Respondent to show that the Applicant has acted dishonestly or contumaciously or with the deliberate or distinct object of breaching the law, as laid down in Para 57 of the Apex Court judgment in the case of Akbar Badruddin Jiwani Vs. Collector of Customs, reported in 1990(47)

ELT 161 (S.C.). Such burden cast upon the Respondent has not been discharged.

On the above grounds, the Applicant prayed to set aside the impugned OIA and grant reliefs.

6. Personal hearing in the case was held on 09.08.2023. Shri Aditya Talpade, Advocate appeared for the personal hearing on behalf of the applicant and submitted that the applicant had brought two gold bangles for personal use. He requested to allow redemption of gold bangles on nominal redemption fine and penalty by restoring original order. 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 two crude gold bangles 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 about carrying dutiable goods. However, after getting cleared through the green channel of Customs and on being intercepted, two crude gold bangles totally weighing 100 grams and valued at Rs.3,39,840/-, were recovered from the Applicant and revealed her intention of not to declare the said gold and thereby evade payment of applicable Customs Duty. The confiscation of the gold was therefore justified and the Applicant had thus rendered herself 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 became 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 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."

13.1. Government further observes that there is catena of judgements, including the ones relied upon by the Applicant, 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 Shaik 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.
- e) Judgement dated 17.02.2022 passed by the Hon’ble High Court, Rajasthan (Jaipur Bench) in D.B. Civil Writ Petition no. 12001 / 2020, in the case of Manoj Kumar Sharma vs. UOI and others.
- f) The Hon’ble High Court, Madras on 08.06.2022 in WP no. 20249 of 2021 and WMP No. 21510 of 2021 in r/o. Shri. Chandrasegaram Vijayasundaram + 5 others in a matter of Sri Lankans wearing 1594 gms of gold jewellery upheld the Order no. 165 – 169/2021-Cus (SZ) ASRA, Mumbai dated 14.07.2021 in F.No. 380/59-63/B/SZ/2018-RA/3716, wherein Revisionary Authority had ordered for restoration of OIO wherein the adjudicating authority had ordered for the confiscation of the gold jewellery but had allowed the same to be released for re-export on payment of appropriate redemption fine and penalty.

13.2. Government, observing the ratios 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.

14. In view of the foregoing paras, the Government finds that as the Applicant had not declared two crude gold bangles totally weighing 100 grams and valued at Rs.3,39,840/- 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 bangles recovered from the Applicant were not concealed in an ingenious manner. There are no allegations that the Applicant is a habitual offender and was involved in similar offence earlier. Further, 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. The absolute confiscation of the impugned gold leading to dispossession of the Applicant of the same in the instant case is therefore harsh and not reasonable. In view of the aforesaid facts, an option to redeem the impugned gold on payment of redemption fine should have been allowed. Considering the above facts, Government is inclined to modify the absolute confiscation and allow the redemption of impugned two crude gold bangles totally weighing 100 grams and valued at Rs.3,39,840/- on payment of a redemption fine.

16. Applicant has also pleaded for setting aside the penalty imposed on her. The market value of the gold in this case is Rs.3,39,840/-. From the facts of the case as discussed above, Government finds that the penalty of Rs.25,000/- imposed on the Applicant under Section 112 of the Customs Act, 1962 commensurate with the omissions and commissions of the Applicant.

17. In view of the above, the Government modifies the Order-in-Appeal No. MUM-CUSTOM-PAX-APP-1800 & 1801/2020-21 dated 18.03.2021 [Date of issue: 22.03.2021] [F. No. S/49-1399/2019 & S/49-55/2020] passed by the Commissioner of Customs (Appeals), Mumbai Zone-III and allows the Applicant to redeem the impugned two crude gold bangles totally weighing 100 grams and valued at Rs.3,39,840/-, on payment of a redemption fine of Rs.50,000/-. The penalty of Rs.25,000/- imposed on the Applicant under Section 112 of the Customs Act, 1962 by the AA is sustained.

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

Shrawan
25/10/23
(SHRAWAN KUMAR)
Principal Commissioner & ex-officio
Additional Secretary to Government of India

ORDER NO. 785/2023-CUS (WZ)/ASRA/MUMBAI DATED 25.10.23

To,

1. Mrs. Memunabibi Mohammed Hanif Jabbha,
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2. The Pr. Commissioner of Customs,
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2. Sr. P.S. to AS (RA), Mumbai.
3. Guard file.