

SPEED POST
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GOVERNMENT OF INDIA
MINISTRY OF FINANCE
DEPARTMENT OF REVENUE

Office of the Principal Commissioner RA and
Ex-Officio Additional Secretary to the Government of India
8th Floor, World Trade Centre, Cuffe Parade,
Mumbai- 400 005

F. No.371/198/B/2021 / 7680
F. No.371/199/B/2021

Date of Issue: 30 .10.2023

790-791
ORDER NO. /2023-CUS (WZ) /ASRA/Mumbai DATED 26 .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 : 1. Mr. Haresh Natvarlal Doshi
2. Mrs. Nancy Vinaykumar Varaiya,

Respondent : The Principal Commissioner of Customs,
C.S.M.I. Airport, Mumbai - 400 099.

Subject : Revision Applications filed under Section 129DD of the
Customs Act, 1962 against the Order-in-Appeal No.
MUM-CUSTOM-PAX-APP-51 & 52/2021-22 dated
05.04.2021 passed by the Commissioner of Customs
(Appeals), Mumbai Customs, Zone - III.



ORDER

The subject Revision Applications have been filed by Shri Haresh Natvarlal Doshi and his wife Mrs. Nancy Vinaykumar Varaiya (*here-in-after referred to as 'the applicant no.1' and 'the applicant no.2', respectively, when mentioned individually or 'applicants' when mentioned together*) against the Order-in-Appeal No.MUM-CUSTOM-PAX-APP-51 & 52/2021-22 dated 05.04.2021 passed by the Commissioner of Customs (Appeals), Mumbai Customs, Zone - III.

2. Brief facts of the case are that the said two applicants, both holders of Indian passports, arrived from Bangkok on 19.11.2018 by Bangkok Airways flight no.PG-733 and were intercepted by the Customs officers at C.S.I. Airport, Mumbai as they opted for the Green Channel. Detailed examination of their baggage and conduct of personal search resulted in the recovery of *three cut gold bars and five kadas, collectively weighing 1000 grams valued at Rs.28,23,165/-*.

3. Pursuant to the cut pieces and kadas being examined and assayed, the 1000 grams of gold recovered from both the applicants valued at Rs.28,23,165/- was seized under the *reasonable belief that the same was attempted to be smuggled into India and hence liable to confiscation under the provisions of the Customs Act, 1962*. On the basis of investigation conducted, a Show Cause Notice dated 09.05.2019 was issued to both the *applicants requiring them to show cause as to why the seized Gold of 24KT purity 999%, weighing 1000 grams, valued at Rs.28,23,165/- which was concealed by them should not be absolutely confiscated under Section 111(d), (l) and (m) of the Customs Act, 1962 and personal penalty under Section 112(a) and (b) of the Customs Act, 1962 should not be imposed on them*.

4. After following due process of law, the original authority i.e. Additional Commissioner of Customs, CSI Airport, Mumbai vide Order-in-Original



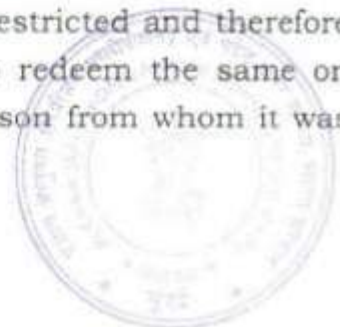
dated 10.10.2019 ordered for absolute confiscation of the said gold weighing 1000 grams valued at Rs.28,23,165/- under Section 111(d), (l) and (m) of the Customs Act, 1962. The original authority also imposed personal penalties of Rs.1,45,000/- each, on both the applicants, under Section 112(a) of the Customs Act, 1962.

5. Aggrieved, the applicants filed separate appeals before the Commissioner (Appeals) who vide the impugned Order-in-Appeal dated 05.04.2021 upheld the order of the original authority and rejected their appeals. Aggrieved, both the applicants have filed the subject Revision Applications. The grounds in both the subject applications are common and are as under:-

(a) That the impugned order was bad in law, unjust and had been passed without giving due consideration to the documents on record and facts of the case; that the original authority ought to have appreciated that dutiable goods brought by them were neither restricted nor prohibited;

(b) That the Commissioner (Appeals) had concluded that the acts and/or commissions on their part was to evade Customs duty and that evasion of Customs duty could be done only in respect of dutiable goods and not prohibited goods; that once the Department accepted that the goods were dutiable, the option of redemption of goods as provided under Section 125 of the Customs Act, 1962 will have to be given to them; that sub-section (1) of Section 125 of the Customs Act, 1962 makes it crystal clear that they were required to give them an option to pay fine in lieu of confiscation in respect of the impugned goods which even as per the Department are dutiable goods; that absolute confiscation of the impugned dutiable goods would mean interpreting or giving a new meaning to the said sub-section (1) of Section 125 of the Customs Act, 1962 in a manner neither authorized or intended by the Act;

(c) That it has held in a number of decisions of the Higher Courts that gold is not a prohibited item and that the same is restricted and therefore should not be confiscated absolutely and option to redeem the same on redemption fine ought to have been given to the person from whom it was



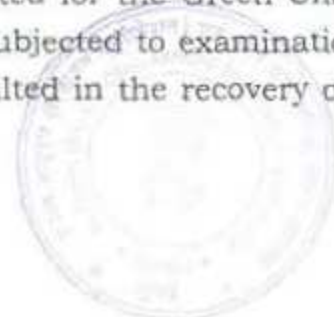
recovered and relied upon the following decisions in support of the submission:-

- Hargovind Das K. Joshi vis. Collector of Customs Civil Appeals Nos. 139-143 of 1985, decided on 6-1-1987;
- Alfred Menezes v/s. CC (C.S.I.) Airport, Mumbai, Final Order Nos. A/613-614/2008-WBZ/C-II/(SMB) and Stay Order Nos. S/298 299/2008-WBZ/C-II(SMB) dated 1-8-2008;
- T. Elavarasan Vs CC (Airport), Chennai [2011 (266) ELT 167 (Mad)]
- Yakub Ibrahim Yusuf vs. CC Mumbai, CEGAT Final Order No. A/362/2010-WBZ/C-II/(CSTB) dated 28-10-2010;
- Universal Traders vs. Commissioner [2009 (240) E.L.T. A78 (SC)];
- Shaik Jamal Basha vs. Government of India [1997 (91) ELT 277(AP)];
- UOI vs Dhanak M. Ramji - [2009 (248) ELT 127 (Bom)] as affirmed in [2010 (252)ELT A102 (SC)];
- CC.Ex. & ST, Lucknow vs Mohd. Halim Mohd. Shamim Khan [2018(359) ELT 265(Tri-All)] and several others.

In view of the above, they prayed that the Gold may be released under Section 125 of the Customs Act, 1962 on nominal redemption fine along with applicable duty and that personal penalty be reduced substantially as violation if any was of a technical nature.

6. Personal hearing in the case was held on 04.08.2023 and Shri N.J. Heera, Advocate, appeared for the same on behalf of the applicants. He submitted that the applicants are husband and wife. He further submitted that they together brought some gold jewellery which was worn by them and a small quantity of gold which was not concealed. He also submitted that applicants are not habitual offenders. He requested to allow redemption of goods on reasonable fine and minimum penalty.

7. Government has gone through the facts of the case and observes that the applicants are husband and wife and had opted for the Green Channel subsequent to which they were intercepted and subjected to examination by the Customs Authorities. Such examination resulted in the recovery of one



cut bar of gold and two cut bars of gold from the baggage of applicant no.1 & 2, respectively. Apart from the said gold cut bars, one gold 'kada' and four gold 'kadas' were recovered from applicant no.1 & 2, respectively, during the course of their personal search. Government notes that the total quantity of gold so recovered from both applicants was 1000 grams. The order of the original authority has recorded that the both the applicants had opted for the Green Channel after arriving at the airport, and Government notes that this allegation has not been denied by both the applicants either before the lower authorities or during the course of these proceedings. Thus, Government finds that it is not in dispute that there was an intent to smuggle the seized gold into the country without payment of proper Customs duty. Government finds that it was the alertness of the Customs officers that led to the detection of the said Gold carried by the applicants and that both the applicants had failed to declare the goods to the Customs authorities as required under Section 77 of the Customs Act, 1962. Government notes that it was only after detailed examination of their baggage and them being subjected to a personal search was the impugned gold detected, and as stated earlier this clearly reveals that they never intended to declare the impugned gold to the Customs authorities on arrival and in the process evade payment of Customs Duty applicable on such gold.

8. Government notes that the original authority had ordered for absolute confiscation of the gold, a decision which has been upheld by the Commissioner (Appeals). In this context, Government finds it pertinent to examine Section 2(33) which defines 'prohibited goods' and the same is 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".

Government notes 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, Government notes that gold, a restricted



item for import, was imported in the present case without fulfilling the conditions for import, and hence the impugned gold under seizure would fall under the category of 'prohibited goods' in terms of the Section 2(33) of the Customs Act, 1965.

9. As regards the issue of whether the said gold would be liable for confiscation or otherwise, Government finds that the Hon'ble High Court of Madras, in the case of Commissioner of Customs (Airport), Chennai-I v/s P. Sinnasamy [2016 (344) E.L.T. 1154 (Mad.)], had observed as under: -

"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....."

Given the principles laid down by the Hon'ble High Court in the decision referred above, Government finds that the failure to declare the said Gold and comply with the prescribed conditions, has made the impugned gold 'prohibited' and therefore liable for confiscation.

10. Having observed so, Government finds that once goods are held to be prohibited, Section 125 of the Customs Act, 1965 still provides that the proper officer may exercise his discretion to consider release of goods on payment of a redemption fine in lieu of confiscation. Section 125 of the Customs Act, 1962 is reproduced below: -

"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 :

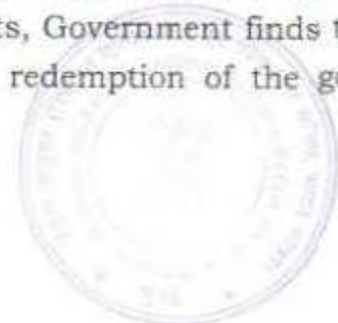
Provided further that, without prejudice to the provisions of the proviso to sub-section (2) of section 115, such fine shall not exceed the market price of the goods confiscated, less in the case of imported goods the duty chargeable thereon.

(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."

A plain reading of Section 125 shows that the Adjudicating Authority has the discretion to give an option of redemption when goods are not subjected to total prohibition. The exercise of such 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, Government finds that in the case of prohibited goods, such as, gold, the Adjudicating Authority may allow redemption in deserving cases on payment of appropriate fine.

11. Government finds that in the present case the gold found on both the applicants, who are husband and wife, would average to 500 grams each and thus the quantum of gold under import is not substantial and is not of commercial quantity. Government notes that the gold was found in their baggage and worn on their person as 'kadas' and that there is no allegation that the said gold was ingeniously concealed in an attempt to keep the same from being detected during inspection. Government also finds that the investigation carried out has not indicated that the applicants were involved in such activity earlier or that they belong to an organized smuggling syndicate and are repeat offenders. Given these facts, Government finds the applicants to be genuine passengers and denying redemption of the gold carried by them would be unjust and unfair.



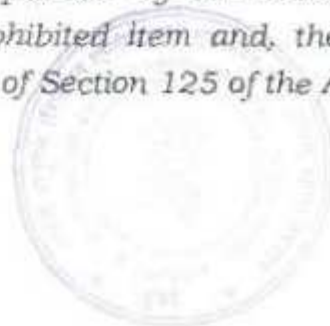
12. Government finds that the Hon'ble Supreme Court in case of M/s. Raj Grow Impex [Civil Appeal Nos.2217-2218 of 2021 arising out of SLP(C) Nos.14633-14634 of 2020 - Order dated 17.06.2021] has laid down the conditions and circumstances under which such discretion allowing redemption should be used, the relevant portion is 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. 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 finds support in the following decisions to hold that the present case is a fit case for allowing redemption: -

- 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, had held 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."*;

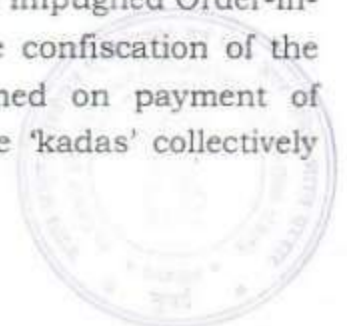


- The Hon'ble High Court of Madras, in the judgment in the case of Shaik Mastani Bi vs. Principal Commissioner of Customs, Chennai-I [2017(345) ELT 201 (Mad)] upheld the order of the Appellate Authority allowing re-export of gold on payment of redemption fine;
- The Hon'ble High Court of Kerala in the case of R. Mohandas vs. Commissioner of Cochin [2016(336) E.L.T, 399 (Ker.)] had observed "*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...*";
- 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 decision dated 08.03.2010 upheld the decision of the Hon'ble High Court of Bombay [2009(248) E.L.T. 127 (Bom)], and approved redemption of absolutely confiscated goods;

Given the ratios of the above judicial pronouncements, Government finds that the present case is a fit case for granting the applicants the option to redeem the impugned gold and hence sets aside the decision of the lower authorities ordering absolute confiscation of the same.

14. As regards the penalty imposed on the applicants, Government finds that both the applicants actively and consciously did not declare the impugned Gold with the intent to evade payment of Customs of duty on the same and have hence rendered themselves liable to penalty for committing such offence. Government finds that the penalties of Rs.1,45,000/- imposed on each of the applicants under Section 112(a) of the Customs Act, 1962 by the original authority and upheld by the Commissioner (Appeals) is commensurate with the omissions and commissions committed by them and hence upholds the same.

15. In view of the above, the Government modifies the impugned Order-in-Appeal dated 05.04.2022 with respect to the absolute confiscation of the impugned Gold and allows the same to be redeemed on payment of redemption fine. The three cut bars of Gold and five 'kadas' collectively



weighing 1000 grams and valued at Rs.28,23,165/- are allowed to be redeemed on payment of a fine of Rs.5,60,000/- (Rupees Five lakhs Sixty Thousand only). The penalties of Rs.1,45,000/- imposed on each of the applicants under Section 112(a) of the Customs Act, 1962 is upheld.

16. The subject Revision Applications are disposed of in the above terms.

Shrawan
26/10/23
(SHRAWAN KUMAR)

Principal Commissioner & Ex-Officio
Additional Secretary to Government of India

790-791
ORDER No. /2023-CUS (WZ) /ASRA/Mumbai dated 26.10.2023

To

1. Shri Haresh Natvarlal Doshi,
Flat No.102, Makanji Park,
Adajan Patiya, Surat - 395 009,
GUJARAT.
2. Mrs. Nancy Vinaykumar Varaiya,
Flat No.102, Makanji Park,
Adajan Patiya, Surat - 395 009,
GUJARAT.

Copy to:

1. The Pr. Commissioner of Customs (Appeals), C.S.M.I. Airport, Awas Corporate Point, Makwana Lane, Andheri (E), Mumbai 400 059.
2. Shri N.J. Heera, Advocate, Nulwala Building, 41 Mint Road, Gr. Floor, Opp. GPO, Fort, Mumbai - 400 001.
3. Sr. P.S. to AS (RA), Mumbai
4. Notice Board.

