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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. 371/378/B/WZ/2022-RA | 7/23 : **Date of Issue** : 10.10.2023

ORDER NO. 808/2023-CUS (WZ)/ASRA/MUMBAI DATED 3/10.2023 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. Arash Vatardoust Miandehi

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-542/2022-23 dated 17.06.2022 [Date of issue: 17.06.2022] [F. No. S/49-2327/2021] passed by the Commissioner of Customs (Appeals), Mumbai Zone-III.

ORDER

The Revision Application has been filed by Mr. Arash Vatandoust Miandehi (herein referred to as the 'Applicant') against the Order-in-Appeal No. MUM-CUSTM-PAX-APP-542/2022-23 dated 17.06.2022 [Date of issue: 17.06.2022] [F. No. S/49-2327/2021] passed by the Commissioner of Customs (Appeals), Mumbai Zone-III.

2. Brief facts of the case are that on 08/09.02.2019, the officers of Air Customs, Chatrapati Shivaji International Airport, Mumbai, intercepted the Applicant, holding an Iranian passport, who had arrived by Air Arabia Flight No. G9 406 from Sharjah, after he had cleared himself through the Customs green channel. Personal search of the Applicant resulted in the recovery of one wrist watch coated with black colour from his left pocket and one silver coloured chain worn by him around his neck.

3. Pursuant to being assayed, the watch made of gold coated with black colour weighing 189 grams and the silver coloured chain made of gold of 22K purity weighing 240 grams and collectively valued at Rs. 14,98,489/- were seized under the provisions of the Customs Act, 1962. The Applicant, in his statement (which was retracted on 03.03.2020) stated that the impugned gold was concealed on his person to evade detection by the Customs authorities; that the impugned gold belonged to one Bahram Bagheri in Sharjah and was given to him with instructions to handover the same to one Mr Sia after reaching Mumbai. In his subsequent statement, the Applicant emphasized on his ignorance of English and claimed that the seized gold articles belonged to him.

4. After following the due process of law, the Original Adjudicating Authority (OAA) i.e. Additional Commissioner of Customs, CSI Airport, Mumbai, vide Order-in-Original No. ADC/AAK/ADJN/171/2021-22 dated

25.10.2021 ordered the absolute confiscation of the seized one gold wrist watch coated with black colour and one gold chain coated with silver colour, collectively weighing 429 grams and valued at Rs. 14,98,489/-, under Section 111(d), (l) and (m) of the Customs Act, 1962. Personal penalty of Rs. 10,000/- was imposed on the Applicant under Section 112 (a) of the Customs Act, 1962.

5. 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-542/2022-23 dated 17.06.2022 [Date of issue: 17.06.2022] [F. No. S/49-2327/2021] upheld the order passed by the OAA.

6. Aggrieved with the above order of the Appellate Authority, the Applicant has filed this revision application on the following grounds:

6.01. That the Applicant was an Iranian national and did not know English language but by way of actions informed the officer that he was wearing a gold chain and gold watch but yet no interpreter was called to understand him;

6.02. That the AA as well as the OAA failed to appreciate that the Applicant through his advocate had by way of a written reply submitted that the impugned gold belonged to him and were his personal gold and was purchased by him from his hard earned money and also produced a Xerox copy of the invoice dated but the same was not appreciated by the officer;

6.03. That the Applicant, prior to filing the SCN reply also filed a retraction and put the true facts before the investigating authority;

6.04. That the OAA and AA failed to appreciate that the impugned gold was his personal gold purchased from his own money and he told the officers that if required, his declaration be recorded but his submissions were not considered and penal action taken though as per law, under Section 77 of the Customs act, even oral declaration is considered as declaration and need not be always in writing;

6.05. That the seizure and confiscation made by both the Authorities is illegal and the Applicant has stated all the facts in the statement itself;

6.06. That *the seized gold were worn by him and were not ingeniously concealed and were visible to the naked eye;*

6.07. That the AA and OAA failed to appreciate that the gold under seizure *were for his personal use and not meant for sale in India and being a foreigner he did not have the knowledge that even personal gold worn or brought need to be declared;*

6.08. That the Applicant told the officers that he was ready and willing to pay the applicable duty if required and if not then the same may be retained by them on making an entry in the passport and on his return from India the same may be handed over to him but the officer failed to listen and/ or pay heed to his say;

6.09. That the purported finding are totally arbitrary, perverse and unjust and have been erroneously made with total non-application of mind;

6.10. That the OAA and AA failed to appreciate that under Section 125 of the Customs Act, 1962, whenever confiscation of any goods is authorized by the Act, the goods can be released by the OAA on payment of redemption fine;

6.11. That mere foreign origin of the goods does not indicate that the goods are smuggled and the entire case is based on assumption and presumption and on surmise and conjectures;

6.12. 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;

6.13. That he had informed that the impugned gold which he was wearing would have been taken back by him as they were old and his regular wear but the fact was misunderstood;

6.14. That the Applicant had a good financial status as he was a businessman and that it was wrongly considered that the Applicant was involved in smuggling activities;

- 6.15. That the Applicant was not acting as a carrier for anybody and was a businessman holding a business visa;
- 6.16. That the OAA and AA failed to appreciate that the goods belonged to him and produced the copy of invoice for purchase of the goods and that this was his first visit to India;
- 6.17. That the AA and the OAA have gone on the basis of presumptions and assumptions only;
- 6.18. That the AA and the OAA failed to appreciate that the impugned gold was for his personal use and was wearing the same and belonged to him and that he was not a carrier for anybody;
- 6.19. That the gold jewellery was not in commercial quantity and the quantity itself shows that it was meant for personal use;
- 6.20. That the AA has given the conclusions and findings which is contrary and inconsistent to the findings of the OAA;
- 6.21. 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 goods used to be released on payment of re-shipment fine and personal penalty;
- 6.22. That the Appellate Authority has discriminated between Indian national and foreign nationals, whereas as per the constitution of India, a person if governed by law of the land whether he/she is a foreign national or Indian national and under the Constitution, justice cannot be denied to foreign national;
- 6.23. That the AA has confirmed the penalty without clinching and cogent evidence and has passed an illegal order which needs to be set aside;
- 6.24. 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 wrist watch and gold chain to be released by way of re-export without payment of any fine and

duty and penalty be waived absolutely or any other order as deemed fit may be issued.

7. 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 is a foreign national and brought some gold items for personal purpose. She requested to allow redemption of goods on reasonable fine and penalty for re-export. No one appeared for the personal hearing on behalf of the Respondent.

8. The Government has gone through the facts of the case and observes that the Applicant had brought one gold wrist watch coated with black colour and one gold chain coated with silver colour, collectively weighing 429 grams and valued at Rs. 14,98,489/- 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 clearing himself through the green channel of Customs and after being intercepted, the impugned one gold wrist watch coated with black colour and one gold chain coated with silver colour, collectively weighing 429 grams and valued at Rs. 14,98,489/- was recovered from the Applicant. The gold chain was worn by the Applicant and the gold wrist watch was kept in pocket and manner in which it was brought 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.

9.1. 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.”

9.2. 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.

10. 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".

11. 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.

12. 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.

13. 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."

14.1. 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 Jhamatma 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.

14.2. Further, The Hon'ble High Court, Madras, in a judgement passed on 08.06.2022 in WP No. 20249 of 2021 and WMP No. 21510 of 2021 in respect of Shri. Chandrasegaram Vijayasundaram and 5 others in a matter of Sri Lankans collectively 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.

14.3. 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.

15. In view of the foregoing paras, the Government finds that as the Applicant had not declared the gold wrist watch coated with black colour and one gold chain coated with silver colour, collectively weighing 429 grams and valued at Rs. 14,98,489/- at the time of arrival, the confiscation of the same was justified. However, Applicant is a foreign national and the quantum of gold under import is not large or of commercial quantity. The impugned one gold wrist watch coated with black colour and one gold chain coated with silver colour was worn by the Applicant and kept in the pocket of his trousers and 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.

16. Government finds that this is a case of non-declaration of gold rather than smuggling of commercial scale. The absolute confiscation of the impugned gold wrist watch coated with black colour and one gold chain coated with silver colour 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 and considering that the Applicant is a foreign national, option to re-export the impugned gold wrist watch coated with black colour and one gold chain coated with silver colour 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 wrist watch coated with black colour and one gold chain coated with silver colour, to be re-exported on payment of a redemption fine.

17. Applicant has also pleaded for waiver of the penalty imposed on him. The market value of the gold in this case is Rs.14,98,489/-. From the facts of the case as discussed above, Government finds that the penalty of Rs. 10,000/- imposed on the Applicant under Section 112 of the Customs Act, 1962 is not commensurate to the omissions and commissions of the Applicant and needs to be revised upwards.

18. In view of the above, the Government modifies the Order-in-Appeal No. MUM-CUSTOMS-PAX-APP-542/2022-23 dated 17.06.2022 [Date of issue: 17.06.2022] [F. No. S/49-2327/2021] passed by the Commissioner of Customs (Appeals), Mumbai Zone-III and allows the Applicant to redeem the impugned gold wrist watch coated with black colour and one gold chain coated with silver colour, collectively weighing 429 grams and valued at Rs. 14,98,489/-, for re-export, on payment of a redemption fine of Rs.3,00,000/- (Rupees Three lakhs only). The penalty of Rs. 10,000/- imposed by the OAA and upheld by the Appellate Authority, not being commensurate to the omissions and

commissions of the Applicant is modified to Rs. 1,50,000/- (Rupees One Lakh Fifty Thousand only).

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


(SHRAWAN KUMAR)

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

ORDER NO. 308/2023-CUS (WZ)/ASRA/MUMBAI DATED 31.10.2023

To,

1. Mr. Arash Vatandoust Miandehi, Unit-2, Karaj Hesaarak Street, Tehran, Iran

Address No.2: Mr Arash Vatandoust Miandehi, C/o Mrs Kiran Kanal/ Mrs Shivangi Kherajani, Advocates, 501, Savitri Navbahar CHS Ltd, 19th Road, Khar (West), Mumbai 400 052.

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.

