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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. 371/41/B/2022-RA / 657

Date of Issue

30.01.2024

ORDER NO. 81 /2024-CUS (WZ) /ASRA/MUMBAI DATED 24.01.2024
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. AmitKumar Ashokkumar Doshi

Respondent: Pr. Commissioner of Customs, Airport-I, Mumbai

Subject : Revision Application filed, under Section 129DD of the
Customs Act, 1962 against the Order-in-Appeal No. Mum-
CUSTM-Pax-App-613-2021-22 dated 24.12.2020 passed by
the Commissioner of Customs (Appeals), Mumbai-III

ORDER

This revision application has been filed by Mr. AmitKumar Ashokkumar Doshi (hereinafter referred to as Applicant) against the Order-in-Appeal No. Mum-CUSTOM-Pax-App-613-2021-22 dated 24.12.2020 passed by the Commissioner of Customs (Appeals), Mumbai-III.

2. Brief facts of the case are that Applicant was travelling from Dubai to India via Chhatrapati Shivaji International Airport on 13.03.2020 wearing 'One Gold Chain - 100 gms' and 'One Gold Kada - 116 gms' totally valued to Indian Rs. 8,09,920/-, without declaring same and opted for the green channel. He was intercepted by the Customs Officer on the basis that import of the impugned goods through baggage mode is in violation of Para 2.20 of the Export and Import policy as well as of Section 11 (1) of the Foreign Trade (Development and Regulation) Act, 1992. Further, the impugned goods fall in the category of 'prohibited restricted / commercial quantity goods. Applicant opted for Green Channel having goods in his baggage beyond his admissible free allowance instead of declaring them to the Proper Officer of Customs.

3. The case was adjudicated and the impugned gold was confiscated absolutely. The adjudicating authority also imposed personal penalty of Rs. 2,00,000/- under Section 112 of Customs Act, 1962.

4. Aggrieved by this Order, the applicant preferred an appeal before the Appellate Authority (AA) viz, Commissioner of Customs (Appeals), Mumbai-III, who vide impugned Order-in-Appeal rejected the appeal and upheld the OIO.

5. Aggrieved with the above order, the Applicants have made an exhaustive submission of case laws and have submitted copies including their submissions made before the lower authorities etc. They have filed revision application on the following main points:

5.1 the findings and order passed by the Respondent are bad in law, illegal, unjust and unfair.

- 5.2 There are numbers of judgments of the apex court, Hon'ble High Court and Tribunal, where in it has been held that gold is not prohibited item and same is restricted and therefore it should not be confiscated absolutely and option to redeem the same or redemption fee ought to be given to the person from whom it is recovered. The applicant submits that the said judgements were submitted to the respondent but the respondent failed to appreciate the same in the right perspective in as much as applying the same ratio in present case.
- 5.3 Applicant denies each charge, averment, and allegations leveled in the Order-in-Appeal No. MUM-CUSTOM-PAX-APP- 613/2020-21 dated 24.12.2020 and states that applicant has not committed any breach of the provisions of the Customs Act, 1962 or any Rules/Regulations
- 5.4 The Hon'ble Commissioner has erred in confirming the order of absolute confiscation of 216 gm. gold bars without the gold bars which were not prohibited for import either under the Customs Act 1962 or any other law for the time being in force. The order of absolute confiscation of gold under Section 111(d) of the Act was therefore not correct in law. In view of that no penalty could have been imposed on the Applicant under Section 112 of the Act.
- 5.5 The Hon'ble Commissioner has erred in overlooking the Voucher contrary to the case law cited in this connection
- 5.6 The Hon'ble Commissioner has erred in overlooking that Gold is not prohibited for importation. That being so, the contravention of Section 111(d) of the Act was not attracted. The Hon'ble Commissioner erred in overlooking this fact as the 300 gold bars were ordered to be absolutely confiscated contrary to the provisions of Section 111(d) of the Act.

5.7 The Hon'ble Commissioner has erred in overlooking that Since gold was not prohibited for import either under the Customs Act 1962 or under any order law for the time being in force, the Ld. Respondent had erred in passing order of absolute confiscation and not giving the mandatory option to pay fine in lieu of confiscation under Section 125 of the Act.

5.8 The Hon'ble Commissioner has in error in overlooking the fact that since the order of confiscation passed under Section 111(d) of the Act was not legal and proper, no penalty could have been imposed on the applicant.

5.9 In view of above, Applicant requested to set aside the impugned order in appeal and to redeem the impugned goods and to reduce/set aside the penalty imposed.

6 Personal hearing in the case was scheduled on 28.08.2023. Ms. Sirat Khan, Advocate for the applicant appeared for personal hearing and submitted that the applicant brought one gold chain and gold kada for personal use. She further submitted that applicant has no history of any offence and jewelry was not concealed She requested to allow redemption of goods on nominal redemption fine and penalty.

7.1 Government observes that the applicant has filed an application for condonation of delay Applicant has stated that the OIA was received by him on 13.03.2020 and that there was delay in filing the application due to inadvertently filing of this application before CESTAT. Government observes that the matter before CESTAT was disposed off on 11.11.2021 and this revision application is filed on 15.03.2022. The applicant was required to file the revision application within 3 months after the CESTAT order i.e. by 11.02.2022. Considering the further extension of 3 months which can be condoned, the applicant was required to file the revision by 11.05.2022. The applicant had filed the revision application on 15.03.2022 which is within the extendable period and hence the Government condones the delay and goes into the merits of the case.

7.2 The Government has gone through the facts of the case, and observes that the applicant had failed to declare the gold while availing the green channel facility. The applicant clearly had failed to declare the goods to the Customs as required under Section 77 of the Customs Act, 1962. By not declaring the gold carried by him, the applicant clearly revealed his intention not to declare the gold and pay Customs duty on it. The Government finds that the confiscation of the impugned gold was therefore justified.

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.

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, Delhu 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" in terms of Section 2(33) and hence it is liable for confiscation under Section 111(d) of the Customs Act, 1962.

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. Once goods are held to be prohibited, Section 125 still provides discretion to consider release of goods on redemption fine. 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."

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. Thus, Adjudicating authority can allow redemption under Section 125 of any goods which are prohibited either under the Customs Act or any other law on payment of fine.

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 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 Shik Mastani Bi vs. Principal Commissioner of Customs, Chennai-1 [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.

14. Government, observing the ratios of all 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. Government observes that the quantity of gold was not substantial, which indicates that the same was not for commercial use. The Applicant claimed ownership of the impugned gold. There are no other claimants of the said gold. There is no allegation that the applicant is a habitual offender and was involved in similar offence earlier. The facts of the case indicate that it is a case of non-declaration of gold, rather than a case of smuggling for commercial considerations.

16.1 The absolute confiscation of the gold, leading to dispossession of the applicant of the gold in the instant case is therefore, harsh and not reasonable. Government for the aforesaid reasons, is inclined to set aside the absolute


confiscation held in the OIA and considers granting an option to the Applicant to redeem the Gold on payment of a suitable redemption fine, as the same would be more reasonable and judicious

16.2 Government finds that the penalty of Rs. 2,00,000/- imposed on the Applicant for the gold valued at Rs. 8,09,920/- under Section 112 of the Customs Act, 1962 is not appropriate and commensurate to the omissions and commissions of the Applicant. The same is required to be revised.

17.1 In view of the above, the Government modifies the impugned order passed by the Appellate authority and allows the applicant to redeem the impugned gold viz. (One Gold Chain - 100 gms' and 'One Gold Kada - 116 gms) totally weighing 216 grams and valued at Rs. 8,09,920/- on payment of redemption fine of Rs. 1,60,000/- (Rupees One Lakh Sixty Thousand Only).

17.2 The penalty of Rs. 2,00,000/- imposed under Section 112 of the Customs Act, 1962 not being appropriate and commensurate with the omissions and commissions of the Applicant, is revised to Rs. 1,00,000/-.

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


(SHRAWAN KUMAR)
Principal Commissioner & ex-officio
Additional Secretary to Government of India

ORDER NO. 21 /2024-CUS (WZ)/ASRA/MUMBAI DATED 24.01.2024

To,

1. Mr. Amitkumar Ashok Kumar Doshi, 201, Naperi Tower, R.A. Kidwai Road, Wadala(E), Mumbai-400031.
2. Pr Commissioner of Customs, Airport-1, Chhatrapati Shivaji International Airport, Terminal - 2, Level - II, Andheri(E), Mumbai - 400099.

Copy to:

1. The Commissioner of Custom Appeals, Mumbai-III, Awas Corporate Point (5th Floor), Makwana Lane, Behind S. M. Centre Andheri-Kurla Road, Marol, Mumbai-400059.
2. Focus(Consultants), 5, Wakefield House, Ground floor, Spratt Road, Ballard Estate, Mumbai-400001.
3. Sr. P.S. to AS (RA), Mumbai.
4. File Copy.
5. Notice Board.

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