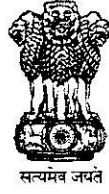


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GOVERNMENT OF INDIA
MINISTRY OF FINANCE
(DEPARTMENT OF REVENUE)
8th Floor, World Trade Centre, Centre - I, Cuffe Parade,
Mumbai-400 005

F.No. 371/500/B/WZ/2022-RA/2986 : Date of Issue : 21.11.2023

ORDER NO. 843/2023-CUS (WZ) /ASRA/MUMBAI DATED 20.11.2023
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 : Shri Virendra Kankariya

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

Subject : Revision Application filed, under Section 129DD of the
Customs Act, 1962 against the Orders-in-Appeal No. MUM-
CUSTM PAX-APP-1574/2021-22 dated 31.01.2022 issued
on 03.02.2022 through [F.No. S/49-736/2020] passed by
the Commissioner of Customs (Appeals), Mumbai - III.

ORDER

This Revision application has been filed by Shri Virendra Kankariya (herein referred to as Applicant) against the Order-in-Appeal No. MUM-CUSTOM-PAX-APP-1574/2021-22 dated 31.01.2022 issued on 03.02.2022 through F. No. S/49-736/2020 passed by the Commissioner of Customs (Appeals), Mumbai – III.

2 Brief facts of the case are that on 16.03.2020, the Officers of Customs Airport, CSMI Mumbai, intercepted Shri Virendra Kankariya, the Applicant having Indian Passport No. K-9997584, who had arrived from Dubai by Flight No. SG 01 along with his family. His wife and son are holders of Passport No. U 7139323 and U 7150126. The applicant and his family cleared themselves without any declaration of dutiable goods to Customs. Personal search resulted in the recovery of 03 crude gold chains totally weighing 233 grams, totally valued at Rs.8,73,662 worn by them. The same were seized by the officers in the reasonable belief that the same was smuggled into India in a clandestine manner in contravention of the provisions of the Customs Act, 1962.

3. After due process of law, the Original Adjudicating Authority (OAA) i.e. the Deputy Commissioner of Customs, CSI Airport, Mumbai, vide Order-In-Original No. Aircus/ 49/ T2/1681/2020 UNI-A Batch dated 16-03-2020 ordered for the confiscation of the 03 crude gold chains totally weighing 233 grams, totally valued at Rs.8,73,662/- under Section 111 (d) of the Customs Act, 1962. However, the applicant was given an option to redeem the goods on payment of a fine of Rs.30,000/- under Section 125(1) of the Customs Act, 1962. Further, a penalty of Rs. 5,000/- was imposed on the applicant under Section 112 of the Customs Act, 1962.

4. Aggrieved by this Order, the Department preferred an appeal before the Appellate Authority (AA) i.e. Commissioner of Customs (Appeal), Mumbai – III, the

appeal was filed against the redemption given to the applicant. The AA vide Orders-in-Appeal No. MUM-CUSTOM-PAX-APP-1574/2021-22 dated 31.01.2022 issued on 03.02.2022 through F. No. S/49-736/2020, allowed the appeal filed by the Department and ordered for the absolute confiscation of the impugned gold and hence waiving off the payment of redemption fine as it becomes redundant due to absolute confiscation. The department had not filed appeal against the Penalty imposed under Section 112 and hence the AA upheld the same.

5. Aggrieved with the above Order in Appeal the Applicant has filed this revision application on the following grounds:

5.01 That the said order has been passed ex-parte on flimsy grounds and deserves to be set aside; that he was intercepted at Bombay Airport and 03 gold chains were recovered from him which he was wearing and these gold were purchased by him in Dubai out of his savings and for his personal use; that he is not aware about the Indian Customs Rules and regulations and also unaware about the Baggage Rules as he was not a frequent flyer.

5.02 That there were various documents which were generated and prepared such as statements, call records, video footage of CCTV cameras and all such other documents which were requested by the Applicant and the same were not furnished; that the applicant relied in the case of Shalu Chadha, reported in 2018 (359) E.L.T. 28 (Bom.), Hon'ble High Court has held that the noticee is also entitled to view the CCTV footage;

5.03 That the applicant relied in the case of Jaisukh Gobarbhair Savalia reported in 2019 (367) E.L.T. 290 (Tri. - Ahmd.) wherein, it has been held that, penalty cannot be imposed on a person when she/he not directly involved in any manner

in smuggling, the applicant submitted that in the present case too, the Applicant was not involved in the alleged smuggling of the own and personal worn jewelry;

5.04 That in the case of *Elektronik Lab Vs. CC (P), Mumbai* [2005 (187) ELT 362 (Tri. Mum.)], *Joseph Itteyara Vs. CC, Mumbai* [2004(176) ELT 165 (Tri. Mum.)] and in *Calcutta Ahmedabad Carriers Vs. CC, New Delhi* [2004(164) ELT 367 (Tri. Del.)], it is held that penalty on the abettor cannot be imposed on assumptions and presumptions. Cogent, tangible and reliable evidence is required;

5.05 That the Revision Authority will appreciate that the goods in Baggage are not much of high value; that the Respondent erred in proceeding to adjudicate the case hurriedly without considering the prayer for redemption;

5.06 That even otherwise goods not being notified as 'prohibited', and are importable 'freely' are not absolutely confiscable and Appellant is entitled for conditional release thereof;

5.07 That the impugned order is very harsh and imposed huge penalty of Rs. 5,000/- without giving an option to redeem the same on RF u/s. 125 of the Customs Act, 1962;

5.08 That the applicant is ready to pay on the confiscated goods nominal RF/PP;

5.09 The applicant requested the Revisionary Authority to do justice to the Applicant by setting aside the Impugned order and granting reliefs as prayed;

5.10 That the OIA dtd 31.01.2022 was never communicated to the applicant. On 12/09/2022 when the applicant wrote letter to the Commissioner, he was told that the appeal by department is already disposed and xerox copy was given. The

applicant separately filed Condonation of delay application. The applicant submitted that it can be treated that the applicant got knowledge of the order in appeal on 12/09/2022 and therefore this application is filed in time.

In view of the above facts and circumstances the applicant requested to set aside the impugned Order in Appeal and allow the applicant to redeem the goods on nominal Redemption Fine and penalty after payment of necessary government duty.

6. Personal hearing in the case was scheduled on 14.09.2023. Shri. Shaikh Faizan, Advocate for the applicant appeared for personal hearing and submitted that OIA has been passed on without giving applicant opportunity. He further submitted that applicant has brought small quantity of gold. He further submitted that the applicant has no past record of any offence. He submitted that RA has been filed within time from the date OIA was received. He requested to restore the Order in Original as the same is fair, reasonable and legal.

7.1 Government observes that the applicant has filed an appeal for condonation of delay in filing the impugned revision application. Applicant has submitted that the OIA dated 31.01.22 was not received by him, they received a photocopy of the impugned Order when they approached the Commissioner (Appeal)'s office on 12.09.2022. Thereafter vide their letter dated 16.11.22 and email dated 16.11.22, they requested the Office of Commissioner Appeal to provide a certified copy of the Order in Appeal for filing the Revision Application. They have further submitted that they had not received the certified copy of the OIA at the time of filing the Revision Application. Government notes that there is neither any negation from the Appellate Authorities regarding the non-receipt of the said OIA, nor any evidence submitted with respect to the despatch of the OIA. The applicant has also submitted their letter dated 16-11-22 sent to Commissioner Appeal's office. In view of the above Government finds that the applicant had not received

the Order in Appeal and hence could not file the Revision Application in time. They have filed the same within 90 days after receiving the photocopy of the OIA. Considering the same Government finds that there is no delay and goes into the merits of the case.

7.2 Government has gone through the facts of the case and notes that the applicant had not declared the gold while availing the green channel facility. The impugned gold had been detected on person. The applicant clearly had failed to declare the goods to the Customs at the first instance as required under Section 77 of the Customs Act, 1962. Had he not been intercepted, the applicant would have gotten away with the gold. Therefore, the confiscation of the gold was 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, 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" 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.

11.1 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 pretense. 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.**

11.2 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-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.


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. There is no allegation that the applicant was a habitual offender and was involved in similar offence earlier, in fact Government notes that he had gone along with his family to Dubai for a short period. The impugned gold chains were not concealed, the applicant and his family were wearing the chain. Further the applicant had claimed ownership of the chains and had submitted that he has bought the gold from his own savings and for his personal use. 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 Government notes that the applicant, at the first instance, had crossed the green channel and had not declared the dutiable goods in their possession and hence confiscation of the gold is justified. However, the gold was not ingeniously concealed and the ownership of the gold is not claimed by anyone else. Hence, the absolute confiscation of the gold, leading to dispossession of the gold in the instant case is 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. Government notes that the OAA has granted redemption to clear the gold on payment of a redemption fine of Rs. 30,000/- considering that the applicant along with his family had gone to Dubai for the first time on a Tourist visa and was not aware about the Rules and finds that the order passed by the OAA is proper and legal. Hence, Government is inclined to restore the same.

17. For the aforesaid reasons, Government sets aside the absolute confiscation held in the OIA and restores in to-to, the OIO passed by the Original Adjudicating Authority.

18. Accordingly, the OIO passed by the OAA is restored and the Revision Application is allowed.


(SHRAWAN KUMAR)

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

ORDER No. 843/2023-CUS (WZ) /ASRA/

DATED 20.11.2023

To,

1. Shri Virendra Kankariya, 151 Mahaveer Nagar, Pali, Rajasthan-306401.
2. The Pr. Commissioner of Customs, C.S.I Airport, Terminal 2, Level-II, Sahar, Andheri (East), Mumbai 400 099.
3. The Commissioner of Customs (Appeals), Mumbai-III, 5th Floor, Avas Corporate Point, Makwana Lane, Behind S. M. Centre, Andheri Kurla Road, Andheri (East), Mumbai 400 059.

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