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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. 371/148/B/WZ/2021-RA 8178: Date of Issue : ~~11.2023~~
04.12.2023

ORDER NO. 878 /2023-CUS (WZ)/ASRA/MUMBAI DATED 30.11.2023 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 : Mr. Shivkumar Jewoor

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-CUSTM-PAX-APP-625/2020-21 dated 24.12.2020 [Date of issue: 08.01.2021] [F. No. S/49-300/2020] passed by the Commissioner of Customs (Appeals), Mumbai Zone-III.

ORDER

The Revision Application has been filed by Mr. Shivkumar Jewoor (herein referred to as the 'Applicant') against the Order-in-Appeal No. MUM-CUSTM-PAX-APP-625/2020-21 dated 24.12.2020 [Date of issue: 08.01.2021] [F. No. S/49-300/2020] passed by the Commissioner of Customs (Appeals), Mumbai Zone-III.

2. Brief facts of the case are that on 07.02.2020, the officers of Air Customs, Chatrapati Shivaji International Airport, Mumbai, intercepted the Applicant, an Indian passport holder, who had arrived from Dubai by Flight No. SG-006 after he had opted for the Customs green channel and did not declare any gold in his possession. The Applicant had brought two gold bars of 24K purity, weighing 232 grams and valued at Rs. 8,50,326/-, which were concealed inside a mobile handset as a battery.

3. The case was adjudicated after waiver of show cause notice and the Original Adjudicating Authority (OAA) i.e. Deputy Commissioner of Customs, 'B' Batch, CSI Airport, Mumbai, vide Order-in-Original No. Air Cus/49/T2/1584/2020 UNI- "B" dated 07.02.2020 ordered the absolute confiscation of the impugned two gold bars of 24K purity, weighing 232 grams and valued at Rs. 8,50,326/- under Section 111 (d) of the Customs Act, 1962. A penalty of Rs. 10,000/- was imposed on the Applicant under Section 112 (b) (ii) of the Customs Act, 1962.

4. 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-CUSTM-PAX-APP-625/2020-21 dated 24.12.2020 [Date of issue: 08.01.2021] [F. No. S/49-300/2020] upheld the order passed by the OAA.

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

5.01. That the Applicant was working as a mechanical engineer, having a residency card of United Arab Emirates;

5.02. That the Applicant was confused regarding the procedure of declaration of goods and that when he was going to approach the red channel for declaration, he was intercepted and thus the Applicant was neither intercepted at the time of passing through the green channel or red channel and the facts recorded in the OIO are not correct;

5.03. That the gold was brought for the first time for his own use out of his own money earned by him and he is not involved in any manner in any illegal transactions to acquire gold for same in the market to get profit;

5.04. That he was returning from Dubai after a period of six months and there was no prior history against him and he was an eligible passenger according to Notification No. 50/2017 Sr. No 356 and condition No 41;

5.05. That the dutiable goods brought by the Applicant are neither restricted nor prohibited and can be released on applicable customs duty under Section 125 of the Customs Act, 1962;

5.06. That the OAA came to the conclusion that the acts of the Applicant was to evade customs duty but evasion of duty can be done only in respect of dutiable goods and not prohibited goods;

5.07. That once the department accepts that the goods are dutiable, the option of redemption of goods as provided under Section 125 of the Customs Act, 1962 will have to be given to the Applicant;

5.08. That he was not aware about the Indian customs laws.

Under the circumstances, the Applicant prayed that the Order-in-Appeal and Order-in-Original be set aside and the two gold bars totally weighing 232 grams be released, the personal penalty imposed on the Applicant be reduced or any other order as deemed fit may be issued.

6. Personal hearing in the case was scheduled for 23.08.2023. Shri Shivkumar Jewoor, Applicant and Shri Vimal Jha, Advocate for the Applicant appeared for the personal hearing on the scheduled date. They submitted that the Applicant was working as a Mechanical Engineer in UAE. They further submitted that small quantity of gold brought by the Applicant was purchased out of salary income of the Applicant and the invoice was produced. They also submitted that the Applicant had no past history of any offence. They requested to allow redemption of the gold on reasonable fine and penalty. No one appeared for the personal hearing on behalf of the Respondent.

7. The Government has gone through the facts of the case and observes that the Applicant had brought two gold bars of 24K purity, weighing 232 grams and valued at Rs. 8,50,326/-, which were concealed inside a mobile handset as a battery 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 opting to clear through the green channel of Customs and after being intercepted, the impugned two gold bars of 24K purity, weighing 232 grams and valued at Rs. 8,50,326/- was recovered from the Applicant. The gold bars were concealed in a mobile handset as a battery and it 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.

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, 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 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 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.

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 the gold bars 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. Though the gold bars were cleverly kept in the mobile handset, they were not concealed in an ingenious manner. The Applicant is financially sound and has produced the invoice for the purchase of the gold. 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.

15. Government finds that this is a case of non-declaration of gold in the form of bars. The absolute confiscation of the impugned gold bars 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, the option of release of the gold bars 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 bars to be released on payment of a redemption fine.

16. Applicant has also pleaded for waiver of the penalty imposed on him. The market value of the gold in this case is Rs. 8,50,326/-. 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 (b) (ii) of the Customs Act, 1962 is not commensurate to the omissions and commissions of the Applicant and needs to be revised upwards.

17. In view of the above, the Government modifies the Order-in-Appeal No. MUM-CUSTOM-PAX-APP-625/2020-21 dated 24.12.2020 [Date of issue: 08.01.2021] [F. No. S/49-300/2020] passed by the Commissioner of Customs (Appeals), Mumbai Zone-III and allows the Applicant to redeem the impugned two gold bars of 24K purity, weighing 232 grams and valued at Rs. 8,50,326/-, on payment of a redemption fine of Rs. 1,70,000/- (Rupees One Lakh Seventy Thousand only). The penalty of Rs. 10,000/- imposed by the OAA and upheld by the Appellate Authority is increased to Rs. 85,000/- (Rupees Eighty Five Thousand only)

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


(SHRAWAN KUMAR)

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

ORDER NO. 878/2023-CUS (WZ)/ASRA/MUMBAI DATED 30.11.2023

To,

1. Mr Shivkumar Jewoor, C/o Shri Vimal Jha, Advocate, M/s Lex Prime Law Firm, 02, 2nd Floor. Singh House. 23/25, Ambalal Doshi Marg, Opp, Stock Exchange, Post Office, Fort, Mumbai 400 001
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. M/s Lex Prime Law Firm, 02, 2nd Floor, Singh House. 23/25, Ambalal Doshi Marg, Opp, Stock Exchange, Post Office, Fort, Mumbai 400 001.
3. Sr. P.S. to AS (RA), Mumbai.
4. File copy.
5. Notice Board.