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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. 371/224/B/2022-RA / 8332 Date of Issue 12.12.2023

ORDER NO. 898 /2023-CUS (WZ) /ASRA/MUMBAI DATED 11.12.2023
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. Radheshyam R. Tiwari

Respondent : Pr. Commissioner of Customs, Ahmedabad

Subject : Revision Application filed, under Section 129DD of the
Customs Act, 1962 against the Order-in-Appeal No. AHD-
CUSTM-000-App-1590-2021-22 dated 16.03.2022 passed by
the Commissioner of Customs (Appeals), Ahmedabad.

ORDER

This revision application has been filed by Mr. Radheshyam R. Tiwari (herein referred to as Applicant) against the Order-in-Appeal No. AHD-CUSTOM-000-App-1590-2021-22 dated 16.03.2022 passed by the Commissioner of Customs (Appeals), Ahmedabad.

2. Brief facts of the case are that on suspicion, the applicant was intercepted after he had opted for the green channel. All the baggage of the applicant was screened in the X-Ray Screening machine but nothing suspicious was noticed. The applicant was asked to walk through the Door Frame Metal Detector, however, nothing objectionable/dutiable on his body/clothes was found. Being not satisfied, the officers asked the applicant to provide his trouser and undergarments for further examination. On examination, the officers recovered two oval shaped balls of semi solid substance wrapped with black adhesive tape concealed in the undergarment (brief) of the applicant suspected to be gold. On being asked about the substance, the applicant informed that the semi solid paste he was carrying was a mixture of gold. On completion of the extraction process, the Government Approved Valuer submitted the valuation report dated 12.11.2019, wherein, it was stated that 24 kt. gold bar pieces (2) totally weighing 292.600 grams having purity 999.0 were derived from 379.400 grams of Semi Solid substance material consisting of Gold & Turpentine Mix. The said gold bars are valued at Rs. 10,11,226/- (Tariff Value) and Rs. 11,45,822/- (Local Market Value). Thereafter, the gold bar piece-2 was placed under seizure vide panchnama drawn on 12.11.2019 by the officers of Customs under the reasonable belief that the subject Gold which was attempted to be smuggled and was liable for confiscation under the provisions of Customs Act. 1962. Therefore SCN dated 21.04.2020 was issued to the applicant to confiscate the said gold under the provisions of Sections 111(d), 111(i), 111(l) and) 111(m) of the Customs Act, 1962 and to impose penalty on him under Sections 112(a) and 112(b) of the Customs Act; 1962.

3. The adjudicating authority vide impugned order, ordered for the absolute confiscation of said gold under the provisions of Sections 111 (d),111 (i),111 (1) & 111(m) of the Customs Act, 1962; and imposed penalty of Rs. 75,000/- on the applicant under the provision of Section 112(i) the Customs Act, 1962.

4. Aggrieved by this Order, the applicant preferred an appeal before the Appellate Authority (AA) viz, Commissioner of Customs (Appeals), Ahmedabad, who vide Order-in-Appeal No. AHD-CUSTOM-000-App-1590-2021-22 dated 16.03.2022 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 Order passed by the lower authority was not in conformity with the spirit of the B.Rules, 1998.

5.2 the order of absolute confiscation of the gold was not at all justified. The Applicant had clearly stated that the Gold was meant for his personal & household use & it was not brought for any sale or trade purpose & that he had not contravened any provisions of C.A. 1962 or any other allied Laws for the time being in force and he had no malafide intention to hide anything from Customs to avoid payment of duty as wrongly alleged. Hence it cannot be said that the applicant had any malafide intention to hide or conceal the Gold to avoid payment of duty.

5.3 The Applicant humbly submits that he had claimed the ownership of the Gold. But otherwise the punishment of absolute confiscation of the Gold, if maintained, meted out to the applicant would be too severe one and it would be out of all proportions. Furthermore, the Gold was neither banned nor restricted under the B. Rules, (Amendment) 2016.

- 5.4 Gold was kept inside the under garment for safety purpose but it was not concealed in any manner whatsoever. The Applicant is not a frequent visitor & as he was also not fully conversant with the English language as well as the Baggage Rules, & as he had claimed the ownership of the Gold. Moreover the applicant had not implicated anybody in any manner whatsoever & furthermore nobody else had claimed the ownership of the Gold. Hence it further proves that the applicant is only the owner of the Gold. Hence the justice demands that the personal Gold be ordered to be released on duty or at the most on token fine & penalty. The Applicant is earning sufficient income and commands good respect in the society, and hence it is below his dignity to bring the goods for somebody else or misuse the B. Rules.
- 5.5 The Applicant therefore hopes that he would not be denied the justice at Your Honour's hands and after perusing the records and genuine circumstances of the case, the applicant would be exonerated of all the charges and allegations and he would be given the benefit of doubt. Your Honour has already taken a lenient view in number of such type of cases by ordering the release of the Gold wherein the Gold was worn on the body of the passengers. Even the release of the un-declared Gold has been considered & decided by the Courts, Tribunal & Govt. of India in the past such as (i) Sapna Sanjiv Kohli v/s CC of Customs AP Mumbai - 2008 (230) ELT 305; (ii) Union of India v/s Dhanak Ramji - 2009 (248) ELT 127 (BOM) by Bombay High Court; wherein the circumstances of the case were similar and the undeclared Gold Bars and Gold Jewellery was allowed to the green channel passenger on fine for clearance here in India. In R.A. Order no. 73/2020 dt. 28/5/2020 in case of Commr. of Customs, Ahmedabad v/s Shri Sajjan & R.A. Order no. 61/2020 dated 21/5/2020 in case of Commr. of Customs, Ahmedabad v/s Basheer M Mansuri & Case of Ashok kumar Verma reported in 2019 (369) ELT 1677 (GOI) & Order no. 29/2018 dt. 31/1/2018 in case of Commr. Chennai v/s Shrimati Navene Elangovan &

Order no. 140/2021 CUS (WZ)/ ASRA/MUMBAI dt. 25/6/2021 in case of Mohammed G v/s Commr. of Customs, Ahmedabad, in all these cases, the Gold was released on the grounds that the Gold was not a prohibited item. All these submissions are already mentioned in the Order-in- Appeal (copy attached). Hence on this count also, the Gold is liable for release on token fine. Moreover, there is no history of the applicant as no case was booked or pending against him. Hence on this count also the Gold is liable for release on duty, fine & penalty particularly when all the goods were covered under the B. Rules (Amendment) 2016, and hence no import license was required for import of the Gold. The Applicant has suffered economically, mentally & physically.

5.7 Under the circumstances, the applicant has prayed to the Revision Authority for:

- i. The 2 pieces of Gold Bars under absolute confiscation valued at Rs. 1011226/- be ordered to be released U/S 125 of C.A. 1962 on fine particularly when the gold is not banned under the Baggage Rules, (Amendment) 2016 & the applicant is ready to pay the duty, fine.
- ii. The P.P. of Rs. 75000/- be ordered to be waived/reduced.

6. Personal hearing in the case was scheduled on 03.08.2023. Shri. O.M. Rohira, Advocate for the applicant appeared for personal hearing and submitted that the applicant brought small quantity of gold for personal use. He requested to allow redemption of gold on reasonable fine and penalty.

7. 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, 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. 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-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. In the instant case, the quantum of gold involved is small and is not of commercial quantity. The quantum of the same does not suggest the act to be one of organized smuggling by a syndicate. Further, there were no allegations that the Applicant is a habitual offender and was involved in similar offences 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. 75,000/- imposed on the Applicant for the gold valued at Rs. 10,11,226/- under Section 112(i) of the Customs Act, 1962 is appropriate and commensurate to the omissions and commissions of the Applicant.

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. gold weighing 292.60 grams and valued at Rs. 10,11,226/- on payment of redemption fine of Rs. 2,00,000/- (Rupees Two Lakhs Only).

17.2 The penalty of Rs. 75,000/- imposed under Section 112(i) of the Customs Act, 1962 being appropriate and commensurate with the omissions and commissions of the Applicant, Government does not feel it necessary to interfere with the imposition of the same and is sustained.

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. **898**/2023-CUS (WZ)/ASRA/MUMBAI DATED **11.12.2023**

To,

1. Mr. Radheshyam Ramnarayan Tiwari, Flat No. 23, 7th floor, C-Wing, Jeevan Jyot Complex, Kansai Gaon Bhidewadi, Ambarnath(East), Thane, Maharashtra-421501.
2. The Pr. Commissioner of Customs(Ahmedabad), Ist Floor, Custom House,Near All India radio, Income Tax Circle, Navarangpura, Ahmedabad-380009.

Copy to:

1. O.M. Rohira, Advocate, 148/301, Uphaar, 10th road, Khar(W),Mumbai-400052.
2. The Commissioner of Customs (Appeals), Ahmedabad, 7th Floor, Mrudul Tower, B/H Times of India, Ashram Road, Ahmedabad- 380009.
3. Sr. P.S. to AS (RA), Mumbai.
4. File Copy.
5. Notice Board.

