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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. 371/348/B/2021-RA / 674 : Date of Issue : 30.01.2024

ORDER NO. 93 /2024-CUS (WZ)/ASRA/MUMBAI DATED 29.01.2024 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. Prem Jain.

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- 758/2021-22 dated 26.10.2021 [Date of issue: 27.10.2021] [F. No. S/49-1043/2020] passed by the Commissioner of Customs (Appeals), Mumbai Zone-III.

ORDER

The Revision Application has been filed by Mr. Prem Jain (herein referred to as the 'Applicant') against the Order-in-Appeal No. MUM-CUSTM-PAX-APP-758/2021-22 dated 26.10.2021 [Date of issue. 27.10.2021] [F. No. S/49-1043/2020] passed by the Commissioner of Customs (Appeals), Mumbai Zone-III.

2. Brief facts of the case are that on 08.08.2020, the officers of Air Intelligence Unit (AIU), CSI Airport, Mumbai intercepted the Applicant, holding Indian Passport No. R 2354567 who had arrived from Dubai by Flight No EK-502. Applicant cleared himself through Green Channel without declaring gold to Customs. The personal search resulted in recovery of one crude gold chain weighing 58 grams, valued at Rs.2,93,959/-. The case was adjudicated and the impugned gold was confiscated absolutely under Section 111 (d) of Customs Act, 1962. The adjudicating authority imposed personal penalty of Rs.20,000/- under Section 112 (b) of Customs Act, 1962

3. The case was adjudicated after waiver of show cause notice and the Original Adjudicating Authority (OAA) i.e. Assistant/ Deputy Commissioner of Customs, 'A' Batch, CSI Airport, Mumbai, vide Order-in-Original No Air Cus/49/2/1688/2020/UNI-A dated 08.08.2020 ordered the absolute confiscation of the impugned one crude gold chain weighing 58 grams, valued at Rs.2,93,959/-. under Section 111 (d) of the Customs Act, 1962 and penalty of Rs. 20,000/- was also imposed on the Applicant under Section 112 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- 758/2021-22 dated 26.10.2021 [Date of issue 27.10.2021] [F. No S/49-1043/2020] 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 OAA as well as the AA failed to appreciate that the applicant was working as a Real Estate Broker in Dubai; the applicant is a bonafide passenger and was returning from Dubai after a long period of time; the applicant had bought the impugned crude chain two years back for his marriage; that the impugned gold is not a smuggled gold; that the applicant is not a frequent flyer and has sufficient capacity to purchase the gold; that the gold was not concealed; that dutiable goods brought by the applicant are neither restricted nor prohibited;

5.02. That oral declaration be considered as declaration and need not be always in writing;

5.03. That the gold chain belonged to the Applicant was he not acting as a carrier for anybody;

5.04. That if the gold jewellery on the person of the Applicant cannot be considered nor does it amount to concealment;

5.05 That the gold jewellery was not in commercial quantity and the quantity itself shows that it was meant for personal use;

5.6. That the AA and the OAA have gone on the basis of presumptions and assumptions only;

5.7. That the AA has confirmed the penalty without clinching and cogent evidence and has passed an illegal order which needs to be set aside;

5.8. 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 and Crude Gold chain can be released under Section 125 of Customs Act, 1962; and personal penalty may be reduced substantially.

6. Personal hearing in the case was scheduled for 23.08.2023. Mr Vimal Jha, Advocate appeared for the personal hearing on the scheduled date on behalf of the Applicant. The Advocate for the Applicant submitted that the Applicant and brought one gold chain for personal use and has no past history of any offence. He requested to allow redemption of the gold chain on nominal fine and penalty as applicant is NRI and resides in UAE.

7. The Government has gone through the facts of the case and observes that the Applicant had brought one crude gold chain weighing 58 grams, valued at Rs 2,93,959/- 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 one crude gold chain weighing 58 grams, valued at Rs.2,93,959/- was recovered from the Applicant 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 B1 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 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.

13.3. 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.

14. In view of the foregoing paras, the Government finds that as the Applicant had not declared the gold chain 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. The impugned gold chain recovered from the Applicant 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.

15. Government finds that this is a case of non-declaration of gold in the form of jewellery. The absolute confiscation of the impugned gold chain 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 chain 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 chain 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. 2,93,959/- . From the facts of the case as discussed above, Government finds that the penalty of Rs 20,000/- imposed on the Applicant under Section 112 of the Customs Act, 1962 is commensurate to the omissions and commissions of the Applicant.

17 In view of the above, the Government modifies the Order-in-Appeal No MUM-CUSTM-PAX-APP- 758/2021-22 dated 26.10.2021 [Date of issue 27.10.2021] [F. No. S/49-1043/2020] passed by the Commissioner of Customs (Appeals), Mumbai Zone-III and allows the Applicant to redeem the impugned one crude gold chain weighing 58 grams, valued at Rs.2,93,959/- on payment of a redemption fine of Rs 60,000/- (Rupees Sixty Thousand only). The penalty of Rs. 20,000/- imposed by the OAA and upheld by the Appellate Authority is sustained.

18 The Revision Application is disposed of on above terms.

(SHRAWAN KUMAR)

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

ORDER NO 93 /2024-CUS (WZ)/ASRA/MUMBAI DATED 29.01.2024

To,

1. Mr. Prem Jain, H-284, Ground floor, Vikaspuri, Delhi-110018.
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. Mr. Vimal C.Jha, Advocate, Office No. 02, Second Floor, Singh House, 23/25, Ambalal Doshi Marg, Opp Stock Exchange Post Office, Fort, Mumbai -400001.
3. Sr. P.S. to AS (RA), Mumbai.
4. File copy.
5. Notice Board.

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