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SPEED POST

GOVERNMENT OF INDIA
MINISTRY OF FINANCE
(DEPARTMENT OF REVENUE)
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Mumbai-400 005

F.No. 371/249/B/2022-RA / 8528 Date of Issue 27.12.2023

ORDER NO. 943/2023-CUS (WZ) /ASRA/MUMBAI DATED 20.12.2023 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 : Shri. Tejaskumar Bhailalbhai Gondaliya

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-1642/2021-22 dated 08.02.2022 passed by the Commissioner of Customs (Appeals), Mumbai-III.

ORDER

This revision application has been filed by Shri. Tejaskumar Bhailalbhai Gondaliya (herein referred to as Applicant) against the Order-in-Appeal No. MUM-CUSTM-PAX-APP-1642/2021-22 dated 08.02.2022 passed by the Commissioner of Customs (Appeals), Mumbai-III.

2. Brief facts of the case are that on 21.03.2021, the officers of Uniform B Batch, CSMI Airport, Mumbai, intercepted the Applicant, on his arrival from Turkey, while he opted for Green Channel for his clearance. Detailed examination of his baggage resulted in the recovery of one cut piece of 22 Kt gold weighing 42 grams and valued at Rs. 1,55,036/-. The charges were orally communicated to the Applicant. He requested for waiver of SCN. During the course of personal hearing before the Adjudicating Authority, the Applicant stated that the gold belonged to him; that he is a mechanic posted in Surat 'Alidra Texpro' company and visited Turkey to repair a machine there and the said gold piece was given as gift by his client at Turkey; that he had no intention to smuggle the said goods as it was kept in his baggage; that he did not know that the said gold had to be declared to Customs at Red Channel as he is not a frequent flier. The Applicant did not produce any invoice for gold and requested to take lenient view.

3. The case was adjudicated and the impugned gold was confiscated under Section 111 (d), (l) and (m) of the Customs Act, 1962, but the Applicant was allowed to redeem the goods on payment of Redemption Fine of Rs.15,000/-, duty extra, in lieu of confiscation under Section 125 of the Customs Act, 1962. Personal Penalty of Rs.5,000/- was imposed on the Applicant under section 112 (a) and (b) ibid.

4. Aggrieved by this Order, the Department preferred an appeal before the Appellate Authority (AA) viz, Commissioner of Customs (Appeals), Mumbai-III, who vide impugned Order-in-Appeal allowed the appeal and ordered absolute confiscation of the impugned gold. Further, Appellate authority upheld the penalty.

5. Aggrieved with the above order, the Applicant has 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 he had no intention to embezzle the duty amount and smuggle the subject gold, therefore, he has kept the same in his baggage; that he did not know that the subject gold had to be declared to Customs at red channel as he is not a frequent flier. Hence, it is evident that the Applicant has no intention to evade the duty on the impugned goods. Actually, the Applicant wanted to pay the duty amount, but due to ignorance regarding procedure, inadvertently, he opted for the Green Channel. Therefore, the punishment ordered for him is not commensurate to the offence due to ignorance. Hence, the impugned Order in Appeal is liable to be set aside.

5.2. Impugned Gold is neither smuggled goods nor prohibited goods, hence absolute confiscation not warranted.

5.4. Applicant is not a habitual offender. Gold piece of only 42gms is not a commercial quantity and redemption of the goods may be allowed.

5.5. It is an inadvertent and innocent mistake, therefore penalty not warranted.

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

i. The impugned Order in Appeal be set aside with consequential relief to the applicant.

ii. The impugned cut piece of 22 Kt Gold weighing 42 gms & valued at Rs.1,55,036/-, which the Applicant bought for the marriage of his cousin brother may kindly be ordered to be released on payment of duty.

6. Personal hearing in the case was scheduled on 12.09.2023. Dr. Sanjay Karla, Advocate for the applicant appeared online for personal hearing and submitted that original adjudicating authority has passed correct, reasonable, and legal order. He further submitted that applicant bought very small quantity of gold for personal use. He requested to restore the OIO.

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 14.02.2022 and that there was delay in filing the application. Government observes that the applicant was required to file the revision application within 3 months i.e. by. 14.05.2022. Considering, the further extension of 3 months which can be condoned, the applicant was required to file the revision by 14.08.2022. The applicant had filed the revision application on 24.05.2022 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, 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. 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 finds granting of an option to the Applicant by the Original Authority to redeem the Gold on payment of a suitable redemption fine was more reasonable and judicious.

16.2 Government finds that the penalty of Rs. 5000/- imposed on the Applicant for the gold valued at Rs. 1,55,036/- under Section 112(a) & (b) of the Customs Act, 1962 is appropriate and commensurate to the omissions and commissions of the Applicant.

17 In view of the above, the Government sets aside the impugned order passed by the Appellate authority and restores the Original Order passed by the Original Adjudicating Authority.

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

Shrawan 20/12/23

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

ORDER NO. 943/2023-CUS (WZ)/ASRA/MUMBAI DATED 20.12.2023

To,

1. Shri. Tejaskumar Bhailalbhai Gondaliya, B/239, Mahalaxmi Society, Pungam, Surat City-395010.
2. Pr. Commissioner of Customs, Airport-I, 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. KPS legal, A-702,703,704, Mahavir Icon, Plot No. 89/90, Sector-15, CBD Belapur, Navi Mumbai-400614.
3. Sr. P.S. to AS (RA), Mumbai.
4. File Copy.
5. Notice Board.