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SPEED POST



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

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F.No. 371/305/B/WZ/2022-RA / 8584 : Date of Issue 22.12.2023

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ORDER NO. 944/2023-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.

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Applicant : Mr. Palash Ghosh

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-2012/2021-22 dated 29.03.2022 passed by the Commissioner of Customs (Appeals), Mumbai Zone-III.

**ORDER**

The Revision Application has been filed by Mr. Palash Ghosh (herein referred to as the 'Applicant') against the Order-in-Appeal No. MUM-CUSTOM-PAX-APP-2012/2021-22 dated 29.03.2022 passed by the Commissioner of Customs (Appeals), Mumbai Zone-III.

2.1 Brief facts of the case are that on 20.06.2019, the officers of Air Customs, Chatrapati Shivaji International Airport, Mumbai, diverted the Applicant, an Indian passport holder, who had arrived from Kuwait by Flight No. KU-301, for examination as some suspicious images were noticed while screening his baggage. On being asked whether he was carrying any contraband or gold either in his baggage or on his person, the Applicant replied in the negative. Not being satisfied with the reply, the officers conducted the examination of his baggage and person. The examination of his baggage resulted in the recovery of one crude gold piece weighing 173 grams wrapped with carbon paper and the personal search of the Applicant resulted in the recovery of two gold bars with foreign markings concealed inside a custom made locket holder worn by him. The gold collectively weighing 389 grams and valued at Rs. 10,45,167/- were seized under the reasonable belief that the same were being smuggled into India and hence liable for confiscation under the Customs Act, 1962.

2.2. In his statement, the Applicant claimed ownership of the gold and stated he was doing the work of stone setting in jewellery in Egypt and that one of the gold bars was produced out of the accumulated gold dust from his jewellery setting work and the other two gold bars were purchased from the open market and that he carried the gold in a concealed manner to evade customs duty. He admitted the ownership, possession, non-declaration, concealment and recovery of the seized gold.



3. After following the due process of law, the Original Adjudicating Authority i.e the Additional Commissioner of Customs, CSI Airport, Mumbai vide Order-in-Original No. ADC/VDJ/ADJN/26/2021-22 dated 25.05.2021 [Date of issue: 27.05.2021] ordered the absolute confiscation of 01 crude gold piece and 02 gold bars totally weighing 389 grams and collectively valued at Rs. 10,45,167/- under Section 111(d), (i) and (m) of the Customs Act, 1962. Penalty of Rs. 1,00,000/- was imposed on the Applicant under Section 112(a) (i) 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-2012/2021-22 dated 29.03.2022 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 order suffers from the vice of excessive powers and jurisdiction with the OAA and did not take into consideration all the aspects of the case;

5.02. That the Adjudication order does not expose any application of mind nor any cogent findings have been recorded and no cogent reasons have been given by the OAA;

5.03. That an oral declaration was made to the officers immediately which was not taken into consideration;

5.04. That the gold was purchased from the savings of the Applicant and there was no smuggling connection whatsoever;

5.05. That the invoice was submitted to the department but the same was not corroborated by the department and the department has arrived at the conclusion of smuggling activities without checking the veracity /investigation;

5.06. That the allegations of concealment are false and frivolous in nature and the department has not brought any cogent material/ evidence to substantiate the allegations of concealment and has failed to corroborate with the allegations averred against the Applicant in reference to personal search conducted. The Applicant has relied upon the case of DG (Adjudication) vs. Its my name Pvt Ltd [2021(375) ELT 545 (Del)]

5.07. That no evidence has been brought on record to prove mens rea and penalty has been imposed in a casual manner and deserves to be set aside;

5.08. That the entire facts and circumstances of the case has not been considered while passing the order and the submission of invoice has not been considered. The Applicant has relied upon the case of Milton Plastics Ltd vs CC [ 2017(347) ELT 258(Bom)]

5.09. That the veracity and genuineness of the invoice receipt was not given utmost importance while passing the order and that the Applicant has discharged his burden. The Applicant has relied upon the decision in the case of UOI vs. Imtiaz Iqbal Pothiawala [2019 (365) ELT 167]

5.10. That the lower authority didn't consider the important and vital provision i.e Section 125 of the Customs Act, 1962 while passing the order and that Section 125 of the Act is the most essential provision while dealing and considering the goods in question;



5.11. That in the case of Yakub I Yusuf vs. CC [2001(127) ELT 543( CEGAT)], it was held that prohibited goods are only those which are absolutely prohibited and since gold is not absolutely prohibited for import, it is mandatory to give option to pay fine but the lower authority did not consider the judgements;

5.12. The Applicant has further relied on the case of CC vs. Alfred Menezes [2009 SCC OnlineBom 2257] and Alfred Menezes vs. CC [2009 (236) ELT 587].

5.13. That for imposing penalty the burden lies on the Respondent to show that the Applicant has acted dishonestly or contumaciously of with the deliberate or distinct object of breaching the law as laid down in Para 57 of the Apex court judgement in the case of Akbar Badruddin Jiwani vs. Collector of Customs [1990(47) ELT 161(SC)]

Under the circumstances, the Applicant prayed to set aside the Order dated 03.01.2022 to the limited extent of release of the gold on such conditions as maybe deemed fit or any other order as deemed proper may be issued.

6. Personal hearing in the case was scheduled for 06.09.2023 or 13.09.2023. Shri Aditya Talpade, Advocate for the Applicant appeared for the personal hearing on 06.09.2023. He submitted that the Applicant was working in Egypt and had brought small quantity of gold for personal marriage. He further submitted that there was no ingenious concealment and applicant is not a habitual offender. He requested to allow redemption of the same on nominal 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 one crude gold piece weighing 173 grams wrapped

with carbon paper and two gold bars with foreign markings concealed inside a custom made locket holder worn by him, collectively weighing 389 grams and valued at Rs. 10,45,167/- 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 piece weighing 173 grams wrapped with carbon paper and two gold bars with foreign markings concealed inside a custom made locket holder were recovered from the Applicant. The non declaration of the gold chains by the Applicant and the manner in which the gold was attempted to be brought in revealed his intention not to declare the impugned gold and thereby evade payment of Customs Duty. The confiscation of the impugned solitary crude gold piece and two gold bars were 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 solitary solitary crude gold piece and two gold bars at the time of arrival, the confiscation of the same was justified. However, the quantum of gold under import is not large and is not of commercial quantity. The crude gold piece wrapped with carbon paper and the gold bars,



though cleverly kept in the locket holder worn by the Applicant, were not concealed in an ingenious manner. The Applicant had produced an invoice for the purchase of two gold bars and was employed in 'stone setting in jewellery' work and was financially sound to purchase 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 crude gold piece and two gold bars leading to dispossession of the Applicant of the crude gold piece and two gold bars in the instant case is therefore harsh and not reasonable. In view of the aforesaid facts, the option of release of the crude gold piece and two 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 crude gold piece and two 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 crude gold piece and two gold bars in this case is Rs. 10,45,167/-. From the facts of the case as discussed above, Government finds that the penalty of Rs. 1,00,000/- imposed on the Applicant under Section 112 (a)(i) 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-CUSTOM-PAX-APP-2012/2021-22 dated 29.03.2022 passed by the Commissioner of Customs (Appeals), Mumbai Zone-III and allows the Applicant to redeem the impugned one crude gold piece and two gold bars with

foreign markings, collectively weighing 389 grams and valued at Rs. 10,45,167/-, on payment of a redemption fine of Rs. 2,00,000/- (Rupees Two Lakhs only). The penalty of Rs. 1,00,000/- imposed by the OAA and upheld by the Appellate Authority is sustained.

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

*Shrawan Kumar*  
20/12/23  
( SHRAWAN KUMAR )

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

ORDER NO. 944/2023-CUS (WZ)/ASRA/MUMBAI DATED 20.12.2023

To,

1. Mr. Palash Ghosh, S/o Swambunath Ghosh, Village and Post Bhanderdoha, Mukharjipada, Police Domruj, Distt Howrah, West Bengal 711 411
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, 5<sup>th</sup> Floor, Makwana Lane, Behind S.M. Centre, Andheri-Kurla Road, Marol, Mumbai - 400 059.
2. Shri Aditya Talpade (Advocate), Trimurti Regency, 3<sup>rd</sup> Floor, J.B. Nagar, Andheri (East), Mumbai 400 059
3. Sr. P.S. to AS (RA), Mumbai.
4. File copy.
5. Notice Board.