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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. 371/431/B/2022-RA (86/14) Date of Issue : 22.12.2023

ORDER NO. 950/2023-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 : Mr. Yousif Mahmoud Yahya Osman.

Respondent : Principal Commissioner of Customs, CSMI
Airport, Sahar, Andheri East, Mumbai – 400 099

Subject : Revision Application filed, under Section 129DD
of the Customs Act, 1962 against the Order-in-
Appeal No. MUM-CUSTM-PAX-APP-608/2022-23
dated 11.07.2022 issued on 12.07.2022 through
F.No. S/49-1133/2019 passed by the
Commissioner of Customs (Appeals), Mumbai –
III, Marol, Mumbai – 400 059.

ORDER

This revision application has been filed by Mr. Yousif Mahmoud Yahya Osman (hereinafter referred to as the Applicant) against the Order-in-Appeal No. MUM-CUSTM-PAX-APP-608/2022-23 dated 11.07.2022 issued on

12.07.2022 through F.No. S/49-1962/2021 passed by the Commissioner of Customs (Appeals), Mumbai – III, Marol, Mumbai – 400 059.

2. Brief facts of the case are that on 31.12.2018, Customs Officers at the CSMI Airport, Mumbai had intercepted the applicant, who is a Sudanese national and had arrived from Addis Ababa by Ethiopian Airlines Flight no. ET-610. The applicant had opted for the green channel. Applicant was found in possession of two silver colour coated gold pieces recovered from the right hand side pocket of the jeans worn by him which were wrapped with white coloured tissue paper. The recovered gold was certified to be two semi circle shaped melted crude gold pieces coated with silver with purity of 21 kt. (999%), totally weighing 357 grams and collectively valued at ₹ 10,20,306/- which he had failed to declare to Customs.

3. The Original Adjudicating Authority (OAA), viz, Addl. Commissioner of Customs, CSMI Airport, Mumbai who vide his Order-In-Original No. ADC/VDJ/ADJN/42/2021-22 dated 01.06.2021, ordered for the absolute confiscation of the two silver colour coated gold pieces, totally weighing 357 grams and collectively valued at ₹ 10,20,306/- under Section 111(d), (l) and (m) of the Customs Act, 1962. Personal penalty of ₹ 1,00,000/- was imposed on the applicant under Section 112(a)(i) of the Customs Act, 1962.

4. Aggrieved by the said order, the applicant preferred an appeal before the appellate authority (AA) viz, Commissioner of Customs (Appeals), Mumbai-III who vide Order-In-Appeal No. MUM-CUSTOM-PAX-APP-608/2022-23 dated 11.07.2022 through F.No. S/49-1962/2021 did not find any reason to interfere in the impugned OIO and upheld the order passed by OAA.

5. Aggrieved by this Order, the applicant has filed this revision application on the undermentioned grounds of revision;

5.1 That the Applicant is a Foreign National and does not know to read and write English Language & understands only his mother tongue.

5.2 That the Applicant when arrived at Airport was asked by the officer in plain clothing whether Applicant was carrying any Gold, to which the Applicant answered in affirmative and then the Applicant took out the Gold and handed over to the Custom Officer. The Applicant submits that the officer had taken the charge of Gold and prepared some papers in English Language & obtained his signature on those papers.

5.3 The Statement of the applicant was also recorded by the Customs u/s. 108 of the Customs Act, which was typed in English Language which is not known to the Applicant and the customs dept. made out the case of non-declaration.

5.4 That the Applicant is the owner of the goods and ready to pay the customs dues and he was not aware that being a Foreign National, he was not supposed to import Gold.

5.5 That the Gold brought by the Applicant is neither restricted nor prohibited and can be released for Re-export under section 125 of the Customs Act, 1962.

5.6 That the violation if any occurred, was out of ignorance, technical in nature and due to language problem.

5.7 That the Respondent has come to the conclusion that the acts and/ or omissions on the part of the Applicant were to evade Customs duty. The evasion of Customs duty can be done only in respect of dutiable goods and not prohibited goods. The Applicant humbly submits that once the department or respondent 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. A bare perusal of the above sub-

section (1) of Section 125 of the Customs Act, 1962, makes it crystal clear that the Respondent is required to give the Noticee an option to pay fine in lieu of confiscation in respect of the impugned goods, which even as per the Respondent are dutiable goods.

5.8 The Applicant relied on various judgments passed by various authorities, wherein re-export of goods have been granted even when the goods were not declared which are as follows:

1. Collector of Customs vs. Elephanta Oil and Inds. Ltd.; 2003-(152)-ELT-0257-Supreme Court.
2. Kusum Bhai Daya Bhai Patel Vs. Commissioner of Customs 1995 (79) ELT 292 Tri Mumbai
3. A.K. Jewellers vs. Commissioner of Customs Mumbai: 2003 (155) E.L.T. 585 (Tri- Larger Bench)
4. Patel vs. Commissioner of Customs Citation: 2003 (153) ELT 226 Tr
5. M.V. Marketing and Supplies vs. Commr. of Customs (Import), Chennai; 2004 (178) E.L.T. 1034 (Tri-Chennai).

5.9 The Applicant also listed the cases wherein re-export has been granted by the Government of India, New Delhi:

1. Revision order no.38/2008 in case Mrs. Majeeda Mohammed Yonus
2. Revision order no.178 /2008 in case Mr. Ravinder Sadhuram Dulari
3. Revision order no.33/2008 in case Shri Deepak Hiralal Parekh
4. In Revision order no.34/2008 in case Shri Pradeep Kumar Bhanwarlal
5. In Revision order no.392/2002 in case Shri Nasir Asgar Mirab

5.10 That in view of the aforesaid submissions, the Customs department shall release the goods u/s. 125 of Customs Act, 1962 for Re-export on nominal redemption fine and reduce the personal penalty as the violation, if any, is of technical in nature.

In view of the above the applicant prayed that the Gold may kindly be released for re-export on nominal fine and personal penalty may kindly be reduced substantially.

6. Personal hearing in the matter was scheduled for 01-12-2023. Shri N. J. Heera, Advocate of the applicant, appeared for the hearing and submitted that the applicant is a foreign national and brought small quantity of gold for personal use. The applicant is not a habitual offender and there was no ingenious concealment. He requested to allow re-export of the same.

7. The Government has gone through the facts of the case and notes that the applicant had failed to declare the goods in his possession as required under Section 77 of the Customs Act, 1962. The applicant had not disclosed that he was carrying dutiable goods and had he not been intercepted, he would have walked away with the impugned two silver colour coated gold pieces, totally weighing 357 grams and collectively valued at ₹ 10,20,306/-, without declaring the same to Customs. By his actions, it was clear that the applicant had no intention to declare the impugned gold to Customs and pay duty on it. The Government finds that the confiscation of the 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. 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. Government, notes that there is neither any allegation that the impugned gold was ingeniously concealed nor that the Applicant is a habitual offender and was involved in similar offences earlier. The applicant has claimed ownership of the gold and his desire to take it back. 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. Under the circumstances, the seriousness of the misdemeanor is required to be kept in mind when using discretion under Section 125 of the Customs Act, 1962 and while imposing quantum of penalty. Government notes that the applicant who is a foreign national has prayed that the absolute confiscation be set aside and he be allowed to re-export the gold.

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 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.

14. In a recent judgement passed by the Hon'ble High Court, Madras on 08.06.2022 in WP no. 20249 of 2021 and WMP No. 21510 of 2021 in r/o. Shri. Chandrasegaram Vijayasundarm + 5 others in a similar matter of Sri. Lankans wearing 1594 gms of gold jewellery (i.e. around 300 gms worn by each person) 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

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.

15. 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.

16.1 In view of the foregoing paras, the Government finds that as the applicant had not declared the two silver colour coated gold pieces, totally weighing 357 grams and collectively valued at ₹ 10,20,306/-, at the time of arrival, the confiscation of the same was justified. However, considering the quantity of silver colour coated gold pieces, no past history the same not being concealed in an ingenious manner, applicant being a foreign national, the absolute confiscation of the same was harsh and not justified. In view of the aforesaid facts and considering that the applicant is a foreign national, option to re-export the impugned gold on payment of redemption fine should have been allowed. Considering the above facts, Government is inclined to modify the absolute confiscation upheld by the AA and allow the impugned two crude gold bangles, totally weighing 357 grams and collectively valued at ₹ 10,20,306/ to be re-exported on payment of a reasonable redemption fine.

16.2 The Applicant has also pleaded for reduction of the penalty imposed on him. The value of the gold in this case is ₹ 10,20,306/-.Government finds that the penalty of ₹ 1,00,000/- imposed on the applicant under Section 112 of the Customs Act, 1962 is commensurate with the omissions and commissions committed and is not inclined to interfere in the same.

17. In view of the above, the Government modifies the order passed by the appellate authority and allows the applicant to redeem the impugned two

silver colour coated gold pieces, totally weighing **357** grams and collectively valued at **₹ 10,20,306/-** for re-export on payment of a redemption fine of **₹ 2,00,000/-** (Rupees Two Lakhs only). The penalty of **₹ 1,00,000/-** imposed on applicant under Section 112 of the Customs Act, 1962 by the OAA and upheld by the AA is sustained.

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


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

ORDER NO. 950/2023-CUS (WZ)/ASRA/MUMBAI DATED 20.12.2023.

To,

1. Mr. Yousif Mahmoud Yahya Osman, Sudan. C/o Advocate N. J. Heera, Nulwala Building, Ground Floor, 41, Mint Road, Opp. G.P.O. Fort, Mumbai-400001
2. The Pr. Commissioner of Customs, C.S.I Airport, Terminal 2, Level-II, Sahar, Andheri (East), Mumbai 400 099.
3. The Commissioner of Customs (Appeals), Mumbai-III, 5th Floor, Avas Corporate Point, Makwana Lane, Behind S.M.Centre, Andheri Kurla Road, Andheri (East), Mumbai 400 059.

Copy to:

1. Advocate N. J. Heera, Nulwala Building, Ground Floor, 41, Mint Road, Opp. G.P.O. Fort, Mumbai-400001
2. Sr. P.S. to AS (RA), Mumbai.
3. File Copy.
4. Notice Board.

