

REGISTERED 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. 380/01/B/15-RA / 2/3

Date of Issue 30.11.2018

ORDER NO. ⁹⁵⁴/2018-CUS (WZ) / ASRA / MUMBAI/ DATED 22.11.2018
 OF THE GOVERNMENT OF INDIA PASSED BY SHRI ASHOK KUMAR
 MEHTA, PRINCIPAL COMMISSIONER & EX-OFFICIO ADDITIONAL
 SECRETARY TO THE GOVERNMENT OF INDIA, UNDER SECTION 129DD
 OF THE CUSTOMS ACT, 1962.

Applicant : Commissioner of Customs, Ahmedabad

Respondent : Shri Bhatiya Nayankumar Jashvantbhai

Subject : Revision Application filed under Section 129DD of the
 Customs Act, 1962 against the Order-in-Appeal No. AHM-
 CUSTM-000-APP-316-14-15 dated 14.10.2014 passed by
 the Commissioner(Appeals), Customs, Ahmedabad



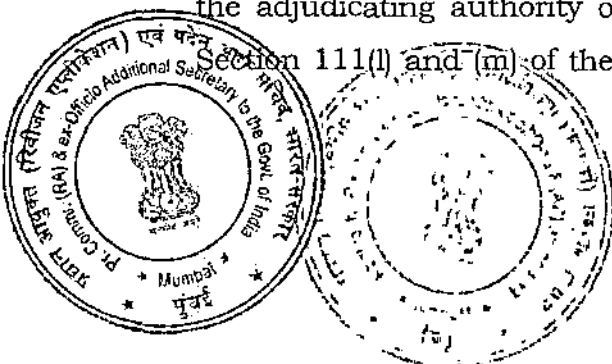
ORDER

This revision application has been filed by the Commissioner of Customs, Ahmedabad against the Order-in-Appeal No. AHM-CUSTOM-000-APP-316-14-15 dated 14.10.2014 passed by the Commissioner(Appeals), Customs, Ahmedabad(hereinafter referred to as the "Applicant") in respect of Shri Bhatiya Nayankumar Jashvantbhai(hereinafter referred to as the "Respondent").

2.1 Briefly stated, the facts of the case are that the respondent on arrival at SVPI Airport, Ahmedabad on 6.04.2014 from Dubai did not declare any dutiable goods and opted for the green channel. During the physical frisking of the respondent, one raw gold chain of 199.87 gms and one $\frac{1}{2}$ Oz gold bar weighing 15.550 gms totally valued at Rs. 5,48,233/-(Rupees Five Lakhs Forty Eight Thousand Two Hundred Thirty Three Only) were recovered.

2.2 As per the provisions of Section 77 of the Customs Act, 1962 read with the provisions of Rule 6 of the Baggage Rules, 1998 and Regulation 3 of the Customs Baggage Declaration Regulations, 2013, the maximum value of jewellery valued at Rs. 1,00,000/- was allowed duty free if carried by a lady passenger and maximum value of jewellery valued at Rs. 50,000/- was allowed duty free if carried by a male passenger on a stay of over one year. As per Notification No. 12/2012-Cus dated 17.03.2012 as amended, for bringing gold bars from outside India by eligible passengers, one of the conditions is filing of a declaration in the prescribed form before the proper officer of Customs at the time of arrival in India. In view of the aforementioned provisions it appeared that the impugned goods being carried by the passenger were liable for confiscation and accordingly the impugned goods were seized from the above passenger as the same were not declared by him as required under Section 77 of the Customs Act, 1962 read with Regulation No. 3 of the Customs Baggage Declaration Regulations, 2013 as amended.

3. The case was decided by the Joint Commissioner of Customs, Ahmedabad vide Order-in-Original No. 12/JC/SVPIA/O&A/2014 dated 16.04.2014 whereby the adjudicating authority ordered confiscation of the impugned goods under Section 111(l) and (m) of the Customs Act, 1962 and gave an option to redeem



the same on payment of fine of Rs. 1,80,000/- under Section 125 and also imposed penalty of Rs. 1,80,000/- under Section 112(b) ibid.

4.1 Aggrieved by the Order-in-Original, the respondent preferred appeal before the Commissioner(Appeals), Customs, Ahmedabad. The said appeal was decided by the Commissioner(Appeals), Customs, Ahmedabad vide Order-in-Appeal No. AHM-CUSTOM-000-APP-316-14-15 dated 14.10.2014 whereby the Commissioner(Appeals) observed that:

- (i) The revenue has not succeeded in proving mensrea on the part of the applicant;
- (ii) The only undisputed fact is that the applicant has not declared the goods;
- (iii) Taking into consideration the fact that the quantity involved was 215.420 gms, the revenue does not have a case to contend that declaration by the passenger was definitely called for;
- (iv) The import of gold is allowed under the EXIM policy and cannot be defined as "prohibited goods" within the meaning of the Customs Act.

4.2 Based on these observations the Commissioner(Appeals) modified the order of the adjudicating authority to allow re-export of the impugned goods on payment of penalty of Rs. 1,50,000/- and waived the redemption fine imposed.

5. The Department found that the impugned Order-in-Appeal was not legal and proper and therefore filed revision application on the following grounds:

- (i) It was obligatory for every passenger to declare the goods being imported as per Section 77 of the Customs Act, 1962 and Regulation 3 of the Customs Baggage Declaration Regulations, 2013 failing which the passenger was liable to punitive action under the Customs Act, 1962.
- (ii) The respondent in the present case did not declare the gold jewellery and gold bar which was in excess of the free allowance allowed and opted for the Green Channel. It proved that he was in a culpable mental state to commit the offence. Therefore, the Commissioner(Appeals) had correctly observed that "the revenue do



have a point that declarations by the passengers were definitely called for" was not proper and legal.

- (iii) Section 123 of the Customs Act, 1962 in case of seizure of gold and manufacture thereof, casts the burden of proof to prove that the same are not smuggled on the person from whose possession the said goods are seized. Thus, once the passenger has opted for the green channel without declaring the goods, the burden of proof was on the passenger. Further, as per Section 138A of the Customs Act, 1962, once the Department has established the offence, negation of culpable mental state was the responsibility of the accused.
- (iv) Section 80 of the Customs Act, 1962 allows detention of goods for re-export if the passenger declares the goods. However, the option of re-export is not available if the goods have not been declared.
- (v) The case law of Hemal K. Shah[2012(275)ELT 266(GOI)] was relied upon to contend that once the goods are liable for confiscation, they cannot be allowed for re-export.
- (vi) The case law of Samyanathan Murugesan][2010(254)ELT A15(SC)] was relied upon wherein it had been held that whenever import of goods is made without fulfilment of requisite conditions, the impugned goods are to be treated as prohibited goods and should be absolutely confiscated. It was pointed out that directives had been issued while circulating the minutes of the meeting of DRI(HQ) held on 30.09.2014 while discussing the said judgment that Commissionerates be advised to adhere to the said judgment during adjudication/review.
- (vii) It was contended that acceptance of the impugned Order-in-Appeal would be a bad precedent and would likely encourage acts of smuggling as it would be perceived that even after getting caught there is a chance of absolving oneself from any punishment.
- (viii) In view of the above grounds, the decision of the Commissioner(Appeals) to allow re-export of the confiscated goods runs contra to the law and is not just and proper.

6. The respondent was granted opportunity to be heard. Shri Rishikesh Mehra, Advocate appeared on behalf of the respondent on 19.11.2018. The respondent reiterated the Order-in-Appeal and pleaded that a lenient view be



taken and the Order-in-Appeal be upheld. None appeared on behalf of the applicant Department.

7. The Government has gone through the case records. On arrival at Sardar Vallabhbhai Patel International Airport, Ahmedabad from Dubai on 6.04.2014, the respondent was intercepted by Officers of Customs. The passenger had opted to walk through the Green Channel. When the respondent was frisked with a metal detector, he was found to be carrying one gold chain weighing 199.87 gms and one $\frac{1}{2}$ Oz gold bar weighing 15.550 gms. Together the gold carried by him weighed 215.420 gms totally valued at Rs. 5,48,233/-. The respondent had not declared to customs that he was carrying gold.

8. As such, the import of gold is restricted but not prohibited. In the present case, the ownership of the gold is not in dispute. In so far as the grounds relating to the amplitude of Section 125 of the Customs Act, 1962 on the question as to whether the goods which are not declared can be released on payment of redemption fine is concerned, it is observed that these provisions mandate allowing the goods to be redeemed on payment of fine.

9. Government observes that the respondent has no previous offences registered against him. Moreover, there is no record of him being a frequent visitor to Dubai. There are a catena of judgments which align with the view that the discretionary powers vested with the lower authorities under section 125(1) of the Customs Act, 1962 have to be exercised. It would be pertinent to note that the section 125 of the Customs Act, 1962 does not even differentiate between an owner and a carrier. These judgments also do not distinguish between concealment of goods as ingenious or otherwise while allowing them to be redeemed. The Government is of the view that the goods are confiscatable as the same have been imported in contravention of the provisions of the Customs Act, 1962. However, the option of redeeming the same on payment of fine could be allowed. The order of the appellate authority setting aside the redemption fine is not correct as the goods were confiscatable and redemption fine was required to be imposed while allowing re-export. In so far as the penalty is concerned, the respondent had concealed the gold.



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chain and gold bar and he did not declare it. Government notes that the redemption fine and penalties should be commensurate with the offence committed so as to deter such acts in future. In the present case the concealment has not been alleged to be ingenious. It is observed that the respondent has not filed for revision against the penalty imposed by the Commissioner(Appeals). While allowing the gold for re-export without imposing any redemption fine, the Commissioner(Appeals) has imposed a penalty of Rs. 1,50,000/-. The penalty of Rs. 1,50,000/- imposed on the respondent is unduly high. There are no grounds for revision of the penalty from either side; viz. the Department or the respondent. Therefore, the Government considers it a fit case to invoke the powers vested in it under sub-section (4) of Section 129DD of the Customs Act, 1962 to annul or modify an order on its own motion. Government is of the opinion that the impugned Order in Appeal is therefore liable to be set aside and the redemption fine and penalty need to be imposed commensurate to the legal infringement and other facts of the case.

10. The impugned Order-in-Appeal is set aside. The Government allows redemption of the gold chain weighing 199.87 gms and the one ½ Oz gold bar weighing 15.550 gms, totally weighing 215.420 gms and valued at Rs. 5,48,233/-(Rupees Five Lakhs Forty Eight Thousand Two Hundred Thirty Three Only) on payment of redemption fine of Rs. 1,75,000/-(Rupees One Lakh Seventy Five Thousand Only) under Section 125 of the Customs Act, 1962 for re-export. The penalty of Rs. 1,50,000/-(Rupees One Lakh Fifty Thousand Only) imposed on the Respondent under Section 112(b) of the Customs Act, 1962 is reduced to Rs. 35,000/-(Rupees Thirty Five Thousand Only).

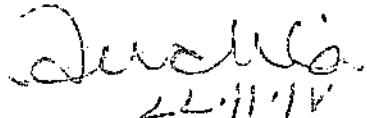
11. Revision application is disposed off in the above terms.

12. So, ordered.

ATTESTED


30/11/17
S.R. HIRULKAR
Assistant Commissioner (R.A.)




22/11/17

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

ORDER No. 954/2018-CUS (WZ) /ASRA/MUMBAI

DATED 22.11.2018

To,
Shri Bhatia Nayankumar Jashvantbhai
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IOC Road, 'D' Cabin,
Sabarmati, Ahmedabad.

Copy to:

1. Commissioner of Customs, Ahmedabad
2. Commissioner of Customs(Appeals), Ahmedabad
3. Sr. P.S. to AS (RA), Mumbai
- ✓ 4. Guard File
5. Spare Copy

