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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. 371/20/B/2021-RA / 73 Date of issue: 04.01.2024

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ORDER NO. 958/2023-CUS (WZ)/ASRA/MUMBAI DATED 29.12.2023  
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. Mohamed Hazan Kaleel  
Respondent : Pr. Commissioner of Customs, CSMI, Mumbai  
Subject : Revision Application filed under Section 129DD of the  
Customs Act, 1962 against the Order-in-Appeal No. MUM-  
CUSTM-PAX-APP-416/2020-21 dated 09.10.2020 [Date of  
issue: 13.10.2020] [F. No. S/49-72/2019] passed by the  
Commissioner of Customs (Appeals), Mumbai Zone-III.

ORDER

This Revision Application is filed by Mr. Mohamed Hazan Kalsool (herein referred to as the 'Applicant') against the Order-in-Appeal (OIA) No. MUM-CUSTOM-PAX-APP-416/2020-21 dated 09.10.2020 passed by the Commissioner of Customs (Appeals), Mumbai Zone-III.

2. Brief facts of the case are that on 12.01.2019, the applicant on arrival at Chhatrapati Shivaji Maharaj International Airport, Mumbai, from Dubai by Flight No. 9W-0525 was found in possession of 01 gold chain weighing 50 grams and 18 kgs of Protein (4 packets) totally valued at Rs.1,57,575/-.

3. The case was adjudicated after waiver of show cause notice and the Original Adjudicating Authority (OAA) i.e., Assistant Commissioner of Customs 'D' Batch, CSMI Airport, Mumbai, vide Order-in-Original (OIO) dated 12.01.2019 ordered absolute confiscation of the seized 01 gold chain weighing 50 grams and 18 kgs of Protein (4 packets) totally valued at Rs.1,57,575/- under Section 111 (d) of the Customs Act, 1962. A penalty of Rs.20,000/- was imposed on the Applicant under Section 112 of the Customs Act, 1962.

4. Aggrieved, the Applicant filed an appeal before the Appellate Authority (AA) who vide impugned OIA upheld the order of the OAA and rejected the appeal.

5.1 Hence, the Applicant has filed the instant revision application on the following grounds:

- i. that the baggage rules will apply when the goods are found in the baggage. Since the passenger was wearing one gold chain weighing 50 grams valued at Rs.1,47,775/-, while he was intercepted by the officers of customs, hence the question of applying the baggage rules does not attract.
- ii. that ownership of the gold is not disputed and there is no ingenious concealment.

- iii. that the goods must be prohibited before export or import, simply because of non-declaration of the goods cannot become prohibited after import.
- iv. the second contention of the department that he has not declared the gold jewellery with department under section 77 of the customs act 1962. In this regard the applicant submits that he was found wearing the gold jewellery and the same is 23 carat purity and the same is personal belongings and hence question of declaration does not arise.
- v. that it is not the case of the department that the gold jewellery was recovered from his baggage. The applicant submits that the baggage rules will apply only when the goods are found in the baggage. Since the applicant was wearing the gold jewellery and the same is personal belongings and hence question of attracting or violation of baggage rules does not arise. If the authority had applied its mind on the proposition of law they would not have registered the case as if the applicant violated the baggage rules
- vi. that the commissioner (appeals) Cochin Kerala has passed an order in F.NO. C27/243,252 & 255/Air/2013 AV CUS in OS. NO. 370, 349, 364/2013 dated 18.12.2014 Shri. Hamsa Mohideen Mohammed Shajahan Srilanka, Rismila Begam Samsudeen Arif and Hussain Sarbudeen Farhan. While passing the order the commissioner of customs (appeals) Cochin has observed "I have come to the conclusion that the department has overreached itself in confiscating the jewelry absolutely. In all the cases, the applicants are foreign nationals and it was gold jewellery that was seized from them. I find that Revenue has not succeeded in proving mens rea on the part of the neither applicants nor disproved the applicants contention that the impugned d jewelry was their personal jewelry and not intended for sale. In the case of Vigneswaran Sethuraman Vs union of india (W.P. @ No. 6281 of 2014 (I) dated 12.03.2014 the hon'ble high court of Kerala directed the revenue to unconditionally return the gold to the petitioner and refund the penalty. Ongoing through the decision cited, I find that he cannot

be any dispute with regard to the law settled by the hobble high court. The only undisputed fact is that the applicants did not declare the jewelry on their persons. Taking into account that the quantity involved was more than 100 grams in each case, Revenue does have a point to be frequent visitors. However absolute confiscation is wrong under the law. I am constrained to set aside those portions of the impinged orders in original confiscating the gold absolutely.

5.2 The Respondent has vide letter dated 22.04.2021, put forth, inter alia, following submissions:

- i. As per Section 77 of the Customs Act, 1962, the owner of baggage shall, for the purpose of clearing it, makes a declaration of its content to the Customs. In the instant case, the applicants, had not made any declaration under Section 77 to the Customs Act, 1962, thus, intent of evasion of Customs duty was apparent. The passenger did not declare the gold on her own and the Assorted Gold Jewellery was detected only after she was intercepted by the officers of Customs after she had cleared herself through Customs Green Channel. Had the passenger not been intercepted, she would have made good with Assorted Gold Jewellery.
- ii. In the instant case, the offence was committed in a premeditated and clever manner which clearly indicates mens rea and if she was not intercepted, the Gold would have been taken without payment of Customs duty.
- iii. In the case of Abdul Razak Vs. Union of India reported in 2012 (275) ELT 300 (Ker) (DB), the Hon'ble Division Bench of Kerala High Court did not find any merit in the appellant's case that he has the right to get the confiscated gold released on payment of redemption fine and duty under Section 125 of the Act.
- iv. The Hon'ble Madras High Court, in the case of Commissioner of Customs (Air) Vs. P. Sinnasamy, cited the above observation of the Hon'ble Division Bench of Kerala High Court and held that even though gold is not an enumerated prohibited item and thus, can be imported,

but when such import is subject to restrictions, including the necessity to declare the goods on arrival at the Customs Station and make payment of duty at the rate prescribed, release of the smuggled goods cannot be ordered and held that when there is a violation of statutory prohibitions, mentioned in Sections 11 and 11A of the Customs Act, 1962 or any other law, for the time being in force or restrictions imposed, such restrictions would also encompass the expression, any prohibition.

- v. Reference is also invited to the judgement in the case of *Om Prakash Bhatia vs. commissioner of Customs, Delhi* (2003) 6 SC 161 wherein the Hon'ble Supreme Court had held that on account of the non-fulfilment of conditions of import of gold as a part of baggage of a passenger—whether ineligible or eligible (intercepted while walking through Green Channel), the conditions precedent which act as a restriction, become a prohibition with reference to that passenger. In other words, non-fulfilment of conditions of imports tantamount to prohibition.
- vi. The passenger has not produced any purchase invoice to prove the licit acquisition and financing of the seized goods. Section 123 of the Customs Act, 1962 casts a burden on the person from whom the gold has been seized to lead the evidence that the seized goods have not been smuggled. In the instant case, the passenger could not produce any licit document for lawful purchase/financing of the seized gold. There is no scope at all for the ineligible to go out of the purview of Section 123 of the Customs Act, 1962.
- vii. In this regard attention is invited to the judgement i.e., 2018 (364)(E.L.T. 811 (Tri- Bang) *Baburaya Narayan Nayak Vs. Commissioner of Customs, Bangalore* wherein the CESTAT, South Zonal Bench, Bangalore has upheld the order of the adjudicating authority wherein the adjudicating authority had absolutely confiscated the silver bars since the appellant had not produced any evidence regarding the licit possession of the said goods.

- viii. Board's Circular No. 495/5/92-Cus.VI dated 10.05.1993 specifies that in respect of gold seized for non-declaration, no option to redeem the same on redemption fine under Section 125 of the Customs Act, 1962, should be given except in very trivial cases where the adjudicating authority is satisfied that there was no concealment of the gold in question. In the instant case, the gold was not declared and concealed. Thus, the Adjudicating Authority was right in ordering absolute confiscation of the seized gold in the light of the aforesaid Board's Circular.

Based on these submissions the respondent has prayed that the Revision Application filed by the Applicant be rejected and the Order-in-Appeal No. MUM-CUSTOM-PAX-APP-416/2020-21 dated 09.10.2020 passed by the Commissioner of Customs (Appeals), Mumbai be upheld.

6. Personal hearing in the matter was fixed on 09.08.2023/23.08.2023. However, no one either from the applicant's side or respondent's side attended the meeting. Subsequently, on 28.08.2023, a letter dated 23.08.2023 was received from Advocate Shri Kamalamalar Palani Kumar, on behalf of the applicant, informing that due to internet connection problem, he could not attend the hearing on either of the dates. He further requested to decide the matter on available records and to show leniency while passing order. No one appeared for the personal hearing on behalf of the Respondent. The matter is therefore taken up for decision based on available records.

7. Government has gone through the facts of the case and observes that the Applicant had brought 01 gold chain weighing 50 grams but 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 clearing himself through the green channel of Customs and on being intercepted, 01 gold chain weighing 50 grams valued at Rs.1,46,775/- were recovered from the Applicant and revealed his intention of 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 became 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. Srinivasan 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 is 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.
- f) 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

Vijayasundaram + 5 others in a matter of Sri Lankans 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.

13.2. 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 01 gold chain weighing 50 grams valued at Rs.1,46,775/- 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. There are no allegations that the Applicant is a habitual offender and was involved in similar offence earlier. Further, there is nothing on record to prove that the Applicant was part of an organized smuggling syndicate. Considering these facts, Government is inclined to modify the absolute confiscation and allow the redemption of impugned 01 gold chain weighing 50 grams valued at Rs.1,46,775/- on payment of a redemption fine.

15. Applicant has also pleaded for setting aside the penalty imposed on him. The market value of the gold in this case is Rs. 1,46,775/-. 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 with the omissions and commissions of the Applicant.

16. In view of the above, the Government modifies the impugned OIA and allows the Applicant to redeem the impugned crude gold bar weighing 01 gold chain weighing 50 grams valued at Rs.1,46,775/-, on payment of a redemption fine of Rs.30,000/-. The penalty of Rs.20,000/- imposed on the Applicant

under Section 112 of the Customs Act, 1962 by the OAA and upheld by the AA is sustained.

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

ORDER NO. 958/2023-CUS (WZ)/ASRA/MUMBAI DATED 29.12.23

To,

1. Mr. Mohamed Hazan Kaleel,  
c/o. Adv. Kamalamalar Palani Kumar,  
No.10, Sunkurama Street,  
Second Floor, Chennai - 600 001.
2. The Pr. Commissioner of Customs,  
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Copy to:

1. Sr. P.S. to AS (RA), Mumbai.
- ~~2. Guard file.~~