

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. 380/127-A/B/16-RA

Date of Issue 23/12/2018

ORDER NO. ⁹⁶⁰ /2018-CUS (WZ) / ASRA / MUMBAI/ DATED 12.11.2018
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 : Pr. Commissioner of Customs(Airport), Mumbai

Respondent : Shri Manazir Hasan

Subject : Revision Application filed under Section 129DD of the
Customs Act, 1962 against the Order-in-Appeal No. MUM-
CUSTM-PAX-APP-43-16-17 dated 9.05.2016 passed by the
Commissioner of Customs(Appeals), Mumbai-III



ORDER

This revision application has been filed by Commissioner of Customs(Airport), Mumbai against the Order-in-Appeal No. MUM-CUSTM-PAX-APP-43-16-17 dated 9.05.2016 passed by the Commissioner of Customs(Appeals), Mumbai-III(hereinafter referred to as the "applicant") in respect of Shri Manazir Hasan (hereinafter referred to as the "Respondent").

2. Briefly stated, the facts of the case are that the respondent on arrival at CSI Airport, Mumbai from Dubai on 11.02.2016 was intercepted and diverted by Customs Officials while he was proceeding to clear himself through the "Green Channel". Detailed examination of his baggage resulted in recovery of one piece of gold bar weighing 116 gms valued at Rs. 3,08,096/- found attached to the bottom of the trolley. The case was adjudicated vide Order-in-Original No. DC/RG/ADJN/B/42/2015-16 dated 14.02.2016 passed by the Deputy Commissioner of Customs, CSI Airport, Mumbai and the goods were confiscated absolutely under Section 111(d) of Customs Act, 1962 and a penalty of Rs. 30,000/-(Rupees Thirty Thousand Only) was imposed under Section 112 of the Customs Act, 1962 on the respondent.

3.1 Aggrieved by the order of the adjudicating authority, the respondent filed appeal before the Commissioner(Appeals) on the grounds that it has consistently been held by the Hon'ble Courts, Tribunal and Revisionary Authority of Govt. of India that if the import of commodities was not completely banned, then such commodities or articles could be released on imposition of fine. Reliance was placed upon the following decisions:

- (i) V. P. Hammed vs. CC, Bombay[1994(7)ELT 4251]
- (ii) Kadar Mydin vs. CC(P), West Bengal[2011(136)ELT 758]
- (iii) Sapna Sanjeeva Kolhi vs. CC, Airport, Mumbai[2008(23)ELT 305]
- (iv) Vatakkal Moosa vs. CC, Cochin[1994(72)ELT(GOI)]
- (v) Order No. 426/04 issued vide F. No. 380/57/8-2004-RA Cus dated 21.09.2004 passed by the Revisionary Authority, Government of India
- (vi) UOI vs. Dhanak M. Ramji[2010(252)ELT A102(SC)].

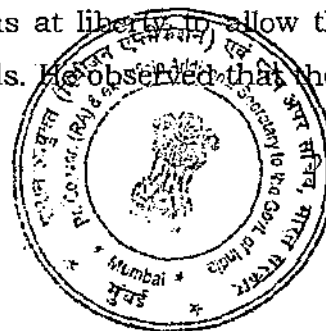
3.2 The respondent also submitted copy of purchase invoice no. 7530 dated 11.02.2016 to counter the charge that he was the carrier of the impugned gold



and sought redemption of the goods confiscated absolutely on imposition of reasonable fine and penalty as allowed by the same adjudicating authority in similar cases.

4.1 The Commissioner(Appeals) found that the passenger had been found in possession of 116 gms of gold valued at Rs. 3,08,096/-(Rupees Three Lakhs Eight Thousand Ninety Six Only) in the form of one piece of gold bar found attached to the bottom of the trolley which was not declared to Customs. The said act amounted to violation of the Baggage Rules, 1998 and relevant policy provisions rendering the goods liable to confiscation and the passenger liable to penalty. The appellate authority observed that the main issue for decision before him was whether the passenger can be given the option of redemption of the confiscated gold on payment of fine and duty on merits.

4.2 After going through the text of Section 125 of the Customs Act, 1962 and the definition of "prohibited goods", the Commissioner(Appeals) inferred that prohibition relates to two types of goods; viz. narcotic drugs, wild life products etc. which are categorised as "prohibited goods". The other category includes the goods the import/export of which is allowed subject to fulfilment of certain conditions and if the conditions are complied with, such goods will not fall in the category of "prohibited goods". The intention of the provisions of Section 125 clearly appeared to be that import of goods such as those which would cause danger to health, welfare or morals of people as a whole should not be allowed to be redeemed and therefore the discretion should not be exercised in these cases. The second category includes the goods, the import/export of which is permitted subject to certain conditions or to a certain category of persons and which are ordered to be confiscated for the reason that the condition has not been complied with. In such a situation, the release of these goods would not cause any danger or harm to the public as a whole and though it is not mandatory for the adjudicating authority to allow redemption albeit such cases may be considered positively for redemption. He found that it was an admitted fact that the import of gold was allowed in case of certain category of persons subject to certain conditions. The Commissioner(Appeals) therefore opined that it was clear that the adjudicating/appellate authority was at liberty to allow the option of redemption even in respect of prohibited goods. He observed that the category of



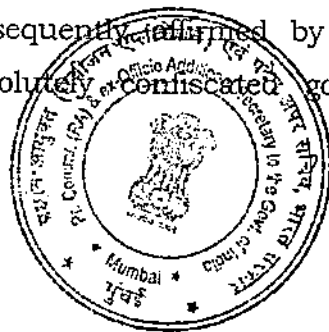
goods involved in this case could be considered for release on payment of redemption fine. He further observed that after the era of liberalisation of EXIM Policy, import of gold was allowed subject to some conditions and therefore gold cannot be termed as "prohibited goods".

4.3 The Commissioner(Appeals) further observed that sub-section (2) of Section 125 of the Customs Act, 1962 provides for an option to be given to the owner of the goods or where the owner of the goods is not known, to the person from whose possession or custody such goods have been seized. In this case, there is no other claimant than the respondent. The gold has been seized from the possession of the respondent and there is no doubt about the ownership of the goods and therefore the option to redeem the goods can be given to the owner or to the person from whom goods have been recovered.

4.4 He placed reliance upon the following case laws:

- (i) Hargovind Das K. Joshi vs. Collector of Customs[1992(61)ELT 172(SC)];
- (ii) Universal Traders vs. Commissioner[2009(240)ELT A78(SC)];
- (iii) Gauri Enterprises vs. CC, Pune[2002(145)ELT 705(Tri-Bang)];
- (iv) CC(Airport), Mumbai vs. Alfred Menezes[2009(242)ELT 334(Bom)];
- (v) Yakub Ibrahim Yusuf[2011(263)ELT 685(Tri-Mum)];
- (vi) Shaik Jamal Basha vs. GOI[1997(91)ELT 277(AP)];
- (vii) V. P. Hameed vs. Collector of Customs, Mumbai[1994(73)ELT 425(Trb)];
- (viii) T. Elavarasan vs. CC(Airport), Chennai[2011(266)ELT 167(Mad)];
- (ix) UOI vs. Dhanak M. Ramji[2009(248)ELT 127(Bom)] & [2010(252)ELT A102(SC)].

4.5 Commissioner(Appeals) inferred on analysis of the Supreme Court judgments in the case of Dhanak Ramji and Samyanathan Murugesan that while interpreting the scope of Section 125 of the Customs Act, 1962, the Supreme Court had not made any distinction on the basis of the manner in which the offending goods had been carried. He took note of the decision of the CESTAT in the case of A. Rajkumari vs. CC, Chennai[2015(321)ELT 540(Tri-Chen)] which was subsequently affirmed by the Supreme Court, wherein redemption of the absolutely confiscated gold was allowed by imposing



reasonable redemption fine despite the fact that 70 gold bars(10 tolas each) were found concealed in the air-conditioner brought by the passenger. The appellate authority found that what could be deduced from this recent judgment of the Supreme Court was that even in cases of clever(ingenious) concealment of gold, the option of redemption under Section 125 of the Customs Act, 1962 could be exercised to secure the ends of justice.

4.6 The Commissioner(Appeals) further found that the list of cases given by the Advocate for the respondent indicated that in similar situation, the adjudicating authority had allowed redemption of gold which by his own yardstick was covered under the scope of alleged "ingenious concealment". He held that such selective approach which was contrary to the provisions of Section 125 of the Customs Act, 1962 cannot be held as legal and proper and that such discriminatory approach cannot pass judicial scrutiny.

4.7 In the light of these findings, the Commissioner(Appeals) allowed the respondent the option to redeem the goods on payment of fine and on payment of applicable rate of duty. He found that there was not much of a difference between the price of gold prevailing in the international market and the local market and that there was a very low margin of profit. He therefore imposed a fine of Rs. 50,000/-(Rupees Fifty Thousand Only) for redemption of the goods and upheld the penalty of Rs. 30,000/-(Rupees Thirty Thousand Only) on the respondent.

5. The Department did not find the impugned Order-in-Appeal to be legal and proper and therefore filed revision application on the following grounds:

- (i) The manner in which the gold was brought; i.e. by concealing it, by attaching it to the bottom of the luggage trolley was clever and ingenious. The passenger opted for the green channel without declaring the gold and therefore it was a fit case for absolute confiscation of the seized gold as a deterrent.
- (ii) Since the gold was ingeniously concealed by pasting it to the bottom of the trolley by the passenger and since he failed to declare the same, the Commissioner(Appeals) ought not to have allowed redemption of the impugned gold. The Commissioner(Appeals) should have upheld the orders for absolute confiscation.



- (iii) The Commissioner(Appeals) relied upon the judgment in the case of Dhanak Ramji vs. UOI[2010(252)ELT A102(SC)] which does not apply to the facts of the present case as the aspect of ingenious concealment of the gold was not an issue in the said case.
- (iv) Commissioner(Appeals) has relied upon the decision of the Hon'ble CESTAT in the case of A. Rajkumari vs. CC, Chennai[2015(321)ELT 540(Tri-Chen)] and observed that the said decision had been affirmed by the Supreme Court as reported in [2015(321)ELT A207(SC)]. However, in that case the Hon'ble Supreme Court has dismissed the appeal on the revenue on the grounds of delay.
- (v) The absolute confiscation of one cut gold bar recovered from the bottom of the luggage trolley of the passenger ordered by the adjudicating authority was correct and supported by the judgment of the Hon'ble Supreme Court in the case of Samyanthan Murugesan vs. CC(Airport), Chennai-I[2010(254)ELT A15(SC)]. In that case, the passenger had attempted to smuggle 7.075 kgs of gold by ingenious concealment in TV set without making declaration before Customs in violation of the provisions of Section 11 and 77 of the Customs Act, 1962 and the adjudicating authority had absolutely confiscated the gold.
- (vi) The judgment of the Hon'ble Delhi High Court in the case of Jain Exports vs. UOI[1987(29)ELT 753(Del)] was relied upon. In the said judgment, the court had observed "..... the resort to Section 125 of the CA, 1962, to impose fine in lieu of confiscation cannot be so exercised as to give a bonanza or profit for an illegal transaction of imports."

6. The respondent was granted opportunity to be heard on 3.10.2018, 25.10.2018 and 5.11.2018. However, the respondent failed to avail of the opportunity to be heard. Shri Rajkumar Kulkarni, Superintendent(Review), CSI Airport appeared on behalf of the department on 1.10.2018. He reiterated the submissions made in the revision application and pleaded that the impugned Order-in-Appeal be set aside & revision application be allowed.



7. The Government has gone through the case records it is observed that the gold bar was recovered from the bottom of the trolley. The passenger had not declared the gold to the proper officer of customs. 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 said to have been ingeniously concealed 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.

8. 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. Coupled with these facts, the quantity of gold is a mere 116 gms. 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 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. It is observed that the Commissioner(Appeals) has discussed the issue at length and also the various judgments on this point. As correctly observed by the lower appellate authority, the adjudicating authority should be consistent while deciding cases which are similar in nature and cannot vary his decisions. The Government therefore is inclined to agree with the Order-in-Appeal in allowing the gold bar to be redeemed on payment of fine and penalty. Government however notes that the redemption fine and penalties should be commensurate to the offence committed so as to deter such acts in future. The Respondent had concealed the gold bar, he did not declare it and therefore the redemption fine cannot be as low as ordered in the order in appeal. Government is of the opinion that the impugned Order in Appeal is therefore liable to be set aside.

9. The impugned Order in Appeal is set aside. The Government allows redemption of the gold bar weighing 116 gms (valued) at Rs. 3,08,096/- (Rupees Three Lakhs Eight Thousand Ninety Six Only) on payment of



customs duties as applicable. The redemption fine imposed is increased from Rs. 50,000/- (Rupees Fifty Thousand Only) to Rs. 1,00,000/- (Rupees One Lakh Only) under section 125 of the Customs Act, 1962. The penalty of Rs. 30,000/- (Rupees Thirty Thousand Only) imposed on the Respondent under Section 112(a) of the Customs Act, 1962 is sufficient to meet the ends of justice, hence upheld.

9. Revision application is partly allowed on the above terms.
10. So, ordered.

Ashok Kumar Mehta
12.11.18

(ASHOK KUMAR MEHTA)
Principal Commissioner & Ex-Officio
Additional Secretary to Government of India

ORDER No. ⁹⁶⁰/2018-CUS (WZ) /ASRA/Mumbai

DATED 12.11.2018

To,
Shri Manazir Hassan
C/o Shri P. K. Shingrani, Advocate

Copy to:

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

