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SPEED POST



GOVERNMENT OF INDIA  
MINISTRY OF FINANCE  
(DEPARTMENT OF REVENUE)  
8<sup>th</sup> Floor, World Trade Centre, Centre - I, Cuffe Parade,  
Mumbai-400 005

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F.No. 371/40/B/WZ/2021-RA / 03 : Date of Issue : ~~12-2023~~  
04.01.2023

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ORDER NO. 961/2023-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. Lokesh Panchal

Respondent : Pr. Commissioner of Customs, Ahmedabad.

Subject : Revision Application filed under Section 129DD of the Customs Act, 1962 against the Order-in-Appeal No. AHD-CUSTM-000-APP-485-20-21 dated 23.12.2020 [Date of issue: 23.12.2020] [F. No. S/49-558/CUS/AHD/2019-20] passed by the Commissioner of Customs (Appeals), Ahmedabad.

**ORDER**

The Revision Application has been filed by Mr. Lokesh Panchal (herein referred to as the 'Applicant') against the Order-in-Appeal No. AHD-CUSTOM-000-APP-485-20-21 dated 23.12.2020 [Date of issue: 23.12.2020] [F. No. S/49-558/CUS/AHD/2019-20] passed by the Commissioner of Customs (Appeals), Ahmedabad.

2. Brief facts of the case are that on 09.08.2018, on suspicion, the officers of Air Customs, SVPI Airport, Ahmedabad, intercepted the Applicant, an Indian passport holder, who had arrived from Emirates Flight EK-538 after he had opted for the Customs green channel. On being asked whether he was having any dutiable/restricted items to declare, he replied in the negative. Not being satisfied with the reply, the Applicant was asked to pass through the Door Frame Metal Detector (DFMD) but no alert sound was heard. Then the officers placed the tray containing the mobile, wallet belt etc in the X ray machine and some unusual images were seen in the wallet of the Applicant, which resulted in the recovery of one small piece of yellow metal. On screening and examination of the mobile, wallet belt etc and baggages of the Applicant, 08 round shaped pieces of yellow metal wrapped with black coloured tape and one yellow coloured metal coated with black colour was recovered from the socks, ladies purse and three pants of the Applicant.

3. Pursuant to being assayed, the said 08 round pieces of gold and 01 button shaped piece of gold totally weighing 246.770 gram valued at Rs. 6,73,300/- were placed under seizure under Section 110 of the Customs Act, 1962 under the reasonable belief that the same were attempted to be smuggled into India in violation of the provisions of the Customs Act, 1962 and relevant provisions of FTP 2015-20 and the same were liable to confiscation under Section 111 of the Customs Act, 1962.

4. The Applicant in his statement stated that he worked in a gold polishing shop at Kuwait; that he had purchased gold in small portion in Kuwait from time to time from his personal savings and by borrowing from his friends; that he had brought the gold to make some ornaments for his family members; that he had concealed the gold in order to evade customs duty and was aware that import of gold without declaring and payment of duty was an offence; that the gold seized from his possession belonged to him and that he had failed to declare the same; that the bills were available with him in the baggage but due to fear, he did not remember that they were with him.

5. After following the due process of law, the Original Adjudicating Authority i.e the Assistant Commissioner of Customs, SVPI Airport, Ahmedabad vide Order-in-Original No.06/AP/MM-AC/SVPIA/2019 dated 25.11.2019 ordered the absolute confiscation of the 08 round shaped pieces of gold and 01 button shaped piece of gold totally weighing 246.770 grams of 24Kt and having a tariff value of Rs. 6,73,300/- and market value of Rs. 7,51,908/-, under Section 111(d), (i) and (l) of the Customs Act, 1962. Penalty of Rs. 1,50,000/- was imposed on the Applicant under Section 112(a) and (b) of the Customs Act, 1962

6. Aggrieved with this Order, the Applicant filed an appeal before the Appellate Authority (AA) viz, Commissioner of Customs (Appeals), Ahmedabad who vide Order-in-Appeal No AHD-CUSTM-000-APP-485-20-21 dated 23.12.2020 [Date of issue: 23.12.2020] [F. No. S/49-558/CUS/AHD/2019-20] upheld the order passed by the OAA.

7. Aggrieved with the above order of the Appellate Authority, the Applicant has filed this revision application on the following grounds:

7.01. That the order of the OAA and AA are erroneous having arrived at without appreciation the facts of the case and defence submission made by the Applicant and the same need to be set aside

7.02. That the OAA and AA have failed to appreciate the fact that the Applicant herein had informed the screening officers that he was not a visitor abroad but has been working abroad for 16 years and the gold in question was purchased by him from his own savings for his own use and there was no motive to have financial gain by sale of the same in India.; That he is an artisan and he was not aware Customs formalities; that he was not enough educated and at the same time not aware of the procedure of Customs department which even educated people find difficult to follow meticulously;

7.03. That the OAA and AA have failed to appreciate the fact that an oral declaration is also a declaration under section 77 of the Act which requires nothing more than declaration of "contents of the baggage" (and not its value). The Applicant has relied upon the case of Naresh Lokumal Serai vs. Commissioner of Customs (Export), Raigad, [2006 (203) E.L.T. 580 (Tri. Mumbai)] and quoted portions the same to emphasis the scope of section 77 of Customs Act 1962 and that it was incorrect to suggest that the Applicant had failed to declare the goods.

7.04. That as regards, absolute confiscation, section 125 of the Act very clearly lays down that where the goods are not prohibited goods, in the event of their confiscation, the goods have to be released on redemption fine and the Adjudicating Authority does not have any option and where the goods are prohibited, the Adjudicating/Appellate Authorities have been given discretion

either to confiscate the goods without redemption or to release the goods on payment of redemption fine; that discretion has to be exercised without evoking the interest of Courts have been laid down in a plethora of judgments, some of which are as under:-

- (i) Commissioner of Customs (Air) vs P. Sinnasamy in CMA No.1638 of 2008, before the Hon High Court of Madras decided on 23 August, 2016
- (ii) Aero Traders Pvt. Ltd., v. Ravinder Kumar Suri [AIR 2005 SC 15], the Supreme Court, explaining the meaning of the word discretion
- (iii) State of NCT of Delhi v. Sanjeev, in [(2005) 5 SCC 181], the Hon'ble Supreme Court, explaining the scope of judicial review of executive action
- (iv) In Reliance Airport Developers Pvt. Ltd., v. Airports Authority of India [2006 (10) JT 423 (SC)], the Hon'ble Apex Court held that the discretion must be governed by rule and not by humour or fanciful, but by legal and regular practice and procedure. The Hon'ble Apex Court further added that, Judicial Discretion" signifies unrestrained exercise of choice or will; freedom to act according to one's own judgment; unrestrained exercise of will; the liberty or power of acting without control other than one's own judgment.
- (v) In Global Energy Limited and another vs. Central Electricity Regulatory Commission [2009 15 SCC 570], the Hon'ble Supreme Court held that the exercise of discretion has to be in conformity with the purpose for which, it is conferred, object sought to be achieved and reasons to be recorded.

7.05 That the power conferred on the authority without any guidelines may likely to be abused or arbitrarily exercised and in such circumstances, the guidance and the control of exercise of such power has to be gathered from the object of conferment of such power and Non-consideration or non- application

of mind to the relevant factors, renders exercise of discretion manifestly erroneous and it cause for judicial interference; that the OAA and AA have failed to appreciate the facts correctly, arrived at erroneous conclusions and thus failed to exercise their discretion properly as per the canons laid down in the cases referred above.

7.06. That there is no illegality/irregularity in the Applicant's action of bringing gold, even if it is presumed without accepting, that there is a case for confiscation, then since there is no ingenious concealment per se, the goods are liable to be released on redemption, both in the event of considering the same as non-prohibited goods as well as prohibited goods.

7.07. That in a recent case of A. Rajkumari vs CC (Chennai) [2015 (321) ELT 540 (Tri-Chennai)], redemption of absolutely confiscated gold was allowed against reasonable fine despite the fact that 70 (Seventy) gold bars (10 Tolas each) were found concealed in the Air Conditioner brought by the passenger. This case was also affirmed by the Hon. Apex Court vide 2015 (321) ELT A207 (SC).

7.08. That various courts and tribunals have allowed redemption of offending goods both prohibited as well as non-prohibited, not only to the owner of the goods but also to the person importing the gold, though he is not the owner. The Applicant has quoted and relied on the following case :-

- (i) Yakub Ibrahim Yousuf [2011 (263) ELT-685 (Tri. Mum)] and subsequently 2014-TIOL-277-CESTST-MUM
- (ii) Shaik Jameel Pasha vs. Govt Of India [1997 (91) ELT 277 (AP)]
- (iii) V.P.Hamid vs Commissioner of Customs, 1994(73)ELT 425 (Tri)
- (iv) T.Elavarasan vs Commissioner of Customs (Airport) Chennai 2011 (266) ELT 167 (Mad)
- (v) Union of India Vs Dhanak M. Ramji 2009 (248) ELT 127 (Bom). This judgment of the Hon High Court of Bombay was also upheld

by the Hon. Supreme Court vide its judgment dated 08-03-2010, reported in 2010 (252) ELT A102 (SC).

7.09. That as regards the penalties imposed, since the goods in question were not prohibited, the penalty under S/112 (a) and (b) of Customs Act 1962, as there is no offence committed by the Applicant, the question of imposition of penalties prima facie does not arise' that if it is felt, that the oral declaration made by the Applicant is defective, it is submitted that the penalty is very high as compared to other cases of similar nature, and thus it is prayed that the same may please be reduced to a reasonable level commensurate with the misdemeanor.

7.10. That the Applicant is not a frequent flyer but was abroad for a long time of over 14 years away from his family and was earning his livelihood and contributing to the exchequer the convertible foreign currency.

7.11. That the gold was purchased from own savings and was meant for own family need and there was no motive of enrichment and for a small time artisan it took years to save the money and hence a lenient view ought to have been taken.

Under the circumstances the Applicant prayed that the application be admitted and allowed and the goods taken over on 09.08.2018 from the Applicant, may be handed over to the Applicant on payment of applicable duty; that the penalty imposed may be dropped/reduced to a reasonable level commensurate with the misdemeanour or any such other and/or further order(s) or directions as deemed fit, just and proper in the facts and circumstances of the case, may be issued.

8. Personal hearing in the case was scheduled for 09.08.2023 or 23.08.2023, 10.10.2023 or 17.10.2023. Shri Mahendra Kothari, consultant

appeared for the hearing on 10.10.2023, on behalf of the Applicant. He submitted that the Applicant brought small quantity of gold for personal use out of personal savings. He submitted that the Applicant was working in Kuwait and has no past record of any offence. He requested for allowing redemption of gold on nominal fine and penalty. No one appeared for the personal hearing on behalf of the Respondent.

9. The Government has gone through the facts of the case and observes that the Applicant had brought 08 round pieces of gold and 01 button shaped piece of gold totally weighing 246.770 grams having a tariff value of Rs. 6,73,300/- and market value of Rs. 7,51,908/- 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 08 round pieces of gold and 01 button shaped piece of gold totally weighing 246.770 was recovered from the Applicant. The gold pieces were kept in the socks, ladies purse and trousers of the Applicant and revealed his intention 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.

10.1. 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.\**

10.2. 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.

11. 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".

12. 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.

13. 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.

14. 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.”*

15.1. 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.
- 15.2. 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.

16. In view of the foregoing paras, the Government finds that as the Applicant had not declared the pieces of gold 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. Though the pieces of gold were kept in the socks, purse and trousers of the Applicant, they were not concealed in an ingenious manner. The Applicant is financially sound and was carrying the invoice for the purchase of 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.

17. Government finds that this is a case of non-declaration of pieces of gold. The absolute confiscation of the impugned gold leading to dispossession of the Applicant of the gold in the instant case is therefore harsh and not reasonable. In view of the aforesaid facts, the option of release of the gold 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 gold to be released on payment of a redemption fine.

18. Applicant has also pleaded for waiver of the penalty imposed on him. The market value of the gold in this case is Rs. 7,51,908/-. From the facts of the case as discussed above, Government finds that the penalty of Rs. 1,50,000/- imposed on the Applicant under Section 112 (a) and (b) of the Customs Act, 1962 is excessive and not commensurate to the omissions and commissions of the Applicant and needs to be reduced.

19. In view of the above, the Government modifies the Order-in-Appeal No. Order-in-Appeal No. AHD-CUSTOM-000-APP-485-20-21 dated 23.12.2020 [Date of issue: 23.12.2020] [F. No. S/49-558/CUS/AHD/2019-20] passed by

the Commissioner of Customs (Appeals), Ahmedabad and allows the Applicant to redeem the impugned 08 round shaped pieces of gold and 01 button shaped piece of gold totally weighing 246.770 grams of 24Kt and having a tariff value of Rs. 6,73,300/- and market value of Rs. 7,51,908/-, on payment of a redemption fine of Rs.1,30,000/- (Rupees One Lakh Thirty Thousand only). The penalty of Rs. 1,50,000/- imposed by the OAA and upheld by the Appellate Authority, being excessive is reduced to Rs. 75,000/- (Rupees Seventy Five Thousand only)

20. The Revision Application is disposed of on above terms.

*Shrawan Kumar*  
29/12/23  
( SHRAWAN KUMAR )

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

ORDER NO. 961/2023-CUS (WZ)/ASRA/MUMBAI DATED 29.12.2023

To,

1. Shri Lokesh Panchal, S/o Shri Subhashji Panchal, Loharwada, P.O Sagwara, Distt:Dungarpur, Rajasthan, 314 025
2. The Pr. Commissioner of Customs, Ahmedabad, Custom Hounse, near All India Radio, Navrangpura, Ahmedabad 380 009

Copy to:

1. The Commissioner of Customs (Appeals), Ahmedabad, 7<sup>th</sup> Floor, Mrudul Tower, Behind Times of India, Ashram Road, Ahmedabad 380 009.
2. Sr. P.S. to AS (RA), Mumbai.
3. File copy.
4. Notice Board.