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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. 371/62/B/WZ/2021 / 220 : Date of Issue : 09.01.2024

ORDER NO. 966/2023-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.

Applicant : Shri. Shakurbhai Chandbhai Mamed Khawala

Respondent : Pr. Commissioner of Customs, CSMI (Airport), Mumbai.

Subject : Revision Application filed, under Section 129DD of the Customs Act, 1962 against the Order-in-Appeal No. MUM-CUSTM-PAX-APP-528/2020-21 dated 04.11.2020 issued on 11.11.2020 through F. No. S/49-320/2019 passed by the Commissioner of Customs (Appeals) Mumbai-III.

ORDER

This revision application has been filed by Shri. Shakurbhai Chandbhai Mamed Khawala (hereinafter referred to as the Applicant) against the Order-In-Appeal no. MUM-CUSTM-PAX-APP-528/2020-21 dated 04.11.2020 issued on 11.11.2020 through F. No. S/49-320/2019 passed by the Commissioner of Customs (Appeals) Mumbai-III.

2. Briefly stated facts of the case are that the applicant had arrived at CSMI Airport, Mumbai from Sharjah on 10.03.2019 and was intercepted by Customs Officers after he had cleared himself through the Green channel facility. Applicant had failed to declare the dutiable goods in his possession. 02 pcs of gold buttons which were anodized in silver colour metal, totally weighing 65 grams and valued at Rs. 1,96,599/- was recovered from the possession of the applicant. Earlier, the applicant had arrived on board Flight No. IX 252 and the duration of his stay abroad was of 2 days.

3. The Original adjudicating authority (OAA) viz. Asstt. / Dy. Commr, CSMI Airport, Mumbai vide Order-In-Original no. Air Cus/T2/49/499/2019 'D' dated 10.03.2019, ordered for the absolute confiscation the 02 pcs of gold buttons which were anodized in silver colour metal, totally weighing 65 grams and valued at Rs. 1,96,599/- under Section 111(d), (l) and (m) of the Customs Act, 1962. A penalty of Rs 20,000 under Section 112(a)(i) of the Customs Act, 1962 was imposed on the applicant.

4. Aggrieved by this order, the applicant filed an appeal with the Commissioner of Customs (Appeals) Mumbai-III. who vide his Order-In-Appeal no. MUM-CUSTM-PAX-APP-528/2020-21 dated 04.11.2020 issued on 11.11.2020 through F. No. S/49-320/2019 held that the OAA had rightly confiscated the seized gold absolutely and did not find any reason to interfere in the OIO passed by the OAA and accordingly, dismissed the appeal.

5. The Applicant has filed this Revision Application inter alia on the following grounds of revision, that;

5.01. The impugned order passed by the Respondent is bad in law and unjust.

5.02 that the impugned order has been passed without giving due consideration to the documents on record and facts of the case

5.03 that dutiable goods brought in by the Appellant are neither restricted nor prohibited.

5.04 that this is the first time that the Appellant has brought this type of goods and there is no previous case registered

5.05 that they are relying on the following Judgements on the observance of Judicial Discipline.

- A. Judgements of the Hon'ble Supreme Court in the case of Birla Corporation Ltd. V/s. Commissioner of Central Excise reported in 2005 (186) ELT 266 (S.C.)
- B. Judgement of the Hon'ble Bombay High Court in the case of Commissioner of Central Excise, Nasik V/s Jain Vanguard Polybutlene Ltd. Reported in 2010 (256) ELT 523 (Bom)
- C. Judgement of the Hon'ble Tribunal in the case of Nirma Ltd. V/s. Commissioner of Central Excise. Nasik reported in 2012 (276) E.L.T. 283 (Tri. - Ahmd)

5.06 The Appellant humbly submits that once it is accepted 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 as held in the following judgements:-

Hargovind Das K. Joshi Versus Collector of Customs reported in 1992 (61) E.L.T. 172 (S.C)

ALFRED MENEZES v/s COMMISSIONER OF CUSTOMS, MUMBAI reported in 2011 (236) E.L.T. 587 (Tri. - Mumbai)

T. ELVARASAN v/s COMMISSIONER OF CUSTOMS (AIRPORT), reported in 2011 (266) E.L.T. 167 (Mad)

YAKUB IBRAHIM YUSUF v/s COMMISSIONER OF CUSTOMS, MUMBAI reported in 2011 (263) E.L.T. 685 (Tri. - Mumbai)

Mohini Bhatia Vs Commissioner of Customs reported in 1999 (106) E.L.T. 485 (Tri. - Mumbai).

Universal Traders v. Commissioner - 2009 (240) E.L.T. A78 (S.C.) also the Apex Court allowed redemption of exported goods being not prohibited.

Gauri Enterprises v. CC, Pune - 2002 (145) E.L.T. 706 (Tri.-Bang.)

Shaik Jamal Basha v. Government of India - 1997 (91) E.L.T. 277 (A.P)

VP Hameed v. Collector of Customs, Mumbai - 1994 (73) E.L.T. 425 (Tri In P).

Union of India Vs Dhanak M. Ramji - 2009 (248) E.L.T. 127 (Bom.) affirmed vide 2010 (252) E.L.T. A102 (S C

A. Rajkumari v. CC (Chennai) - 2015 (321) E.L.T. 540 (Tri.-Chennai)

Kadar Mydin v. Commissioner of Customs (Preventive), West Bengal - 2001 (136) E.L.T. 758

Sapna Sanjeev Kohli v. Commissioner of Customs, Airport, Mumbai - 2008 (230) E.L.T. 305

Vatakkal Moosa v. collector of Customs, Cochin - 1994 (72) E.L.T. 473 (G.O.I.)

Halithu Ibrahim v. CC [2002-TIOL 195-CESTAT-MAD. = 2002 (148) E.L.T. 412

(Tribunal); Krishnakumari v. CC, Chennai - 2008 (229) E.L.T. 222 (Tri-Chennai)

S. Rajagopal v. CC, Trichy - 2007 (219) E.L.T. 435 (Tri-Chennai); M. Arumugam

v. CC, Tiruchirappalli, 2007 (220) E.L.T. 311 (Tri-Chennai)

COMMR. OF C. EX. & S.T., LUCKNOW V/s MOHD. HALIM MOHD. SHAMIM KHAN

In view of the above submissions, the applicant has prayed to the revisionary authority to allow the redemption of the gold on payment of a reasonable fine and penalty. The applicant has also filed an application for condonation of delay.

6. Shri N J Heera Advocate appeared before me and submitted that applicant brought small quantity of gold for personal use. He further submitted that the applicant is not a habitual offender. He requested to allow redemption of the same on reasonable fine and penalty.

7. At the outset, the Government notes that the Applicant has filed for condonation of delay. The Revision Application was filed on 26.02.2021. The date of issue of the Order of the Appellate Authority is 11.11.2020. Based on the date of issue of the said Order of the Appellate Authority, the Applicant was required to file the Revision Application by 10.02.2021 (i.e. taking the first 3 months into consideration) and by 10.05.2021 (i.e. taking into consideration a further extension period of 3 months). The Applicant has accepted that there was a delay in filing the Revision Application from the date of receipt of the order. Thus it is seen that the Revision Application has been filed within the date, after considering the extended period.

7.2. The Applicant in her application for condonation of delay has stated that the revision application could not be filed due to reasons beyond applicants control and requested that the delay be condoned.

7.3. For understanding the relevant legal provisions, the relevant section is reproduced below :

SECTION 129DD. Revision by Central Government.-

(1) The Central Government may, on the application of any person aggrieved by any order passed under section 128A, where the order is of the nature referred to in the first proviso to sub-section (1) of section 129A, annul or modify such order.

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(2) An application under sub-section (1) shall be made within three months from the date of the communication to the Applicant of the order against which the application is being made :

Provided that the Central Government may, if it is satisfied that the Applicant was prevented by sufficient cause from presenting the application within the aforesaid period of three months, allow it to be presented within a further period of three months.

.....

7.4. From above, it is clear that the Applicant was required to file the Revision Application within 3 months from the communication of the Appellate Order. The delay thereafter, upto 3 months can be condoned. Since, the Revision Application is filed within the condonation period of three months, and the reason also being genuine. Government condones the delay on the part of the Applicant in filing the application and proceeds to examine the case on merits.

8. 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 would have walked away with the impugned buttons made of gold 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 Customs duty on it. The Government finds that the confiscation of the gold buttons was therefore, justified.

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".

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 the 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.

12.1. Government further observes that there are 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.

12.2. 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.

13 The quantity 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. 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 misdemeanour is required to be kept in mind when using discretion under Section 125 of the Customs Act, 1962 and while imposing quantum of penalty. Absolute confiscation of the gold is harsh and unreasonable. Government is therefore, inclined to set aside the OIA and allow the gold to be redeemed on payment of a fine.

14. The penalty of Rs. 20,000/- imposed by the OAA under Section 112 of the Customs Act, 1962 is commensurate to the omissions and commissions committed by the applicant. Government is not inclined to interfere in the same.

15. For the aforesaid reasons, the Government modifies the OIA to the extent of allowing the redemption of the 02 pcs of gold buttons which were anodized in silver colour metal, totally weighing 65 grams and valued at Rs. 1,96,599/- on payment of a fine of Rs. 40,000/- (Rupees Forty Thousand only). The personal penalty of Rs. 20,000/- imposed by the OAA and upheld by the AA is found to be appropriate.

14. Revision Application filed by the applicant is decided on the above terms.


(SHRAWAN KUMAR)

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

ORDER No. 966/2023-CUS (WZ) /ASRA/MUMBAI

DATED 29.12.2023

To

1. Shri. Shakurbhai Chandbhai Mamed Khawala, Wadi Moti Vhorwad, Near Vavgaja Pir, Vadodara 390017.
2. Pr. Commissioner of Customs, Chhatrapati Shivaji Maharaj International Airport, Terminal 2, Level – II, Sahar, Mumbai 400 099.

Copy to:

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