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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. 371/101/B/WZ/2022-RA : Date of Issue 01.02.2024
/263

ORDER NO. 99 /2024-CUS (WZ)/ASRA/MUMBAI DATED 30.01.2024
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.

F.No. 371/101/B/WZ/2022-RA

Applicant. : Shri. Mohd Amir.

Respondent : Commissioner of Customs, Customs House, Margoa.

Subject : Revision Applications filed, under Section 129DD of the
Customs Act, 1962 against the Order-in-Appeal F.Nos.
GOA-CUSTM-000-APP-006-2021-22 dated 26.08.2021
DOI: 26.08.2021 through F.Nos. A-40/CUS/GOA/2020-
21 passed by the Commissioner (Appeals), CGST &
Customs, GOA.

ORDER

This revision application has been filed by Shri. Mohd Amir [herein after referred to as the Applicant] against the Order-in-Appeal F. No. GOA-CUSTM-000-APP-006-2021-22 dated 26.08.2021 DOI: 26.08.2021 through F.Nos. A-40/CUS/GOA/2020-21 passed by the Commissioner (Appeals), CGST & Customs, GOA.

2(a). Briefly stated facts of the case are that the aircraft which was an Air India flight no. A1/994 and operating in sector Dubai-Goa-Bangalore route which had arrived at Dabolim International Airport (DIA) from Dubai and was enroute to Bengaluru, was rummaged by the Officers of Goa Customs on 11.04.2018. While rummaging the aircraft, two small brown coloured packets were found in the life jacket pocket of seat no. 19E. The onboard passengers in the aircraft were asked about the ownership of these packets. However, no passenger claimed ownership. Thereafter, the Customs Officers asked the applicant who was occupying seat no. 19F whether the recovered brown coloured packets belonged to him, to which he had replied in the affirmative. On scrutiny, it was found that the applicant had been allotted seat no. 19E but he was occupying seat no. 19F and had shifted to this seat as the same was vacant. The passport of the applicant indicated that he was a frequent traveller and was returning from Dubai after a stay of 4 days.

2(b). As the said aircraft was scheduled to fly to Bengaluru, the applicant was off loaded from the flight. It was ascertained by the Customs Officers from the ground handling staff whether any passenger on this flight who had alighted at Goa had come forward to claim the recovered small brown coloured packet, to which the Air India Staff had replied in the negative.

2(c). Examination of the two brown coloured packets recovered from seat no. 19E from the aircraft operating as AI flight no. 994, led to the recovery of 8 nos of gold bars of 10 tolas each having markings 'ARG 10 TOLAS 999.0 ARG Melter Assayer'. The weight of each bar of gold was 116 grams and were of high purity of 23.99 carats. Thus, in all 8 gold bars of 10 tolas each, i.e. each bar weighing 116 grams, totaling 928 grams and valued at Rs. 26,41,904/- were recovered and seized.

2(b). The applicant admitted that he had purchased the said gold bars at Dubai; that he had borrowed money from his brothers and friends; that he had converted the money into foreign exchange and had taken it to Dubai; that he had concealed the gold in the life jacket of seat no. 19E to avoid detection during the rummaging; that he had travelled 10 times to Dubai in the past; that he used to take samples of Burkhas to Dubai; that his flight tickets were paid for by the burkha manufacturer; that he was scheduled to alight at Bengaluru airport.

3(a). The Original Adjudicating Authority i.e. Addl. Commissioner of Customs, Goa vide his Order-In-Original i.e. OIO No. 15/2018-19-ADC(CUS) dated 26.12.2018 issued through F.No. 11/22/2018-R&I(AIU)/Adj had ordered for the absolute confiscation of the impugned gold i.e. 08 gold bars, totally weighing 928 grams, valued at Rs. 26,41,904/- under Section 111(d) of the Customs Act, 1962. A penalty of Rs. 4,00,000/- was imposed on the applicant under Section 112 (a) of the Customs Act, 1962.

3(b). Aggrieved by the said order dated 26.12.2018, the applicant filed an appeal before the Appellate Authority (AA) viz, Commissioner (Appeals), CGST & Customs, GOA who vide his Order-in-Appeal F. No. GOA-CUSTM-000-APP-095-2018-19 dated 09.05.2019 issued through F.Nos. A-25/CUS/GOA/2018-19 had remanded back the impugned Order-in-Original dated 26.12.2018 to

the Adjudicating Authority with direction to dispose the same by a well-reasoned order, after following the principles of natural justice.

4(a). Accordingly, the case was adjudicated by the Original Adjudicating Authority (OAA) viz, Joint Commissioner of Customs, Goa who vide his Order-in-Original no. 04/2020-21-JC(CUS) dated 10.06.2020 through F.No. 11/22/2018-R&I(AIU)/Adj, ordered for the absolute confiscation of the impugned gold i.e. 08 gold bars, totally weighing 928 grams, valued at Rs. 26,41,904/- under Section 111(d) of the Customs Act, 1962. A penalty of Rs. 4,00,000/- was imposed on the applicant under Section 112 (a) of the Customs Act, 1962.

4(b). Aggrieved by the said order dated 10.06.2020, the applicant filed an appeal before the Appellate Authority (AA) viz, Commissioner (Appeals), CGST & Customs, GOA who vide his Order-in-Appeal F. No. GOA-CUSTM-000-APP-006-2021-22 dated 26.08.2021 DOI: 26.08.2021 through F.Nos. A-40/CUS/GOA/2020-21 held that the impugned Order-in-Original dated 10.06.2020 was legal and proper and upheld the same.

5. Aggrieved with the above order, the Applicant has filed this revision application before the revisionary authority and the grounds of revision are as under;

5.01. that the O-I-O dated 10-6-2020 issued by the OAA was patently without jurisdiction and hence, liable to be set aside; that the case had been remanded back to the OAA for following principles of natural justice; that since the case had been remanded back to the OAA, the case ought to have been adjudicated only by the Additional Commissioner of Customs in the *de novo* adjudication proceeding; that the case had been adjudicated by the Joint Commissioner of Customs, Custom House, Goa who was not legally conferred with any jurisdiction to adjudicate the case; that in Circular No.762/78/2003-CX 11th November, 2003 issued under F.No. 208/27/2003-CX.6 (Pt.) by the Board, under para 2(i) of the said circular, the Board had

clarified that for cases where the appellate authority remanded the case with the direction mentioning specifically the level of officer who has to adjudicate the case, then those cases should be adjudicated by the level of officer specified in the said appellate order and the revised level of monetary limit of adjudication was not applicable for those cases;

- 5.02. that the applicant did not attempt to smuggle the gold out of Customs area at Goa Airport; that the seizure of the gold was illegal; that the applicant had pleaded that he was to clear the gold on his arrival at Bangalore Airport on payment of Customs duty; that even then he had been forcibly offloaded from the flight AI-994 on 11-4-18; that it was not understood as to how he would have smuggled the gold bars at Goa when he was alighting at Bengaluru airport; that it was not established by Customs that someone would have taken the gold from the aircraft at Bengaluru and smuggled it out of the airport;
- 5.03. that it was not disputed that he was not to disembark at Goa; that he had not been allowed to declare the gold; that they rely on the case of Bombay High Court in the case of DB case of Bombay High Court M/s Sylvania & Laxman (77 B.L.R. 380); that when he was still in the flight bound for Bangalore and in transit, he should not have been considered as to have completed the 'import' of the goods into India; that he relies on the case of Shri Ramalinga Mills Pvt. Ltd. and others v. Asst. Collector of Customs and another, 1983 E.L.T. 65 (Kerala); The Delhi High Court in Jain Shudh Vanaspati Ltd. v. Union of India and others 1983, E.L.T. 1688 (Delhi) DB; that he recovery of the gold had been made when he was still in the aircraft; that even if a passenger carrying imported goods had an intention to smuggle the goods into India, it cannot be alleged to have committed violation of the provisions of Customs Act, 1962 unless he had disembarked from the aircraft at an airport and cleared the goods without declaring it to Customs; that he relies on the case of K. R. Ahmed Shah vs. Additional Collector of Customs, Madras and others, 1981 E.L.T. 153,
- 5.04. that his statements were involuntary and against truth and the statements were recorded under force and threat and therefore the same cannot be relied upon; they rely on the following case laws;
- (a). Smt. Selvi and ors. Vs. State of Karnataka of Apex Court, reported in 2010 (3) Supreme 558,
 - (b). Balwinder Singh v. State of Punjab,
 - (c). Thulasiammal and others vs Joint Secretary to the Government of India – 987 (30) ELT 415 (Mad)
- 5.05. that gold was not a prohibited item; that order of absolute confiscation of the gold under Section 111(d) was not sustainable;

that the lower authorities had exercised their discretionary power to order absolute confiscation of the gold arbitrarily; that the orders of the lower authorities was not sustainable; that gold was not a prohibited item and was only a restricted item; that prohibition was in relation to goods which cannot be imported by any one, such as arms, ammuniton, drugs etc; that this would not apply to a case where import/export of goods 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; that in such a situation, the release of such goods confiscated would not cause any danger or detriment to public health; The above view was also supported by the decision of Honble High Court of Calcutta in the case of Commissioner of Customs (Preventive), West Bengal Vs. India Sales International reported in 2009 (241) ELT 182 (Cal.); that gold was now removed from the negative list and can be imported in terms of notification No.171/94-Cus dated 30.9.94; that Tribunals have been consistently taking the view that even in extreme circumstances of attempting to smuggle foreign branded gold biscuits the authorities are required to release the gold biscuit on payment of redemption fine as held in V.P.HAMEED Vs CC, BOMBAY reported in 1994 (73) ELT 425(T); Judgement of KAMLESH KUMAR Vs CC reported in 1993 (67) ELT 1000 (G.O.I.);in the case of HARGOVID DAS K.JOSHI& OTHERS Vs CC 7 OTHERS reported in AIR 1987 SC 1982; In the case of SHAIK JAMAL BASHA Vs GOI & OTHERS; Etc.

506. that the case laws relied upon by the OAA was not applicable to the present case; that the decision relied upon by the OAA were not applicable to the case of the applicant; that the OAA had failed to discuss as to how the facts of the cases relied upon by him, factually fit the case of the applicant; that they rely upon the Apex Court's Order in the case of CCE, Calcutta Vs Alnoori Tobacco Products 2004 (170) ELT 135 (SC)] where it has been stressed that the facts of decision relied upon should actually fit factual situation of a given case and to exercise caution while applying the ratio of one case to another; this was also reiterated by the Apex Court in the case of Escorts Ltd. Vs CCE, Delhi [2004 (173) ELT 113 (SC)], wherein it has been observed that one additional or different fact may make difference between conclusion in two cases; and so, disposal of cases by blindly placing reliance on a decision is not proper; that further in the case of CC (Port), Chennai Vs Toyota Kirloskar [2007 (213) ELT

4 (SC)], it has been observed by the Hon'ble Supreme Court that the ratio of a decision has to be understood in factual matrix involved therein and that the ratio of decision has to be culled out from facts of given case; that many other cases have been relied upon by A1 & A2 on this contention.

- 5.07. that the entire case was based only on presumption;
- 5.08. that the order of the OAA was vitiated on account of bias, violations of principles of natural justice and fair play and the OIO which was cryptic was not sustainable;
- 5.09. that applicant claimed ownership of the goods under absolute confiscation and he prayed for redemption of the gold on payment of reasonable fine and penalty;
- 5.10. that applicant relies under following case laws;
 - (a). Yakub Ibrahim Yusuf vs CC, Mumbai 2011 (263) ELT 685
 - (b). Neyveli Lignite Corpn Ltd vs UOI 2009 (242) E.L.T. 487 (Mad.)
 - (c). Universal Traders v. Commissioner – 2009 (240) ELT A78 (SC)
 - (d). Gauri Enterprises vs CC, Pune 2002 (145) ELT (705) (Tri-Bangalore)
 - (e). CC (Airport), Mumbai vs Alfred Menezes 2009 (242) ELT 334 (Bom)
 - (f). Shaikh Jamal Basha vs Government of India 1997 (91) ELT 277 (AP)
 - (g). VP Hameed vs Collector of Customs, Mumbai 1994 (73) ELT 425 (Tri)
 - (h). T. Elavarasan vs Commissioner of Customs (Airport), Chennai 2011 (266) ELT 167 (Mad)
 - (i). Kadar Mydin vs Commissioner of Customs (Preventive), West Bengal 2011 (136) ELT 758
 - (j). Sapna Sanjeeva Kohli vs Commissioner of Customs Airport, Mumbai 2008 (23) ELT 305
 - (k). Vattakkal Moosa vs Collector of Customs, Cochin 1994 (72) ELT (GOI)
 - (l). Halithu Ibrahim vs CC 2002-TIOL 195-CESTAT-MAD
 - (m). Krishna Kumara vs CC, Chennai 2008 (229) ELT 222 (Tri-Chennai)
 - (n). S.Rajagopal vs CC, Trichy 2007 (219) ELT 435 (Tri-Chennai)
 - (o). M.Arumugam vs CC, Trichirapalli, 2007 (220) ELT 311 (Tri-Chennai)
 - (p). R.Mohandas vs CC, Cochin 2016 (336) ELT 399 (Ker)
 - (q). A.Rajkumari vs CC, Chennai 2015 (321) ELT 540 (Tri-Chennai)
 - (r). Mastani Bi vs Pr. CC, Chennai, 2017 (345) ELT 201 (Mad)
 - (s). UOI vs. Dhanak M. Ramji; 2009(248) ELT 127 (BOM) which has been upheld by the Apex Court – 2010-252-ELTA102(SC).
- 5.11. that the penalty imposed on the applicant was disproportionate to the value of gold imported by him; that high penalty was not sustainable; that they rely on the undermentioned case laws;

- (a). Union of India Vs Mustafa & Najibai Trading Co (1998) 6 SCC 79
- (b). Supreme Court in Management of Coimbatore District Central Co-operative Bank v. Secretary, Coimbatore District Central Co-operative Bank Employees Association and Anr., (2007) 4 SCC 669,
- (c). Madras High Court in Commissioner of Customs, Tuticorin v. Sai Copiers [2008 (226) E.L.T. 486 (Mad.)]
- (d). In Commissioner of Customs (Import) v. Shankar Trading Co. [2008 (224) E.L.T. 206 (Bom
- (e). CC, Tuticorin vs. Sri Kamakshi Enterprises: 2009 (238) ELT 242 (Mad.)
- (f). Maa Tara Enterprises vs. CC, Cochin reported in 2009 (248) ELT 730 (Tri.-Bang.),
- (g). Commissioner of Customs, Cochin vs. Dilip Ghelani: 2009 (248) ELT 888 (Tri.-LB),

Under the circumstances; the applicant has prayed to the revision authority to allow the release of the gold on payment of applicable duty and the penalty imposed on him may be set aside, since the case of smuggling or attempt of smuggling alleged against him had not been proved.

6. Personal hearing in the case was scheduled for 14.09.2023, 21.09.2023, 05.10.2023, 12.10.2023. Shri. Prakash Shingrani, Advocate appeared for personal hearing on 05.10.2023 and submitted that applicant has brought small quantity of gold for marriage in the family. He further submitted that applicant has no past record of any offence. He requested for allowing redemption of gold on reasonable fine and penalty.

7. The Government has gone through the facts of the case and notes that the quantum of gold was quite substantial and it was in primary form. The flight from Dubai to Bengaluru had a stopover at Goa and during the rummaging at Goa airport the impugned gold had been recovered from an empty seat. Records indicate that initially none of the passengers on the flight came forward to claim

the impugned gold bars. Later, the applicant upon being specifically queried about the ownership of the impugned gold bars, admitted that the same belonged to him. It was found that the applicant was not eligible to import gold as he was returning from abroad after a stay of only 4 days. It was found that the seat no. 19E from where the impugned gold had been recovered had been allotted to the applicant. All the facts, indicate that the applicant was not eligible to import gold. An ingenious method was attempted by the applicant to smuggle the impugned gold bars. The act committed by the applicant was conscious, pre-conceived and pre-meditated. It was clear that the applicant had adopted a unique method to import gold wherein some other passenger in the domestic leg of the journey would have cleared the gold bars. The applicant did not have a mindset to pay the duty on the impugned gold bars. Had the applicant not been intercepted, he would have gotten away with the gold without payment of Customs duty. Government finds that the confiscation of the gold was therefore, justified.

8. 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”.

9. 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 Applicants thus liable for penalty.

10. 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.

11. In the instant case, it is noted that the impugned gold was recovered from the seat of the aircraft when it was at DIA, Goa. Government observes that the applicant was bound for Bengaluru and had been intercepted onboard the flight when it was at Goa and was offloaded. Government finds that the allegation made by the applicant that he had not been given an opportunity to declare the impugned gold, does not have any substance. Government observes that at the time of interception, onboard the aircraft, an opportunity was accorded to the applicant to declare the gold, however, the applicant had not come forward to claim the impugned gold but later on a pointed reference, had admitted that the impugned gold belongs to him. The quantum of gold recovered is substantial. Gold is in primary form indicating that the same is for commercial use. Government finds that the impugned gold bars were found unclaimed in the aircraft; that initially applicant had not claimed it; that the gold had been left on plane to be collected by accomplice which was thwarted by the Customs. It is clear that applicant was part of a syndicate and had adopted a unique modus operandi to smuggle the gold.

12. Government finds that all these facts have been properly considered by the lower authorities while absolutely confiscating the impugned gold i.e. 08 gold bars, totally weighing 928 grams, valued at Rs. 26,41,904/-. Government finds that the absolute confiscation of the impugned gold bars is justified and the Order-in-Appeal passed by the Appellate Authority is legal and judicious. In the circumstances, Government does not find it necessary to interfere in the absolute confiscation upheld by the Appellate Authority .

13. The Government finds that the penalty of Rs. 4,00,000/-, imposed on the applicant under Section 112(a) of the Customs Act, 1962 is harsh and excessive

and not commensurate with the omissions and commissions committed and is inclined to reduce the same.

14. In view of the above, the Government modifies the OIA bearing F.No. GOA-CUSTM-000-APP-006-2021-22 dated 26.08.2021 DOI: 26.08.2021 through F.Nos. A-40/CUS/GOA/2020-21 passed by the AA only to the extent of reducing the penalty from Rs. 4,00,000/- to Rs. 2,50,000/- (Rupees Two Lakhs Fifty Thousand only) imposed on the applicant under Section 112(a) of the Customs Act, 1962. In other words, the absolute confiscation of the impugned gold i.e. 08 gold bars, totally weighing 928 grams, valued at Rs. 26,41,904/- is upheld.

15. Accordingly, the revision applications is disposed of on the above terms.

(Signature)
(SHRAWAN KUMAR)

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

ORDER No. 99 /2024-CUS (WZ) /ASRA/MUMBAI DATED 30.01.2024

To,

1. Shri. Mohd Amir, S/o. Shri. Abdul Ajij, H.No. 35, Chak No. 18, Mohalla Najjupura, P.O Tanda, Rampur, Uttar Pradesh – 244 925.
2. Pr. Commissioner of Customs, Goa, Customs House, Marmagao Harbour, Vaco-da-Gama, Goa – 403 803.

Copy to:

3. Shri. Prakash Shingrani, Advocate, 12/334, Vivek New MIG Colony, Bandra East, Mumbai – 400 051.
4. Sr. P.S. to AS (RA), Mumbai.
5. File Copy.
6. Notice Board.