

**CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
ALLAHABAD**

REGIONAL BENCH - COURT NO.I

Customs Appeal No.70723 of 2019

(Arising out of Order-in-Original No.01/Commr/2016-17 dated 19/04/2016
passed by Commissioner of Customs (Preventive), Lucknow)

Shri Waqar,

(S/o Mohammad Yusuf, R/o 2724,
2nd Floor, Kucha Chellan Dariya Ganj, New Delhi-110002)
VERSUS

.....Appellant

Commissioner of Customs (Preventive),

(5th Floor, Kendriya Bhawan, Sector-H, Aliganj, Lucknow)

....Respondent

APPEARANCE:

Shri S.S. Arora, Advocate for the Appellant

Shri Sarweshwar T. Khairnar, Authorised Representative for the
Respondent

CORAM: HON'BLE MR. SANJIV SRIVASTAVA, MEMBER (TECHNICAL)

FINAL ORDER NO.70083/2023

DATE OF HEARING : 06 September, 2023
DATE OF DECISION : 06 September, 2023

SANJIV SRIVASTAVA:

This appeal is directed against Order-in-Original
No.01/Commr/2016-17 dated 19/04/2016 passed by
Commissioner of Customs (Preventive), Lucknow. By the
impugned order Commissioner has held as follows:-

ORDER

"69.1 *I order absolute confiscation of the seized 15 Nos. of gold
bars totally weighing 1749.60 grams valued at Rs.48,37,644/-
recovered from Noticee Waqar S/o Shri Mohammad Yusuf, R/o.
1247, Ganj Mir Khan, Rakabganj, Near Delite Cinema, Delhi-*

110002 under Section 111 (i), (1) & (m) of the Customs Act, 1962;

69.2 *I order confiscation of the seized packing material shoes and socks, having nil commercial value, used for concealing the said gold bars under section 119 of the Customs Act, 1962;*

69.3 *I impose penalty of Rs.5,00,000/- (Rs. Five Lakhs Only) upon Noticee Waqar S/o Shri Mohammad Yusuf R/o. 1247, Ganj Mir Khan, Rakabganj, Near Delite Cinema, Delhi-110002 under Section 112(b) of the Customs Act, 1962;*

69.5 *I impose penalty of Rs.4,00,000/- (Rs. Four Lakhs Only) upon Noticee Waqar S/o Shri Mohammad Yusuf R/o. 1247, Ganj Mir Khan, Rakabganj, Near Delite Cinema, Delhi-110002 under Section 114AA of the Customs Act, 1962."*

2.1 Appellant was intercepted by the AIU Officers posted at Airport, Lucknow. On a search of the appellant, it was found that he had concealed 15 gold bars in his shoes and socks which were recovered in the presence of independent Panchas. As per the government approved valuer Shri Rajesh Kumar Gupta, these bars were made of gold weighing 1749.60 grams and values at Rs.48,37,644/-. The gold bars were seized under the responsible belief that these are liable for confiscation under Section 111 (i), (I) & (m) of Customs Act for contravening various provisions of Customs Act, 1962 read with Baggage Rules, 1998. The shoes, shocks and other packing materials used for concealing were also seized. Accordingly, a show cause notice dated 02.11.2015 was issued to the appellant, asking them into show cause as to why-

- "(i) *The aforesaid 15 Gold bars weighing 1749.60 grams valued at Rs. 48,37,644/- should not be confiscated under Section 111(i), (I) and (m), of the Customs Act, 1962;*
- (ii) *The aforesaid packing materials along with one pair of Shoes and socks should not be confiscated under Section 119 of the Customs Act, 1962 for being used in illegal smuggling of gold bars;*

- (iii) *Penalty should not be imposed upon the party under Section 112 of the Act ibid for his act of contravening various provisions of The Customs Act, 1962 read with Baggage Rules, 1998 narrated in above paras rendering the goods liable for confiscation under Section 111 of the Act ibid;*
- (iv) *Penalty should not be imposed upon the party under Section 114AA of the Customs Act, 1962 for illegally importing the said goods and making false declaration containing incomplete as well as fake information in respect of goods carried by him.*

2.2 This show cause notice was adjudicated by the Commissioner as per the impugned order above in para-1. Aggrieved appellant has filed this appeal.

2.3 Since, this appeal is against the order of Commissioner, Customs (Preventive) and not Commissioner (Appeals) thus this appeal is maintainable before this Tribunal and is accordingly taken up for consideration.

3.1 I have heard Shri S.S. Arora learned Counsel for the appellant and Shri Sarweshwar T. Khairnar learned Authorized Representative appearing for Revenue.

3.2 Arguing for the appellant, learned Counsel submits that

- the issue involved in the present case is with regards to the seizure of the gold which admittedly is not a prohibited goods. In cases where the goods are absolutely prohibited in terms of Section 125 the goods could have been absolutely confiscated without any option for redemption.
- In the present case as these goods are not prohibited but could have been imported on payment of requisite duties and the same have held liable for confiscation under Section 111 (i), (l) & (m).
- He relied on the following cases, where the Tribunal has held that in such cases the goods should have been allowed an option for redemption fine:-

- *Yakub Ibrahim Yusuf [2011 (263) ELT 685 (Tri.- Mumbai)]*.
 - *Mohini Bhatia [1999 (106) E.L.T. 485 (Tribunal)]*.
 - *UMA SHANKAR VERMA [2000 (120) E.L.T. 322 (Cal.)]*.
 - *DHANAK MADHUSUDAN RAMJI [(237) E.L.T. 280 (Tri. Mumbai)]*.
 - *Mohd. Ashraf Armar [2019 (369) E.L.T. 1654 (Tri. - Mumbai)]*.
 - *Commissioner of Customs (Preventive) Jodhpur filed the civil writ petition bearing no. 5640/2019 before the Hon'ble Rajasthan High Court.*
 - *Prakash Chandra Shantilal [2013 (290) E.L.T. 125 (TRI. - AHMD.)]*.
 - *Access World Wide Cargo [2022 (379) E.L.T. 120 (Tri. - Bang.)]*.
 - *Jitender Singh 2019 (369) ELT 1683 (G.O.I.)*.
- In view of the above, he submits that goods may be allowed to be redeemed on payment of redemption fine.
 - He prays that the penalty imposed under Section 114AA cannot be justified, as he has not filed any document nor asked to file any document with intention to evade payment of duty.
 - Accordingly, his appeal be allowed to the above extant.

3.3 Arguing for the revenue the Authorized Representative reiterates the findings of the Original Authority.

4.1 I have considered the impugned order along with the submissions made in the appeal and during the course of argument.

4.2 For absolute confiscation of the said goods i.e. gold Commissioner has observed as follows:-

"61. The impugned gold bars do not fall under the category of jewellery. It is evident from entries in his Passport that the Noticee is a frequent traveller and does not fulfill the eligibility criteria for import of gold as envisaged in the Notification No.12/2012-Cus dt.17.03.2012 as amended of which the Explanation given under Condition No. 35 reads:

*"For the purposes of this notification, **"eligible passenger" means a passenger of Indian origin or a passenger holding a valid passport, issued under the Passports Act, 1967 (15 of 1967), who is coming to India after a period of not less than six months of stay abroad; and short visits, if any, made by the eligible passenger during the aforesaid period of six months shall be ignored if the total duration of stay on such visits does not exceed thirty days and such passenger has not availed of the exemption under this notification or under the notification being superseded at any time of such short visits."***

62. The said impugned gold is brought into India without making the mandatory declaration u/s 77 of the Customs Act, 1962 is undisputedly established and CBEC circular F.No.495/5/92-Cus.VI dt.10.05.1993 categorically instructs 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 adjudication authority is satisfied that there was no concealment of the gold in question....."

62-A. In addition to above, as regards to smuggled gold, there are catena of Judgments of Hon'ble Supreme Court and Hon'ble High Courts on the issue of absolute confiscation.

- *In the case of Om Prakash Bhatia vs Commissioner of Customs, New Delhi [2003 (155) ELT 423 (S.C.)]. Hon'ble Supreme Court clearly deliberated on the definition of*

prohibited goods. In the said pronouncement, Hon'ble Supreme Court inter alia observed as under:-

"7. *The aforesaid Section empowers the authority to confiscate any goods attempted to be exported contrary to any 'prohibition' imposed by or under the Act or any other law for the time being in force. Hence, for application of the said provision, it is required to be established that attempt to export the goods was contrary to any prohibition imposed under any law for the time being in force.*

8. *Further, Section 2(33) of the Act defines "prohibited goods" as under :-*

"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."

9. *From the aforesaid definition, it can be stated that (a) 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. This would also be clear from Section 11 which empowers the Central Government to prohibit either absolutely or 'subject to such conditions' to be fulfilled before or after clearance, as may be specified in the notification, the import or export of the goods of any specified description. The notification can be issued for the purposes specified in sub-section (2). 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."

- *In the case of Samynathan Murugesan vs Commissioner, Hon'ble Supreme Court on 11-01-2010 dismissed the Petition for Special Leave to Appeal (Civil) No. 22072 of 2009 filed by Samynathan Murugesan against the Madras High Court Judgment and Order dated 27-4-2009 in C.M.A. No. 2040 of 2007. It was upheld that 7.075 kg. gold ornament concealed in T.V. sets as part of his baggage **"were prohibited as the assessee did not belong to category of persons who could bring gold at concessional rate of duty and such goods had been imported in violation of Import (Control) Order, 1955 read with Section 3(i) of Import and Export Control Act, 1947. Therefore, Commissioner's order of absolute confiscation of goods was correct."** Appeal of the assessee was accordingly rejected. **[2010 (254) ELT A015 (S.C.)]**.*

- *In the case of Aiyakannuvs Joint Commissioner of Customs (Airport), Chennai [2012 (281) ELT 0223 (Mad.)], Hon'ble High Court, Madras observed as under:-*

"6. *Shri Sathish Sundar, learned counsel appearing for the petitioner contended that in terms of Section 125 of the Customs Act, 1962, option to pay fine in lieu of confiscation should have been allowed.*

7. *Similar plea was considered and rejected by the Division Bench of this Court in C.M.A. No. 2040 of 2007 [Commissioner of Customs (Air) v. Samynathan Murugesan and Customs, Excise and Service Tax Appellate Tribunal, South Zonal Bench reported in 2009 (166) ECR 160 (Madras) = 2009 (247) E.L.T. 21 (Mad.) decided on 27-4-2009 in a case of smuggling of gold by a passenger of Indian Origin who attempted to clear the goods imported under the provisions of the Foreign Trade (Exemption from Application of Rules in Certain Cases) Order, 1993 by concealment in a television set. The customs authorities seized the goods and confiscated the*

goods absolutely and refused to allow redemption. The Tribunal granted redemption of the goods on payment of fine which was set aside by the High Court on an appeal by the Commissioner, who justified the absolute confiscation. The Division Bench considering the decision of the Supreme Court in Om Prakash Bhatia v. Commissioner of Customs - 2003 (6) SCC 161 = 2003 (155) E.L.T. 423 (S.C.) came to the conclusion that the prohibition in terms of Section 2(33) of the Customs Act, 1962 was attracted in a case of this nature. Therefore, absolute confiscation was justified. This order of the Division Bench was taken up on appeal to the Supreme Court in Special Leave to Appeal (Civil) No. 22072 of 2009 [2010 (254) E.L.T. A15 (S.C.) and the Special leave Appeal was dismissed holding as follows :-

"Applying the ratio of the judgment in the case of Om Prakash Bhatia v. Commissioner of Customs, Delhi reported in 2003 (6) S.C.C. 161, to the facts of the case, we find that, in the present case, the assessee did not fulfil the basic eligibility criteria, which makes the imported item a prohibited goods; hence, we see no reason to interfere with the impugned order. The special leave petition is, accordingly dismissed."

- *In the case of Abdul Razak vs UOI [2012 (275) ELT 0300 (Ker.)]. Hon'ble High Court, Kerala was deliberating on the issue of absolute confiscation in a case where the appellant tried to smuggle gold by concealing it in emergency light, mixie, grinder, car horns etc. The Customs authorities seized the smuggled goods i.e. gold and recorded statement from the appellant under Section 108 of the Act. In the statement, the appellant had admitted that he is only carrier of the gold. It was pleaded before Hon'ble High Court that Section 125 does not provide for confiscation of goods other than prohibited goods, and according to him, importers' conduct has no significance for considering whether the option exercised by importers to release the goods on payment of*

redemption fine and duty should be allowed or not. It was also contended that gold is not a prohibited goods which can be released on payment of redemption fine and duty. On the contrary, Ld. Standing Counsel appearing for the Department relied on the judgment of the Supreme Court in Om Prakash Bhatia v. Commissioner of Customs. Delhi reported in 2003 (155) ELT 423, and contended that when import is permissible on satisfaction of certain conditions, the violation of the same will make the goods imported as prohibited goods within the meaning of Section 2(33) of the Act. Hon'ble High Court held as under:-

"Even though gold as such is not a prohibited item and can be imported, such import is subject to lot of restrictions including the necessity to declare the goods on arrival at the Customs Station and make payment of duty at the rate prescribed. There is no need for us in this case to consider the conditions on which import is permissible and whether the conditions are satisfied because the appellant attempted to smuggle out the goods by concealing the same in emergency light, mixie, grinder and car horns etc. and hence the goods so brought is prohibitory goods as there is clear violation of the statutory provisions for the normal import of gold. Further, as per the statement given by the appellant under Section 108 of the Act he is only a carrier i.e. professional smuggler smuggling goods on behalf of others for consideration. We, therefore, do 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."

63. As per Section 123 of Customs Act, 1962, **in the case of 'gold', the burden of proof that the imported gold was not smuggled was on the carrier of the gold**, from whose possession the goods were seized. As per Section 2(39) of the Customs Act, 1962, **"smuggling, in relation to any goods,**

means any act or omission which will render such goods liable to confiscation under section 111 or section 113."

In this case, the burden was on the Noticee, who has utterly failed to discharge it. It is pertinent to mention here that there is specific purpose behind providing a very small list of items under Section 123 & gold figures with specific mention under section 123(2) of the Act where the burden of proof is on the importer. This indicates that the Government recognizes that the smuggling of gold is widespread and wants to discourage the smuggling of gold into India.

64. *In light of the above legal scenario and judicial interpretations, the smuggled gold is ordered to be confiscated with no option to redeem the same on payment of redemption fine.*

65. *As the impugned 15 Nos. of gold bars brought by the Noticee Waqar totally weighing 1749.60 grams valued at Rs.48,37,644/- have been found smuggled into India concealing them in shoes and socks put on by him rendering these impugned 15 Nos. of gold bars totally weighing 1749.60 grams valued at Rs.48,37,644/- liable to confiscation under Section 111 (i), (I) & (m) of the Customs Act, 1962 and Noticee Waqar is found willingly involved in the unscrupulous act of smuggling, Noticee Waqar is liable to penal action under section 112(b) of the Customs Act, 1962."*

4.3 The reliance placed by the Commissioner on a Circular of 1993 is totally miss-placed as the gold is now not subject to any restriction for importation except that duty is required to be paid. Further it is also worth noting that said circular is categorically directing that no option for redemption should be given, whereby the circular seem to direct the adjudicating authority to decide the matter in manner which is contrary to the provisions as they are in the Act or Rules. Hon'ble Allahabad High Court has in case of Vijay Singh & Others [2005 (2) AWC 1191], quoted various authorities on the subject and concluded as follow:

"6. *It is settled legal proposition that executive instructions cannot override the statutory provisions [Vide B.N. Nagrajan v. State of Mysore, AIR 1966 SC 1942; Sant Ram Sharma v. State of Rajasthan and Ors., AIR 1967 SC 1910; Union of India and Ors. v. Majji Jangammyya and Ors., AIR 1977 SC 757; B.N. Nagarajan and Ors. v. State of Karnataka and Ors., AIR 1979 SC 1676; P.D. Agrawal and Ors. v. State of U.P. and Ors., (1987) 3 SCC 622; M/s. Beopar Sahayak (P) Ltd. and Ors. v. Vishwa Nath and Ors., AIR 1987 SC 2111; State of Maharashtra v. Jagannath Achyut Karandikar, AIR 1989 SC 1133; Paluru Ramkrishnananiah and Ors. v. Union of India and Ors., AIR 1990 SC 166; Comptroller and Auditor General of India and Ors. v. Mohan LalMalhotra and Ors., AIR.1991 SC 2288; State of Madhya Pradesh v. G.S. Dall and Flour Mills, AIR 1991 SC 772; Naga People's Movement of Human Rights v. Union of India and Ors., AIR 1998 SC 431; C. Rangaswamaeah and Ors. v. Karnataka Lokayukta and Ors., AIR 1998 SC 96.]*

7. *Executive instructions cannot amend or supersede the statutory rules or add something therein, nor the orders be issued in contravention of the statutory rules for the reason that an administrative instruction is not a statutory Rule nor does it have any force of law; while statutory rules have full force of law provided the same are not in conflict with the provisions of the Act. (Vide State of U. P. and Ors. v. Babu Ram Upadhyaya, AIR 1961 SC 751; and State of Tamil Nadu v. M/s. Hind Stone etc., AIR 1981 SC 711).*

8. *In Union of India v. Sri Somasundaram Vishwanath, AIR 1988 SC 2255, the Hon'ble Apex Court observed that if there is a conflict between the executive instruction and the Rules framed under the proviso to Article 309 of the Constitution, the Rules will prevail. Similarly, if there is a*

conflict in the Rules made under the proviso to Article 309 of the Constitution and the law, the law will prevail.

9. Similar view has been reiterated in Union of India v. Rakesh Kumar, AIR 2001 SC 1877; Swapan Kumar Pal and Ors. v. Samitabhar Chakraborty and Ors., AIR 2001 SC 2353; Khet Singh v. Union of India, (2002) 4 SCC 380; Laxminarayan R. Bhattad and Ors. v. State of Maharashtra and Anr., (2003) 5 SCC 413; and Delhi Development Authority v. Joginder S. Monga, (2004) 2 SCC 297, observing that statutory rules create enforceable rights which cannot be taken away by issuing executive instructions.

10. In Ram Ganesh Tripathi v. State of U.P., AIR 1997 SC 1446, the Hon'ble Supreme Court considered a similar controversy and held that any executive instruction/order which runs counter to or is inconsistent with the statutory rules cannot be enforced, rather deserves to be quashed as having no force of law. The Hon'ble Supreme Court observed as under :-

"They (respondents) relied upon the order passed by the State. This order also deserves to be quashed as it is not consistent with the statutory rules. It appears to have been passed by the Government to oblige the respondents and similarly situated ad hoc appointees."

11. Thus, in view of the above, it is evident that executive instructions cannot be issued in contravention of the Rules framed under the proviso to Article 309 of the Constitution and statutory rules cannot be set at naught by the executive fiat."

4.4 Further, reliance placed in the case of Shri Om Prakash Bhatia and other judgments, also do not support the case of revenue, because in the case of prohibited goods, the goods should have been held liable for confiscation under Section 111 (d) of the Customs Act and not under Section 111 (i), (l) & (m)

of the Customs Act, 1962. Even in the case of Om Prakash Bhatia after holding the goods to be prohibited and liable for confiscation under Section 113 (d) of the Customs Act, 1962 the same were allowed to be released on payment of redemption fine. Hon'ble Supreme Court held as follows:

"8. Further, Section 2(33) of the Act defines "prohibited goods" as under :-

"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."

9. From the aforesaid definition, it can be stated that (a) 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. This would also be clear from Section 11 which empowers the Central Government to prohibit either 'absolutely' or 'subject to such conditions' to be fulfilled before or after clearance, as may be specified in the notification, the import or export of the goods of any specified description. The notification can be issued for the purposes specified in sub-section (2). 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. This is also made clear by this Court in *Shekih Mohd. Omer v. Collector of Customs*,

Calcutta and Others [(1970) 2 SCC 728] wherein it was contended that the expression 'prohibition' used in Section 111(d) must be considered as a total prohibition and that the expression does not bring within its fold the restrictions imposed by clause (3) of the Import Control Order, 1955. The Court negated the said contention and held thus :-

'...What clause (d) of Section 111 says is that any goods which are imported or attempted to be imported contrary to "any prohibition imposed by any law for the time being in force in this country" is liable to be confiscated. "Any prohibition" referred to in that section applies to every type of "prohibition". That prohibition may be complete or partial. Any restriction on import or export is to an extent a prohibition. The expression "any prohibition" in Section 111(d) of the Customs Act, 1962 includes restrictions. Merely because Section 3 of the Imports and Exports (Control) Act, 1947, uses three different expressions "prohibiting", "restricting" or "otherwise controlling", we cannot cut down the amplitude of the word "any prohibition" in Section 111(d) of the Act. "Any prohibition" means every prohibition. In other words all types of prohibitions. Restrictions is one type of prohibition. From item (I) of Schedule I, Part IV to Import Control Order, 1955, it is clear that import of living animals of all sorts is prohibited. But certain exceptions are provided for. But nonetheless the prohibition continues."

20. *In Toolsidass Jewraj v. Additional Collector of Customs & Others [(1991) 2 SCC 443], full export value of the goods was not correctly stated in the shipping bills along with G.R. I forms and it was a case of under-valuation in respect of full export value of goods. In that set of circumstances, the Court upheld the order passed by the authorities that there was violation of Section 12(1) of the Foreign Exchange Regulation Act, 1947.*

21. *In the present case, as found by the authorities, 28,000 pieces of ladies skirts at the rate of \$10.25 per piece, export value of which was mentioned as Rs. 1,21,54,447/-, were sought to be exported. The market price of such skirts was ascertained to be Rs. 45/- per piece and on that basis total value of the goods came to be Rs. 9,53,280/-. The exporter claimed a drawback of Rs. 21,87,800/- on the consignment on the basis that value of each skirt was Rs. 78/- per piece. No doubt, during the enquiry exporter admitted that the market price of Rs. 45/- per piece was acceptable to him and the claim for drawback was withdrawn. Thereafter, the exporter has not led any evidence that export value mentioned in the shipping bill was the true sale consideration for the goods sought to be exported.*

22. *Considering the aforesaid facts and also the fact that this was the second case belonging to the same exporter, the authorities arrived at the conclusion that it was an organized racket to claim fraudulent drawback or an act of deliberate over-invoicing the readymade garments. Hence, the authority imposed redemption fine as well as levied penalty. In our view, this finding arrived at by the authorities below cannot be said to be, in any way, unreasonable which would call for interference by this Court in this appeal."*

4.5 The sections under which the gold has been held liable for confiscation are the sections in which the goods become prohibited for the reason of misdeclaration or any other violation of the provisions of Custom Act, 1962. Thus adjudicating authority has held that the gold does not fall under the category of prohibited goods for the reasons of prohibition imposed under Custom Act or any other law, but the confiscation is for the case of non-declaration or miss-declaration of the same to the Customs Authorities by the passenger in an appropriate manner. In my view, in such cases the gold could have been allowed to

be redeemed by the appellant on payment of redemption fine. In the case of Commissioner of Customs (Preventive), Jodhpur Vs Shri Mehboob in D.B. Civil Writ Petition No.5640/2019 order dated 22.02.2022 Hon'ble Rajasthan High Court has analyzed the various provisions of the Customs Act and held as follows:-

"Section 125 of the Act pertains to option to pay fine in lieu of confiscation and reads as under:-

"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 4 [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 (no such fine shall be imposed)

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.

Explanation.—For removal of doubts, it is hereby declared that in cases where an order under subsection (1) has been passed before the date on which the Finance Bill, 2018 receives the assent of the President and no appeal is pending against such order as on that date, the option under said sub-section may be exercised within a period of one hundred and twenty days from the date on which such assent is received.]

Sub-section (1) of Section 125 thus provides that whenever confiscation of any goods is authorized by the Act, the officer adjudging it, the importation or exportation of goods which is prohibited may and shall in other cases offer an option to pay fine in lieu of confiscation. It is in this context that the counsel for the department has argued that the case falls under the first part of sub-section (1) of Section 125.

In a recent judgment dated 17.02.2022 Division Bench of this Court has considered a very similar issue. It was a case in which the assessee had attempted to smuggle gold by concealing it in his handbag and not declaring the same upon arrival at the international airport. The authorities had provided absolute confiscation of gold and also imposed penalties. In the context of interpretation of Section 125 of the Customs Act, this Court held as under:-

"15.The second area of concern is applicability of Section 125 of the Act. Sub-section (1) of Section 125 provides that whenever confiscation of any goods is authorised by the Act the officer adjudging it may in the case of any goods, the importation or exportation whereof is prohibited under the Act or under any other law for the time being in force and shall in 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. This

provision thus comes in two parts. The first part covers the cases where importation or exportation of the goods is prohibited under the Act. In such a case discretion is given to the competent authority to offer redemption fine in lieu of confiscation. The second part covers a case where importation or exportation of the goods is not prohibited. In such a case there is a mandate to offer redemption fine in lieu of confiscation as the officer thinks fit. In the present case all three authorities have provided for absolute confiscation of the goods without any facility of payment of redemption fine. This in our view was not correct. This is exactly what the Andhra Pradesh High Court has held in case of **Shaik Jamal Basha Vs. Government of India reported in 1997 (91) ELT 277 (AP)**. The Division Bench of the High Court in the context of Section 125 of the Customs Act had held as under:-

"3. But, all the same, we find the petitioner is entitled to a different relief. The order of confiscation is made under Section 111 of the Customs Act, 1962 on account of concealment. Section 125 requires that whenever confiscation of any goods is authorised by the Act, the officer adjudging it may, in the case of any goods, the importation or exportation whereof is prohibited under the 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 an option to pay in lieu of confiscation such fine as the said officer thinks fit. Rule 9 of the Baggage Rules, 1978 framed under Section 79(2) of the Customs, Act, 1962 lists Gold in any form other than ornaments in Appendix B of the Rules as articles which shall not be imported free of duty. Hence gold in the form other than ornaments is entitled to be imported on payment of duty. Attempt to import gold unauthorisedly will thus come under the second part of Section 125(1) of the Act where the adjudging officer is under mandatory duty to give option to the person found guilty to pay (fine) in

lieu of confiscation. Section 125 of the Act leaves option to the officer to grant the benefit or not so far as goods whose import is prohibited but no such option is available in respect of goods which can be imported, but because of the method of importation adopted, become liable for confiscation....."

16. This view may seem incongruent with the view expressed by Gujarat High Court in case of **Bhargavraj Ramesh kumar Mehta (supra)** which we have also followed in this judgment but flavours of Section 112 and 125 of the Customs Act are entirely different. Section 112 of the Act pertains to penalty for improper importation of goods. Section 125 on the other hand pertains to option to pay fine in lieu of confiscation. As noted sub-section (1) of Section 125 comes in two parts. Whenever confiscation of goods is authorized under the Act, as per sub-section (1) of Section 125 the adjudicating officer has a discretion to offer redemption fine in lieu of confiscation in case of goods importation or exportation whereof is prohibited. In all other cases there is a statutory mandate on the adjudicating officer to offer such redemption fine. If the interpretation of Section 112 and 125(1) is not reconciled as above, this latter portion of sub-section (1) of Section 125 which covers all cases except where the importation or exportation of the goods is prohibited, would become otiose.

17. Learned counsel for the respondents however heavily relied on the decision of Supreme Court in case of **Om Prakash Bhatia Vs. Commissioner of Customs, Delhi reported in AIR 2003 SC 3581**. Our attention was drawn to paragraph 9 and 10 of the judgment. However in our view this decision does not hold anything contrary to what we have observed in connection with Section 125 of the Customs Act. In fact it was a case in which the Supreme Court had confirmed the view of the customs authority of offering redemption fine in lieu of confiscation.

18. In the result petitions is disposed of with following directions:-

(i) The fine of Rs.40 lacs under Section 112 of the Customs Act imposed by revisional authority is reduced to Rs.30 lacs.

(ii) The issue of fixing the redemption fine in lieu of confiscation requires to be decided. To avoid further delay let this issue be decided by the revisional authority. The proceedings are placed back before the said authority for the limited purpose of deciding the redemption fine that the petitioner may pay if he wishes to avoid absolute confiscation of the seized gold. Fresh order shall be passed preferably within four months from today.

19. All pending applications also stand disposed of."

*Our attention was drawn to the judgment of the Madras High Court in the case of **Commissioner of Customs Vs. Samynathan Murugesan 2009(247) ELT 21 (Madras)** in which view taken was slightly different. It is pointed out that the said decision was also upheld by the Supreme Court when the SLP was dismissed. In the said case, the reference was made to the decision in the case of **Om Prakash Bhatia Vs. Commissioner of Customs, Delhi reported in AIR 2003 SC 3581** in which itself as observed in our earlier judgment, the redemption fine was offered and upheld by the Supreme Court."*

4.6 In view of the above, the appellant should have been given an option to redeem the goods against the redemption fine. Accordingly, in my view, the absolute confiscation made as per the impugned order will have to be modified to the extent of allowing the goods to be redeemed on payment of redemption fine of Rs.5 lakhs (Rupees Five Lakhs Only). In case appellant redeems the goods he is also required to pay Customs duties as applicable as per Section 125 (2) of the Customs Act. Since the case under consideration is a case where the goods sought to be imported as baggage, the applicable rate of duty will be the baggage rate of duty, which is much higher than the normal rate of duty applicable to the same goods. This fact has been taken

into consideration while determining the quantum of redemption fine.

4.7 Section 114AA of Customs Act, 1962 is reproduced below:

"Section 114AA. Penalty for use of false and incorrect material. -

If a person knowingly or intentionally makes, signs or uses, or causes to be made, signed or used, any declaration, statement or document which is false or incorrect in any material particular, in the transaction of any business for the purposes of this Act, shall be liable to a penalty not exceeding five times the value of goods."

From the plain reading of Section 114AA it is evident that penalty under this section can be imposed on a person who intentionally makes, signs or uses, or causes to be made, signed or used, any declaration, statement or document which is false or incorrect in any material particular for the transaction of any business under the Customs Act, 1962. In the present case nothing has been brought on record by which it can be said that the appellant had made or caused to be made any declaration/ used or caused to be used any statement or document which is false or incorrect. In the present case the appellant carrying the Gold has in fact not made any declaration to the Custom Authorities as required under the Custom Act, 1962. No document etc., which has been produced by him which has been produced by him was found to be materially wrong. As the ingredients for invocation provisions of Section 114AA are absent in the present case penalty under the said section is not justified. Bangalore bench has in case of Ismail Ibrahim [2019 (370) E.L.T. 1321 (Tri. - Bang.)] held as follows:

"6.3 Further penalty under Section 114AA of the Customs Act is concerned, I find that the penalty under Section 114AA can only be imposed if the person knowingly or intentionally makes, signs or uses, or causes to be made, signed or used, any declaration, statement or document which is false or incorrect in any material

particular. Further I find that in the present case, the appellants have not made intentionally any false sign or declaration, incorrect statements or declarations to attract penalty under Section 114AA of the Act. Therefore I set aside the penalty imposed under Section 114AA of the Customs Act, 1962 on both the appellants."

4.8 In the case of Jitender Singh [2019 (369) ELT 1683 (G.O.I.) following has been held:-

"4. Government also agrees with the applicant's plea that penalty under Section 11AA of Customs Act, 1962 is also not maintainable in this case as the Section is attracted only where false declaration/statement document is used. But no such false declaration, etc., was made by the applicant and rather the case against the applicant is that he did not declare the TV to the Customs authorities for which Section 112 is appropriately attracted. Therefore, the justice and fairness demands that penalty of Rs. 25,000/- will be sufficient under Section 112 of the Customs Act on the applicant in this case for carrying the TV for ulterior design of smuggling of TV for monetary consideration."

In the case of Manoj Kumar Sharma [2020 () ELT (GOI)] in similar case following has been held:

"The customs authorities in the Revision Application have also requested for setting aside order-in-appeal regarding waiving of penalty of Rs. 10 lacs (Rupees Ten Lacs) under Section 114AA of Customs Act, 1962.

Section 114AA of the Customs Act, 1962 reads as follows :

.....

It is observed that this is not a case for imposition of penalty under Section 114AA of the Customs Act, 1962. Therefore the order of Commissioner (Appeals) in waiving the penalty under Section 114AA of Customs Act, 1962 is legally sustainable and is upheld."

Similar view has been expressed in the case of Abdul Kalam Ammangod Kunhamu [2019 (370) E.L.T. 1743 (G.O.I.)]

4.9 In view of the above, the penalty imposed under Section 114AA of the Customs Act is set aside.

4.10 Appellant do not challenge any other part of the impugned order, i.e the penalty imposed under Section 112 (b) or the confiscation made under Section 119. Accordingly these parts of order are upheld.

4.11 In view of the above order, impugned order is modified to the extent as indicated in para 4.5 and as per para 4.9.

5.1 Appeal is allowed as indicated above in para 4.5 to 4.9 by modifying the impugned order to the extent of:

- setting aside the absolute confiscation and allowing the option to redeem the confiscated gold bars against payment of redemption fine of Rs 5,00,000/- (Rupees Five Lakhs) along with the baggage rate of duty as applicable.
- setting aside the penalty imposed under Section 114AA.

(Operative part of the order pronounced in open court)

Sd/-
(SANJIV SRIVASTAVA)
MEMBER (TECHNICAL)

akp