

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

WEST ZONAL BENCH

Customs Appeal No. 86190 of 2019

(Arising out of Order-in-Appeal No. ORDER/Compounding No. 01/2018 dated 08.01.2019 passed by the Chief Commissioner of Customs, Compounding Authority, Mumbai Zone II)

Amrutlal Kaluram Purohit
6/9, Ahmad Bldg., Gr Floor
225m SVP Road,
Goldeval, Mumbai

.....Appellant

VERSUS

ADG (Adjudication), DRI, Mumbai
2nd Floor, Old Bldg., New Custom House,
Ballard Estate,
Mumbai

.....Respondent

APPEARANCE:

Shri Mihir Mehta, Advocate for the appellant
Shri Ram Kumar, AC(AR) for the respondent

CORAM:

HON'BLE MR. AJAY SHARMA, MEMBER (JUDICIAL)

FINAL ORDER No: A/85388/2023

DATE OF HEARING : 15.12.2022
DATE OF DECISION : 16.03.2023

Per: AJAY SHARMA

This appeal has been filed assailing the order dated 8.1.2019 passed by the Chief Commissioner of Customs, Mumbai, Zone-V by which the application filed by the appellant for Compounding of Offence in terms of Section 137(3) of the

Customs Act, 1962 read with the Customs (Compounding of Offences) Rules, 2005 was rejected.

2. The issue to be decided herein is whether the learned Chief Commissioner is justified in rejecting the application for compounding of offence as not maintainable in terms of proviso to Section 137(3) of the Customs Act, 1962 by resorting to the definition of '*prohibited goods*' as prescribed under Section 2(33) *ibid*?

3. The facts leading to the filing of the instant appeal are stated in brief as follows. According to Directorate of Revenue Intelligence, Mumbai (hereinafter referred to as 'DRI') three consignments of Air conditions, imported in the name of M/s. Anmol Trading, M/s. Vinayak Enterprises & Royal Trading, were examined by the officers of DRI, Mumbai on 29th & 30th December, 2017 at JNPT and a total of 57 kgs. gold bars concealed in the air conditioner, valued at Rs.16.96 crores, were seized under the provisions of Customs Act. According to the department the investigation revealed that the entire operation was orchestrated by the appellant and one Rajuram Purohit.

4. When the case was still under investigation, before the issuance of show cause notice, on 22.01.2018 the appellant filed the application u/s.137(3) *ibid* for compounding of offences punishable u/s.135 *ibid*. The department opposes the compounding of offence application on the ground that the same is pre-mature as show cause notice has not been issued by that date and therefore not maintainable. According to the department Rule 4 of Customs (Compounding of Offences) Rules, 2005 states that "*application shall not be allowed unless the duty, penalty and interest liable to be paid have been paid for which application has been made*" and since the duty, penalty and interest has not been paid the application is liable to be rejected. It is also the case of the department that since the gold bars herein were imported by mis-declaration and

concealment in violation of various provisions of Customs Act, The Foreign Trade (Development & Regulation) Act, 1992, Foreign Trade (Regulation) Rules, 1993 and also in violation of RBI guidelines therefore the same falls under the definition of '*prohibited goods*' as per section 2(33) *ibid*. During the course of hearing before the lower authority, it was requested on behalf of the appellant to keep the application in abeyance till the appellant has paid the duty, fine and penalty as determined by the department which the appellant undertook to pay.

5. The learned Chief Commissioner vide impugned order dated 8.1.2019 rejected the application filed by the appellant for Compounding of Offence by referring to sub-clause (ii) of clause (c) of proviso to Section 137(3) *ibid* and concluded that the offence in respect of which the compounding application has been made involves smuggling of goods that answer the description of '*prohibited goods*' in terms of provisions of the Customs Act thereby rendering the application for compounding not maintainable in terms of the aforesaid provision i.e. sub-clause (ii) of clause (c) of proviso to Section 137(3) *ibid*.

6. Learned counsel for the appellant submits that the learned Chief Commissioner ought to have kept the application pending for the sake of consistency since in a similar matter involving same set of facts the Chief Commissioner, Lucknow Zone in the matter of one Raghunath International has kept the compounding application pending. Learned counsel has also brought to my notice that the show cause notice dated 24.12.2018 has also been issued to the appellant which culminated in the Order-in-Original dated 2.11.2020 which ordered for absolute confiscation of the seized goods i.e. gold bars and also imposed penalty on the appellant and other persons who are involved and an appeal against the said order is pending before the Commissioner of Customs (Appeals). He further submits that the learned Chief Commissioner has erred in

relying upon the definition of '*prohibited goods*' as provided u/s. 2(33) *ibid* as the relevant proviso to section 137(3) *ibid* which is in issue, has used the word '*prohibited items*' *prescribed under the ITC (HS)* and only those *prohibited items* have been excluded from the purview of Sec.137(3) *ibid* and therefore the definition as prescribed section 2(33) is not applicable in the facts of the present case. He further submits that *gold bar* is covered under the ITC HS code 7108 13 00 and is free importable and therefore the same cannot be termed as *prohibited good*. In support of his submissions learned counsel placed reliance on the decision of the Tribunal in the matter of *Bhargav B. Patel vs. Commr. of Customs; 2015(9) TMI 1197-CESTAT*; in which in the context of Section 125 of the Customs Act, it has been held that u/s. 125 *ibid* unless the importation or exportation of goods is expressly '*prohibited*', the adjudicating authority is obliged to offer to the owner of the goods an option to pay fine in lieu of confiscation. Per contra learned Authorised Representative appearing on behalf of Revenue supported the findings recorded in the impugned order and submits that any goods, imported in violation of the conditions imposed for their import, attract the mis-chief of the definition of '*prohibited goods*' as mentioned in Section 2(33) *ibid* and has to be treated as such. In support of his submission learned Authorised Representation placed reliance on the decision of the Hon'ble Supreme Court in the matter of *Om Prakash Bhatia vs. Commr. of Customs, Delhi; 2003(153) ELT 423 (SC)*.

7. I have heard learned counsel for the appellant and learned Authorised Representative for the Revenue and perused the case records including the written submissions/synopsis and case laws cited by the respective sides. In order to appreciate the issue involved herein I consider it proper to have a look at Sections 2(33) and 137(3)(c)(ii) of the Customs Act, 1962 which are reproduced hereunder:-

"2(33) Prohibited Goods:- "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."

"137.Cognizance of offences.

Xxx

xxx

xxx

(3) Any offence under this Chapter may, either before or after the institution of prosecution, be compounded by the Principal Chief Commissioner of Customs or Chief Commissioner of Customs on payment, by the person accused of the offence to the Central Government, of such compounding amount and in such manner of compounding as may be specified by rules.

Provided that nothing contained in this sub-section shall apply to –

(c) a person involved in smuggling of goods falling under any of the following, namely :-

(ii) goods which are specified as prohibited items for import and export in the ITC (HS) Classification of Export and Import Items of the Foreign Trade Policy, as amended from time to time, issued under Section 5 of the Foreign Trade (Development and Regulation) Act, 1992 (22 of 1992);"

8. For compounding the offence under Customs Act, 1962 an application to that effect has been filed by the appellant u/s. 137 ibid, sub-section (3) whereof specifically provides that any offence under this Chapter may, either before or after the institution of prosecution, be compounded by the Principal Chief Commissioner of Customs or Chief Commissioner of Customs on payment by the person accused of the offence to the Central Government, of such compounding amount and in such manner of compounding as may be specified by rules. Certain exceptions has been provided by the proviso to section 137 and one of the exception therein is clause (c), which provides that if the goods involved is *prohibited items for import & export in ITC (HS)*

classification of Export and Import items of Foreign Trade Policy then the same is not compoundable. This exception has been relied upon by the learned Chief Commissioner while rejecting the application filed by the appellant. It is true that an application for compounding can be rejected but only due to the reasons mentioned under proviso to Section 137 *ibid* and for no other reason whatsoever. But the learned Chief Commissioner failed to appreciate that the expression used in the proviso to Section 137(3) is *prohibited items* whereas for rejecting the application he relied upon the definition of *prohibited Goods* as prescribed u/s. 2(33) *ibid*.

9. Gold is freely importable and therefore can such a good will become prohibited merely because it was imported illegally without prior permission? In my view the answer is in negative. The learned Chief Commissioner has rejected the application merely on the ground that since the gold bars have been imported illegally therefore the definition of '*prohibited goods*' as per sec.2(33) gets attracted and the gold bars becomes *prohibited goods* for which no compounding application is maintainable. According to me, learned Chief Commissioner has misdirected himself by looking into the definition of '*prohibited goods*' as prescribed u/s. 2(33) of Customs Act, 1962 because Section 137(3)(ii) *ibid* only talks about *prohibit items* and specifically mentioned that it has no application if the *goods involved are prohibited items for import and export in the ITC (HS) Classification of Export and Import Items of the Foreign Trade Policy*. A perusal of the list of *prohibited items* for import & export in India nowhere mentions gold or gold bar. For the applicability or otherwise of section 137 *ibid* one has to look only into the list of *prohibited items* and the word '*prohibited goods*', as has been relied upon by the learned Chief Commissioner, nowhere mentioned in section 137 *ibid*. The definition of *prohibited goods* as specified in Sec.2(33) *ibid* cannot be applied in section 137(3) *ibid* in view of explicit language employed

therein and the relevant provision in question excludes only the *prohibited items for import and export in ITC (HS) classification of export and import items of the Foreign Trade Policy*. There is a difference between '*prohibited items*' and '*prohibited goods*'. The definition of *prohibited goods* prescribed u/s. 2(33) by any stretch cannot be applied into the provision of Section 137 (3)(c)(ii) *ibid*. The learned Chief Commissioner failed to appreciate that Section 2 *ibid* itself begins with the words '*unless context otherwise requires*'.

10. The Hon'ble Supreme Court in the matter of *Commr. of Customs vs. Atul Automations Pvt. Ltd.; 2019(365) ELT 465 (SC)* rejected the submission raised by revenue that Multi-Function Devices although were a *restricted* and not prohibited item but absence of necessary authorization under the Foreign Trade Police would give it the character of a *prohibited item* and has laid down that there exists a fundamental distinction between what is prohibited and what is restricted. So when '*restricted goods*' in absence of proper authorization cannot be treated as '*prohibited*' then the gold bars herein are on a much better footing as its freely importable. The only reason given by the learned Chief Commissioner for rejecting the application is that the goods involved herein becomes *prohibited goods* by importing in violation of the conditions imposed for their import, therefore the application is not maintainable which, in my considered view, is totally contrary to the legal position and the language of the statute. The Hon'ble High Court of Judicature at Bombay in the matter of *Imran Latif Shirgawkar vs. DRI, Mumbai; 2019(368) ELT 1052 (Bom.)* has held that there is no bar on filing an application for compounding before issuance of show cause notice or adjudication thereof as contemplated in the Act. Therefore this ground is also not available to the authority below for not entertaining the application filed by the appellant for compounding and in my view there is no bar in filing or considering the compounding application. Since I am of the view

that the authority concerned erred in rejecting the application for compounding being not maintainable and merit of the application was not discussed in the impugned order therefore, I am not commenting upon the merit as it is for the adjudicating or compounding authority to decide the application in accordance with law.

11. In view of the discussions held in the preceding paragraphs the impugned order is set aside and the application is restored to the file of the learned Chief Commissioner for adjudication on merits after giving sufficient opportunity of hearing to both sides. The appellant is at liberty to file documents in support of their submissions before the said authority. The appeal is accordingly allowed in the above terms.

(Pronounced in open Court on 16.03.2023)

(Ajay Sharma)
Member (Judicial)

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