

REGISTERED
SPEED POST



F.No. 373/81/B/13-RA
GOVERNMENT OF INDIA
MINISTRY OF FINANCE
(DEPARTMENT OF REVENUE)

14, HUDCO VISHALA BLDG., B WING
6th FLOOR, BHIKAJI CAMA PLACE,
NEW DELHI-110 066

Date of Issue... 30/4/14

Order No. 189/14-cus dated 28-04-2014 of the Government of India, passed by Shri D. P. Singh, Joint Secretary to the Government of India, under section 129DD of the Custom Act, 1962.

Subject : Revision Application filed,
under section 129 DD of the Customs Act
1962 against the Order-in-Appeal No.
188/2013 dated 28-02-2013
passed by Commissioner of Custom (Appeals),
Bangalore.

Applicant : Shri B.G.Reddy,
No. 44, 3rd Cross, Shri Hanuman Layout,
Manorayanapalya,
R.T.Nagar post, Bangalore-560032.

Respondent : Commissioner of Custom,
Bangalore.

ORDER

The revision application is filed by Shri B.G.Reddy, against the Order-in-Appeal No. 188/2013 dated 28-02-2013 passed by Commissioner of Customs (Appeals), Bangalore with respect to order-in original No. 102/12 dated 22-11-2012 passed by the Deputy Commissioner of Customs, International Airport, Bangalore.

2. Brief facts of the case are that Shri B.G.Reddy the applicant was on duty on 01-09-2012 from 2000 hours to 0800 hours on 02-09-2012 and manning the red channel as Superintendent counter no. 4 at the International Airport, Bangalore, One passenger by name Shri Manik Taneja who arrived from Dubai by flight EK568, brought a "Kayak" a sporting equipment valued at Rs. 60,000/- as an accompanied baggage and approached the applicant. The applicant insisted the passenger for payment of duty of Rs. 21,630/-. The passenger pleaded that he is a sports person and the kayak purchased is sporting equipment. The applicant allegedly took Rs. 8,000/- from the passenger and allowed the item duty free clearance. The passenger later in "ipaidbribe.com" portal alleged that kayak was cleared duty free after payment of bribe to the applicant. Based on the information that the passenger has not paid the duty on the item brought by him, An enquiry was conducted which culminated in passing of the impugned order. The lower adjudicating authority vide the impugned order held that the passenger cleared the dutiable goods without payment of custom duty which made the impugned goods liable for confiscation under section 111(d) and (o) of the Act *ibid*. A penalty of Rs. 60,000/- equivalent to the value of the goods, was also imposed on the said passenger under section 112 of Customs Act, 1962 while the passenger was imposed penalty of Rs. 9062, equivalent to the duty involved, under section 114 A of the Customs Act, 1962. Aggrieved by the said order the present appeal is filed by the applicant.

3. Being aggrieved by the said order-in-original, applicant filed appeal before Commissioner (Appeals), who after considering all the submissions rejected the appeal.

4. Being aggrieved by the impugned Order-in-Appeal, the applicant has filed this revision application under Section 129 DD of Customs Act, 1962 before Central Government mainly on the following grounds:

4.1 Although the show cause notice alleges inducement of the passenger by the applicant, there is no legally sustainable evidence against the applicant about demand and acceptance of any illegal gratification as a quid pro quo for having released the kayak without payment of duty. Even the learned Assistant Commissioner who conducted the enquiry under the administrative proceedings initiated against the applicant has concluded that there is no clear evidence of the complicity of the applicant and has sought to sustain the charges only on the basis of circumstantial evidences. Thus at the most, the act of the applicant may be termed as negligence or dereliction of duty, for which no penalty is imposable under the provisions of Customs Act, 1962, as held by the Hon'ble Tribunal in the case of Commissioner V/s. M. Naushad [2007 (210) ELT 464 (TRI)].

4.2 Ostensibly, the applicant is penalized as an abettor of the act of commission on the part of the importer in taking away the impugned goods without payment of duty. 'Abetment' means instigating a person to commit an offence; or engaging in a conspiracy to commit it; or intentionally aiding a person to commit it. It is a serious criminal charge which needs to be proved by much higher degree of proof and not merely by the preponderance of probability.

4.3 Coming to the subject case, there is absolutely no evidence to show that the applicant had instigated the importer to take away the impugned goods without payment of duty; no evidence to show that there was a pre-importation arrangement between the importer and the applicant. Further, considering the meager amount of duty involved in the subject importation, it is apparently illogical to conceive any possibility of intentionally aiding the importer to take away the good. There is also no conclusive evidence to prove the demand and acceptance of illegal gratification. The applicant allowed the importer to take away the kayak without payment of duty on the bonafide belief that he was entitled for the benefit of Rule 3

and Rule 5 of the Baggage Rules, 1998. Infact, the learned enquiry authority who conducted an enquiry under the provisions of Rule 14 of CCS (CCA) Rules, 1965, in which the subject matter of the Charge Memorandum was the very same importation, also has specifically recorded a finding to this effect and proceeded to sustain the charges on the basis of preponderance of probabilities. Under these circumstances, this Hon'ble Authority may appreciate that the charge of abetment is not sustainable in the facts and circumstances of this case. At best, the applicant may be held guilty of negligence and for any negligent act no penalty is imposable under the provisions of Customs Act, 1962. Thus, the penalty imposed on the applicant under the provisions of section 112 is bad in law.

4.4 With due respects, it is submitted that both the learned lower authorities have misread the law laid down by the Hon'ble Supreme Court on the concept of 'prohibited goods' as defined under the provisions of section 2 (33) of the Customs Act, 1962. It is submitted that 'restriction' and 'prohibition' are two different concepts and one cannot be read into another. In the instant case, the item kayak is a freely importable item under the Import-Export Policy and the restriction is only about the value for free allowance under the relevant provisions of Baggage Rules, 1998. Further, there is no any other law, or notification issued either under the Customs Act, 1962, or any other law declaring the kayak as prohibited goods. Thus, when the goods which are otherwise not prohibited are brought in excess of the permissible limits in terms of value or quantity and are cleared without payment of appropriate duty, they can only be treated as dutiable goods and not 'prohibited goods'. Infact, all along in the show cause notice the department has treated the subject kayak as dutiable goods and not prohibited goods. Only in the adjudication ordered, an effort is made to hold the item as prohibited goods and penalty equal to the value of goods under section 112 (a) (i) is imposed. It is submitted that if at all any penalty is imposable on the applicant on the allegation of abetment, or any omission or commission, the same can be imposed only under the provisions of section 112 (a) (ii) which is equal to duty sought to be evaded/short paid or Rs. 5000/- whichever is greater.

4.5 There is one more argument to say that imposition of penalty equal to value under section 112 (a) (i) is bad in law. Apparently, if the applicant is found to be the abettor and the goods offence also ought to have been penalized under the same provisions viz; section 112 (a) (i). However the importer is met with a penalty equal to the duty sought to be evaded i.e. Rs. 9062/- under section 112 (a) (ii). This clearly shows that both the lower authorities are not treating the impugned kayak as prohibited goods when it comes to imposition of penalty on the passenger. It is quite specious to say that for imposing penalty on one person the goods are prohibited and the same goods are not prohibited when it relates to the penalization of the other person in the same transaction. Therefore, the order impugned order is vitiated for discrimination and vindictiveness of the lower authorities.

Applicant finally prayed to set aside the impugned Order-in-Appeal.

5. Personal hearing scheduled in this case 21-03-2014 at Chennai was attended by Shri M.A. Narayana, Advocate on behalf of the applicant who reiterated the grounds of Revision Application.

6. Government has carefully gone through the relevant case records and perused the impugned Order-in-Original and Order-in-Appeal.

7. On perusal of records, Government notes that in this applicant Shri B.G.Reddy, then Supdt. of Customs on duty at airport allowed duty free clearance of kayak as sport equipment valuing Rs. 60000/- under rule 3 and 5 of baggage rules allegedly for consideration of Rs. 8000/-. Disciplinary proceeding were initiated by department against applicant for accepting bribe. Simultaneously he was also show caused along with passenger for imposition of penalty under section 112 of Customs Act. A penalty of Rs. 60000/- imposed by original authority was upheld by Commissioner (Appeals). Applicant has filed now revision application against the impugned Order-in-Appeal on the grounds stated above.

8. Government notes that applicant has contested the imposition of penalty equivalent to value of the goods on him and pleaded that for negligence of duty departmental disciplinary proceedings are already initiated and penalty imposed under section 112 may be set aside. The facts and circumstances of the case reveal that applicant allowed duty free clearance of Kayak valuing of Rs 60000/- without charging any duty. Applicant was required to charge duty of Rs. 9062 on value in excess of free allowance. This lapse is admitted by applicant in his statement recorded under section 108 of Customs Act. Commissioner (Appeals) has observed in para 7 of his Order-in-Appeal as under:-

" In view of above, a show cause notice dt. 25-09-2012 was issued by Assistant Commissioner of Customs, Bangalore International Airport, Bangalore to Shri Manik Taneja to show cause to the as to why:

- (i) The above goods i.e. one 'Kayak' imported by Shri Manik Taneja at Bangalore International Airport as a part of his baggage on flight EK568 from Dubai on 02-09-2012 should not be confiscated under section 111 (o) and section 111 (d) of Customs Act, 1962.
- (ii) The duty on the import of 'Kayak' amounting to Rs. 9012/- should not be demanded and recovered under the provisions of section 28 (4) of the Customs Act, 1962.
- (iii) The interest for the delay in payment of the duty mentioned above should not be demanded and recovered under section 28AA of the Customs Act, 1962.
- (iv) The amount of Rs. 9062/- paid vide challan 321317 d. 10-09-2012 should not be appropriated against the duty of Rs. 9012/- and interest of Rs. 50/- under the provisions of section 28 of the Customs Act, 1962.
- (v) Penalty should not be imposed under section 112 (a) /114A of the Customs Act, 1962.


Further, in the above mentioned show cause notice dt. 25-09-2012, Shri B.G. Reddy was called upon to show cause as to why penalty should not be imposed on him under section 112 (a) of the Customs Act, 1962. "

Government notes that the facts and circumstances of the case as discussed above in Order-in-Appeal reveals that applicant had abetted in commissioning of said offence on the part of passenger. The act of applicant has

resulted in evasion of customs duty of Rs. 9012. So the applicant is rightly held liable to penal action under section 112 of Customs Act. Applicant has contended that goods are not prohibited goods and at the most penalty can be imposed equal to duty sought to be evaded. Government notes that original authority has not confiscated the goods and allowed the same to be cleared on payment of duty of Rs. 9012, as the goods were not treated as prohibited goods. Government find force in this contention of applicant and holds that penalty cannot be imposed more than duty sought to be evaded in terms of clause a (ii) of section 112. Government therefore revises the penalty to Rs. 8000/- under section 112 (a) (ii) of Customs Act, 1962. The impugned Order-in-Appeal is modified to this extent.

9. The revision application is disposed off in terms of above.

10. So, ordered.

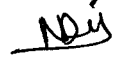


(D.P. Singh)

Joint Secretary to the Govt. of India

Shri B.G.Reddy,
No. 44, 3rd Cross, Shri Hanuman Layout,
Manoravananpalva,
R.T.Nagar post, Bangalore-560032.

ATTESTED



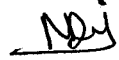
(निर्मला देवी / NIRMALA DEVI)
अनुभाग अधिकारी / Section Officer
वित्त मंत्रालय (राजस्व विभाग)
Ministry of Finance (Deptt. of Rev.)
भारत सरकार / Govt. of India
नई दिल्ली / New Delhi

Order No. 150/14-Cx dated 28-4-2014

Copy to:

1. Commissioner of Custom, Custom House, P.B No. 5400, C.R. Building, Queens Road, Bangalore-560001.
2. Commissioner of Customs (Appeals), P.B No. 5400, C.R. Building, Queens Road, Bangalore-560001.
3. Deputy Commissioner of Customs, Bangalore International Airport, Bangalore.
- ✓ 4. PS to JS(RA)
5. Guard File.
6. Spare Copy

ATTESTED



(Nirmala Devi)

Section Officer (REVISION APPLICATION)

(निर्मला देवी / NIRMALA DEVI)
अनुभाग अधिकारी / Section Officer
वित्त मंत्रालय (राजस्व विभाग)
Ministry of Finance (Deptt. of Rev.)
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