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SPEED POST

GOVERNMENT OF INDIA  
MINISTRY OF FINANCE  
(DEPARTMENT OF REVENUE)

8<sup>th</sup> Floor, World Trade Centre, Centre - I, Cuffe Parade,  
Mumbai-400 005

F. No. 371/69/B/14-RA

F. No. 380/95/B/14-RA

Date of Issue 11/12/2018

ORDER NO. <sup>1015-1016</sup> /2018-CUS (WZ) / ASRA / MUMBAI/ DATED 30.11.2018  
OF THE GOVERNMENT OF INDIA PASSED BY SHRI ASHOK KUMAR  
MEHTA, PRINCIPAL COMMISSIONER & EX-OFFICIO ADDITIONAL  
SECRETARY TO THE GOVERNMENT OF INDIA, UNDER SECTION 129DD  
OF THE CUSTOMS ACT, 1962.

Applicant : Shri Abdul Kadar Hussain Kunji

Respondent : Commissioner of Customs, CSI Airport, Mumbai

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Applicant : Commissioner of Customs, CSI Airport, Mumbai

Respondent : Shri Abdul Kadar Hussain Kunji

Subject : Revision Applications filed under Section 129DD of the  
Customs Act, 1962 against the Order-in-Appeal No. MUM-  
CUSTM-PAX-APP-227&228/14-15 dated 3.07.2014 passed  
by the Commissioner of Customs(Appeals), Mumbai Zone-  
III.





2.3 On detailed examination of the other checked-in cardboard box wrapped with brown cellophane tape, it was found to contain personal effects and foodstuff. Detailed examination of two of the wafer packets with brand name "ULKER DELUXE WAFERS", resulted in the recovery of two more gold bars bearing embossed marking "SUISSE 10 TOLAS FINE GOLD 999.9" which were found to be cleverly concealed inside the said wafer packets which had in turn been concealed inside the said brown colour cardboard box carton.

2.4 Since the passenger had not declared the abovementioned four gold bars totally weighing 466.40 grams and could not satisfactorily explain its possession, acquisition and carriage, the said gold bars totally weighing 466.40 grams totally valued at Rs. 11,42,680/- (Rupees Eleven Lakhs Forty Two Thousand Six Hundred Eighty Only) were seized under panchnama dated 23.04.2013 in the reasonable belief that the same were attempted to be smuggled into India in contravention of the provisions of the Customs Act, 1962.

2.5 During the course of the detailed investigation that ensued, amongst other facts, the passenger revealed that the gold bars had not been purchased by him but that they had been given to him by one Shri Ashraf Abbu to be delivered at the latter's residence in Kerala on the understanding that he would be paid Rs. 4000/- and admitted to possession, carriage, concealment, non-declaration of the seized four gold bars with intention to evade customs duty. The passenger was therefore called upon to show cause to the Additional Commissioner of Customs, CSI Airport, Mumbai as to why the seized 04 gold bars weighing 466.40 grams totally valued at Rs. 11,42,680/- should not be confiscated under Section 111(d), (l) and (m) of the Customs Act, 1962, penalty should not be imposed on the passenger under Section 112(a) and (b) of the Customs Act, 1962 and the black coloured STARCO brand zipper stroll hand bag & checked in cardboard box used for concealing the gold bars under seizure should not be confiscated under Section 119 of the Customs Act, 1962.



3. After due process of law, the case was adjudicated vide Order-In-Original No. ADC/ML/ADJN/74/2013-14 dated 31.01.2014 ordering absolute confiscation of the 04 gold bars totally weighing 466.40 grams collectively valued at Rs. 11,42,680/- under Section 111(d), (l) and (m) of the Customs Act, 1962 and imposing penalty of Rs. 2,00,000/- on the passenger under Section 112(a) and (b) of the Customs Act, 1962.

4. Aggrieved by the said order, the passenger applicant filed appeal before the Commissioner (Appeals) who vide Order-in-Appeal No. MUM-CUSTOM-PAX-APP-227&228/14-15 dated 3.07.2014 allowed redemption of the goods on payment of fine of Rs. 2.30 lakhs(Rupees Two Lakhs Thirty Thousand Only) to the passenger and reduced the penalty imposed on him to Rs. 1.15 lakhs(Rupees One Lakh Fifteen Thousand Only). The Commissioner(Appeals) has followed the ratio of the Supreme Court decision in the case of Dhanak Madhusudan Ramji[2010(252)ELT A102(SC)] holding that the goods were not prohibited but had become prohibited due to the breach of law by the petitioner, that the goods had not been claimed by any other person and that there was a discretionary power available to release the goods which had been properly exercised.

5. Aggrieved by the order of the Commissioner(Appeals), the passenger filed for revision on the following grounds:

- (i) This was the first time that the passenger had imported gold.
- (ii) The goods were not restricted on prohibited goods.
- (iii) Compared to the gravity of the offence committed by the passenger, the redemption fine and penalty imposed are on the higher side.
- (iv) The Commissioner(Appeals) has not considered local market value to decide margin of profit and the redemption fine. In this case, there is no margin of profit after payment of duty. Therefore, the fine and penalty imposed in this case are very harsh.



6. On the other hand, the Department found that the Order-in-Appeal passed by the Commissioner(Appeals) was not legal and proper for the following reasons:

- (i) In the present case, the gold bars had been recovered from wafer packets in a checked in cardboard box containing foodstuff and a black coloured STARCO brand zipper stroll hand bag with the gold bars wrapped in carbon paper. The gold bars had been wrapped and concealed in hand bag and wafer packets with the clear intention to smuggle them into India. The passenger had opted for the green channel inspite of carrying dutiable goods and had failed to make a true declaration as required under Section 77 of the Customs Act, 1962. The passenger had in his statement dated 23.04.2013 stated that the impugned goods were to be handed over at the residence of his childhood friend in Kasargod, Kerala for money and therefore he was clearly acting as a carrier. The passenger had accepted possession, carriage and recovery of the seized gold. The novel way of concealing the gold was used to evade customs duty. The power to allow redemption of the seized goods was the discretionary power of the adjudicating authority to be exercised depending upon the facts of the case after examining its merits. The circumstances of the case and the intention of the passenger was not at all considered by the appellate authority while allowing redemption of the goods. Redemption of the goods should not have been allowed without pointing out any legal infirmity in the order-in-original.
- (ii) The Department placed reliance on the case laws of Commissioner of Customs, Tuticorin vs. Sai Copiers[2008(226)ELT 486(Mad)], Om Prakash Bhatia vs. Commissioner of Customs, Delhi[2003(155)ELT 423(SC)], Samynathan Murugesan vs. Commissioner[2010(254)ELT A15(SC)]. The Department prayed



that the impugned goods may not be allowed to be redeemed to the passenger on payment of fine and reduced penalty.

7. Personal hearings were granted in the matter on 28.03.2018, 21.05.2018, 31.05.2018 & 29.08.2018. However, none appeared on behalf of the passenger or the Department.

8. The Government has gone through the case records. The passenger had attempted to clear himself through the green channel. The Customs Officers had intercepted him and carried out a detailed examination of all the baggages of the passenger. Detailed examination of the black coloured STARCO brand zipper stroll hand bag resulted in recovery of 2 gold bars of 116.6 grams each bearing the mark "SUISSE 10 TOLAS FINE GOLD 999.9" which was cleverly wrapped in blue coloured carbon paper and cello tape and concealed inside a black coloured carbon paper and cello tape and again concealed inside a black coloured leather purse, which in turn was concealed inside the said handbag. On detailed examination of the other checked-in cardboard box wrapped with brown cellophane tape, it was found to contain personal effects and foodstuff. Detailed examination of two of the wafer packets with brand name "ULKER DELUXE WAFERS", resulted in the recovery of two more gold bars bearing embossed marking "SUISSE 10 TOLAS FINE GOLD 999.9" which were found to be cleverly concealed inside the said wafer packets which had in turn been concealed inside the said brown colour cardboard box carton. Government observes that the passenger has gone to great lengths to ensure that the gold bars are not detected. The act of wrapping the gold bar in carbon paper and concealing it in wafer packets demonstrates their intent.

9. Government observes that the Commissioner(Appeals) has principally gone by the ratio of the judgment of the Hon'ble High Court of Bombay in the Writ filed by the Department in the case of Dhanak M. Ramji[2009(248)ELT 127(Bom)]. It is observed that in the said case, the Department had while



objecting to the release of jewellery contended that the passenger was not the owner of the goods and therefore was not entitled to take possession of the goods. In that case, the Hon'ble High Court observed that no other person had claimed title of the goods and therefore the passenger was entitled to take possession of the goods on payment of redemption fine.

10. The revision application filed by the passenger is exclusively for reduction in the amount of redemption fine and penalty imposed by the Commissioner(Appeals). On the other hand, the Department has emphasized on several facts concerning the case; viz. the fact of ingenious concealment by the passenger, failure to make true and correct declaration, the discretionary power vested in the adjudicating authority to allow redemption of seized goods depending on the facts of each case and also placed reliance on several case laws. Since the merits of the case would first have to be decided before there can be any orders for reduction of redemption fine and penalty, it would be in the fitness of things to first take up the grounds for revision by the Department for consideration.

11. It is observed that the passenger was on a short trip and was clearly not an "eligible passenger" for import of gold in such quantity. Government observes that these facts have weighed upon the adjudicating authority while ordering for absolute confiscation of the impugned goods. The facts and circumstances of the case indicate the criminal bent of mind and the clear intention to evade customs duty.

12. The Government observes that the Hon'ble Madras High Court had in the case of Commissioner of Customs(AIR), Chennai-I vs. P. Sinnasamy[2016(344)ELT 1154(Mad)] discussed the amplitude of the discretion vested in the adjudicating authority under Section 125 of the Customs Act, 1962. The conclusion drawn by their Lordships in that case is reproduced below.



*“54. The power conferred on the authority without any guidelines may likely to be abused or arbitrarily exercised and in such circumstances, the guidance and the control of exercise of such power has to be gathered from the object of conferment of such power. Non-consideration or non-application of mind to the relevant factors, renders exercise of discretion manifestly erroneous and it causes for judicial interference. In Global Energy Limited and Another v. Central Electricity Regulatory Commission reported in (2009) 15 SCC 570, the Hon’ble Supreme Court held that the exercise of discretion has to be in conformity with the purpose for which, it is conferred, object sought to be achieved and reasons to be recorded.*

*55. Power has to be exercised with regard to the duty arising from the nature of the action to be performed by the adjudicating authority. The conditions on the basis of which the power has to be exercised and the repercussions or consequences of such exercise, in the light of the scheme of the Act, which prohibits smuggling and other acts more fully set out in Sections 11 and 11A of the Customs Act, 1962, or any other law for the time being in force, should always be kept in mind, while considering either provisional release or passing an order, on the culmination of adjudicatory proceedings.*

*56. At the time, when discretion is exercised under Section 125 and if any challenge is made under Article 226 of the Constitution of India, the twin test, to be satisfied is “relevance and reason”. In the light of the judgments of the Hon’ble Apex Court and applying the same to the facts of this case and testing the discretion exercised by the authority, on both subjective and objective satisfaction, as to why, the goods seized, cannot be released, when smuggling is alleged and on the materials on record, we are of the view that the discretion exercised by the competent authority, to deny release, is in accordance with law. Interference by the Tribunal is against law and unjustified.*

*57. In the light of the above discussion and decisions, we have no hesitation to set aside the order of the Tribunal. Substantial question of law raised is answered in favour of the respondent. Hence, the present civil miscellaneous appeal is allowed. No costs.”*

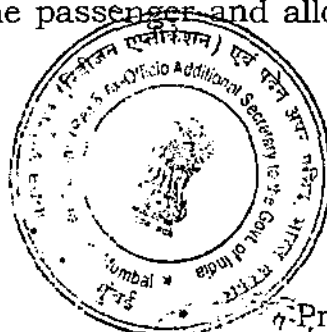




13. Applying the ratio of the above judgment, the inference that flows is that the conditions on the basis of which the power has to be exercised and the repercussions or consequences of such exercise in the scheme of the Act, which prohibits smuggling should always be kept in sight while allowing release of the goods on payment of fine. In a clear case of smuggling by resorting to ingenious concealment, the option to redeem the goods should be carefully weighed. Government is of the considered view that in the present case, the adjudicating authority has given careful consideration to the facts of the case and therefore ordered absolute confiscation. Moreover, as correctly pointed out by the Department in the grounds for revision, the judgment of the Supreme Court in the case of Samynathan Murugesan vs. Commissioner[2010(254)ELT A15(SC)] also reinforces this view. The present case involves facts where the passenger has ingeniously concealed the impugned goods, failed to declare the impugned goods, attempted to clear the goods by walking through the green channel; thereby demonstrating his intent to smuggle the goods into the country by evading the customs duties due thereon. The passenger has thereby also rendered himself liable to be penalized.

14. Accordingly, the impugned Order-in-Appeal No. MUM-CUSTOM-PAX-APP-227&228/14-15 dated 3.07.2014 is set aside and the Order-in-Original No. ADC/ML/ADJN/74/2013-14 dated 31.01.2014 passed by the Additional Commissioner is restored. Government therefore dismisses the revision application filed by the passenger and allows the revision application filed by the Department.

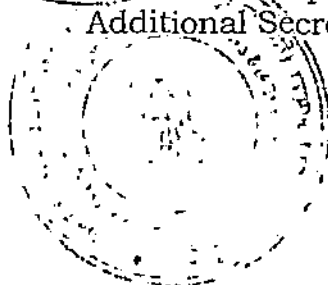
15. So, ordered.



*Ashok Kumar Mehta*  
20.11.14  
(ASHOK KUMAR MEHTA)  
Principal Commissioner & ex-officio  
Additional Secretary to Government of India

**ATTESTED**

*S.R. Hirulkar*  
11.12.14  
S.R. HIRULKAR  
Assistant Commissioner (R.A.)



1015-1016  
ORDER No. /2018-CUS (WZ) /ASRA/Mumbai

DATED 30.11.2018

To,

Shri Abdul Kadar Hussain Kunji  
1/397, (6/378) M. H. Manzil,  
Safi Nagar, Al-aba Building,  
P.O. Uppala, Kasargod,  
Kerala 671 322

Copy to:

1. The Commissioner of Customs(Airport), Mumbai.
2. The Commissioner of Customs(Appeals), Mumbai-III
3. Sr. P.S. to AS (RA), Mumbai.
- ✓ 4. Guard File.
5. Spare Copy.



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21.11.2018  
(AR) [Signature]