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SPEED POST

GOVERNMENT OF INDIA
MINISTRY OF FINANCE
(DEPARTMENT OF REVENUE)
8th Floor, World Trade Centre, Centre - I, Cuffe Parade,
Mumbai-400 005

F.No. 373/138/B/16-RA

12963

Date of Issue

02/06/21

ORDER NO. 123/2021-CUS (SZ)/ASRA/MUMBAI DATED 12.05.2021 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.

Applicant : Shri Mohamed Ariff

Respondent : Commissioner of Customs, Bangalore.

Subject : Revision Application filed, under Section 129DD of the Customs Act, 1962 against the Order-in-Appeal No. 374-376/2016 dated 21.04.2016 passed by the Commissioner of Customs (Appeals), Bangalore.

ORDER

This revision application has been filed by Shri Mohamed Ariff (herein after referred to as the Applicant) against the order in appeal Order-in-Appeal No. 374-376/2016 dated 21.04.2016 passed by the Commissioner of Customs (Appeals), Bangalore.

2. Briefly stated the facts of the case are that the Applicant, a Sri Lankan national was intercepted when he arrived at the Kempegowda International Airport on 15.10.2014. When the Applicant was made to pass through the door frame metal detector it gave a loud beep indicating the presence of metal on his body. On personal examination the officers recovered two gold chains with a ring worn by the Applicant totally weighing 231.04 grams and valued at Rs. 6,34,436/- (Rupees Six lacs Thirty four thousand Four hundred and Thirty six).

3. The Original Adjudicating Authority vide Order-In-Original No. 257/2014 – Cus ordered absolute confiscation of the impugned gold under Section 111 (d) (i) (l) & (m) of the Customs Act, 1962, and imposed penalty of Rs. 1,30,000/- (Rupees One lakh Thirty thousand) under Section 112 (a) of the Customs Act, 1962. A penalty of Rs. 65,000/- (Rupees Sixty five thousand) under Section 114AA of the Customs Act, 1962.

4. Aggrieved by the said order, the applicant filed appeal before the Commissioner (Appeals) who vide Order-In-Appeal No. 374-376/2016 dated 21.04.2016 rejected the appeal of the Applicant.

5. Aggrieved with the above order the Applicant, has filed this revision application on the following grounds;

5.1 The respondent as erred in passing the impugned order on the basis of assumptions and presumptions.

5.2 The seizure made by the respondent is illegal, since he was taken into illegal custody on 15/10/2014 and the mahazar was drawn in the presence of independent witnesses which was initiated at 20:45hrs on 15/10/2014 and ended at 06:00hrs on 16/10/2014, as stated in the remand application and thereafter the statements was recorded on 16/10/2014 and was produced before the Hon'bre court on 17/10/2014 at 11:30pm who remanded him to judicial custody and released on bail on 18/10/2014.

5.3 The arrest and the production of the appellant/accused is made after 24 hours taken into custody is against the principle of natural justice and this seizure made before recording his statement is not acceptable and admissible in the eye of Law. The appellant has retracted his statement given, in his bail application.

5.4 The Respondent has erred in not considering the facts that no show-cause notice was issued and the matter was adjudicated very hastily without giving a proper opportunity to the appellant to effectively reply and adduce properly to the allegation alleged against him. Thus the Respondent has gravely violated the principles of natural justice. On this ground itself the order-in-original has to be set-aside.

5.5 The Respondent as erred in not considering the facts th was apprehended at the appellant rehended on 15.10.2014, mahazar was drawn on 15.10.2014 and order-in-original was passed on 01.12.2014. This goes to show that the matter was adjudicated hastily without giving proper opportunity to the appellant.

5.6 The respondent has failed to appreciate that the goods under seizure were gold ornaments worn by the appellant/passenger where two gold chains which was worn by him around the neck and one gold ring worn but were ornaments in the mode chains and ring, weighting 231.04 Grams. The said gold seized are gold ornaments of the appellant, of his daily personal use and are not new but 7 to 8 months old.

5.7 The applicant submits that the gold under the seizure are of personal and of daily use. And the gold chains and ring worn by him and on his arrival at Bangalore from the flight.

5.8 The applicant submits that he is a foreigner i.e. Srilankan and did not know nor had the knowledge that he cannot wear gold ornaments while arriving into the India, as per the Law in India.

5.9 The applicant submits that the customs officers did not even tell him nor warn him, as he was a foreign tourist entering to not wear gold India can ornaments or carry them. But just seized the gold and arrested him. I told the customs officers that I am ready to pay the applicable duty and if not the same may be retained the count by then and return it ry/ India. But the officers failed to listen while he was leaving

5.10 The applicant further submits that instead of affording an opportunity to the appellant to explain the facts and circumstances of the case, the authority

concerned arrived at a purported finding in the Order-In-Original, which is totally arbitrary, perverse and unjust and have been erroneous) made with total non application of mind. y 12. The applicant submits that the two gold chains and one ring are of his personal use and which is of a crude finish, is a fashion because it oyes a look of antique.

5.11 The Applicant submit that under section 125 of the customs Act When even confiscation of any good is authorized by this act, the officer adjudging it may, in the case of any goods, the importation or exportation whereof is in force, prohibited under this act or under any other law for the time being and shall, in the 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 been such goods have seized.

5.12 The appellant submits that mere foreign origin of the goods does not indicate that the goods are smuggled. The entire case is based on mere suspicion, assumption and presumption and on surmise and conjunctions. It is settled law that suspicion however grave is not a substitute for proof.

5.13 For the reasons stated above paragraphs and other reasons that may be adduced to at the time of personal hearing, the Applicant prays that this Hon'ble Authority be pleased to set-aside the Order-In-Appeal may be set aside and grant consequential relief by way of releasing the goods and refund the penalty deposited to the Appellant in the interest of justice and equity.

6. Personal hearings in the case were scheduled online on 08.12.2020, 15.12.2020, 22.12.2020 and 25.02.2021. However neither the Applicant nor the respondents attended the hearings, the matter is therefore being decided on merits.

7. At the outset Government notes that the Applicant being a frequent traveller to India cannot plead that he was not aware that gold has to be mandatorily declared as gold is not a freely importable item. A proper declaration was not filed by the Applicant as required under section 77 of the Customs Act, 1962 and therefore the confiscation of the gold is justified.

8. Government however notes that the Applicant is a foreign national. The impugned gold jewelry was worn by him and therefore was not ingenuously concealed. The ownership of the gold jewellery is not disputed. The quantity of jewellery under import is small. There are no allegations that the Applicant is a habitual offender and was involved in similar offences earlier. The facts of the case indicate that it is a case of non declaration of gold, rather than a case of smuggling for commercial considerations. Under the circumstances, keeping the seriousness of the misdemeanor in mind,

absolute confiscation and dispossessing the Applicant of the gold jewellery is harsh and unjustified. The Apex court in the case of Hargovind Dash Vs Collector of Customs 1992 (61) ELT 172 (SC) and the several other cases has pronounced that a quasi judicial authority must excise discretionary powers in a judicious manner and not in an arbitrary manner. In the case of Vigneswaran vs UOI in W.P. 6281 of 2014 (I) dated 12.03.2014 the High Court of Kerala has directed the revenue to unconditionally return the gold to the petitioner, observing that only because of not declaring the gold, the absolute confiscation is bad under law, further stating, the only allegation is that she (the passenger) a foreigner, did not declare the gold.

9.1 Under the circumstances, the absolute confiscation of the gold is required to be set aside and the impugned gold is allowed for re-export on payment of suitable redemption fine and penalty. The order of the Appellate authority is liable to be revised.

9.2. In addressing the issue of penalty imposed under section 114AA, Government relies on the observations of the Hon'ble High Court of Karnataka in the case of Khoday Industries Ltd. Vs UOI reported in 1986(23)ELT 337 (Kar), which states that "*Interpretation of taxing statutes – one of the accepted canons of Interpretation of taxing statutes is that the intention of the amendment be gathered from the objects and reasons which is a part of the amending Bill to the Finance Minister's speech*". The objective of introduction of Section 114AA in Customs Act is explained in para 63 of the report of the Standing Committee of Finance (2005-06) of the 14th Lok Sabha which states.....

" Section 114 provides for penalty for improper exports of goods. However, there have been instances where export was on paper only and no goods had ever crossed the border. Such serious manipulations could escape penal action even when no goods were actually exported. The lacuna has an added dimension because of various export incentive schemes. To provide for penalty in such cases of false and incorrect declaration of material particulars and for giving false statements, declaration, etc. for the purpose of transaction of business under the Customs Act, it is proposed to provide expressly the power to levy penalty up to five times the value of the goods. A new Section 114AA is proposed to be inserted after Section 114A."

Thus Government concludes, penalty under Section 112 is imposable on a person who has made the goods liable for confiscation. But there could be situation where no goods ever cross the border. Since such situations were not covered for penalty under Section 112/114 of the Customs Act, 1962, Section 114AA was incorporated in the Customs Act by the Taxation Laws (Amendment) Act, 2006. Hence, once the penalty is imposed under Section 112, then there is no necessity for a separate penalty under section 114AA for the same act.

10. In view of the above facts, The Government sets aside impugned Order in Appeal, the impugned gold is allowed to be redeemed for re-export on payment of Rs. 1,60,000/- (Rupees One Lakh Sixty Thousand Only). The Penalty of Rs. 1,30,000/- (Rupees Three Lakhs Thirty Thousand Only) imposed is maintained. The Penalty of Rs. 65,000/- (Rupees Sixty Five Thousand Only) imposed under section 114AA of the Customs Act, 1962 is set aside.

11. Revision application is disposed of on above terms.

Shrawan
12/05/21
(SHRAWAN KUMAR)
Principal Commissioner & ex-officio
Additional Secretary to Government of India

ORDER No. 123/2021-CUS (SZ) /ASRA/

DATED 12.05.2021

To,

1. Shri Mohamed Ariff. S/o Late Mr. Mahamed Jawath, No. 170, Divs Line, Green Pass, Colombo-14, Sri Lanka.

Copy To,

1. The Commissioner of Customs, Kempegowda International Airport, C. R. Building, Queens Road, Bangalore.
2. Sr. P.S. to AS (RA), Mumbai.
3. Guard File.
4. Spare Copy.