

REGISTERED
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. 373/98/B/15-RA/३/१०

Date of Issue 28.06.2021

ORDER NO. 38/2021-CUS (SZ)/ASRA/MUMBAI DATED 07.06.2021 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 Sumesh Nair

Respondent: Commissioner of Central Excise, Customs & Service Tax Calicut.

Subject : Revision Application filed, under Section 129DD of the Customs Act, 1962 against the Order-in-Appeal No. 116/2014-CUS dated 18.11.2014 passed by the Commissioner of Central Excise, Customs & Service Tax (Appeals), Cochin.

ORDER

This revision application has been filed by the Shri Sumesh Nair (herein referred to as Applicant) against the order No. 116/2014-CUS dated 18.11.2014 passed by the Commissioner of Central Excise, Customs & Service Tax (Appeals), Cochin.

2. Briefly stated facts of the case are that the on 05.11.2012 the Officers of Customs intercepted Shri Sumesh Nair at the Calicut International airport. He was intercepted at the exit gate after opting for the green channel. A personal examination resulted in the recovery of gold coins (19gms) and ornaments (104 gms) totally weighing 123 gms valued at Rs. 3,73,097/- (Rupees Three lakhs Seventy Three thousand and Ninety seven).

3. After due process of the law vide Order-In-Original No. 62/2012 dated 20.11.2012 the Original Adjudicating Authority confiscated the gold coins and jewelry, but allowed redemption on payment of Rs. 5,000/- (Rupees Five thousand) and imposed a penalty of Rs. 20,000/- (Rupees Twenty thousand) on the Applicant.

4. Aggrieved by this order the Respondents filed an appeal with the Commissioner of Customs (Appeals), The Commissioner (Appeals) vide his order No. 112/2014-CUS dated 18.11.2014 holding that the redemption fine and penalty was too low increased the redemption fine to Rs. Rs. 75,000/- (Rupees Seventy Five thousand) and also increased penalty to Rs. 50,000/- (Rupees Fifty thousand).

5. Aggrieved with the above order the Applicant has filed this revision application interalia stating that

5.1 the adjudicating authority considering all the facts and the bonafides in this case, fixed the redemption fine at Rs.5,000/- and penalty of

Rs.20,000/-. Even this is not warranted for the following reasons among others. The department filed appeal against this order ground that the penalty imposed by the adjudicating authority is very low considering the value of the goods and gravity of the offence.

5.2 The learned Appellate Authority erred in law and on facts in enhancing the redemption fine to Rs.75,000 and penalty under section 112(a) (b) of the Customs Act 1962 to Rs.50,000 for the following reasons among others:-

5.3 The applicant submits that the learned Appellate Authority has not addressed to their objection with regard to the maintainability of the appeal as the Review Order passed was by the Commissioner after the prescribed period of 3 months as explained below. Hence the impugned order is a non speaking order and the same is liable to be set aside.

5.4 At the outset the applicant submits that the present appeal filed by the department is legally not sustainable for the reason that the Order-in-Original was reviewed by the Commissioner after the prescribed period of 3 months, under section 129 D(3) of the Customs Act 1962.

5.5 The Applicant submits that as per section 129 D (2), of the Custom Act 1962. the Commissioner of Customs of his own motion after examination of decision or an order passed by any subordinate authority to him, if not satisfied to the legality or Proprietary of such decision or order passed by him, then he can order any, customs officer subordinate to him to file an appeal to the Commissioner of Customs (Appeals) against such order. The Order directing to file an appeal has to be passed by the Commissioner within a period of 3 months from the date of communication of the decision or order of the Adjudicating Authority.

5.6 In the instant case the impugned order was passed by the Adjudicating Authority on 05.11.2012. The Review Order was passed by the Commissioner on 17.05.2013, which is beyond the 3 months time limit prescribed in the 129 D(3) of the Customs Act 1962. The Review Order dated 17.05.2013 was communicated to the Commissioner of Customs, Calicut on 20.05.2013, within 3 days, which is evident from column 5 of the Appeal Memorandum (C.A.2) filed by the Department). So one can safely say that the impugned

order dated 05.11.2012 should have been communicated to the Commissioner of Customs, Calicut within a weeks time at the maximum. Therefore, the due date for passing Order by the Committee under 129 D(3) of the Customs Act 1962 i.e. 3 months limit ends on 13.2.2013, whereas the Review Order was passed only on 17.05.2013, beyond the said period of 3 months time limit, which is an invalid order. Hence the present appeal filed by the Revenue is legally not sustainable as it is filed based on an invalid order. Therefore on this ground alone the appeal filed by the department before the Commissioner Appeals was not maintainable and as a result the impugned passed by the learned Appellate authority has no legal legs to stand and may kindly be set aside.

5.7 As explained above, since the learned Appellate Authority has neither considered their submissions in toto nor rendered any finding with regard to the same, the impugned order is a non speaking order and the same is liable to be set side on this ground alone.

5.8 In other words the learned Appellate Authority even though acknowledged their memorandum of cross objections and their submissions during the personal hearing, the impugned order is silent about the applicability or non applicability of the same. This clearly establish their case that the impugned order is a non speaking order and the same is liable to be set aside on this ground also.

5.9 The Hon'ble High Court of Gujarat in the case of Anil Products Ltd. ' Vs. CCE, Ahmedabad — 2010 257 ELT 523 (Guj.) held that the order of the Tribunal ought to have given his specific findings on various submissions made, case laws relied upon and the distinguishing features pointed out by the appellants before the Tribunal. As it does not done, the order was set aside and remanded the matter back for fresh adjudication.

5.10 The Hon'ble Tribunal in the case of Parnikka Harvest Florateh Ltd. Vs. CCE, Hyderabad — 2010(256) ELT 417 held that since the Commissioner has passed the order without meeting the challenge net up by the assessee, it is not sufficient to confirm the demand of the lower authority and it is a non speaking order as it was passed without considering the arguments of the assessee.

5.11 Similarly the hon., Tribunal in the case of Premier Plastics Vs. CCE. Kanpur — 2010 (253). FIT 117 (Tri. Del.) set aside the order of the Commissioner of Appeals as non speaking order for the reason that the Appellate Authority had failed to consider the rival contentions raised in the matter and also not formulated the points which arises for determination. There are no analyses of the materials on record, not the logical conclusions supported by reasons. The findings do not disclose consideration of all the relevant materials on record. Since the Commissioner (Appeals) having failed to do the required exercise, the order cannot be sustained.

5.12 The applicant submits that the learned Adjudicating Authority after considering all the facts and bonafide belief in this case has fixed Redemption fine as Rs.5,000 and imposed penalty of Rs.20,000 even this is not warranted. Such being the case the learned appellate authority without rendering any valid reasons enhanced the redemption fine and penalty, which may kindly be set aside.

5.13 The applicant submits that 67 grams of used necklace and earring cannot be called as import of gold by a passenger. In fact it is a personal belonging of the applicants wife and this cannot be taken as import of gold in baggage by a passenger. After excluding this, what is left out is only 56 grams which consist of gold coins, Thin baby chains, small baby lockets and small baby bracelet which were given as a gift by my relatives and friends in Dubai on the occasion of my son's first Birthday which was on 22-10-2012. The value of these items is Rs.1,39,000/- and the baggage allowance for gold is Rs.50,000/- for a male passenger and Rs.1,00,000/- for female passenger. Since the value of the goods is well within this limit, seizure of goods is unwarranted and legally not sustainable. Your applicant further submit that gold is not a prohibited item and it can be imported as a passenger baggage. Hence the finding of both the lower authorities that it is a prohibited item is legally unsustainable. Hence the goods are not liable for confiscation and as a result neither redemption fine nor any penalty is warranted in the case. Hence on this ground alone the enhanced redemption fine of Rs.75,000 and penalty of Rs.50,000 may kindly be set aside.

5.14 Apart from the above, the applicant submits that the main contention of the department is that to arrest smuggling activities higher penalty has to be imposed and law provides for that. I am employed in Emirates Airlines company and residing in Dubai for the past 30 years and I used to visit India to see my Grand parents and relatives on festive occasions only. I don't have any business interest in India and the total value of the goods in this case is Rs. 1,39,000/-excluding the used necklace and earring. In fact these goods were received as gift on my son's first birth day occasion and not even purchased by me. Hence this cannot be classified as smuggling of goods by any stretch of imagination to seek for higher penalty.

5.15 The learned Appellate Authority simply held that during personal hearing I admitted the carrying of gold and not shown any evidence of willingness not to pay duty. Your applicant carried the impugned goods as a bonafide passenger and as explained above there was no intention to evade any duty. The learned Appellate Authority also admits that the adjudicating authority has the discretion to extend the option of paying fine in view of confiscation which he thinks fit. Merely the goods are confiscated it is not necessary that the fine should be pro-rata to the value of the goods. The Adjudicating Authority being a quasi judicial authority can decide the quantum of fine depending upon the facts and circumstances of each Case. In this case considering the bonafide nature of the passenger he has fixed redemption fine as Rs.5,000 and penalty of Rs.20,000 in addition to collection of duty. Hence it is prayed that the impugned order enhancing the fine and penalty may kindly be set aside.

5.16 Without prejudice to the above your applicant submit that even if the goods are liable for confiscation, then the redemption fine and penalty fixed by the Adjudicating Authority is normal and which cannot be questioned now by the Department merely for the reasons the law provides for imposition of higher fine and penalty. It is pertinent to note here that it is not mandatory to impose higher penalty in all cases and the law provides for non imposition or imposition of lesser redemption fine and penalty after taking into consideration of mensrea and facts and circumstances of each and every case, in the instant case there is no mensrea on my part to import any gold

or to evade any tax. Hence the redemption fine and penalty fixed by the adjudicating authority need not be enhanced.

5.17 The Applicant cited case laws in favour of his case and prayed that the fine and penalty enhanced by the appellate authority may kindly be set aside and allow the appeal, or pass any such order or further orders, as the learned Joint Secretary may deemed fit and proper in the facts and circumstances of the case.

8. Accordingly personal hearings in the case were scheduled on 09.03.2021. Shri M. Saravanan, Advocate, attended the hearing on behalf of the Applicant. He reiterated his earlier submissions and submitted that the Commissioner (Appeals) did not consider their contention of Department (Appeal) being time barred. He requested for reduction of the redemption fine and penalty. Nobody attended the hearing on behalf of the Respondents.

9. Government has gone through the facts of the case. In addressing the issue of timebarr Government observes that the Section 128 of the Customs Act, 1962 ie Appeals to [Commissioner (Appeals)]. - states “ *(1) Any person aggrieved by any decision or order passed under this Act by an officer of customs lower in rank than a [Principal Commissioner of Customs or Commissioner of Customs] may appeal to the [Commissioner (Appeals)] [within sixty days] from the date of the communication to him of such decision or order*”. The time limit in section 128 of the of the Customs Act, 1962 is from the date of receipt of the Adjudication order by the review committee. The issue of the review being timebarred has been alleged on the assumption that, the order of the adjudicating authority should have reached the review office within one week. The section clearly mentions “sixty days from the date of communication of such decision”. Hence, the date of communication of the adjudication order is the date from which the limit of three months are to be calculated. In its absence, the Appeal cannot be held as timebarred.


10. The Government has gone through the case records. It is observed that the Applicant did not declare the gold as required under section 77 of the Customs,

Act, 1962 and had opted for the green channel. Therefore the confiscation of the gold is justified. Even though the Applicant has claimed that the gold was brought as a gift it should have been declared to the authorities. Once the gold is held liable for confiscation, the misdemeanor/ transgression of the passenger is held as confirmed and therefore the imposition of fine in lieu of confiscation becomes mandatory and leads to imposition of personal penalty on the passenger.

11. The Applicant has prayed for reducing the redemption fine and penalty. The gold bars totally weigh totally weighing 123 gms valued at Rs. 3,73,097 / - (Rupees Three lakhs Seventy Three thousand and Ninety seven). The redemption fine imposed has been increased to Rs. 75,000/- (Rupees Seventy five thousand) and the penalty imposed is Rs. 50,000/- (Rupees Fifty thousand). Considering the misdemeanor in the case Government observes that the fine and penalty imposed is reasonable and appropriate. The order of the Appellate authority is therefore required to be upheld.

12. In view of the above Revision Application does not survive on merits. Revision application is therefore liable to be dismissed.

13. Revision application is accordingly dismissed.


 7/6/21
 (SHRAWAN KUMAR)
 Principal Commissioner & ex-officio
 Additional Secretary to Government of India

ORDER No. 132/2021-CUS (SZ) /ASRA/

DATED 07.06.2021

To,

1. Shri Sumesh Nair, Ragasudha Chinmaya, Nagar Melemuri, Palakkad.
2. The Commissioner of CGST & Customs, Calicut International Airport, Mallapuram District, 673647.

Copy to:

1. Sree Gopal & Co., Chartered Accountants, Old No. 74, New No. 93, Satyanmurty, Ramnagar, Coimbatore - 641 009.
2. Sr. P.S. to AS (RA), Mumbai.
3. Guard File.
4. Spare Copy.