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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. 371/35/B/2018-RA
F.No. 380/23/B/WZ/2018-RA/880

Date of Issue : 03.02.2023

ORDER NO. ¹⁷⁹⁻¹⁸⁰ /2023-CUS (WZ)/ASRA/MUMBAI DATED 03.02.2023
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.

(i). F.No. 371/35/B/2019-RA

Applicant : Shri. Salifou Salissou
Respondent-Dept : Commissioner of Customs (Airport), CSI, Mumbai

(ii). F.No. 380/23/B/WZ/2019-RA

Applicant-Dept : Commissioner of Customs (Airport), CSI, Mumbai.

Respondent-Applicant : Shri. Salifou Salissou

Subject : Order-in-Appeal Airport No. MUM-CUSTM-PAX-APP-
865/2018-19 dated 21.12.2018 [F.No.S/49-276/2016]
passed by the Commissioner of Customs (Appeals),
Mumbai-III

ORDER

These two revision applications have been filed by (i). Shri. Salifou Salissou, (hereinafter referred to as the Applicant or also as Respondent-Applicant.) and (ii). Commissioner of Customs (Airport), CSI Airport, Mumbai (hereinafter referred to as the Respondent-dept. or Applicant-department) against the Order in Appeal No. MUM-CUSTOM-PAX-APP-865/18-19 dated 18.05.2018 [F.No.S/49-276/2016] passed by the Commissioner of Customs (Appeals), Mumbai-III.

2. Brief facts of the case are that on 19.06.2014, the applicant Mr Salifou Salissou holding Nigerian passport no. O7PC76908, arrived at CSI Airport, Mumbai from Addis Ababa by Ethiopian Airways flight No. ET-610 / 18.06.2014. On suspicion, the Customs AIU officers intercepted the applicant near the exit gate after he had cleared himself through the Green channel. To query put forth to him for possession of any dutiable items, he had replied in the negative. Not satisfied with the reply, it was decided to check the applicant's baggage and also search in person. The applicant was asked to pass through the Metal Door frame which gave indication that some metal was concealed on his person. Personal search of the applicant resulted into the recovery of assorted gold jewellery, yellow metal strip and one metal bar of gold totally weighing 4094 gms of gold (80% purity as per valuer's report dtd. 10.10.2014) and valued at Rs. 80,56,418/-, the said gold was kept in four white transparent packets which were concealed in the cloth waist belt tied to his waist. The same was seized by the officers in the reasonable belief that the same was smuggled into India in a clandestine manner in contravention of the provisions of the Customs act, 1962.

5. Aggrieved with the above order, the Applicant filed this revision application (no 371/35/B/2019-RA) on the following grounds;

- 5.1. that the impugned order passed by the appellate authority was bad in law and was unjust.
- 5.2. that the impugned order was passed without giving due consideration to the documents on record and facts of the case.
- 5.3. that the original adjudicating authority ought to have appreciated that the dutiable goods brought by the applicant were neither restricted nor prohibited.
- 5.4. that the goods had been brought for the first time and that there was no case previously registered against the applicant.
- 5.5. that the original adjudicating authority was required to impose redemption fine under Section 125 of the Customs Act, 1962 to the extent of difference between CIF and market value to wipe out margin of profit.
- 5.6. that the department had not given any local market value of the goods and in the absence of the same, the margin of profit cannot be ascertained and therefore the heavy fine and personal penalty was totally unjustified.

Under the circumstances of the case, the applicant prayed to set aside the AA's Order in as much as to reduce the redemption fine and penalty imposed.

6. Aggrieved with the order passed by the appellate authority, the applicant - department has filed Revision application (F.No. 380/23/B/WZ/2019-RA) and the grounds of revision are as under;

6.1. that the order passed by the appellate authority was not legal and proper

6.2. That the Respondent-applicant had admitted knowledge, possession, concealment, carriage, non-declaration and recovery of the impugned gold; and that he had purchased the impugned gold from various people at his aforesaid shop; that he brought the gold into India to sell the same in India and that he wanted to use the sale proceeds to buy imitation jewellery, veterinary drugs and textiles from India; that he had concealed the gold and did not declare the same to Customs to evade the Customs Duty.

6.3 The Respondent-applicant being a tourist of foreign origin is governed by Rule 7 read with Appendix E of the Baggage Rules, 1998 and is allowed to bring in used personal effects only. The impugned gold cannot be taken as bonafide baggage and their import is in violation of para 2.20 of Foreign Trade Policy (2009-2014) and as per Rule 7 of the Baggage Rule read with Appendix - E, a foreign national cannot import gold, and the Respondent-applicant also did not declare its possession for payment of duty as required under Section 77 of the Customs Act, 1962.

6.4 As per the provisions of Section 80 of Custom Act 1962, where the baggage of a passenger contains any article which is dutiable or the import of which is prohibited and in respect of which a true deceleration has been made under section 77 ibid, the proper officer may, at the request of the passenger, detain such article for purpose of being returned to him on his leaving India. In this case, the passenger has not declared the same on his arrival, therefore Commissioner (Appeals)'s order allowing to re-export the goods is not proper.

6.5 The Commissioner (Appeals) referred to a number of judgments which does not apply in the instant case as the Respondent-applicant in this case is a foreign national who is not entitled to import gold.

6.6 The Commissioner (Appeals) has also erred in granting the re-export of seized gold by imposing Redemption Fine under Section 125 of the Customs Act, 1962.

6.7 that the applicant department relies on the following case laws:

a) Hon'ble Supreme Court's judgment in the case of Om Prakash Bhatia Vs Commissioner of Customs, Delhi (2003(155)ELT 423 (S.C.) is squarely applicable in this case

b) Judgement of the Hon'ble High Court of Madras in case of Aiyakannu v/s. Joint Commissioner of Customs reported as 2012(281) ELT 223 (Mad.)

c) Judgement of Hon'ble Madras High Court in case of Commissioner of Customs (AIR), Chennai-1, v/s Samyanthan Murugesan reported as 2009(247)ELT 21 (Mad.).

6.8 That regarding the redemption fine and penalty the applicant department submitted that it shall depend on the facts and circumstances of the case and other cases cannot be binding as a precedent. In support of this contention, I refer to the judgment of Hon'ble Delhi High Court in the case of Jain Exports Vs Union of India 1987(29) ELT753.

The applicant – department has prayed that the order of the appellate authority be set aside and that the order-in-original passed by the original adjudicating authority be upheld.

7. Personal hearing in the case in the online video conferencing mode was scheduled for 10.11.2022. Shri. N.J Heera, Advocate for the applicant appeared on 10.11.2022 and submitted that Commissioner Appeal has passed legal and correct order, but requested for reducing Redemption fine and penalty. The advocate submitted Reply dated 7.11.2022 to the Revision Application filed by the department alongwith citation requesting to reject the revision application and uphold the AA's order

8. The Government has gone through the facts of the case, and notes that the applicant had been granted an opportunity to declare the goods in his possession. However, he chose not to do so. The Applicant had used a very ingenious method to smuggle the gold into the country. The gold was concealed in a cloth waist belt tied to his waist. He admitted that he had concealed the gold and did not declare the same to Customs to evade the Customs Duty. But for the alertness of the staff of Customs, the gold would have escaped detection. The quantum of gold indicates that the same was for commercial use. The applicant in his statement to the department has also admitted that he brought the gold into India to sell the same in India. The Applicant did not declare the gold as required under section 77 of the Customs Act, 1962. The quantity of gold recovered was ingeniously concealed to avoid detection. This clearly reveals the intention of the applicant to ingeniously smuggle the gold. The applicant had adopted an ingenious concealment to hoodwink the Customs and evade payment of Customs duty. The act committed by the applicant was pre-meditated, well-planned and conscious. The Government finds that the confiscation of the gold is therefore justified.

9. The Hon'ble High Court Of Madras, in the case of Commissioner Of Customs (Air), Chennai-I V/s P. Sinnasamy reported in 2016 (344) E.L.T. 1154 (Mad.), relying on the judgment of the Apex Court in the case of Om Prakash Bhatia v. Commissioner of Customs, Delhi reported in 2003 (155) E.L.T. 423 (S.C.), has held that “ *if there is any prohibition of import or export of goods under the Act or any other law for the time being in force, it would be considered to be prohibited goods; and (b) this would not include any such goods in respect of which the conditions, subject to which the goods are imported or exported, have been complied with. This would mean that if the conditions prescribed for import or export of goods are not complied with, it would be considered to be prohibited goods. Hence, prohibition of importation or exportation*

could be subject to certain prescribed conditions to be fulfilled before or after clearance of goods. If conditions are not fulfilled, it may amount to prohibited goods.” It is thus clear that gold, may not be one of the enumerated goods, as prohibited goods, still, if the conditions for such import are not complied with, then import of gold, would squarely fall under the definition, “prohibited goods”.

10. Further, in para 47 of the said case the Hon’ble High Court has observed *”Smuggling in relation to any goods is forbidden and totally prohibited. Failure to check the goods on the arrival at the customs station and payment of duty at the rate prescribed, would fall under the second limb of section 112(a) of the Act, which states omission to do any act, which act or omission, would render such goods liable for confiscation.....”*. Thus failure to declare the goods and failure to comply with the prescribed conditions has made the impugned gold “prohibited” and therefore liable for confiscation and the Applicants thus liable for penalty.

11. Hon’ble Supreme Court in case of M/s. Raj Grow Impex [CIVIL APPEAL NO(s). 2217-2218 of 2021 Arising out of SLP(C) Nos. 14633-14634 of 2020 – Order dated 17.06.2021] has laid down the conditions and circumstances under which such discretion can be used. The same are reproduced below.

71. Thus, when it comes to discretion, the exercise thereof has to be guided by law; has to be according to the rules of reason and justice; and has to be based on the relevant considerations. The exercise of discretion is essentially the discernment of what is right and proper; and such discernment is the critical and cautious judgment of what is correct and proper by differentiating between shadow and substance as also between equity and pretence. A holder of public office, when exercising discretion conferred by the statute, has to ensure that such exercise is in furtherance of accomplishment of the purpose underlying conferment of such power. The requirements of reasonableness, rationality, impartiality, fairness and equity are inherent in any

exercise of discretion; such an exercise can never be according to the private opinion.

71.1. It is hardly of any debate that discretion has to be exercised judiciously and, for that matter, all the facts and all the relevant surrounding factors as also the implication of exercise of discretion either way have to be properly weighed and a balanced decision is required to be taken.

12. Government observes that the quantum of gold was large weighing 4094 grams, of commercial quantity which indicates that the same was for commercial use. An option to declare the goods in his possession was granted to the applicant, but he chose not to disclose it. The applicant had made a firm mind to smuggle the gold into the country. The action and demeanor indicate that the act of the applicant was pre-meditated, conscious and having full knowledge. It has been categorically admitted by the applicant that he had brought the gold to sell in India. Though he claimed to be the owner of the gold, he could not produce any documents to substantiate the said claim.

13. The main issue in the case is the manner and quantum of the impugned gold which was attempted to be brought into the Country. The option to allow redemption of seized goods is the discretionary power of the adjudicating authority depending on the facts of each case and after examining the merits. In the present case, the manner of concealment being conscious with clear intent, quantity being large and commercial, this being a clear attempt to smuggle the gold, is a fit case for absolute confiscation as a deterrent to such offenders. Thus, taking into account the facts on record and the gravity of offence, the adjudicating authority had rightly ordered the absolute confiscation of the gold. But for the intuition and the diligence of the Customs Officer, the gold would have passed undetected. The redemption of the gold

will encourage non bonafide and unscrupulous elements to resort to concealment and bring gold. If the gold is not detected by the Custom authorities, the passenger gets away with smuggling and if not, he has the option of redeeming the gold. Such acts of mis-using the liberalized facilitation process should be meted out with exemplary punishment and the deterrent side of law for which such provisions are made in law needs to be invoked. The absolute confiscation of the gold would act as a deterrent against such persons who indulge in such acts with impunity. Therefore, the order passed by the appellate authority is liable to be set aside and the order passed by the original adjudicating authority is liable to be upheld.

14. The Applicant-department has pleaded for setting aside the redemption granted to the applicant and the applicant has pleaded to reduce the redemption fine and penalty imposed by the Appellate Authority. On considering the quantity of the gold, manner of ingenious concealment and clear attempt to smuggle gold, plea of the applicant does not deserve consideration. The Government, keeping in mind the facts of the case is in agreement with the plea of the department and finds that redemption allowed on the impugned goods by the AA is not proper and judicious. For the aforesaid reasons, the Government sets aside the order passed by the AA in respect of the redemption allowed and maintains the OAA's Order of absolute confiscation of the gold.

15. With regard to the penalty imposed on the applicant under Section 112(a) of the Customs Act, 1962, Government finds that the AA has held that the same commensurates with the omissions and commissions committed by the applicant and hence does not find any reason to interfere in the matter.

16. In view of the above, the Government sets aside the order passed by the appellate authority in respect of allowing the redemption of gold. The impugned

gold i.e assorted gold jewellery, yellow metal strip and one metal bar of gold totally weighing 4094 gms of gold and valued at Rs. 80,56,418/- are absolutely confiscated.

17. For the aforesaid reasons, Government rejects the Revision Application i.e. F.No. 371/35/B/2019-RA filed by the applicant and allows the Revision Application F.No. 380/23/B/WZ/2019-RA filed by the applicant-department.

18. The Revision Applications are accordingly disposed off.


(SHRAWAN KUMAR)

Principal Commissioner & ex-officio
Additional Secretary to Government of India

ORDER No. 179-180/2023-CUS (WZ) /ASRA/

DATED 03.02.2023

To,

1. Shri. Salifou Salissou C/o Shri N.J. Heera, Advocate, Nulwala Building, 41, Mint road, Opp G.P.O., Fort, Mumbai- 400001..
2. The Pr. Commissioner of Customs, C.S.I Airport, Terminal 2, Level-II, Sahar, Andheri (East), Mumbai 400 099.
3. The Commissioner of Customs (Appeals), Mumbai-III, 5th Floor, Avas Corporate Point, Makwana Lane, Behind S.M.Centre, Andheri Kurla Road, Andheri (East), Mumbai 400 059.

Copy To,

1. Shri N.J. Heera, Advocate, Nulwala Building, 41, Mint road, Opp G.P.O., Fort, Mumbai- 400001.
2. Sr. P.S. to AS (RA), Mumbai.
3. File Copy.
4. Notice Board.