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

F.No. 380/38/B/WZ/2018-RA / 4197

Date of Issue 12.08.2021

ORDER NO. 182/2021-CUS (WZ)/ASRA/MUMBAI DATED 30.07.2021 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 : Pr. Commissioner of Customs, Mumbai.

Respondent : Shri Wajid Abdul Latif Naik

Subject : Revision Application filed, under Section 129DD of the Customs Act, 1962 against the Order-in-Appeal No. MUM-CUSTM-PAX-APP—62/17-18 dated 27.04.2018. passed by the Commissioner of Customs (Appeals), Mumbai-III.

ORDER

This revision application has been filed by The Pr. Commissioner of Customs Mumbai (herein after referred to as the Applicant department) against the Order in appeal No. MUM-CUSTM-PAX-APP-62/ 17-18 dated 27.04.2018 passed by the Commissioner of Customs (Appeals), Mumbai-III.

2. Briefly stated the facts of the case are that the Respondent, Shri Wajid Abdul Latif Naik arrived from Dubai on 01.01.2017. The officers of Air Intelligence of Customs intercepted him at the exit gate after he had cleared himself through the green channel. During the examination of his baggage the officers recovered 8 cut pieces of gold weighing 232 grams totally valued at Rs. 5,92,476/- (Rupees Five lakhs Ninety two Thousand and Four hundred and seventy six). The gold bits were concealed in the plastic coating outside each of the four rotating wheels of the trolley bag brought by the respondent.

3. The Original Adjudicating Authority vide Order-In-Original No. ADC/RR/ADJN/521/2016-17 dated 22.02.2017 ordered absolute confiscation of the impugned gold collectively weighing 232 grams , and imposed penalty of Rs. 60,000/- (Rupees Sixty thousand) under section 112 (a) and (b) of the Customs Act, 1962 on Applicant.

4. Aggrieved by the said order, the applicant filed appeal before the Commissioner (Appeals) who vide Order-In-Appeal No. MUM-CUSTM-PAX-APP—62/ 17-18 dated 27.04.2018. The Appellate Authority set aside absolute confiscation and allowed the gold to be redeemed on payment of a redemption fine of Rs. 1,05,000/- (Rupees One lakh Five thousand). The penalty of Rs. 60,000/- (Rupees Sixty thousand) imposed under Section 112 (a) & (b) of the Customs Act, 1962 was upheld.

5. Aggrieved with the above order the Applicant department has filed this revision application interalia on the grounds that;

5.1 The passenger was found in possession of 8 gold pieces each concealed in the plastic coating of each rotating wheel of the trolley bags in

his possession. The passenger had opted for the green channel for clearance without declaring the aforesaid items in his possession. Therefore the manner of recovery of gold clearly indicating that the concealment was not only ingenious but also premeditated. The passenger admitted to knowledge, possession carriage and non-declaration of the gold.

5.2 It is an admitted fact brought out in the O-in-O that the passenger had failed to make a true declaration of the contents of the goods imported by him in terms of value as well as quantity in his baggage as required under section 77 of the Customs Acts 1962. It is therefore evident that by attempting to clear the 8 rectangular gold pieces each concealed inside the plastic coating on each rotating wheel or the trolley bags without declaring the same was with the mala fide intention to evade customs duty and the passenger had attempted to smuggle the same in contravention to the aforesaid legal provisions of the Customs Act, 1962.

5.3 The option to redeem the seized goods under Section 125 of the Customs Act, 1962 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 clever and ingenious is a fit case for absolute confiscation as a deterrent to passengers mis-using the facility of Green channel. Thus, taking into accounts the facts on record and the gravity of the offence. the lower authority had rightly ordered the absolute confiscation of the impugned 8 rectangular gold pieces. The subject gold was detected only after he was intercepted by AIU and detailed search of his baggage was conducted. The manner in which gold was imported showed his criminal bent of mind and clear intention to evade duty and smuggle the same into India. 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 need to be invoked. Hence the Commissioner Appeal ought not to have allowed redemption of the impugned gold as the same should have been confiscated absolutely.

5.5 It is also pertinent to mention here that the redemption fine and penalty shall depend on the facts and circumstances and other cases cannot be binding as a precedent. The findings of the original authority,

who has first-hand knowledge and is in a position to assess the facts and the credibility of circumstances from his own observation cannot be unmindfully set aside. If the original authority has acted bonafide through a speaking order, which is not illogical or suffers from procedural impropriety, the appellate authority should not take a contrary view on the same issue as held in plethora of judicial pronouncements.

5.6 The Applicant department submitted case laws in support of their case and prayed that the order in Appeal passed by the Commissioner of Customs (Appeals), CSI Airport, Mumbai-III, may be set aside and the order in original upheld and/or any other order as deemed fit and proper.

6. Personal hearings in the case were scheduled on 10.12.2020, 17.12.2020, 24.12.2020 and 29.01.2021. Shri Sudhir Kumar Assistant Commissioner, attended the said hearing online on behalf of the Applicant department. He reiterated the points made in the written submissions and prayed that the order of the adjudicating authority be maintained. Nobody attended the hearing on behalf of the Respondent.

7. The Government has gone through the facts of the case, The officers of Air Intelligence Customs conducted a detailed examination of the Respondent's baggage, which resulted in the recovery of 8 cut pieces of gold weighing 232 grams. The gold bits were concealed in the plastic coating outside each of the four rotating wheels of the trolley bag brought by the respondent. The facts regarding the interception and subsequent detection are not in dispute. The respondent did not file any declaration as required under section 77 of the Customs Act, 1962 and was intercepted at the exit after he had cleared himself through the green channel.

8. The original adjudicating authority in its order dated 27.10.2017 ordered absolute confiscation of the impugned gold as the impugned gold bits were ingenuously concealed in the wheels of the trolley bags so as to hoodwink the Customs officers. The Appellate authority has allowed redemption of the gold contending that "*I find that that the prohibition relates to two types of goods, one which cannot be imported by any one, such as arms, ammunition, addictive substance viz. Narcotic Drugs, wild life products etc which are categorised as 'prohibited goods'. The other category includes the goods the import/export of*

which is allowed subject to fulfilment of certain condition and if the conditions are complied with, such goods will not fall in the category of 'Prohibited Goods'." Accordingly, the intention behind the provisions of Section 125 is clear that import of such goods (which are prohibited in absolute terms) under any circumstances would cause danger to the health, welfare or morals of people as a whole and therefore the discretion should not be exercised. Second category includes the goods, the import/export of which is permitted subject to certain conditions or to certain category of persons and which are ordered to be confiscated for the reason that the condition has not been complied with, such goods will not fall in the category of "Prohibited goods". It is an admitted fact that the import of gold is allowed in case of certain category of persons subject to certain conditions. No permission or license from any Govt. agency or Reserve Bank of India is required for entitled persons to bring in Gold."

9. However, Government notes 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". The Honble Apex Court in the case of Sheikh Mohd. Omer V/s Collector of Customs, Calcutta and others, reported in 1983 (13) ELT 1439 (S.C.) has also held that, "*..... any goods which are imported or attempted to be imported contrary to "any prohibition imposed by any law for the time being in force in this country" is liable to be*

confiscated. "Any prohibition" referred to in that section applies to every type of "prohibition". That prohibition may be complete or partial. Any restriction on import or export is to an extent a prohibition. The expression "any prohibition" in Section 111(d) of the Customs Act, 1962 includes restrictions.". Therefore this contention of the Appellate authority is not based on correct appreciation of law as held by the Apex court and High Courts.

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 Respondent thus liable for penalty.

11. The Appellate authority has quoted the Apex Court in the case of Om Prakash Bhatia Vs Commissioner of Customs, Delhi [2003 (155) E.L.T. 423 (SC)], to buttress the argument, that the Apex Court judgement has not given any findings to the effect that *"such cases warrant absolute confiscation for violating any condition of import or export nor limited the scope of section 125 of the Customs Act, 1962, for allowing redemption of the offending goods"*. Government however notes that in the same judgement the Hon'ble Supreme Court observes that in matter of quasi-judicial discretion, interference by the Appellate Authority would be justified only if the lower authority's decision was illogical or suffers from procedural impropriety. In a recent judgement, the Hon'ble Apex Court in the case of UOI V/s M/s. Raj Grow Impex & ORS, has defined the principles of discretion 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 as such discernment is the critical and cautious judgment of what is correct and proper by differentiating between shadow and substance as also between pretense. 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."*

12. The original adjudicating authority has taken an informed decision of confiscating the subject goods absolutely using this discretion. The Appellate authority cannot be unmindful of the great weight to be attached to the findings of the original authority, who has first-hand knowledge and is in a position to assess the facts and the credibility of circumstances. The impugned Order in Original does not suffer from any such vice and therefore Commissioner (Appeals) should not have allowed redemption of the subject gold.

13. The Appellate Authority also states “*coming to the merits of the present case I find that there is no material in any form or finding in the order that the passenger was acting as carrier for somebody else and/ or the gold did not belong to him. I find that the adjudicating authority has absolutely confiscated the gold treating it as ingenious concealment. But as far as the scope of section 125 is concerned, it is independent of manner of carrying the offending goods and there are no conditions attached to the discretion of allowing redemption which could have an overriding effect while interpreting the scope of section 125 of Customs Act, 1962.*” Government however opines that the ownership of the gold does not give the owner to conceal the gold in such a manner and attempt to smuggle it. The manner in which the gold was concealed i.e. as gold bits inside the baggage wheels of the trolley bags, reveals the intention of the respondent. It also revealed his clear intention to evade duty and smuggle the gold into India. Further, the passenger opted for the green channel. Had the passenger not been intercepted he would have escaped the law. These circumstances of the case and the clear intention of the Appellant was not at all considered by the Appellate Authority while giving him option to redeem the seized goods on payment of fine and penalty.

14. Further, the ownership of the impugned gold or whether the Respondent was acting as a carrier would be a factor for allowing redemption of the gold, only when the gold was not ingeniously concealed or when the passenger inadvertently fails to declare the gold. But when an concerted attempt has been made to import the goods in such an ingenious manner gold merits absolute confiscation. The Order of the Original adjudicating authority clearly indicates that the fact of ingenious concealment of the gold weighed in the mind of the Original adjudicating authority in not allowing redemption of the gold.

15. Government therefore concludes that the manner in which the impugned gold was being brought into the Country is a relevant factor. 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 clever and ingenious is a fit case for absolute confiscation as a deterrent to passengers misusing the facility of green channel. In support of this contention, the judgment of Hon'ble Delhi High Court in the case of Jain Exports Vs Union of India 1987(29) ELT753 is relevant wherein the Hon'ble High Court has observed that, "*the resort to Section 125 of the C.A. 1962, to impose fine in lieu of confiscation cannot be so exercised as to give a bonanza or profit for an illegal transaction of imports.*". Allowing the redemption of the gold brought in such manner, will encourage such concealment as, the passenger gets possession of the gold either way, i.e. when the gold is not detected by the Custom authorities the passenger gets away with smuggling and if it is caught he has the option of redeeming the gold. Therefore, such acts of mis-using the liberalized facilitation process should be meted out with exemplary punishment. The impugned gold therefore merits absolute confiscation. The order of the Appellate authority is therefore liable to be set aside.

16. In view of the above the Government sets aside the Order of the Appellate authority. The order of the Original Adjudicating Authority is upheld.

Shrawan
30/7/21
(SHRAWAN KUMAR)

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

ORDER No 182/2021-CUS (WZ) /ASRA/Mumbai

DATED 30.07.2021

To,

1. The Pr. Commissioner of Customs, CSI Airport, Sahar, Mumbai.
2. Shri. Wajid Abdul Latif Naik, Bldg. No. 100/C, R.M.13, Haji Allan Chawl, Victoria Road, S.S.Marg, Mustafa Bazar, Mazgaon, Mumbai- 400 010.

Copy to:

1. Sr. P.S. to AS (RA), Mumbai.
2. Guard File. ,
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