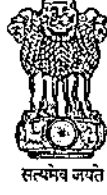


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GOVERNMENT OF INDIA
MINISTRY OF FINANCE
(DEPARTMENT OF REVENUE)

8th Floor, World Trade Centre, Centre – I, Cuffe Parade,
Mumbai-400 005

F.No. 373/214/B/SZ/2018-RA/1561 : Date of Issue : 20/05/2022

ORDER NO. 184/2022-CUS (WZ/SZ)/ASRA/MUMBAI DATED 17.05.2022
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. 373/214/B/SZ/2018-RA

Applicant : Shri. Uvaraj

Respondent : Commissioner of Customs, No. 1 Williams Road,
Cantonment, Tiruchirappalli - 620 001.

Subject : Revision Application filed, under Section 129DD of the
Customs Act, 1962 against the Orders-in-
Appeal No. TCP-CUS-000-APP-118-18 dated 31.07.2018
[A.No. C24/07/2018-TRY(CUS)] passed by the
Commissioner of GST, Service Tax & C.Ex, Trichirappalli
- Pin : 620 001.

ORDER

The revision application has been filed by Shri. Uvaraj (hereinafter referred to as the Applicant) against the Order-in-Appeal No. TCP-CUS-000-APP-118-18 dated 31.07.2018 [A No. C24/07/2018-TRY (CUS)] passed by the Commissioner of GST, Service Tax & C.Ex, Trichirappalli – Pin : 620 001.

2. Brief facts of the case are that the applicant who is a Sri Lankan national was intercepted by Customs Officers at Coimbatore International Airport on 16.11.2017 having arrived from Colombo on board Sri Lankan Airlines Flight no. UL193. The applicant to the query put forth by the Customs, had replied that he was not in possession of any dutiable / contraband items. Personal search led to the recovery of two gold rings and one gold rod found concealed on his person. The total weight of the recovered gold was 108.8 grams of 24 carats purity and valued at Rs. 3,31,840/- and since it was found that the applicant was not eligible to import gold, the same was detained. The issuance of the show cause notice was waived at the instance of the applicant.

3. The Original Adjudicating Authority (OAA), viz, Asstt. Commissioner of Customs, International Airport, Peelamedu, Coimbatore – 641 014 vide Order-In-Original No. C.No. VIII/10/46/2017-Air Cus dated 16.11.2017 ordered for absolute confiscation of the impugned gold valued at Rs. 3,31,840/- under Section 111 (d), (e), (l), (m) & (o) of the Customs Act, 1962 and imposed a penalty of Rs. 34,000/- under Section 112 (a) of the Customs Act, 1962 on the applicant

4. Aggrieved by the said order, the applicant preferred an appeal before the appellate authority (AA) viz, Commissioner of GST, Service Tax & C.Ex, Trichirappalli – Pin : 620 001 who vide Order-In-Appeal No. TCP-CUS-000-

APP-118-18 dated 31.07.2018 [A. No. C24 / 07 / 2018 – TRY (CUS)], rejected the appeal and upheld the Order passed by the OAA.

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

5.01. the order of the Commissioner (Appeals) is against law, weight of evidence and circumstances and probabilities of the case;

5.02. that the Appellate authority has simply glossed over the judgements and the points raised in the appeal grounds and no cogent reason has been given to reject the Appeal;

5.03. that impugned gold belongs to the applicant and he had worn it and it was his personal belonging; that ownership of the gold was not disputed and there was no ingenious concealment; that the two rings were worn by the applicant and gold had been purchased out of his own earnings / savings.

5.04. that baggage rules would apply only if goods are found in the baggage, since the Applicant was wearing the gold, the violation of baggage rules did not arise;

5.05. that there was no specific allegation that the applicant had passed through green channel and only contention of department was that the applicant had not declared the gold.

5.06. that the contention of the department of non declaration of the gold as per Section 77 of the Customs Act, 1962 is refuted as not applicable since the gold was worn by the applicant there was no necessity to declare the same since it was his personal belongings.

5.07. applicant has relied upon the following case laws;

(i). Vigneswaran Sethuraman vs UOI in W.P. 6281 of 2014 (I) dated 12.03.2014.

(ii). Shri. Hamsa Mohideen Mohammed Shajahan, a Sri Lankan national in F.No. C27/243, 252 & 255/Air/2013 AU CUS in O.S No. 370, 349, 364/2013 dated 18.12.2014 passed by Commissioner (Appeals), Cochin, Kerala.

(iii). Smt. Kamaleshwari in Order no. C4-1/35/0/2017 in C.Cus No. 68 of 2017 dated 04.04.2017 passed by Commissioner of Customs (Appeals), Chennai.

5.08: that the personal penalty of Rs. 34,000/- imposed on applicant was very high and requested for reduction.

Under the above facts and circumstances of the case, the Applicant has prayed that the Revision Authority be pleased to set aside the impugned order and permit to re-export the gold jewellery on payment of nominal fine and penalty and render justice.

6(a). Personal hearing through the online video conferencing mode was scheduled for 23.03.2022 and 30.03.2022. Smt. Kamalamalar Palanikumar, Advocate for the applicant appeared for physical hearing and submitted a written submission. She submitted that the applicant is a Sri Lankan and had come with a minor quantity of gold jewellery. She requested for allowing re-export of gold jewellery with nominal RF and penalty.

6(b). In the written submission dated 30.03.2022 handed over during the personal hearing, Smt. Kamalamalar Palanikumar reiterated the submissions made in the grounds of appeals and relied upon some more case laws viz,

(i). that CESTAT Bangalore has passed an order in C/21257/2018-S.M. dated 01.01.2019- Final Order No. 20020-20021/2019- Smt. Abitha Tahillainathan & Smt. Kirthucase Mary Thawarnani v/s. Commissioner of Customs, Cochin, Kerala, too has passed an order to re-export the gold jewellery citing that gold jewellery recovered from person is personal belonging and the same is not covered under the baggage rules.

(ii). JS (RA) Mumbai in Order no. 65/2020-CUS(SZ) ASRA/Mumbai dated 26.05.2020 in F.NO. 380/58/B/15-RA/3693 held that gold recovered from a pouch kept in the pocket of kurta worn by respondent cannot be termed as ingenious concealment.

(iii). That in O-i-O no. 161 to 164 dated 10.03.2012, Sri Lankan nationals viz(i). Mohamed Ansar, (ii). H.M Naushad, (iii). Seiyed Faizan Mohamed, (iv).Mohamed Rafeek and (v). Imtiyas Mohammed, the Commissioner of Customs(Appeals) had released the gold on payment of redemption fine; that RevisionAuthority, New Delhi had confirmed these order dated 31.07.2012.

6(c). She has reiterated her prayer that the Revisionary Authority may be pleased to set aside the impugned order passed by the AA and permit the applicant to re-export the gold jewellery

7. The Government has gone through the facts of the case and notes that the applicant had failed to declare the goods in his possession as required under Section 77 of the Customs Act, 1962. Even upon being questioned, the applicant had not disclosed that he was carrying dutiable goods and had he not been intercepted would have walked away with the impugned gold rings and rod without declaring the same to Customs. By his actions, it was clear that the applicant had no intention to declare the impugned gold to Customs and pay Customs duty on it. The Government finds that the confiscation of the gold jewellery is therefore justified.

8. The Government notes that the quantum of gold recovered from the applicant is very small. There is no case made out that the concealment was ingenious or that the applicant is a repeat offender. Thus, this case can be termed as a case on non-declaration of gold rather than smuggling of gold. The demeanor of the applicant is required to be considered while confiscating the gold and imposing penalty. Considering the facts on record and the persistent prayer of the applicant that being a foreign national he be permitted to re-export the gold, the Government is inclined to accede to his prayer.

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 applicant thus, liable for penalty.

11. Section 125 provides discretion to consider release of goods on redemption fine. 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 even in prohibited goods. 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. The Government finds that this is a case of non-declaration of the gold jewellery. The facts of the case reveals that the gold jewellery was worn by the Applicant and it was not ingeniously concealed. The gold jewellery has been claimed by the Applicant and there is no other claimant. There are no previous offences registered against the Applicant. Thus, in the facts and circumstances of the case, mere non-submission of the declaration cannot be used to dispossess the applicant of his goods, more so because he is a foreign national. Government therefore, is inclined to allow the impugned gold to be re-exported on payment of a redemption fine. Government is inclined to modify the order passed by the appellate authority.

13. The Government finds that the personal penalty of Rs. 34,000/- imposed on the applicant under Section 112(a) of the Customs Act, 1962 is commensurate with the omissions / commissions committed.

14. In view of the above, the Government modifies the order passed by the appellate authority and allows the applicant to redeem the impugned gold for re-export as prayed for on payment of a redemption fine of Rs. 85,000/- (Rupees Eighty Five Thousand only). The penalty amount of Rs. 34,000/- is upheld.

15. The Revision application is disposed of on the above terms.

Shrawan Kumar
17/05/22
(SHRAWAN KUMAR)

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

ORDER NO. 184/2022-CUS (WZ/SZ)/ASRA/MUMBAI DATED 17.05.2022.

To,

1. Shri. Uvaraj, Sri Lankan national, postal address not available in the records so dispatched to C/o. Smt. Kamalamalar Palanikumar, Advocate, No. 10, Sunkurama Street, Chennai - 600 001.
2. Commissioner of Customs, No. 1 Williams Road, Cantonment, Tiruchirappalli - 620 001.

Copy to:

1. Smt. Kamalamalar Palanikumar, Advocate, No. 10, Sunkurama Street, Chennai - 600 001.
2. Sr. P.S. to AS (RA), Mumbai.
3. Guard File,
4. File Copy.
5. Notice Board.