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SPEED POST



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

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F.No. 371/40/B/2017(Mum)

4211

Date of Issue 02.09.2024

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ORDER NO 92/2021-CUS (WZ)/ASRA/MUMBAI DATED 25.08.2021 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.

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**Applicant** : Shri Mohammed H. A. Alshaer

**Respondent** : Pr. Commissioner of Customs, CSI Airport, Mumbai

**Subject** : Revision Application filed, under Section 129DD of the Customs Act, 1962 against the Order-in-Appeal No. Mum-CUSTOM-PAX-APP-391 & 392/2017-18 dated 04.07.2017 passed by the Commissioner of Customs (Appeals), Mumbai-III.

ORDER

This revision application has been filed by Shri Mohammed H. A. Alshaer (herein referred to as "Applicant") against the Order in Appeal No. MUM-CUSTM-PAX-APP-391 & 392/2017-18 dated 20.07.2017 passed by the Commissioner of Customs (Appeals), Mumbai- Zone-III.

2. The Officers of Customs intercepted the Applicant at the CSI Airport, Mumbai on 03.04.2013 at the exit of the module 2CB after he had cleared himself at the green channel. The Applicant was holding a Palestinian passport. When asked whether he was carrying any dutiable goods like gold, silver, diamonds etc or contraband he replied in the negative. Not being satisfied the officers conducted a personal search. A personal examination of resulted in the recovery of 10.5 kgms of gold valued at Rs. 3,15,00,000/- ( Rupees Three crores Fifteen lakhs). The gold bars were recovered from the eight specially made inner pockets made in the jeans worn by the Applicant. Investigations conducted in the matter revealed that the Applicant was not the owner of the gold. He had visited India thrice, his first visit was as a tourist, in his second visit he carried 5kgs of gold handed to him in Dubai and walked out through the green channel, thus smuggling the gold. He was given US\$300 for his efforts. The present was his third visit and as advised he had stitched the pockets in his jeans and attempted to smuggle the gold for which he was promised US\$500.

3. The Original Adjudicating Authority vide its Order-In-Original No. ADC/ML/ADJN/17/2014-15 dated 30.05.2014 observing the nature of concealment and that the Applicant was not the owner of the gold ordered absolute confiscation of the gold under Section 111 (d) (l) and (m) of the Customs Act, 1962, and imposed penalty of Rs. 30,00,000/- (Rupees Thirty lakhs) on the Applicant. A penalty of Rs. 10,000/- (Rupees Ten thousand ) was also imposed on the Applicant under section 114AA Customs Act, 1962.

4. Aggrieved by this order the Applicant filed an appeal with the Commissioner of Customs (Appeals), pleading for release of the gold on redemption fine and penalty. The Commissioner (Appeals) vide his order No.

MUM-CUSTOMS-PAX-APP-392/2017-18 dated 20.07.2017 rejected the appeal, holding that the Applicant was a habitual offender.

5. Aggrieved with the order of the Appellate authority, the Applicant has filed this revision application inter alia on the grounds that;

5.1 The impugned order passed by the Respondent is bad in law and unjust.

5.2 The Appellant submits that the impugned order has been passed without giving due consideration to the documents on record and facts of the case.

5.3 The Ld. Adjudicating authority ought have appreciated that dutiable goods brought in by the Appellant are neither restricted nor prohibited.

5.4 This is the first time that the Appellant has brought this type of goods and there is no previous case registered against her.

5.5 It is submitted that the Respondent has not taken into consideration the points in Show Cause Notice issued by the Respondent which would clearly reveal that the impugned Gold is dutiable goods and not prohibited goods.

5.6 The Appellant submits that the Respondent has come to the conclusion that the acts and / or omissions on the part of the Appellant was to evade Custom duty. The evasion of Customs duty can be done only in respect of dutiable goods and not prohibited goods.

5.7 The Appellant humbly submits that once the department or respondent accepts that the goods are dutiable, the option of redemption of goods as provided under section 125 of the Customs Act, 1962 will have to be given to the Appellant.

5.8 The Appellant submits that in the facts and circumstances of the present case, absolute confiscation of the impugned dutiable goods would only mean interpreting or giving a meaning to the said sub-section (1) of Section 125 of the Customs Act, 1962, in a manner neither authorized or intended by the Act. Thus, redemption of dutiable goods on payment of

fine in lieu of confiscation is what the Legislature in its collective wisdom has proposed vide sub-section (1) of Section 125 of the Customs Act, 1962, and the same is the intent of the Legislature, but inspite of the above observation the dutiable goods were absolute confiscated by the Respondent.

5.9 The Appellants submit that without prejudice to the above contentions it is sub-mitted that there are a number of judgments of the Hon'ble Apex Court, the Hon'ble High Courts and the Hon'ble Tribunal, wherein it has been held that gold is not a prohibited item and the same is restricted and therefore it should not be confiscated absolutely and option to redeem the same on redemption fine ought to be given to the person from whom it is recovered.

5.10 The Appellants submits that in view of the various judgments passed by various authorities, wherein re-export of goods have been granted even when the goods were not declared, under section 125 of the Customs Act, 1962: even when the goods have not been declared for the purpose of section 77 on payment of appropriate fine and penalty.

5.11 The Commissioner of Appeal Mumbai had also allowed re-export of gold in cases where foreigner had brought gold and re-exported their country. Considering the above facts and circumstances of the case and cited cases, it is re-quested to kindly release the goods for re-export under section 125 of the Customs Act, 1962 2. The Appellant craves leave to add/alter/amend any of the grounds mentioned above and / or produce any documents / any judgments before or during personal hearing.

5.12 The Appellant may kindly be granted a personal hearing before the case is decided.

5.13 Therefore the Appellent pray as under:

1) The Gold may kindly be allowed for re-export on any terms & condition as your goodself may feel fit & proper U/S 125 of C.A. 1962.

2) Personal Penalty may kindly be reduced substantially.

3) Any other order may kindly be passed.

6. Personal hearings in the case were scheduled on 10.12.2020, 17.12.2020, 28.01.2021, 17.03.2021 and 24.03.2021. No one attended the said hearing on behalf of the Applicant or the Applicant department. The case is therefore being decided on the basis of available records on merits.

7. The Government has gone through the facts of the case. The Respondent was intercepted after his baggage indicated metal concealment. When questioned whether he was carrying any contraband /dutiable goods he replied in the negative. The examination of the Applicants person resulted in the recovery of 10.5 kgms of gold. The Applicant did not declare the gold as required under section 77 of the Customs Act, 1962, the confiscation of the gold is therefore justified and the Applicant has rendered himself liable for penal action.

8. The Respondent has contended that gold is not a prohibited item. 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 *"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.

9. 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 applicants is also not based on correct appreciation of laws held by the Apex court and High Courts.

10. Further Government contends that concealment of the impugned gold is a major issue while interpreting the scope of section 125 of Customs Act, 1962. The manner in which the gold was concealed i.e. in the specially made pockets in the jeans worn by the Applicant reveals the intention of the Applicant. It also revealed his criminal bent of mind and a clear intention to evade duty and smuggle the gold into India. Further, the passenger opting to clear himself through green channel, where these passengers are cleared on the basis of their declaration and only a small fraction of passengers are intercepted for detailed examination. Had the passenger not been intercepted he would have made good with 10.5 kilograms of gold. Government also notes that the Applicant has admitted that he has acted as a carrier for monetary considerations and he is not the owner of the gold. In his statements to the investigative authorities he has escaped the law when he brought gold earlier. The circumstances of the case and the intention of the Appellant was properly considered by the Appellate Authority while upholding absolute confiscation ordered by the original adjudicating authority. The case laws submitted by the Applicant have no relevance in the matter as the passengers in the said cases were owners of the gold. The request for re-export pleaded for by the Applicant in the case laws submitted by the Applicant pertain to personal jewelry and therefore not applicable, the Applicant as detailed earlier is not the owner of the gold and the same is in the form of bars and not personal jewellery, and therefore re-export cannot be considered.

11. 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 Applicant is a foreigner and is an admitted carrier, and has smuggled gold earlier evading the customs authority. Taking into account the facts on record and the gravity of offence, the adjudicating authority had rightly ordered the absolute confiscation of gold and the Appellate authority has rightly upheld the order. 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 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." . The redemption of the gold will encourage smuggling as, 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 order of the Appellate authority is therefore liable to be upheld. However government observes that once penalty has been imposed under section 112(a) and (b) there is no necessity of imposing penalty under section 114AA. The penalty of Rs. 10,000/- ( Rupees Ten thousand ) imposed under section 114AA of the Customs Act,1962 is set aside.

12. In view of the above the Government upholds the Order of the Appellate authority. Revision Application is accordingly dismissed.

  
25/8/21

( SHRAWAN KUMAR )

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

ORDER No. 92/2021-CUS (WZ) /ASRA/

DATED 25.08.2021

To,

1. Shri Mohammed H. A. Alshaer, Al-Harish , Egypt.
2. The Pr. Commissioner of Customs, CSI Airport, Sahar, Mumbai.

Copy to:

1. Shri N.J. Heera, Advocate, Nulwala building, 41, Mint Road, G.P.O. Fort, Mumbai 400 001.
2. Sr. P.S. to AS (RA), Mumbai.
3. Guard File. ,
4. Spare Copy.