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SPEED POST



GOVERNMENT OF INDIA  
MINISTRY OF FINANCE  
(DEPARTMENT OF REVENUE)  
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Mumbai-400 005

F.No. 380/14/B/WZ/2019 / 4722

Date of Issue

02.09.2021

ORDER NO. 94/2021-CUS ( WZ ) / ASRA / MUMBAI / DATED 25.08.2021  
OF THE GOVERNMENT OF INDIA PASSED BY SMT. SHRAWAN KUMAR,  
PRINCIPAL COMMISSIONER & EX-OFFICIO ADDITIONAL SECRETARY TO  
THE GOVERNMENT OF INDIA, UNDER SECTION 129DD OF THE  
CUSTOMS ACT, 1962.

Applicant : Commissioner of Customs (Airport) Mumbai.

Respondent : Shri Siddique Masir

Subject : Revision Application filed, under Section 129DD of the  
Customs Act, 1962 against the Order-in-Appeal No.  
MUM-CUSTOM-PAX-APP-674 /18-19 Dated 31.10.2018,  
passed by the Commissioner of Customs (Appeals),  
Mumbai - III.

ORDER

This revision application has been filed by Commissioner of Customs (Airport), Mumbai, (herein referred to as Applicant) against the Order in Appeal No. MUM-CUSTOM-PAX-APP-674 /18-19 Dated 31.10.2018 passed by the Commissioner of Customs (Appeals), Mumbai-III.

2. On 07.07.2015 the officers of Air Intelligence Unit based on specific information followed the respondent who had arrived from Dubai, as he directly went to the Indian style toilet. Examination of the toilet used by the respondent resulted in the recovery of 1615 grams of assorted gold jewelry valued at Rs. 31,01,979/- (Rupees Thirty one lakhs One thousand Nine hundred and Seventy nine) and the respondent was detained. In his statement dated 07.07.2015 the respondent interalia stated that the gold jewelry was handed over to him by Mr. Saiyed Mushraf who works with him in Dubai, and he was instructed to keep the gold in the tissue box of the designated toilet. He also informed that he did not know who was supposed to collect the jewelry from the toilet.

3. After due process of the law vide Order-In-Original No. ADC/RR/ADJN/442/2015-16 dated 30.12.2016 the Original Adjudicating Authority ordered absolute confiscation of the gold under Section 111 (d), (l) and (m) of the Customs Act 1962 and imposed penalty of Rs. 3,10,200/- (Rupees Three lakhs Ten thousand Two hundred) on the respondent under Section 112 (a) of the Customs Act,1962.

4. Aggrieved by the said order, the applicant filed appeal before the Commissioner (Appeals) who vide Order-In-Appeal No. MUM-CUSTOM-PAX-APP-674 /18-19 Dated 31.10.2018 set aside the absolute confiscation and allowed the gold for redemption on payment of redemption fine of Rs. 5,50,000/- ( Rupees Five Lacs Fifty thousand ) and upheld the penalty imposed by the lower authority on the respondent.

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

5.1 It is an admitted fact as per the order-in-Original that the passenger Mr. Siddique Masir had not declared the gold jewellery at Column 9 or 10(ii) of the Customs Declaration Form, as he wanted to evade payment of Customs duty. Hence he failed to make true declaration as required under Section 77 of the Customs Act, 1962. The manner in which the gold was brought i.e. in two brown coloured oval shaped packets wrapped in brown cello tape and kept in the JRD tissue paper roll box in the toilet by the passenger indicated the greed and criminal mindset of the passenger. The passenger in his statement recorded on 07.07.2015 admitted that the gold jewellery found in JRD tissue paper roll box in the toilet was kept by him; that the seized gold does not belong to him but were handed over to him by one Mr. Saiyed Mushraf in Dubai.

5.2 The passenger was merely a carrier of the seized gold jewellery and redemption of seized goods is not to be allowed to the carrier in view of Kerala High Court's judgment in the case of Abdul Razak v/s UOI 2012(275)ELT 300(Ker) wherein it was held that -"Appellant, as mater of right, cannot claim release of goods on payment of fine and duty - As per statement given by appellant u/s 108 of CA, '62, he is only a carrier i.e. professional smuggler smuggling goods on behalf of others for consideration — Confiscated goods not to be released on payment of redemption fine and duty u/s 125 ibid". In the present case the gold being carried for monetary considerations and the manner of its concealment being ingenious, is fit case for Absolute Confiscation of seized gold as a deterrent punishment to passengers. In view of the above, the Commissioner (Appeals)'s order is not correct, and proper.

5.3 The Commissioner (Appeals) has also erred in granting the release of seized gold by imposing Redemption Fine under Section 125 of the Customs Act, 1962. In this regard, it is to state that, 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. Thus, taking into account

the facts on record and the gravity of the offence, the lower adjudicating authority had rightly ordered the absolute confiscation of the impugned gold. The passenger had concealed the impugned gold jewellery in two brown coloured oval shaped packets wrapped in brown cello tape and kept in the JRD tissue paper roll box in the toilet to be further smuggled clandestinely by some unknown person or by himself at the opportune time which clearly shows his intention to evade duty on dutiable goods and smuggle the same into India. Had the passenger not been intercepted he would have made good with 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 need to be invoked. Considering the fact that the gold jewellery was ingeniously concealed in the toilet by the passenger and he failed to declare the same, the Commissioner (Appeals) ought not to have allowed redemption of the impugned gold. The same should have been confiscated absolutely. Therefore, Commissioner (Appeals)'s order is not proper from this aspect too.

5.4 Absolute confiscation of the impugned gold jewellery totally weighing 1615 grams valued at Rs. 31,01,979/- kept by the passenger in tissue paper roll box in the toilet, ordered by the Adjudicating Authority is correct as it is supported by the decision of Hon'ble Supreme Court in the case of Samyanthan Murugesan v/s Commissioner of Customs (AIR), Chennai-I as reported in 2010(254) ELT Al 5 (SC). This decision of Hon'ble Supreme Court was in the appeal against the Hon'ble Madras High Court's Order reported as 2009(247)ELT 21 (Mad.). Hon'ble High Court found that the passenger had attempted to smuggle 7.075 kilogram gold by ingenious concealment in T.V. set without making declaration before Customs in violation of provisions under Section II & 77 of the Customs Act, 1962 and the adjudicating authority had absolutely confiscated the gold. Thus, vide this order the Hon'ble High Court upheld the order of the Original adjudicating authority for absolute confiscation of gold. The Hon'ble High Court observed that " the concealment had weighed with the Commissioner to order absolute confiscation. He was right, the Tribunal erred". The Hon'ble Supreme Court after examining the High

Court's order upheld the said Judgment of Hon'ble High Court. Therefore in the present case the Commissioner (Appeal)'s order is not correct on this ground too as the seized gold was brought into India with an attempt to smuggle the same into India in a clandestine manner to avoid detection by the Customs.

5.5 Further, the Commissioner (Appeals) has referred to the order of CESTAT, Chennai in the case of A. Rajkumari Vs CC (Chennai) 2015 (321) ELT 540 (Tri.-Chennai) for drawing the conclusion of release of impugned gold on redemption fine and also held that the Hon'ble Apex Court vide order in the case as reported in 2015 (321) ELT A 207 (SC) dismissed the appeal filed by the Department. However, it may be seen that the Hon'ble Supreme Court dismissed the appeal of Revenue on the ground of delay and not on merits.

5.6 Regarding the redemption fine and penalty, it is pertinent to mention here 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 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."

5.7 Therefore, on this ground alone, the Commissioner (Appeals)'s order is not proper in the eyes of law, as the Commissioner (Appeals) has not considered the facts of the present case, where the goods in question was gold jeweller, totally weighing 1615 grams (1298 grains 18KT and 317 grams 22KT) valued at Rs. 31,01,979/- found in two brown coloured oval shaped packets wrapped in brown cello tape and kept in the JRD tissue paper roll box in the toilet, left to be further smuggled clandestinely by some unknown person or by himself at the opportune time, which falls under the ambit of ingenious concealment and leads to other ulterior motives.

In view of the reasons stated above, the Order-in-Appeal No. MUM-CUSTOMS-PAX-APP-674/18-19 dated 31.10.2018, passed by the Commissioner of

customs (Appeals), Mumbai Zone —111, be set aside in terms of the following prayer :

The Revision Applicant prayed for setting aside the order of the Appellate authority or any other order as deemed fit and proper.

6. In view of the above, personal hearings in the case were scheduled on 08.12.2020, 09.02.2021, 23.02.2021, 25.02.2021, 17.03.2021 and 24.03.2021. Nobody attended the hearing on behalf of the Applicant or the department. The respondent submitted written submissions as detailed below;

6.1 It is submitted at the outset that the impugned order passed by the Appellate Authority is a well-reasoned order and the justification / rationale for permitting redemption of impugned goods to the Respondent is well founded and is based on solid grounds and sound principles of law.

6.2 The Respondents submits that in the Appeal the Appellant has stated that there was contravention of Section 77 of the Customs Act, 1962, by the Respondent. It is submitted that due to the reason of contravention of Section 77 of the Customs Act, 1962, the Ld. Appellate Authority has imposed fine and penalty on the Respondent.

6.3 The Respondent submits that the Ld. Appellate Authority has clearly and rightly expressed the reason for granting the option of redemption of Gold to the Respondent.

6.4 The Respondent submits that the Ld. Appellate Authority has correctly discarded the judgements relied upon by the Adjudicating Authority and the grounds & judgements mentioned in the Appeal filed by the Department as being inapplicable to this case, since the facts of the said cases were entirely different from the facts of the present case.

6.5 The Respondent further submits that the Goods seized from the passenger were disposed off by the department and the respondent received the refund of sale proceed of goods after deduction of

Redemption Fine, Personal Penalty and applicable duty through a refund order.

6.6 The Respondent submits that it may be kindly appreciated that the Mumbai Commissionerate in similar situations/Cases have permitted the redemption of Gold under Section 125 of the Customs Act, 1962 and therefore the impugned goods in the present case also ought to have been released under Section 125 of Customs

6.7 The Respondent states that even though the Section 125 is clear on this point and the Appellate Authority had given reasoned order before passing the impugned order, moreover there are no of judgements passed by the various Forums including Hon'ble Supreme Court wherein the Goods were ordered to be released.

6.8 The respondent submitted a gist of cases in favour of their case and prayed that the Revision Application filed by the Department may kindly be summarily rejected. The impugned Appeal Order No. MUM-CUSTOMS-PAX-APP-674/2018 dated 31.10.2018 passed by Ld. Appellate Authority may kindly be upheld and confirmed and for such other and further orders as Your Lordship may deem fit and proper in the facts and circumstances of the Case.

7. The Government has gone through the facts of the case. It is a fact admitted by Respondent passenger that the gold was brought by him with a intention to clear the same without the payment of duty. The operation was elaborately planned, as per the instructions the gold was left in the tissue roll of the toilet to be picked up by the another person and smuggled out into the country. The manner of attempt clearly indicates that there was a blatant attempt to avoid its detection by the Customs authorities and smuggle the gold into India clandestinely.

8. The Appellate authority has dwelt on length to justify the goods as not being prohibited extending the argument to allow redemption under section 125 of the Customs Act, 1962. Government however contends that the said goods

are restricted and its release depends on the facts of each case. 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. 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 also not based on correct appreciation of laws held by the Apex court and High Courts.

9. Further, respondents has in his statement has claimed that the gold jewelry was given to him by one Mr. Saiyed Mushraf who works with him in Dubai, that the impugned gold does not belong to him. Government also contends that concealment of the impugned gold is a major issue while interpreting the scope of section 125 of Customs Act, 1962. Government notes, in a recent judgement by the Hon'ble Supreme Court in the case of M/s Raj Grow Impex and others Vs UOI states *".....when it comes to discretion, the exercise thereof has to be guided by law; according to the rules of reason and justice; and has to be based on the relevant considerations.....such an exercised cannot be based on private opinion."* The manner in which the gold



was concealed i.e. in the toilet to be collected by another person and smuggled out of the airport revealed a criminal bent of mind and a clear intention to smuggle the gold into India. The Hon'ble Supreme Court in the *judgment of Omprakash Bhatia* notes ".....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." Had the passenger not been intercepted he would have made good with 1615 grams of gold. These circumstances of the case and the intention of the Appellant was not properly considered by the Appellate Authority while setting aside absolute confiscation ordered by the original adjudicating authority.

10. The issue in the case is the manner in which the impugned gold was being 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 modus operandi in 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. Thus, taking into account the facts on record and the gravity of offence, the adjudicating authority had rightly ordered the absolute confiscation of gold. The Hon'ble Delhi High Court in the case of *Jain Exports Vs Union of India 1987(29) ELT 753* 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 brought in with such impunity in disregard of this country's laws will encourage such concealment 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 Respondents are therefore liable for penal action under section 112 (a) of the Customs Act, 1962. The Government therefore holds that the Original Adjudicating Authority has rightly confiscated the gold absolutely and imposed penalty. The impugned Revision Application is therefore liable to be upheld and the order of the Appellate authority is liable to be set aside.

11. The order of the Appellate authority is therefore set aside. The order of the original adjudicating authority is upheld as legal and proper. Revision application is accordingly allowed.

  
25/08/21

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

ORDER No. 94/2021-CUS (WZ) /ASRA/MUMBAI

DATED 25.08.2021

To,

1. The Commissioner of Customs (Airport), Chatrapati Shivaji International Airport, Terminal.-2, Mumbai.
2. Shri Siddique Masir, House no. 42/28, Ward -5, Mumma Street, Bhatkal, Karwar, -581 320.

Copy to:

3. Shri N. J. Heera, Advocate, Advocate, Nulwala bldg., Mint Road, Opp. GPO., Fort, Mumbai 400 001.
4. Sr. P.S. to AS (RA), Mumbai.
5. Guard File.
6. Spare Copy.