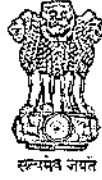


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GOVERNMENT OF INDIA
MINISTRY OF FINANCE
(DEPARTMENT OF REVENUE)

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

F.No. 373/150/B/2020 / 5275

Date of Issue 17.09.2021

ORDER NO. ^{205/2021} CUS (WZ)/ASRA/MUMBAI DATED 26.08.2021 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.

Applicant : Shri Hyder Ali Noor Mohamed

Respondent : Commissioner of Customs, Chennai

Subject : Revision Application filed, under Section 129DD of the
Customs Act, 1962 against the Order-in-Appeal Cus.I No.
95/2020 dated 28.02.2020 passed by the Commissioner
of Customs (Appeals-I), Chennai.

ORDER

This revision application has been filed by Shri Hyder Ali Noor Mohamed (herein referred to as Applicant) against the Order-in-Appeal Cus.I No. 95/2020 dated 28.02.2020 passed by the Commissioner of Customs (Appeals-I), Chennai.

2. On 11.10.2018 the officers of AIU intercepted the Applicant after he had cleared the green channel and was walking out of the arrival hall. When he was questioned whether he was carrying any gold or dutiable items he replied in the negative. Observing him to be nervous an examination of his baggage and person was conducted which resulted in the three gold bits totally weighing 220 gms, valued at Rs. 7,10,820/- (Rupees Seven lakhs Ten thousand Eight hundred and Twenty) from his checked in baggage.

3. After due process of the law vide Order-In-Original No. 250/2019-20 dated 20.11.2019 the Original Adjudicating Authority ordered absolute confiscation of the gold and imposed penalty of Rs. 70,000/- (Rupees Seventy thousand) under Section 112 (a) and (b) of the Customs Act,1962 on the respondent.

4. Aggrieved by this order the Applicant filed an appeal with the Commissioner of Customs (Appeals), Commissioner (Appeals) vide his order Cus. I No. 95/2020 dated 28.02.2020 rejected the Appeal.

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

5.1 It is submitted that the impugned order is liable to be set aside as it was contrary to the facts and circumstances and as illegal. It is submitted that the impugned order is not a speaking order, as there is no discussion by the Commissioner (Appeals) about the contention of the appellant that he was escorted directly from the immigration department before reaching the red channel. In this circumstance, the allegation of

mis-declaration of gold by the applicant is not sustainable and the same is premature. This fact was canvassed by the applicant before both the adjudication authority and the appellate authority. However, the same was not considered by the adjudicating authority and the appellate authority. Therefore, the impugned order is not a speaking order and the same is liable to be set aside.

5.2 It is submitted that the Commissioner (Appeals) has observed in paragraph 5 of the impugned order that there is no proof that the passenger wanted to go to red channel. It is relevant to mention that it is a fact that the Customs Officers had taken the applicant forcefully from the immigration Department itself in the guise of investigation and thus the opportunity of declaration and the option of choosing the red channel was denied to the applicant.

5.3 With regard to the observations in paragraph 5 of the impugned order of Commissioner (appeal), It is submitted that the witnesses to the alleged mahazar dated 12.10.2018 were not present while the applicant was forcefully taken by the Customs Officers from the Immigration Department, on a reasonable suspicion that he might be carrying dutiable goods or gold/ gold jewellery either in baggage or in his person. Therefore, the reliance placed on the mahazar by the Department is liable to be ignored and consequently, the impugned order is liable to be set aside.

5.4 It is submitted that the Commissioner (Appeals) in para 6 of the impugned order has held that the passenger has given confessional statements that the gold was given by Noor Mohammed at Kaula lumpur Airport with an instruction to conceal and carry it without declaring to customs. The Commissioner (appeals) has further held that the voluntary statements under Section 108 are admissible as evidence. In this regard, it is submitted that the Department have put up a concocted story in the mahazar to make it appear as if the applicant has concealed the gold and had not declared the same. The applicant had arrived at Anna International Terminal, Chennai from Kuala Lumpur on 12.10.2018 and

brought with him 3 pieces of gold cut bits weighing 220 grams, which he had purchased legally in Malaysia and also was in possession of the bills for the same. Further, Mr. Noor Mohammed is the Applicant's father, who had purchased the gold. The submission of the invoice and identity proof of the person who had purchased the gold is recorded by the adjudicating authority in paragraph 13 of the Order-in-Original. Accordingly, it is submitted that the applicant did not try to smuggle the gold and even before he could declare the same at the red channel, he was escorted by the Customs Officer. The applicant strongly refutes the charge that he concealed the goods.

5.5 It is submitted that the applicant was in possession of the invoice dated 10.10.2018 for impugned gold during his travel. However, the same was not taken for consideration by the Investigation Officer, as it was not in the name of applicant, but it was held in the name of applicant's father, i.e., Mr. Noor Mohamed. The Department Officers have conveniently omitted to note the same, so as to charge the applicant under offence of "smuggling". This fact is not disputed by the Department.

5.6 In the present case, the contention of the applicant is that he was forcefully taken by the Customs Officers for investigation while he was in immigration and the opportunity of declaration and opting red channel was denied to him and thus, the allegation on the same is premature. No evidences applicant produced by the Department for allegation that the applicant was opted green channel and intercepted at the exit gate of terminal.

5.7 It is submitted that the applicant cannot read and write English as he has failed to pass 8th standard and it is strange as to how he was made to sign the detention/ seizure memo and the declaration for waiving the show cause notice, without explaining the contents of the detention/ seizure memo, statement and the notice. This itself demonstrates the mala fide manner in which the proceedings have been initiated against the applicant.

5.8 It is submitted the Commissioner (Appeals) in pars 5 of the impugned order has rejected the defence taken by the applicant that the contents of statement and mahazar to the proceedings were not explained in Tamil to him. The reason assigned by the Commissioner (Appeals) is as follows; as the personal minute details could not have been recorded by the officers on their own but could have only been as stated by him and thus lying on the points that are favourable to them in a statement and questioning the reliability of the other portions of the statement by citing a language barrier is liable to be rejected." It is relevant to mention that the Commissioner (Appeals) has also referred another proceeding against the applicant in paragraph 8 of the impugned order. It is submitted that the Customs Officer has retrieved the personal minutes of the applicant from the earlier proceedings as referred to in paragraph 8 of the impugned order. As the proceedings referred to have not attained finality, the contentions that the applicant is a previous offender lack credibility and is liable to be rejected.

5.9 It is submitted that as per section 125 of Customs, Act, 1962 it is thus clear that the absolute confiscation is not a must even in the case of prohibited goods. Such confiscation can arise if the goods are prejudicial to the public health, morally, security of the country, grave danger to the economy, environmental hazard, relationship with other countries, etc. Gold is permitted for import but, because it was brought as baggage goods by ineligible passenger, it has become prohibited. Absolute confiscation is therefore unreasonable, unjustified and arbitrary.

5.10 It is not the intention of the appellant to smuggle the goods and that he had been intercepted even before he had reached the red channel. Therefore, imposition of penalty is unwarranted. The applicant would like to take the gold back to Malaysia. Therefore, it is most humbly prayed that the Hon'ble Revisional Authority may be pleased to set aside the impugned order-in-appeal C.Cus.I.No. 95/2020 dated 28.02.2020 and permit the applicant to re-export the goods to Malaysia and thus render justice.

6. The Respondent meanwhile filed a Writ Petition No. 5625 of 2021 before Hon'ble High Court of Madras for issuance of a writ of mandamus directing the respondent (Applicant department) to restrain the respondent from disposing off the gold till the disposal of the revision Application. Hon'ble High Court of Madras vide its order 08.04.2021 issued the following orders:- *"The Hon'ble High Court of Madras vide order dated 09.03.2021 held that the Revision Authority could grant interim relief and power of stay has to be read into the provisions of section 129 DDof the Customs Act,1962. Accordingly the petitioner is seeking leave of this Hon'ble Court to withdraw the writ petition with liberty to file a stay application before the 3^d respondent viz Revisional Authority. The writ petition may be permitted to be withdrawn with the above liberty."*

6.1 Accordingly a stay application has been filed by the Applicant, with a request that the same may be taken on record and personal hearing may be granted at the earliest

7. As desired personal hearings in the case were held on 23.07.2021. Shri Vidya Balan Advocate for the Applicant appeared and reiterated earlier submissions. He submitted that his client was picked up from the immigration, thus he did not get the opportunity to declare, gold was brought for personal use, there was no concealment. Hence he requested to release the gold on nominal redemption fine. Nobody attended the hearing on behalf of the respondent.

8. The Government has gone through the case records, the facts of the case, reveal that the Applicant was intercepted as he was walking through the exit of the Customs arrival hall. When he was questioned whether he was carrying any gold or dutiable items he replied in the negative. Observing him to be nervous an examination of his baggage and person was conducted which resulted in the three gold bits totally weighing 220 gms, valued at Rs. 7,10,820/- (Rupees Seven lakhs Ten thousand Eight hundred and Twenty). It is clear that the impugned gold bits were recovered on examination of the his checked -in baggage. The Applicant claims that he was picked up at

the immigration stage and not allowed to declare the gold bits, It is however noticed that as he did not fulfill the conditions for import, he was ineligible to import gold. The confiscation of the gold is therefore justified.

9. The Advocate of the Applicant has during personal hearing, pleaded for the release of the gold on redemption fine. The core issue to be decided in this case is whether the impugned gold bits can be allowed redemption. The Hon'ble Supreme Court of India in Hargovind Das K Joshi Versus Collector of Customs reported in 1992 (61) ELT 172 has set aside absolute confiscation of goods by Collector without considering question of redemption on payment of fine although having discretion to do so, and remanded the matter to Collector for consideration of exercise of discretion for imposition of redemption fine as per Section 125 of Customs Act, 1962. In Shaik Jamal Basha Vs Government of India 1997 (91) ELT 277(AP) the Hon'ble High Court held that gold is allowed for import on payment of duty and therefore Gold in the form other than ornaments imported unauthorisedly can be redeemed.

10. 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.*" Government notes that there is no past history of such offence/violation by the Applicant. The impugned gold was not concealed ingeniously. The applicant claims ownership of the gold and its ownership is not disputed. The quantity of gold is small and not commercial in nature. The Applicant has claimed that he was not given an opportunity to declare the gold. Government opines that the absolute confiscation is harsh and a more reasonable approach would be to allow redemption on suitable fine and penalty. Government also notes that even prohibited goods can also be allowed for redemption at the discretion of the judicial authority. The section also allows goods to be released to the person from whose possession or custody such goods have been seized. This general principle has been relied in catena of cases by higher courts. Under the circumstances the Government opines that the order of absolute confiscation in the impugned case is harsh and unjustified.

11. In view of the above Government is inclined to take a reasonable view in the matter and sets aside the impugned order of the Appellate authority in respect of the impugned gold. The impugned gold bits weighing 220 gms valued at Rs. 7,10,820/- (Rupees Seven lakhs Ten thousand Eight hundred and Twenty) is allowed redemption on payment of Rs. 2,00,000/- (Rupees Two lakhs). The penalty of imposed under section 112 (a) of the Customs Act is appropriate.

12. Revision Application is disposed of on above terms.

Shrawan Kumar
26/8/21
(SHRAWAN KUMAR)

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

ORDER No 205/2021-CUS (WZ) /ASRA/

DATED 26.08.2021

To,

1. Hyder Ali Noor Mohamed, S/o Noor Mohammed, Old No. 27/1, New No. 53/1, Pedariyar Koli Street, Seven Wells, Chennai.
2. The Commissioner of Customs, (Airport), New Customs House, Chennai. 600 027.

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