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SPEED POST



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

F.No. 373/34/B/17-RA / 5188

Date of Issue 16.09.2021

ORDER NO. 267/2021-CUS (SZ)/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 Sunil Kundandas Kalyani

Respondent : Commissioner of Customs, Kempegowda International Airport, Bangalore

Subject : Revision Application filed, under Section 129DD of the Customs Act, 1962 against the Order-in-Appeal No. 473/2016 dated 30.06.2016 passed by the Commissioner of Customs (Appeals), Bangalore.

ORDER

This revision application has been filed Shri Sunil Kundandas Kalyani (herein referred to as Applicant department) against the Order in Appeal No. 473/2016 dated 30.06.2016 passed by the Commissioner of Customs (Appeals), Bangalore.

2. The Officers of Customs on specific intelligence intercepted the Applicant who had arrived from Bangkok, at the Kempegowda International Airport, Bangalore on 11.09.2014 after he had cleared himself through the green channel. On repeated questioning whether he was carrying any contraband /dutiabale goods he admitted that he had concealed two cut pieces of gold bits in his rectum. The two recovered gold bits weighed 257.27 gms and were valued at Rs. 7,07,492/- (Rupees Seven lakhs Senev thousand Four hundred and ninety two) was recovered from the Applicant.

3. The Original Adjudicating Authority vide its Order-In-Original No. 583/2015-16 dated 30.01.2016 ordered absolute confiscation of the gold under Section 111 (d) (l) and (m) of the Customs Act, 1962, and imposed penalty of Rs. 2,10,000/- (Rupees Two lacs ten thousand) under section 112 of the Customs Act,1962.on the Applicant. A penalty of Rs. 1,40,000/- (Rupees One lac Forty thousand) was also imposed under section 114AA of the Customs Act,1962. penalty of Rs. 2,10,000/- (Rupees Two lacs ten thousand) under section 112 of the Customs Act,1962.on the Applicant.

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. 473/2016 dated 30.06.2016 rejected the appeal.

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

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

5.2 The Applicant 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 Respondent authority ought to have appreciated that dutiable goods brought in by the Applicant are neither restricted nor prohibited.

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

5.5 The Respondent Authority ought to have appreciated that Show Cause Notice issued by the Respondent would clearly reveal that the impugned goods are dutiable goods and not prohibited one.

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

5.7 The Respondent Authority ought to have appreciated 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 Applicant.

5.8 The Applicant submits that the allegation of the concealment in his rectum is totally incorrect as concealment in rectum is neither supported with any X-ray Report nor with a Doctor's examination report as to whether it was possible for the Applicant to insert the gold of the size and weight (as seized) in his rectum or whether there was any injury, mark etc., noticed in the rectum of the Applicant to establish that the Gold was inserted and ejected from the rectum. In absence of any supporting confirmation and in light of denial by the Applicant that the gold was ever concealed by him in his rectum, the said allegation, even if leveled under a Panchnama, loses its credibility and cannot withstand. It is submitted that a bare perusal of the Sub-section (1) of Section 125 of the Customs Act, 1962, makes it crystal clear that the Respondent is required to give

the Noticee an option to pay fine in lieu of confiscation in respect of the impugned goods, which even per the Respondent are dutiable goods.

5.9 The Applicant 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 nor 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 in spite of the above observation the dutiable goods were absolutely confiscated by the Respondent.

5.10 The Applicant submits that without prejudice to the above contentions it is submitted 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. The Noticee submits that some of the judgments are listed below viz. to a prohibited if the condition subject to which their export or import are being complied with: In similar types of case the Commissioner of Customs and Central Excise (Appeals) vide Appeal No 30/2015- Customs has released the Goods concealed in Rectum on payment of Redemption Fine and Personal Penalty (copy enclosed).

5.11 The Applicant says and submits that in view of the aforesaid submissions, the Customs department shall release the goods u/s 125 of Customs Act, 1962 on nominal redemption fine and personal penalty as the violation, if any, is of technical in nature.

5.12 The Applicant craves leave to add/alter/amend any of the grounds mentioned above and / or produce any documents / any judgments before or during personal hearing.

The Applicant has submitted case laws in support of his case and humbly prayed for release of the gold under section 125 of the Customs Act, 1962 on nominal redemption fine and personal penalty, or any other order as your kind self may deem fit or proper.

7. Personal hearings in the case was scheduled in the case on 15.12.2020, 22.12.2020, 25.02.2021, 20.04.2021 and 27.04.2021. Nobody attended the hearing on behalf of the Applicant nor the department. The case is therefore being decided on the basis of available records on merits.

8. The Government has gone through the facts of the case. The Applicant was intercepted after he had cleared himself through the green channel. When questioned whether he was carrying any contraband /dutiabale goods he replied in the negative. The Respondent did not declare the gold as required under section 77 of the Customs Act, 1962, and he had used the green channel meant for passengers not having anything to declare. The confiscation of the gold is therefore justified and the Applicant has rendered himself liable for penal action.

9. The Applicant has contended that gold is a dutiable item and is allowed for import. The Applicant is ineligible to import gold. 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". 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.....*".

10. Government opines that the manner in which the gold was concealed i.e. in the rectum of the Applicant reveals the intention of the respondent. 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 themselves through green channel 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 the gold pieces. The circumstances of the case and the intention of the Appellant was considered by the Original adjudicating authority when considering absolute confiscation and not giving him option to redeem the seized goods on payment of redemption fine.

11. 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 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 confiscation of gold. In the instant case, and the Appellate Authority has rightly upheld the order. The redemption of the gold 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 gets 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. With regard to the penalty imposed under section 114AA of the Customs Act, 1962, Government observes, once the penalty is imposed under

Section 112(a), then there is no necessity for a separate penalty under section 114AA for the same act. The penalty of Rs. 1,40,000/- (Rupees One lac Forty thousand) imposed under section 114AA of the Customs Act,1962 is therefore liable to be set aside.

12. In view of the above facts, the order of the Appellate authority does not warrant interference. The penalty of Rs. 3,00,000/- (Rupees Three lacs) imposed is appropriate. The penalty of Rs. Rs. 1,40,000/- (Rupees One lac Forty thousand) imposed under section 114AA of the Customs Act, 1962 is set aside.

13. The Revision Application is disposed of as above.

Shrawan
26/8/21
(SHRAWAN KUMAR)

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

ORDER No.257/2021-CUS (SZ) /ASRA/MUMBAI DATED 26.08.2021

To,

1. Shri Sunil Kundandas Kalyani, No. 601, Tirupati Apartments, Near Regency hotel, Chopra Court, Ulhasnagar, Thane-421 003.
2. The Commissioner of Customs, Kempegowda International Airport, Bangalore.

Copy to:

1. Shri Advani Sachwani & Heera Associates, Advocates, Nulwala building, 41, Mint Road, Fort, Mumbai -400 001. Advocate,
2. Sr. P.S. to AS (RA), Mumbai.
3. Guard File. ,
4. Spare Copy.