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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. 380/01/B/16-RA / 5198

Date of Issue 16.09.2021

ORDER NO. 210/2021 - CUS (SZ)/ASRA/MUMBAI DATED 26.09.2021 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 : Commissioner of Customs, Chennai.

Respondent : Shri T. Senthil Kumar

Subject : Revision Application filed, under Section 129DD of the Customs Act, 1962 against the Order-in-Appeal C.CUS-I No. 601 & 602/2016 dated 30.09.2015 passed by the Commissioner of Customs (Appeals), Chennai.

ORDER

This revision application has been filed by the Commissioner of Customs, Chennai. (herein referred to as Applicant) against the order C. CUS-I No. 601 & 602/2016 dated 30.09.2015 passed by the Commissioner of Customs (Appeals), Chennai.

2. Briefly stated facts of the case are that the Officers of Customs intercepted Shri T. Senthil Kumar at the exit of the arrival hall of the Anna International Airport, Chennai on 30.10.2014. Examination of his person resulted in the recovery of 25 packets of gold bars from his pant pockets totally weighing 2500 grams valued at Rs. 62,20,513/- (Rupees Sixty two lacs Twenty thousand Five hundred and Thirteen).

3. After due process of the law vide Order-In-Original No. 76/26.05.2015 the Original Adjudicating Authority ordered confiscation of the gold under Section 111 (d) (l) and (m) of the Customs Act, 1962 but allowed redemption of the same for re-export on payment of Rs. 31,00,000/- (Rupees Thirty one lacs) as redemption fine and imposed penalty of Rs. 6,00,000/- (Rupees Six lacs) under Section 112 (a) of the Customs Act,1962.

4. Aggrieved by this order both the Respondent as well as the Applicant department filed an appeal with the Commissioner of Customs (Appeals), The Commissioner (Appeals) vide his order reduced the redemption to Rs. 12,00,000/- (Rupees Twelve lacs) and reduced the penalty to Rs. 4,00,000/- (Rupees Four lacs).

5. Aggrieved with the above order the Applicant department has filed this revision application stating that the order of the Commissioner (Appeal) is not legal nor proper for the following reasons;

5.1 The facts of the case is that, on 30.10.2014, Shri Senthilkumar arrived at Anna International Terminal of Chennai Airport from Singapore. The officers of Air Intelligence Unit of Customs, Chennai Air Port intercepted the passenger at the Green Channel of the arrival hall of the Anna International Terminal, after the said passenger cleared through immigration and Customs and had been attempting to pass through green channel, meant for passenger with no dutiable goods, on a reasonable suspicion that he might be having gold either in his baggage or on his person. The passenger had filled up the value of the dutiable goods brought by him as NIL in his Customs Declaration Card. Thereafter, on search of the person, the officers recovered twenty five numbers of black colour adhesive tape packets which were kept concealed in the pockets of the black colour pant worn by him. On cut opening the packets 25 numbers of yellow metal bars were totally recovered from the passenger which were found to be gold totally weighing 2500 grams of 24 carat purity and appraised the total value at Rs.68,47,500/-. Since the passenger had attempted to smuggle the said gold by not declaring the same and by way of concealing them and has neither declared nor was in possession of any valid permit or eligibility to bring the gold, the same were seized along with the material objects under Customs Act, 1962 read with Section 3(3) of the Foreign Trade (Development & Regulation) Act, 1992.

5.2. In his voluntary statement given before the Customs officer immediately after the seizure Shri Senthilkumar inter alia stated that in respect of the seizure of 2500 gms of 24 carat purity of gold bars, the same were given to him by one Shri Mohamed Ali at Singapore who was known to him and offered him Rs.1,00,000/- for smuggling the gold into India and handing it over to his associate outside the Chennai International Airport who would identify him and pay him; that he did not have any foreign currency to pay for the duty of the gold as he had intended to smuggle the gold into India; that he was not the owner of the gold and requested to be pardoned.

5.3 The passenger has not declared to the Customs officer the possession of gold weighing 2500 grams under section 77 of Customs

Act, 1962 further the said gold was concealed in his pant pocket. The Act of non-declaration of possession of gold and as such the same was concealed with the intention to smuggle out such contraband from airport, violates the provisions of section 77 and 11(2) of Customs Act, 1962 read with section 3(1) and 3(2) of foreign trade (Development and Regulation) Act 1992.

5.4 The eligibility of a passenger to clear the gold imported by her is covered under Notification No. 12/2012 CUS dated 17.03.2012 as amended.

In terms of the said notification. The passenger of Indian origin or a passenger holding a valid Indian Passport issued under the Passport Act, 1967, who is coming to India after a period of stay not less than six months of stay abroad and short visits, if any, made by this eligible passenger during the above said period of six months shall be ignored if the total duration of stay on such visits does not exceed thirty days can bring gold upto 1 kg and the duty has to be paid @ 10% on the value of the gold and the duty has to be paid in foreign currency.

5.5 Further, as per Rule 6 of Baggage Rules, 1998, as amended, a passenger who stayed abroad for more than one year can bring gold jewellery (22carat) to an extent of Rs. 1 lakh (female passenger) and to an extent of Rs.50,000/- (male passenger) and the same can be cleared from Customs without payment of duty;

5.6 In the present case, the passenger, Shri Senthilkumar did not declare the gold possessed by him as required under Section 77 of the Customs Act, 1962 was not in possession of Foreign currency for the payment of duty. Thus, he has not fulfilled the conditions stipulated under the said notification No.12/2012 and Baggage Rules. Therefore, the passenger was ineligible to import the gold. In other words, the 2500 grams of gold, a restricted item, which was attempted to be smuggled by him becomes prohibited from bringing/importing by the said passenger. Hence the Order-in-Original passed by the lower adjudicating authority allowing the re-export of the gold (which is

prohibited for the subject_passenger), instead of ordering for the absolute confiscation, is not correct, especially when the passenger acted as carrier and when he was not the owner of the seized gold.

5.7 Shri Senthilkumar, in his statement dated 30.10.2014, has categorically stated that the gold bars did not belong to him that the same was given to him by one Shri Mohamed Ali at Singapore who was known to him and offered him Rs.1,00,000/- for smuggling the gold into India and handing it over to his associate outside the Chennai International Airport who would identify him and pay him; He admitted that it is an offence to bring gold by concealment and not declaring to Customs and did the same for monetary benefit and requested for lenient view.

5.8 The so called retraction cited by the advocate of the passenger is not acceptable for the reason that the passenger in the first instance during interrogation and in his voluntary statement had categorically stated the facts and admitted the offence, which were well within his knowledge. The so called retraction cited by his advocate was an after-thought and the same was made later on at the time of personal hearing. There was no evidence to prove that he gave the statement under threat / coercion. Therefore, the statement given before the investigating officer of Customs under the provisions of Customs Act., 1962 has evidentiary value as it contains the facts of smuggling, which were well within the exclusive knowledge of the passenger.

5.9 Accordingly, the Appellate Authority's order to release the goods to a person who is not the owner of the goods is totally bad in law.

5.10 Re-export of goods is covered in Section 80 of the Customs Act 1962. As per the said act, where the baggage of the passenger contains any article which is dutiable or the import of which is prohibited and in respect which a true declaration has been made under the section 77, the proper officer may, at the request of the passenger, detain such article for the purpose of being returned to him on his leaving India. In this case, the passenger has not filed any declaration and hence the

Appellate Authority's order to allow the re-export of the gold is not in order.

5.11 Further, the Commissioner of Customs (Appeals-I) vide O-in-A C.Cus. No.343/2015 dated 29.06.2015, O-in-A, C.Cus no. 296/2015 dated 24.06.2015 and O-in-A, C.Cus. no.342/2015 dated 29.06.2015, had set aside the orders of the lower adjudicating authority wherein the passengers have been allowed to redeem the gold on payment of redemption fine and penalty for re-export in the cases related to this Commissionerate (Chennai- I Commissionerate). The Appellate Authority had allowed the appeal filed by the department stating that the passengers have accepted that they were carrying the gold for monetary consideration and the passengers had obviously concealed the gold and the same has not been declared in the customs declaration card. However, in the present case, the Appellate authority have taken a different view although the facts of the case in the above orders remains the same.

5.12 It is pertinent to mention herein the instruction of Board's circular No.06/2014Cus dated 06.03.2014, wherein vide para 3(iii) of the said circular, it has been advised to be careful so as to prevent misuse of facility of bringing of gold by eligible persons hired by unscrupulous elements. However, both the original Adjudicating Authority and the Appellate Authority failed to examine the above aspects which are vital to prove the ownership of gold by producing documentary evidence regarding the source for funding for gold as well as duty to be paid in foreign currency.

5.13 In view of the above, it is prayed that the order of the appellate authority allowing the be set aside or such an order be redemption of the gold on payment of redemption fine may _ fit.

5.14 The Revision Applicant cited case laws in support of their contention and prayed that the redemption of the gold be set aside or any such order as deem fit.

6. The Respondent meanwhile filed a Writ Petition No. 17969 of 2016 before Hon'ble High Court of Madras for issuance of a writ of mandamus directing the respondent (Applicant department) to release the gold and give effect to the impugned order in Appeal. In reply the Applicant department informed that the Hon'ble High Court of Madras that a Revision Application has been filed before the revision authority in this regard and awaiting orders. The Hon'ble High Court of Madras issued the following orders:-

(a) " The Writ petition is disposed of directing the respondent to release the goods (gold) for purpose of re-export subject to the petitioner complying with the conditions imposed in the order passed by the Commissioner (Appeals) i.e., payment of redemption fine for re-export and personal penalty and also giving an undertaking to comply with the order in original, in the event the Department succeeds in the revision, with a period of two weeks from the date of receipt of a copy of this order.

(b) Petitioner is directed to pay 5% of the cash amount of the value of the goods to the Commissioner, Customs, Chennai and get receipt from the commissioner within a period of one week, from the date of receipt of a copy of this order.

(c) In the event there is no stay in the Revision Petition that has been preferred by the, respondent, then it is hereby directed that the main revision petition shall be disposed of within period of eight weeks from the date of receipt of a copy of this order. No costs."

7. In view of the above, personal hearings in the case were scheduled on 27.08.2018, 17.09.2018, 26.09.2018, 08.12.2020, 15.12.2020, 25.02.2021 and 26.03.2021. Nobody attended the hearing on behalf of the Applicant department or Respondent. The case is therefore being decided exparte on merits.

8. The Government has gone through the case records. It is observed that the respondent did not declare the gold as required under section 77 of

the Customs, Act, 1962 and had opted for the green channel. Therefore the confiscation of the gold is justified.

9. Discussing the facts of the case the Original adjudicating authority in his order at para 22 has observed as follows,

“ 22. The passenger in his statement after the seizure has stated that the gold was given to him by Shri. Mohamed Ali of Singapore and the gold would be received by an unknown person outside Chennai Airport who would identify him outside Chennai Airport, for a consideration of Rs. 1,00,000/-. He was discretely taken outside the Chennai Airport but nobody contacted him. Further he has stated that he did not have any other details of Shri Mohamed Ali. On the other hand he has retracted his voluntary statement in his bail application, during hearing & through written submissions.....”

The above facts have been kept in mind by the Original adjudicating authority and in using his discretion he has allowed redemption for export imposing appropriate/suitable redemption fine and penalty.

10. The Appellate authority has in his order reduced the redemption fine and penalty. Government however notes that the Applicant did not declare the gold possessed by him as required under Section 77 of the Customs Act, 1962 was not in possession of foreign currency for the payment of duty at the time of import. Thus, he has not fulfilled the conditions stipulated under the said notification No.12/2012 and Baggage Rules. Therefore, the passenger was ineligible to import the gold. In other words, the 2500 grams of gold, a restricted item, which was attempted to be smuggled by him becomes prohibited. These facts were properly factored in by the Original adjudicating authority in justifying his decision in using his discretion in allowing redemption and imposing suitable redemption fine. The Original adjudicating authority has also factored in the aspect of the Applicant being a foreign citizen and allowed re-export. Government therefore opines that further consideration in reduction of the redemption fine and penalty ordered by the Appellate authority is uncalled for. Hargovind Das K. Joshi v/s Collector of Customs reported in 1992 (61) E.L.T. 172 (S.C.), The Apex Court has pronounced that a quasi judicial authority must exercise

discretionary powers in judicial and not arbitrary manner. Hon'ble Delhi High Court in the case of Jain Exports Vs Union of India 1987(29) ELT753 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.*"

11. In view of the above, government observes that the original adjudicating authority has clearly brought facts justifying his decision in allowing redemption, considering the eligibility of the Applicant, his wife and daughter. The Appellate authority has not brought out any additional facts to justify the reduction in redemption fine and penalty and has unreasonably reduced the same. The order of the Appellate authority is therefore liable to be set aside.

12. Accordingly the order of the Appellate authority is set aside. The order of the Original adjudicating authority is upheld.

13. Revision application is disposed of accordingly.


26/8/21
(SHRAWAN KUMAR)

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

ORDER No 210/2021 -CUS (SZ) /ASRA/MUMBAI DATED 26.08.2021

To,

1. The Commissioner of Customs, New Custom House, Meenambakam, Chennai-600 027.
2. Shri T. Senthil Kumar. No. 92, West Street (MelaTheru), Naduvikkottai PO, Pattukottai Taluk, Tanjore 614 602.

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2. Sr. P.S. to AS (RA), Mumbai.
3. Guard File.
4. Spare Copy.