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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. 373/257/B/15-RA

5266

Date of Issue

17.09.2024

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ORDER NO 2(3)/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.

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Applicant : Shri Kasi Prakash

Respondent : Commissioner of Customs, Chennai

Subject : Revision Application filed, under Section 129DD of the Customs Act, 1962 against the Order-in-Appeal C. Cus-I No. 576/2015 dated 28.09.2015 passed by the Commissioner of Customs (Appeals-I), Chennai.

ORDER

This revision application has been filed by Shri Kasi Prakash (herein referred to as Applicant) against the Order in Appeal C. Cus-I No. 576/2015 dated 28.09.2015 passed by the Commissioner of Customs (Appeals-I), Chennai.

2. The brief facts of the case are as follows, Officers of Customs intercepted the Respondent at the Anna International Airport, Chennai on 09.08.2014 as he was walking out of the arrival hall declaring the value of goods imported by him as Rs. 4,000/-. When questioned whether he was carrying any contraband /dutiabale goods he replied in the negative. The officers then examined his checked in baggage and recovered two gas cylinder regulators. As the regulators were abnormally heavy the officers ripped open the regulators and recovered 17 square gold bits to tally weighing 699 grams totally valued Rs.20,18,013/- ( Rupees Twenty lakhs Eighteen thousand and Thirteen).

3. The Original Adjudicating Authority vide its Order-In-Original No. 16/02.05.2015 observed that such ingenious concealment merits absolute confiscation and ordered absolute confiscation of the gold under Section 111 (d) and (l) of the Customs Act, 1962, and imposed penalty of Rs. 2,00,000/- (Rupees Two lacs ) 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 C. Cus-I No. 576/2015 dated 28.09.2015 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 order of the Commissioner of Customs is contrary to law and probabilities of the case.

5.2 The applicant had not attempted to import any of the goods into India in contravention of any rules and regulations prevailing in India.

5.3 The applicant states that, it is not known on what basis the Customs Authorities have come to the conclusion that the above goods are sensitive trade items.

5.4 The applicant states that the Commissioner purportedly relied upon extraneous considerations which has no nexus of any kind whatsoever in with the goods brought in the instant case. This show the non-application of mind on the part of the Commissioner.

5.5 The submissions made by the applicant before the Commissioner at the time of personal hearing was not recorded in the manner known to law.

5.6 The applicant submit that, he had not concealed the above Gold Pieces and the above Gold Pieces should be released as orders held by Hon'ble High Courts and Revision Authority.

5.7 The Commissioner in arriving at the impugned decision to refuse the clearance of the said goods has also purportedly adjudicated the matter in the manner as aforesaid and has acted in gross abuse of power and / or colorable exercise of power and acted mechanically and without any application of mind, in as much as there has been no violation of the provisions of the Customs Act in so far as the importation of goods said above are concerned.

5.8 The Commissioner in refusing to clear the said goods has taken into consideration irrelevant facts and relevant facts have been left out.

5.9 The impugned order is tainted with the vice of non-application of mind and suffers from grave errors which are apparent on the face of the records.

5.10 The Commissioner has failed to act in a fair and bonafide manner and therefore the impugned order is tainted with the vice of arbitrariness which is violative of applicant's constitutional rights guaranteed under the Constitution of India.

5.11 The applicant submits that, he had declared entire goods brought by him and there is no mis-declaration or non-declaration of the goods and that the applicant have complied the provisions Section 77 of the Customs Act.

5.12 The applicant submit that, it is settled by Division Bench of Calcutta High Court in the case of Commissioner of Customs (Preventive) /vs/ Umashanker varma. reported in 2000 (120) ELT, Page

322 (Calcutta) holding that when the goods are not prohibited the Customs Authorities have no other option but to allow grant of an option to the assessee.

5.13 The Commissioner has failed to note that the penalty of Rs.2,00,000/- imposed on the applicant in purely arbitrary and unreasonable and there is no reasoning or working sheet furnished to the applicant as to how the penalty amount has been arrived.

5.14 The Commissioner has failed to take into consideration the relevant aspect and has taken into consideration irrelevant aspects and as such the impugned order is unjust and perverse.

5.15 The Commissioner has wrongly come to the conclusion that the applicant had committed an offence for which there is no proof or reasoning given in the order.

5.16 The Commissioner of Customs failed to note the case reported in 1970 SC 253. Para 7, which has held that fine and penalty is not a matter of course. Even minimum penalty is unwarranted.

5.17 The applicant submit that, if the same was not bonafide also the goods must be treated as part of baggage in terms of Ministry of Finance Instructions File No.495/16/91 CUS-VI, dated 31.1.1992 and the Benefit must be extended.

5.18 The applicant also submit that, in the present case the goods were not prohibited goods and it is mandatory on the part of the Adjudicating Authority to release the goods on payment of fine in terms of Section 125 of the Customs Act 1962.

5.19 The applicant submit that, Hon'ble Tribunal in the case of Ms. Mohini Bhatia it has been held that when the goods are not prohibited for import at the relevant time and an option had given to the importer to redeem on payment of fine which does not exceed the Market Price of the goods less duty payable thereon. Hence, the goods must have been released with appropriate fine by the Adjudicating Authority.

5.20 The applicant submits that, as per Section 125 (1) the Adjudicating Officer is under a mandatory duty to give option to the person found guilty to pay fine in lieu of confiscation and the Section 125 leaves option to the officer to grant the benefit or not solar as the goods whose import is prohibited but, no such option is available in respect of the goods which can be imported as held by Honourable

Division Bench of the Andhra Pradesh High Court and hence, the absolute confiscation of the goods is to be set aside and goods must have been released.

5.21 The applicant submit that, as held by Honourable Supreme Court in the case of Hargovindas K.Joshi, it has been held that absolute confiscation of the goods by collected without considering question of Redemption on payment of fine although discretion to do so and further it has been held that undoubtedly the authority under law to give an option to the importer to pay such fine as was considered appropriate by him in lieu of confiscation of the goods.

5.22 The applicant submit that, very recently it has been held by Honourable High Court of Andhra Pradesh that Authority has a discretion to order release of prohibited goods on payment of fine in lieu of confiscation when such discretion is given by the act, it is normally expected that the officer concerned would exercise such discretion unless there are good grounds for not exercising it. The discretion is given by statute for the purpose of exercising it hence has held by Honourable High Court that the goods must have been released on payment of Redemption Fine and hence, the absolute confiscation is to be set aside.

5.23 The applicant submits that, the department cannot pass different orders for each and every person for the same set of facts and hence in this ground also order of absolute confiscation is to be set aside.

5.24 The applicant submit that, in this case the Baggage Declaration was filed by the applicant in terms of Section 77 of the Customs Act.

5.25 The applicant submit that, as per the Section 125 of the Customs Act, 1962, it is observed that in the case of nonprohibited goods were the goods are held liable for confiscation, the same "shall" be release of payment of fine, ie., the word "shall" signifies that it is mandatory on the part of the Adjudicating authority to impose fine in lieu of confiscation.

5.26 The applicant submit that, the applicant had stayed in Malaysia for more days and had no previous offences hence, the above gold is to be allowed for release.

5.27 The applicant submit that, the above gold been bought in Kuala Lumpur for his sister's marriage and he had voluntarily declared the

gold and allegation in the order dated 02.05.2015 that the passenger had not declared the gold is not correct and false.

5.28 The applicant submit that, it is not correct to state that, the applicant's counsel had stated that this is a concealment case and requested for reduction of penalty. The applicant's counsel had never stated that this is a concealment case on the other hand, the applicant's counsel had prayed for release of gold pieces without imposing any fine and penalty.

5.29 The applicant submit that, the Commissioner of Customs (Appeals-I) had on his own had stated that the applicant's counsel had stated that this is a concealment case which is totally un-true.

5.30 The other reasons given by the Commissioner for arriving at his findings are not sustainable in law.

5.31 The applicant reserves his right to urge additional grounds at the time of the hearing of this application.

PRAYER The applicant prays that this Hon'ble Additional Secretary I Joint Secretary (Revision Application) may be pleased to; (i) Set aside the order of the Commissioner of Customs (Appeals-I), Custom House, Chennai. (ii) To pass an order of direction, ordering to release the 17 Nos., of Gold Pieces, totally weighing 699 grams, valued at Rs.20,18,013/- (iii) Pass such further or other orders as this Hon'ble Additional Secretary/Joint Secretary (Revision Application), may deem fit and proper in the facts and circumstances of the case.

7. Personal hearings in the case was scheduled in the case on 14.05.2018, 10.12.2020, 17.12.2020, 24.12.2020, 03.02.2021, 18.03.2021, 25.03.2021. Nobody attended the hearing on behalf of the Applicant department 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 Respondent was intercepted as he was walking out of the arrival hall declaring the value of goods brought by him as Rs. 4000/-. When questioned whether he was carrying any contraband /dutiabale goods he replied in the negative. The gold was discovered only when special efforts were taken for its detection. The impugned gold was ingeniously concealed in the two gas cylinder

regulators brought by the Applicant. As the gold was concealed ingeniously, the impugned gold was confiscated absolutely by the original adjudicating authority, and was upheld by the Appellate authority.

9. Government notes that the Applicant has contended that gold is not a prohibited item and has to be mandatorily released as per section 125 of the Customs Act, 1962. Government differs with this view. 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".

10. 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.....*". 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.

11. 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 the contentions raised in the appellate order are not based on correct appreciation of laws as held by the Apex court and High Courts.

12. The concealment was elaborately planned and it reveals the intention of the respondent. In his declaration form he had declared the value of the goods brought by him at Rs. 4000/- thus he had not declared the gold and revealed a clear intention to evade duty and smuggle the gold into India. Had the passenger not been intercepted he would have made good with 699 grams of gold concealed in the two gas cylinder regulators. The Applicant had no intention to declare the gold. These circumstances of the case and the intention of the Appellant must have weighed in the Original adjudicating authority for absolute confiscation and not allowing him option to redeem the seized goods on payment of fine and penalty.

13. 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 ordered the absolute confiscation of gold which has been upheld by the appellate authority. In the instant case, the passenger did not declare the said gold to Customs on his own and the subject gold was detected only after the officers conducted a thorough examination of the goods brought by the Applicant. 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 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, and the revision application is liable to be dismissed.

15. In view of the above the Government upholds the Order of the Appellate authority. The revision application is accordingly dismissed.

*Shrawan Kumar*  
26/8/21  
( SHRAWAN KUMAR )

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

ORDER No 213/2021-CUS (SZ) /ASRA/MUMBAI DATED 26.8.2021

To,

1. Shri Kasi Prakash, No. 106/9/1, 2<sup>nd</sup> Main Road, Bangalore – 560 086.
2. The Commissioner of Customs, New Custom House, Meenambakkam, Chennai -600 027.

Copy to:

1. Shri A. K. Jayaraj, Advocates, New No. 234, Old No. 217, Thambu Chetty Street, I & II<sup>nd</sup> Floor, Chennai-600 001.
2. Sr. P.S. to AS (RA), Mumbai.
3. Guard File. ,
4. Spare Copy.