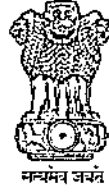


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GOVERNMENT OF INDIA
MINISTRY OF FINANCE
(DEPARTMENT OF REVENUE)
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Mumbai-400 005

F.No. 371/10/B/17-RA / 5480

Date of Issue 24.09.2021

ORDER NO.215/2021-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 Akbar Ahmed

Respondent : Commissioner of Customs, Goa

Subject : Revision Application filed, under Section 129DD of the
Customs Act, 1962 against the Order-in-Appeal No. GOA-
CUSTM-000-APP-310-16-17 dated 20.12.2016 passed by
the Commissioner of Customs (Appeals), Pune Appeal-II,
CX (GOA).

ORDER

This revision application has been filed by Shri Akbar Ahmed (herein referred to as Applicant) against the order No. GOA-CUSTOM-000-APP-310-16-17 dated 20.12.2016 passed by the Commissioner of Customs (Appeals), Pune Appeal-II, CX (GOA).

2. Briefly stated facts of the case are that the Officers of Customs intercepted the Applicant and Shri Ashish K. Nahar both domestic passengers who arrived on the domestic leg of the Air India flight Dubai-Mumbai-Goa. Personal search of the Applicant and Shri Ashish K. Nahar resulted in the recovery of one gold chain and one gold kada each. Investigations carried revealed that the Applicant was engaged to travel as a domestic passenger, and collect the impugned gold chain and kada from an International passenger, so as to smuggle the same without the payment of Customs duty. The one gold chain and one gold kada totally weighed 299 gms and valued at Rs. 7,56,039/- (Rupees Seven lakhs Fifty six thousand and thirty nine).

3. After due process of the law vide Order-In-Original No. 19/2016-ADC(CUS) dated 25.04.2016 the Original Adjudicating Authority ordered absolute confiscation of the gold chains and kadas and imposed penalty of Rs. 1,00,000/- (Rupees One lakh)each on the Applicant and Shri Ashish K. Nahar.

4. Aggrieved by this order the Applicant filed an appeal with the Commissioner of Customs (Appeals), The Commissioner (Appeals) vide his order GOA-CUSTOM-000-APP-310-16-17 dated 20.12.2016 rejected the appeal of the Applicant.

5. Aggrieved with the above order the Applicant has filed this revision application interalia stating that the order of the Appellate authority is not legal or proper on the following grounds,

5.1 That Appellate Authority has not applied the mind before passing the order in appeal and not appreciated the facts of the case and mechanically passed the impugned Order.

5.2 The Appellate Authority while rejecting the Appeal in Para No. 8 has stated that the Appellant has made several rounds of Appeal but is unable to show that the impugned order is bad in law and was passed without justification.

5.3 It is the submission of the Appellant that the gold is not having any foreign marking and therefore is not liable for confiscation. It is an admitted fact that the flight was going from Mumbai to Goa and there was no question of taking of gold from any international passenger from domestic flight. The Appellate Authority while passing the Order has merely assumed and presumed that the gold was smuggled through there is no foreign markings on the said gold chain and there is no purity report admittedly in the Show Cause Notice. Therefore the Ld. Appellate Authority has not examined the impugned Order.

5.4 The Appellate Authority in Para No 9 has observed that one Shri. Sandeep who had arranged to take a parcel to Goa. On this angle, there is no investigation before issuance of the SCN. The case was registered on 24.12.2014 and the SCN was issued in the month of March 2015. There was enough time to locate Shri Sandeep to corroborate the statements.

5.5 The Appellant submits that the Appellate Authority has merely relied upon on whatsapp messages, which are also not attached with the SCN as relied upon documents. In para no. 9 of the Appeal Order, the Ld Adjudicating Authority has merely stated that the gold was not declared and the gold was dutiable and non declaration an offence. The Appellant submits that while issuing the SCN, the department has not relied upon the said declaration form which has been allegedly referred in the SCN. Therefore, the question of declaration / non declaration cannot be said in the case.

5.6 The Appellate Authority ought to have appreciated the fact that if any person wears the gold on his person which has no foreign markings and the passenger is a domestic passenger and the question of applicability of the Customs Act, 1962 will not arise.

5.7 The Appellate Authority has relied upon the judgment of Commissioner of Customs, Mumbai v/s. Ambalal and Co - 2010 (487 ELT). The judgment is not applicable in the present case as this judgment is available to imported goods. In the present case, the Appellant has not claimed any exemption as the Appellant was a domestic passenger and has not filed any exemption under Notification. Therefore observations in Para No 9.1. are totally incorrect.

5.8 The message of what's up copies were not attached with SCN and there no certificates under section 65 B under the evidence Act 1962 for admissibility of such evidence.

5.9 The appellant was not called for any investigation after 24.12.2014 through the case of customs was getting the gold in the international flight. Some names have been referred in the statement SCN and as well in the statement but no investigation is done by the officers of customs therefore the all such statement cannot be relied upon by the adjudicating authority and as well as appellate authority while confirming the allegation of SCN. The appellate authority ought to have appreciated the fact that there is no corroboration to the attempts which have recorded on the computer.

5.10 The appellate authority while passing the order has observed on the legal issue and referred to the statement which have drafted by the customs officer but not seen the fact that one of the appellant was deaf dumb. The appellate authority has said that there are no retraction filed by the appellant in the case. While observing these fact the adjudicating authority ought to have seen both the statements i.e. of Appellant and Ashish K. Nahar is almost same and which admitting saying and referring the fact the one of the appellant was deaf and dumb. The

burden of proving these statement are true and correct is on the department as the appellant is deaf and dumb. The appellate authority has not commented any of the point the gold has no foreign marking.

5.11 The appellate authority has merely relied upon some what's up message which print out is not given to the appellant therefore such evidence cannot be relied upon. The Appellant was domestic a passenger therefore the Provision of Customs Act would not be attracted for the domestic passenger and therefore the question declaration before the Customs officers does not arise.

5.12 The appellant was wearing gold chain and gold kada and there was no foreign marking on the such ornaments, therefore, Section 111 of Customs Act will not be attracted in the case the section 111 says and refers that any goods brought from outside India shall be liable for confiscation. As in the SCN no international passenger has been identified or nor the investigating agency has brought on record any foreign the passenger who had brought the gold in Dubai -Goa - Mumbai flight on 24 12.2014.

5.13 The gold ornament was not smuggled from a foreign country as no evidence has come on record in SCN, adjudication proceedings or appeal proceedings. The Appellant is the owner of the gold ornaments, therefore. The appellant was wearing the gold jewellery. Thereby he becomes the owner of gold. For personal jewellery, there is no need for any passenger to carry voucher or bill for domestic travel.

5.14 It is the submission of appellant that If Section 111 is not applicable then violation Section 112 & 110 of Customs Act will be not applicable.

5.15 That the statement has been typed in the computer and the appellant was to sign the statement under pressure and force by the officers, the statement was dictated to him with the answers by AIU Superintendent and other officers from AIU. The Appellant had not concealed the gold as wrongly alleged in the SCN. The appellant had

worn the gold jewellery on his body and the same was visible naked eyes of the Customs officer. The panchnama is not saying the gold jewellery was concealed.

5.16 That another passenger was one Shri Ashish K. Nahar from the same flight detained for having gold ornaments the same was also seized by the Customs, thereafter both were taken before the Superintendent of Customs and their statement were recorded under Section 108 of the Customs Act. 36. The Appellant came to know that both the cases were clubbed together and on the basis of distorted facts a false case of smuggling was made out against the Appellant. The Appellant did not personally know the other passenger.

5.17 Retraction statement filed by the Appellant were not considered. Suspicion however grave shall not take legal proof in smuggling cases. Similar types of gold chain and kadas are very much available in Mumbai Bullion / Jewellery market. The Appellant is not a professional smuggler / carrier, only a case of breach of declaration rules by domestic passengers not having any smuggling antecedent. The reasoning and finding given by the Adjudicating Authority is totally erroneous and contrary to the facts of the case based on surmises.

5.18 The gold seized is merely ornaments weighing only 299 gms meant for personal use and not foreign marked gold. Hence the presumption of smuggled gold cannot be canvassed by Customs to support their case. Two individual cases were clubbed together to give a colour of smuggling case.

5.19 The onus of proof is on the department to establish that the gold ornaments were handed over to him by the co-passenger Shri. Ashish Nahar during the flight from Mumbai to Goa. In this case no international passenger is apprehended nor is any effort made by the Customs Department to investigate that aspect as there was no involvement of any international passenger in this case. The Appellant was wearing the ornaments while he took the flight from Mumbai to Goa.

5.20 The Applicant / Appellant therefore humbly prays that:

- i. That the Personal Jewellery one gold chain and one gold kada weighing 299 gms valid at Rs. 7,56,039/- along with mobile handset HTC Model PH-85110 may be returned to the Appellant on redemption fine. Personal Penalty may be waived. Personal hearing may be granted.
- ii. Any other reliefs.

6. In view of the above, personal hearings in the case were scheduled on 05.12.2019, 12.12.2019, 10.12.2020, 17.12.2020, 28.01.2021, 17.03.2021, 24.03.2021, 06.04.2021 and 25.08.2021. Shri Y. B. Sahare, AC attended the hearing online on behalf of the department and reiterated the earlier submissions. He submitted that goods have been correctly absolutely confiscated and requested to uphold Commr(A) order. Shri N. J. Heera, Advocate on behalf of the Applicant requested to release the gold jewelry on minimum redemption fine and penalty.

7. The Government has gone through the case records. It is observed that the respondent is a domestic passenger. The impugned gold jewelry was recovered from the Applicant. The Applicant was travelling on domestic route of an international flight which had arrived from Dubai. The facts of the case reveal that the Applicant in his initial statements recorded after his interception informed that one Shri Sandeep who is his friend, proposed the idea to earn some quick and easy money, which was accepted by the Applicant as his economic condition was not good. Accordingly, arrangements were made by Shri Sandeep, for his tickets etc and was informed that one person, a relative of Shri Sandeep would hand over a package containing gold jewelry. The Advocate of the respondent has retracted the statements later, and has claimed the impugned gold.

8. At the outset government observes that the Applicant has revealed the name of the person who has engaged the Applicant for the job. Further, he has also informed that the entire communications for this operation was carried out on whatsapp, the mobile phone of the Applicant was taken over by the officers at the time of the interception and therefore the person who was the

mastermind in the said operation, who had issued instructions to the Applicant and his accomplice, could have been identified and apprehended. It is observed that no further investigations have been conducted in this aspect to unravel the smuggling operation. The Government finds that the original adjudicating authority as well as the Appellate authority, have relied on the initial statement of the Applicants to justify absolute confiscation of the gold jewelry. The Applicant has pleaded for redemption, and prays for setting aside absolute confiscation of the gold and was instrumental in hiring the Applicants for collecting the gold in-flight. The Applicant claims that the gold jewelry does not have any foreign markings and such designs are available locally. Government opines that to prove that the impugned gold was given to the Applicant in-flight, and for it to have to be considered as smuggled it is vital to establish that it was given by an international passenger, and the jewelry was brought from abroad. However, except for the retracted statement and that too a deaf and dumb co-accused no investigations have been conducted by the Investigating authorities. Suspicion howsoever grave cannot be taken as legal proof in such cases. Government opines that the Investigating Officer should have enquired the matter in detail in support of their allegation, especially when the passengers are domestic, the gold jewelry was worn and there are no foreign markings on it.

9. The Appellate authority has opined in para 9. of his order “ *The facts indicate that the gold was not declared by the appellant despite knowing that gold was dutiable and non-declaration thereof was an offense. I find that that the department has been able to discharge its primary onus by recording the voluntary statement of the appellant under Section 108 of the Act which is in the nature of substantive evidence*” Further in Para 9.1 of the order the Appellate authority opines “ *the appellant was part of a smuggling syndicate along with the other domestic passenger Shri Ashish who were acting as domestic passengers with intent to evade payment of the Customs duty on the crude gold ornaments. If he had no intention to evade payment of Customs duty he should have declared the same to the Customs which he deliberately failed to do.*” Government observes that being domestic passengers there is no question of declaration and therefore the onus of proof is

on the department to establish that the gold ornaments were handed over to the Applicants during the flight from Mumbai to Goa. Both the orders of the lower authority have relied heavily on the Applicants statements which the Applicant claims to have retracted and therefore corroboration of the facts recorded through the statements is extremely vital. The Supreme Court in the case of K.I. Pavunny Vs Asst. Collector of Central Excise in 1977 has held that "*Confessional statement of the accused can form the sole basis for conviction -if retracted, Court is required to examine whether it was obtained by threat, duress or promise and whether the confession is truthfull - if found to be voluntary and truthful inculpatory portion of retracted confession could be relied upon to base conviction – However prudence and practice require that the court should seek assurance by way of corroboration from other evidences adduced by prosecution*". In this case no such corroboration from further investigations have been adduced through investigations.

10. The analysis of various judgments on the issue of redemption of gold under section 125 of Customs Act, 1962 make it clear that the discretion has to be exercised based on merits of each case and there cannot be any straight jacket formula to decide such cases. It is also found that one of the crucial aspects of the case is that the passenger was a domestic passenger arrived from Mumbai There is also nothing in the order to reflect about the exact incident of import of the offending goods in India to substantiate smuggling and its mode. The investigation has also failed to find out about the alleged owner of the gold or to whom the gold was to be delivered at Mumbai. There are no findings or investigation with reference to Shri Sandeep who engaged the Applicant or to whom the gold was to be delivered. Government however opines despite all these shortcomings in investigation, section 123 of Customs Act, 1962 casts burden on the person from whose custody gold jewelry has been seized to prove that it is not smuggled and therefore even though the gold has been recovered from the domestic passenger, its smuggled character as alleged via air route will attract legal provisions under section 77 and Baggage Rules 1998 read with Para 2.20 of Foreign Trade Policy. Further, the Applicants have not provided any evidence for the legal purchase or evidence for possession of the gold. Therefore Government upholds the confiscation of the gold jewelry.

Accordingly the Applicant passenger will be deemed to have attempted to clear smuggled goods and will be liable to penal consequences.

11. Government notes in the absence of any further investigations, not acceding to the pleadings of the Applicant would lead to a miscarriage of justice in punishing without clear evidence. In the absence of any evidence corroborating the statements of the Applicant absolute confiscation would be an order in excess. Government notes that the Applicant being a domestic passenger, goods being gold jewelry and the fact that there are no material facts to prove smuggling is enough reason to exercise the option under section 125 of the Customs Act, 1962, and therefore Government extends the option of redemption with suitable fine. In view of the above facts, Government sets aside the absolute confiscation allows redemption of the gold jewelry weighing 299 gram valued at Rs. 7,56,039/- on payment of Rs. 2,50,000/- (Rupees Two lakhs fifty thousand) as redemption fine. The penalty of Rs. 1,00,000/- (Rupees one lakh) imposed under section 112 (a) of the Customs Act, 1962 is appropriate. The HTC Model PH-85110 be returned to the Applicant. Revision application is allowed on above terms.

12. Revision application is allowed on above terms.

Shrawan Kumar
26/8/21

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

ORDER No 215/2021-CUS (SZ) /ASRA/MUMBAI

DATED 26/08.2021

To,

1. Shri Akbar Ahmed, Adelphi-10 A wing, Shastri Nagar Complex, Lokhandwala, Mumbai 400053
2. The Commissioner of Customs, Goa.

Copy to:

1. Shri N. J. Heera- Advocate, Nulwala Building, Ground Floor, 41- Mint Road, Opp. G.P.O. Fort, Mumbai 400 001.
2. Sr. P.S. to AS (RA), Mumbai.
3. Guard File.
4. Spare Copy.