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GOVERNMENT OF INDIA
MINISTRY OF FINANCE
(DEPARTMENT OF REVENUE)

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F. No. 373/284/B/16-RA / 5424

Date of Issue 24.09.2024

ORDER NO. 218/2021-CUS (SZ)/ASRA/MUMBAI DATED 07.9.21 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 Sameer Mohd Abdul Khader

Respondent : Commissioner of Customs(Airport), Mangalore

Subject : Revision Application filed, under Section 129DD of the Customs Act, 1962 against the Order-in-Appeal No. 312/2016 dated 31.03.2016 passed by the Commissioner of Customs (Appeals), Bangalore.

ORDER

This revision application has been filed by Shri Sameer Mohd Abdul Khader (herein after referred to as the Applicant) against the Order in appeal No. 312/2016 dated 31.03.2016 passed by the Commissioner of Customs (Appeals), Bangalore.

2. The Original Adjudicating Authority vide Order-In-Original No. No. 22/2015 JC dated 19.06.2015 ordered absolute confiscation of the gold bars and imposed penalty of Rs. 5,50,000/- (Rupees Five lakhs fifty thousand) on the Applicant under Section 112 (a) of the Customs Act, 1962. A penalty of Rs. 3,00,000/- (Rupees Two thousand) was also imposed under section 114AA of the Customs Act, 1962 on Applicant.

3. Aggrieved by the said order, the applicant filed appeal before the Commissioner (Appeals) who vide Order-In-Appeal No. 312/2016 dated 31.03.2016 rejected the appeal of the Applicant.

4. Aggrieved with the above order the Applicant, has filed this revision application, interalia on the following grounds;

4.1 The petitioner challenges the impugned Order-in-Appeal no 312/2010 dated 31-3-2016 passed by the Commissioner Customs (Appeals), Bangalore and seek the following reliefs:

(i) to issue a reasoned direction or order and quash the impugned Order-i Appeal;

(ii) to declare that the order absolute confiscation of the gold weighing kgs seized by the DRI Officers from the petitioner on 30-5-2014 Mangalore International Airport, Mangalore under sections 111 (d), and (m) of Customs Act, 1962 and imposition of penalty under section 112 and 114AA of the Customs Act, 1962 as arbitrary, illegal an unsustainable; and

(iii) to issue an appropriate direction or order directing the respondent 2 to return the gold bars weighing 2 kgs seized by the Officers from the petitioner on 30-5-2014 at Mangalore International Airport.

4.2 Petitioner Shri Sameer Mohd. Abdul Kader submits that on 31-5-14, in the immigration hall on seeing the movements of some persons looking like Customs Officials, he was very much scared of carrying the gold bars beyond the immigration. He was in a dilemma whether to clear immigration with the gold bars or not. Then he decided to abandon the gold bars. He went to the toilet and dropped the gold bars in the dustbin. He was intercepted by the Officers when he dropped the gold bars in the dustbin.

4.3 The petitioner submits that since he had suffered some losses and was in debt he decided to take some risk and resort to smuggling to come out of his financial problems. He purchased the gold in Dubai. He had intention to evade payment of Customs duty. But, on his arrival at Mangalore International Airport, he got scared to smuggle the gold out of Customs. Therefore, out of fear, he dropped the gold bars in the dustbin with an intention to abandon the gold.

4.4 When he was examined by the Officers, out of fear he provided incorrect facts and information surrounding the event and the ownership of the goods under seizure. He stated that he requested his brother Salim who was in Dubai to find some operators indulging in smuggling of gold into India from Dubai so that he can act as a carrier and earn some money; his brother Salim introduced him to a person who was father of one Sabu of Kasargod, whose name he did not know; the said gold bars would be received by Sabu in India; the gold brought by him was dropped in the dustbin for clearing it clandestinely as he was instructed by Sabu's father to do so; he was informed that Sabu and his father had some arrangement to retrieve the gold from the dustbin at Mangalore International Airport.

4.5 Having realized his mistake of giving incorrect facts and information and having understood the effect of it, the petitioner retracted the panchnama and also his statements dated 30-5-14 and 15-7-14 on 25-7-

14. He also claimed ownership of the gold and requested that he may be given an opportunity to pay duty, fine and penalty and redemption of the gold.

4.6 It is well settled law that if effort is made to controvert the contents of the panchnama and the statements recorded during the investigation, the said panchnama and statements dated 30-5-14 and 15-7-14 should not have been accepted as true. Since the panchnama dated 30-5-14 and the statements dated 30-5-14 and 15-7-14 were retracted by the petitioner on 25-7-14, they should not have been relied upon in this case, unless the retraction of the petitioner was proved as wrong. However, the learned adjudicating authority relied upon the retracted panchnama dated 31-5-14 and statements dated 31-5-14 and 15-7-14. The Adjudicating Authority observed that delayed retraction is an after thought and not reliable; when certain things are admitted during interrogation and are retracted very late such retraction is liable to be discarded.

4.7 The petitioner submits that basing the allegation in the SCN solely on the basis of retracted statements would not be safe. As a general rule of practice, it is unsafe to rely upon a retracted confession without corroborative evidence. The question is whether the statement is sufficient to make the allegation or not. As a general rule of prudence, it is unsafe to rely upon a retracted confession and judicial as well as quasi-judicial authorities ought to look for corroborative evidence. In the light of this position of law, if the facts of the present case are examined, then it would reveal that Investigating Agency failed to bring any evidence on the record which can suggest that statements given by him were under some mistaken belief or facts. The stand of the petitioner is that he had retracted the statements and brought demonstrative evidence on record showing the proof of purchase of the gold by him which should have been accepted by the Adjudicating Authority and Appellate Authority and the gold should have been redeemed to him on payment of duty, fine and penalty.

4.8 The question is as to whether statements of the petitioner could be used against him or not. It would be gainful to refer that under special

legislation when a statement is recorded by an Investigating Officer, it is considered to be judicial proceeding and such statement can be made use of against the maker. This is more so when the Act of 1962 provides and give liberty to the accused to retract the statements given by him during the period of investigation. It is not a case where accused ever retracted from statement recorded from him. If there is a retraction of the statement, the argument raised by the petitioner in the reply to SCN and in the appeal would always carry weightage. In the light of the submission made above and looking to the provisions of section 108 of the Act of 1962, there is no legality if the retracted statements of the accused are used to prove prosecution case. It is further submitted that in the present case, independent of the statements, no other material exists to show that the goods were smuggled by the petitioner as a carrier for someone else for monetary consideration.

4.9 The petitioner submits that when he was arrested on 31-5-14 he went into a deep depression and he was in a confused state of mind. As he was in a confused frame of mind, he did not retract his statement when he was produced before the Magistrate. Even after his release on bail, when his statement was recorded on 15-7-14 he admitted to and reiterated the incorrect facts which were recorded in his statement dated 31-5-14, under fear of cancellation of his bail and re-arrest. It was only on 15-7-14 the petitioner realized that the panchnama and statements dated 31-5-14 and 15-7-14 were not true and issue damaging which therefore, will put him under huge financial burden. He therefore made a full retraction of the panchnama and statements based on which the case of smuggling was booked against him.

4.10 On the date of his arrival i.e 30-5-14 and at the time of recording his statements, as he very much scared and confused he failed to use proper judgment and failed to take time when his statements were recorded by the Officers. In his letter of retraction he submitted that he dropped the gold in the dustbin out of fear; he was ashamed that he did not declare the gold and tried to evade duty; he may be granted an opportunity to pay duty, fine and penalty; out of fear he admitted that he

is a carrier which is not true; the gold belonged to him and he did not declare the gold with an intention to make profit. He also submitted copy of sales voucher no DS002272 dated 29-5-14 issued by M/s BIC Jewellers LLC, Dubai towards the proof of purchase of the gold by him for 294,800/- DHs. The abovesaid Sales Voucher was not accepted by the Investigating Agency and the Adjudicating Authority without verifying it's genuineness.

4.11 SCN dated 26-11-14 was issued on the petitioner Shri Sameer Mohd Abdul Khader, Shri Salim, Shri Sabu and his father proposing for confiscation of the seized gold and imposition of penalty on all of them. However, the Learned Adjudicating Authority dropped the proposal for imposition of penalty on Shri Salim, Sabu and Sabu's father on the ground that the proposal was made on the basis of the statement of the co-accused Shri Sameer Mohd Abdul Khader; the allegations made against them are not corroborated by any other evidence; it is settled law that imposition of penalty based only on the statement of co-accused without corroboration is not tenable under law. Since the proposal for imposition of penalty on Shri Salim, Sabu and Sabu's father, has been dropped the claim of the petitioner that he is the owner of the gold is very well established. However, the Ld. Adjudicating authority and Appellate authority failed to consider this aspect.

4.12 There is a distinction between "preparation" and "attempt". Attempt begins where preparation ends. In sum, a person commits the offence to commit a particular offence when

(i) he intends to commit that particular offence and
(ii) he, having made preparations and with the intention to commit the offence, does a further act towards its commission. In the instant case the Petitioner carried the gold bars and boarded the flight from Dubai and disembarked at Mumbai Airport. In short he did all that was necessary to import the gold by air and the only step that remained was to make an attempt to smuggle the gold bars out of Mumbai Airport. But he did not make an attempt to smuggle the gold out of the Airport. Out of fear of getting caught, he dropped the packets containing gold bars in the dustbin in the toilet with an intention to abandon the gold. The question, therefore,

is whether from the facts and circumstances, enumerated above, it could be inferred beyond reasonable doubt that the petitioner had attempted to smuggle the gold in contravention of law from India. But in the present case, there is no dispute that the petitioner made only a preparation but did not make any attempt to smuggle the gold out of Mumbai Airport.

4.13 The petitioner re-iterates that when he was intercepted by the DRI Officers he did not even reach Customs arrival hall for filing the declaration. The DRI Officers who intercepted him in the toilet seized the Customs declaration from him wherein he did not declare the value of dutiable goods. In the SCN it was alleged that the petitioner did not declare the goods carried by him. The petitioner submits that as per CBEC notification No. 40/2012-Customs (N.T.) dated the 2nd May, 2012 the DRI Officers who intercepted him are not the Proper Officers to whom the Petitioner was supposed to declare the goods for clearance. It is Inspector of Customs and Central Excise or Preventive Officer or Examining Officer is the Proper Officer as per notification no No. 40/2012-Customs (N.T.) dated the 2nd May, 2012 as far as declaration under Section 77 of Customs Act, 1962 is concerned. In view of this fact, the allegation made in the SCN that the petitioner (passenger) failed to declare the gold in the Customs declaration is not maintainable.

4.14 Petitioner submits that according to the Section 2(25) of Customs Act, 1962, 'imported goods' means any goods brought into India from a place outside India but does not include the goods which have been cleared for home consumption. According to the definition of the 'goods', the baggage forms part of the goods. When these two definitions are read together, what emerges is that when the goods are brought into India from a place outside India (in this case, baggage) till they are cleared for home consumption, they are considered as imported goods. In this case, the goods have been seized even before the passenger cleared immigration and even before filing of declaration under Section 77 of Customs Act, 1962. The definition of the importer It is quite clear that in this case, whatever was brought by the petitioner from abroad, he was required to make a

declaration under Section 77 and till the goods are declared and cleared from Customs area (airport) after declaration, the goods remain imported goods and the person remains the importer is only when the goods are cleared for home consumption, he is required to file a declaration as he is required under Section 77 of Customs Act, 1962. In the present case, the petitioner did not even clear immigration and reach the Red Channel to make a declaration under section 77 of Customs Act, 1962 or Green Channel to clear himself as if he was having nothing to declare. Out of fear, the petitioner dropped the packets containing gold bars in the dustbin in the toilet before going for immigration. It is not the findings of the learned Adjudicating Authority that the packets containing the gold bars were to be removed from the dustbin and clandestinely removed by someone out of the Airport. In view of the fact that the petitioner abandoned the goods even before going for immigration, the allegation that the petitioner failed to declare the gold in the declaration form under Section 77 of Customs Act, 1962 is not sustainable.

5. Personal hearings in the case were held on 25.08.2021. Shri Prakash Shingrani, Advocate attended the hearing on behalf of the Applicant. He reiterated the submissions already made in the revision application and submitted that the passenger is not an habitual offender, therefore goods be released on redemption fine and penalty. Nobody attended the hearing on behalf of the department.

6. The Government has gone through the facts of the case. Due to a specifically developed intelligence the Applicant was kept on watch when he arrived from Dubai. the Applicant proceeded towards the toilet and dropped two small packets inside the dustbin near the urinals. The Applicant was intercepted by the officers and the packets dropped in the dustbin were recovered. Examination of the packets resulted in the recovery of two gold bars totally weighing 2000 grams and valued at 54,20,000/- (Rupees Fifty four lakhs Twenty thousand). On enquiry he explained that another person who is not a passenger would pick up the gold from the dustbin and take it out of the airport without payment of duty. The impugned gold was confiscated absolutely

by the original adjudicating authority, and was upheld by the Appellate authority.

7. The Applicant claims that he had purchased the said gold in Dubai, and after seeing an extra alertless and more number of Customs officers he was scared of carrying the gold bars beyond immigration and therefore decided to abandon the gold bars. The actions of the Applicant however do not support this submission, as the Applicant in his statement has clearly stated that he proceeded towards the toilet and dropped two small packets inside the dustbin near the urinals. On enquiry he explained that another person who is not a passenger would pick up the gold from the dustbin and take it out of the airport without payment of duty. It indicates that the Applicant had proceeded according to plan to secret the gold bars in the dustbin from where another person would take it out of the airport evading customs duty. If he was genuinely scared as he states he would not have attempted the drop. The statement of the Applicant recorded immediately after the interception clearly corroborates the modus operandi of the Applicant with his statement. Thus Government concludes that the retraction of his statement and claiming ownership of the gold is part of an afterthought attempt to secure release of the gold bars. Further, there are a large number of authoritative pronouncements of the Supreme Court and the High Courts that the statements recorded under section 108 of the Customs Act, 1962 are admissible evidence and culpability of the concerned persons can be based on the same.

8. In his extensive submissions the Applicant accepts the fact that he was an ineligible passenger for import of the gold and he did not have the required foreign currency to pay for customs duty. On one hand he submits that having suffered losses he was in debt, and on the other hand he expects the Government to believe he abandoned two kilograms of gold due to fear. Government also notes that an attempt has been made to mislead by submitting that there were preparations made to smuggle the gold, however the plan was abandoned at the last moment as the gold itself was abandoned. These submissions would have had credibility if there were no plans to extricate the gold secreted in the dustbin later. The secreting of the gold bars

in the dustbin was in furtherance of the plan to smuggle the gold out of the Airport by another person. The investigation conducted and the statement stands corroborated clearly indicating that it was elaborate plan put in action, but foiled due to the vigilant watch kept by the officers at the airport.

9. 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 *“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.

10. The plan put in execution by dropping the gold bars in the dustbin to be picked up by another accomplice was elaborately planned and it reveals the intention of the respondent. He had not declared the gold and revealed a clear intention to evade duty and smuggle the gold into India. Had the Applicant not been intercepted he would have made good with two kilograms of gold. The Applicant by his own admissions had no intention to declare the gold. These circumstances of the case and the intention of the Appellant have weighed in the minds of Original adjudicating authority to order absolute confiscation and not allowing him option to redeem the seized goods on payment of fine and penalty.

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 gold is the discretionary power of the adjudicating authority depending on the facts of each case and after examining the merits. The present case is a clear attempt at smuggling by a smuggling syndicate. The manner in which the gold was attempted to be smuggled in to the country is ingenious and is a fit case for

absolute confiscation as a deterrent to passengers attempting such measures. 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 kept a watch on the movements of the Applicant on his arrival. The redemption of the gold will encourage such attempts at smuggling 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 needs to be invoked in such a case. The order of the Appellate authority is therefore liable to be upheld, and the revision application is liable to be dismissed.

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

Shrawan
7/9/21
(SHRAWAN KUMAR)

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

ORDER No. 218/2021-CUS (WZ) /ASRA/MUMBAI DATED 07.09.2021

To,

1. Shri Sameer Mohd Abdul Khader, R/o Chembirika House, Chandragiri, PO, Kalanad, Kasargod, 671 317, Kerala.
2. The Commissioner of Customs (Airport), New Custom House, Panambur, Mangalore.

Copy to:

3. Shri P. K. Shingrani- Advocate, 12/334, New MIG Colony, Bandra (E) , Mumbai - 51.
4. Sr. P.S. to AS (RA), Mumbai.
5. Guard File. ,
6. Spare Copy.