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GOVERNMENT OF INDIA
MINISTRY OF FINANCE
(DEPARTMENT OF REVENUE)

8th Floor, World Trade Centre, Centre - I, Cuffe Parade,
Mumbai-400 005

(i). F.No. 373/24/B/17-RA / 3293 : Date of Issue : 01.08.2022
(ii). F.No. 373/25/B/17-RA

ORDER NO. ²³²⁻²³³ /2022-CUS (WZ/SZ)/ASRA/MUMBAI DATED 27.07.2022
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.

(i). F.No. 373/24/B/17-RA

Applicant No. 1 : Smt. Vairavasundaram Jeyanthi

(ii). F.No. 373/25/B/17-RA

Applicant No. 2 : Shri. A.K Ganesan

Respondent : Pr. Commissioner of Customs, Commissionerate - I,
Meenambakkam, Chennai - 600 027.

Subject : Revision Application filed, under Section 129DD of the
Customs Act, 1962 against the common Orders-in-
Appeal Airport C. CUS.I No. 146 & 147 / 2017 dated
04.08.2017 [F.No. C4-I/115 & 114/0/2017-AIR]
passed by the Commissioner of Customs (Appeals-I),
Chennai.

ORDER

These two revision applications have been filed by (i). Smt. Vairavasundaram Jeyanthi and (ii). Shri. A.K Ganesan [herein after referred to as the Applicant No 1/ (A1) and Applicant no. 2 /(A2) respectively or both together referred to as applicants] against the common Orders-In-Appeal Airport C. CUS.I No. 146 & 147 / 2017 dated 04.08.2017 [F.No. C4-I/115 & 114/0/2017-AIR] passed by the Commissioner of Customs (Appeals-I), Chennai.

2(a). Briefly stated the facts of the case are that the Applicant No. 1, an Indian national had arrived at Anna International Airport on 04.03.2016 from Kuala Lumpur onboard Air Asia Flight No. AK-011/04.03.2016 and had opted for the green channel. The applicant no. 1 was intercepted by Customs Officers while she was walking out of the exit gate. In her Customs declaration card, A1 had not declared the possession of any dutiable items. To the query put forth by the officers about possession of any gold / crude gold / gold jewellery etc either in her baggage or on her person, A1 had replied in the negative. An examination of her baggage revealed that the same contained her personal effects. Search of her person led to the recovery of one red coloured small ladies zipper purse kept inside her brassiere and one olive green coloured pouch tied around her waist under the inner skirt. The examination of the small purse led to the recovery of 3 rectangular cut pieces of foreign marked gold bars. The examination of the olive green coloured pouch led to the recovery of 5 bars of foreign marked gold. Thus, in all, five gold bars and three rectangular gold cut pieces, all of 24 carats, totally weighing 6470 grams and having total market value of Rs. 1,92,54,720/- were recovered from Applicant no. 1. A1 neither possessed any valid permit/licence/documents for the legal import of the gold bars in her possession nor did she possess any foreign currency for the payment of Customs duty. Further, A1 had revealed that

she did not own the gold bars and was to hand over the same to one Mr. Thirupathi who would identify her outside the airport. The applicant was not eligible to import gold into India as she had left for Kuala Lumpur on 02.03.2016 and had returned back on 04.03.2016.

2(b). The applicant during the investigations revealed that she had been making trips twice a month to Kuala Lumpur for training for the past one year under the guidance of Applicant no. 2 who was their team leader in a Network Marketing Office at Madurai and she had known him for the last 10 years; that the gold had been handed over to her at the Kuala Lumpur airport by an unknown person who had referred to the name of Applicant No. 2. In her further statement, the applicant no. 1 had revealed that Applicant no 2 knew about her dire financial position and had send her to Malaysia and on her return trip asked her to smuggle gold; that her flight tickets had been booked by Applicant no. 2.

2(c). The residential address of A2 was obtained on the basis of his cell no. revealed by A1 and the same was found locked. A2 was summoned to appear for investigations but he failed to appear. A2 filed for anticipatory bail which was dismissed by the Hon'ble High Court, Madras and he was directed to appear before the Customs Department with some conditions. In his statement he stated that he would sent A1 to Malaysia for ladies training programme and had sent her to Malaysia many times in the past.

3. The Original Adjudicating Authority (OAA) viz, Additional Commissioner of Customs Adjudication-AIR, Chennai vide Order-In-Original No. 28/2016-17 dated 02.05.2017 [F.No. O.S 17/2016-INT-AIR & O.S. No. 202/2016-AIU] ordered absolute confiscation of the 5 nos of gold bars and 3 nos of rectangular gold cut pieces of 24 carats purity, totally weighing 6470 grams and valued at Rs. 1,92,54,720/- (M.V) under Section

111(d) & (l) of the Customs Act, 1962 read with Foreign Trade (Development & Regulation) Act, 1992. Penalties of Rs. 18 lakhs and Rs. 7 lakhs were imposed on A1 under Section 112(a) and Section 114AA of the Customs Act, 1962, respectively. Further, a penalty of Rs. 15 lakhs was imposed on A2 under Section 112(a) of the Customs Act, 1962. Also, a penalty of Rs. 5 lakhs under Section 112(a) of the Customs Act, 1962 was imposed on Shri. R. Tirupathi also.

4. Aggrieved by the said order, A1 & A2 both filed appeals before the Appellate Authority viz, Commissioner of Customs (Appeals-I), Chennai who vide common Orders-In-Appeal Airport C. CUS.I No. 146 & 147 / 2017 dated 04.08.2017 [F.No. C4-I/115 & 114/0/2017-AIR] except for setting aside the penalty of Rs. 7 lakhs imposed on A1 under Section 114AA of the Customs Act, 1962, found no fault in the remaining part of the original order passed by the OAA and upheld it.

5. Aggrieved with the above order, A1 has filed this revision application on the following grounds;

5.01. that the orders of the OAA and AA were against the law, weight of evidence and probabilities of the case.

5.02. that Section 125 of the Customs Act, 1962, postulates that where importation or exportation of goods confiscated was prohibited, then the adjudicating authority may release the goods confiscated on payment of redemption fine. In any other case, i.e. goods, importation or exportation of which is not prohibited, the adjudicating authority shall give an option for redemption. It was emphasised that nowhere under the scheme of the Customs Act, 1962, or the Foreign Trade Policy or under any other law, importation of gold was prohibited. On the other hand, the Foreign Trade Policy which governs the field relating to importability stated that import of gold as a commodity was free. Import of gold in baggage of a passenger, coming from abroad was subject to certain conditions. Therefore, on fulfilment of such conditions, the

importation of gold as baggage becomes not prohibited. The non-fulfilment of conditions would only make importation of the gold restricted inasmuch as the person bringing the gold may not be given the benefit of the notification on concessional payment of duty; that importation of the gold in baggage is not prohibited per se. It was submitted that not every restriction would amount to prohibition and application of such restriction would not entail absolute confiscation of the gold. Likewise, the fact that there was no declaration and attempted concealment in the carriage of the gold would also not bring it within the categorization of the gold being "prohibited". In such a scenario, it was contended that the fact there was no declaration and was concealed would not make the seized gold absolutely confiscable. It was pleaded that the alleged concealment should be viewed that applicant (A1) had done so for safety and security reasons and that this cannot be brushed aside as had been done by the authorities. A1 had submitted that the order of absolute confiscation of the gold bits/bars in question cannot be sustained and requires to be modified/set aside.

- 5.03. Consequently, A1 has contended that the fine and penalty also needed to be revisited. The reasoning of the appellate authority on this aspect appeared to be flawed and there was a divergence of judicial opinion on the question of confiscability of gold imported as baggage or otherwise and the need for absolute confiscation did not exist. The lower authorities, especially the appellate authority ought to have extended the option of redemption with respect to the seized gold bits and not having done so, the order under challenge required to be set aside / modified.
- 5.04. that the entire case against A1 for confiscation of the imported gold and for imposition of penalty, was on the basis of statements recorded under section 108 of the Customs Act, 1962.
- 5.05. that the first statement dated 4.3.2016 had been retracted by A1.
- 5.06. that the plea of A1 to permit re-export had been rejected by the OAA and AA.; that there are precedent orders allowing the same which had not been considered by the lower authorities; that it was their bounden duty to consider the same and apply the ratio therein and grant option of redemption in terms of Section 125 of the Customs Act, 1962 as had been done in the said cases.

5.07. it has been submitted that the appellate order confirming the OIO passed by the adjudicating authority insofar as it absolutely confiscated the gold cut pieces weighing 6470 grams totally valued at Rs.1,92,54,720/- and imposition of penalty of Rs.18,00,000/- in terms of Sec. 112(a) of the Customs Act, 1962 was wholly unsustainable, erroneous and required to be set aside.

6. Aggrieved with the above order, A2 has filed this revision application on the following grounds;

- 6.01. The orders of the lower authorities are against law, weight of evidence and probabilities of the case.
- 6.02. The entire case of the department against A2 was based on the retracted confession made by A1; that retracted confession was not valid evidence inasmuch as, there was no independent corroboration on particulars disclosed in the statement; that A2 had denied his complicity and had stated that he had nothing to do with the alleged attempt made by A1; that reliance placed on the retracted statement of A1 was incorrect and therefore penalty imposed on A2 cannot be sustained and required to be set aside.
- 6.03. that the findings of the lower authorities that A2 had nothing to do with M/s. K. Link Health Care Pvt. Ltd, is without any basis; that A2 as a Manger was instrumental in promotion of the products of M/s. K Link which was based at Malaysia and had been instrumental in recruiting several people including A1 for the purpose of promotion in marketing of their products; that A1 had been sent on more than one occasion to Malaysia for training with the parent company; that A2 had booked the air tickets for A1 which did not mean that he had instigated her to indulge in alleged illegal activity of acquiring the gold bars and attempting to bring it into India surreptitiously; that the circumstances like phone calls from mobile of A2 to A1 were not at all compatible to the charge made and except for certain circumstantial evidence and in the retracted confession of A1 there was no material connecting A2 to A1; that the charge of abetment against A2 was unsustainable.
- 6.04. that the term 'abetment' had not been defined under the Customs Act, 1962 and was found in the Indian Penal Code; that the department had not placed independent evidence to show that A1 had acted at the instigation of A2.
- 6.05. The appellate order confirming the order of the adjudicating authority upholding the penalty of Rs. 15 lakhs on A2 under Section 112(a) of the Customs Act, 1962 was wholly unsustainable and required to be set aside.

7(a). Personal hearings in the case through the online video conferencing mode were scheduled for 02.11.2021, 09.11.2021, 17.11.2021, 24.11.2021, 01.12.2021, 07.12.2021, 11.01.2022, 03.02.2022, 22.03.2022 and on 29.03.2022.

7(b). Shri. B. Satish Sundar, Advocate appeared online for A1 on 29.03.2022 and reiterated the earlier submissions. He requested to allow redemption of goods on reasonable RF and reduce the penalty imposed.

7(c). Shri. B. Satish Sundar, Advocate vide his email dated 29.03.2022 informed that the revision application filed by A1 & A2 may be taken up and disposed in terms of their written submission dated 03.12.2019 submitted in r/o of RA case no. 380/01-02/B/17-RA which had been filed by the respondent.

7(d). No one appeared for the respondent.

8(a). Government has gone through the facts of the case, submissions and records. At the outset, Government notes that the respondent had filed Revision Application Nos. 380/01-02/B/17-RA (Mum) against the aforesaid Order-In-Appeal wherein these two applicants were the respondents. Those revision applications were on the specific issue of the Appellate Authority having set aside the penalty imposed by the OAA on the applicants under Section 114AA of the Customs Act, 1962. On the issue of setting aside the penalty imposed on the applicants under Section 114AA of the Customs Act, 1962, Government vide its Order No. 56-57/2020-CUS (SZ)/ASRA/MUMBAI dated 20.05.2020 (DOI : 31.07.2020) through F.No. 380/01-02/B/17-RA/3702-3706 did not find it necessary to interfere with the Orders-In-Appeal and had upheld the appellate order.

8(b). Government at the outset notes that while disposing of the revision applications no. F.No. 380/01-02/B/2017-RA filed by the department

(Respondent here), issue of the role played by A1 had been dealt with in detail and thereafter, the impugned OIA had been upheld. Government with great consternation notes that the applicants (who are respondents in F.No. 380/01-02/B/2017-RA) had not revealed to the Revision Authority both in their written averments as well during personal hearings that they too had filed separate revision applications against the same OIA dated 31.07.2020 and that their revision applications were still pending.

8(c). Had this fact been brought to the notice of the revisionary authority at the relevant time, the extant revision applications i.e. 373/24 & 25/B/2017-RA could have been taken together with the revision applications F.No. 380/01-02/B/2017-RA filed by the department.

9. In the aforesaid Revision Order No. 56-57/2020-CUS (SZ)/ASRA/MUMBAI dated 20.05.2020 (DOI : 31.07.2020) passed through F.No. 380/01-02/B/17-RA/3702-3706, at paras 8 to 10, the Government has held the following;

'8. In addressing the grounds of the respondent on the issue of penalty under section 114AA of the Customs Act, 1962, the Hon'ble High Court of Karnataka in the case of Khoday Industries Ltd. Vs UOI reported in 1986(23)ELT 337 (Kar), has held that "Interpretation of taxing statutes – one of the accepted canons of Interpretation of taxing statutes is the intention of the amendment be gathered from the objects and reasons which is part of the amending Bill to the Finance Minister's speech".

*8.1. The Appellate authority has congruently gleaned the objective of introduction of Section 114AA in Customs Act as explained in para 63 of the report of the Standing Committee of Finance (2005-06) of the 14th Lok Sabha which states.....
"Section 114 provides for penalty for improper.....Section 114A".*

8.2. Penalty under Section 112 is imposable on a person who has made the goods liable for confiscation. But there would Taxation Laws (Amendment) Act, 2006.

8.3. Hence, once the penalty is imposable under Section 112(a) , then ther eis no necessity for a separate penalty under section 114AA of the same act. The Government therefore, in full agreement with the above observations of the Appellate authority.

8.4. In light of observation made in foregoing para, the Government in conclusion therefore finds no reason to interfere with the Order-in-Appeal of this aspect. The setting aside of the penalty under section 114AA in the impugned Appellate orders is upheld as legal and proper.

9. Government, now dwells on the reply of the respondent on the Revision Application. At the outset, the Government notes that the quantity of gold is huge and was not declared as required under Section 77 of the Customs Act, 1962. The respondent did not have any legal permit nor documents for permitting legal imports of such large quantity of gold. She had only one day stay abroad and the concealment and non-declaration clearly point out to her intention to evade payment of duty and facilitate the smuggling of gold. The respondent is also not an eligible person to import gold. The Respondent does not have the means to purchase such huge quantity of gold and the gold was carried for somebody else. The initial statement of the respondent, that she had gone abroad for training purposes and her subsequent explanation that she was supposed to accompany eligible passengers in the carriage of the gold from Malaysia to Chennai etc. are all after thoughts to escape her present predicament and secure release of the gold. The order in original also notes that in her frequent travels in the guise of attending training she had brought gold jewellery and sold it in India for small profits, thus she is an habitual offender. Government therefore does not find any merits in her submissions, the Impugned orders are therefore liable to be upheld.

10. Accordingly, Government upholds the impugned order of the Appellate authority. The setting aside of penalty under Section 114AA of the Customs Act, 1962 by the Appellate authority is also upheld as legal and proper'.

10. Government notes that in RA Order no. 56-57/2020-CUS (SZ)/ASRA/MUMBAI dated 20.05.2020 (DOI : 31.07.2020) passed through F.No. 380/01-02/B/17-RA/3702-3706 passed by the Revisionary Authority, Mumbai, it is seen that only A1 is mentioned as Respondent. However,

Government notes that (a). the notice under Section 129DD of the Customs Act, 1962 and (b). the 'personal hearing intimations' letters, had been sent to both the applicants i.e. A1 and A2, which clearly indicates that the said earlier RA Order no. dated 20.05.2020 (DOI : 31.07.2020), was passed in context of both the applicants and it follows that the findings and orders therein would be applicable to the both the applicants, as such. The role played by A2 had been examined in the earlier RA Order dated 20.05.2020 (DOI : 31.07.2020) and by the disclosures made by A1, the role played by A2 had implicitly stood confirmed. Thus, instant OIA, being legal and proper, does not merit interference.

11. Accordingly, the two Revision Applications are hereby, dismissed.


(SHRAWAN KUMAR)

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

ORDER No. ~~232-233~~/2022-CUS (WZ/SZ) /ASRA/ DATED 27.07.2022

To,

1. Smt. Vairavasundaram Jeyanthi, D/o Shri. Vairavasundaram, No. 19/20, Kasithevar Santhu, West Masi Street, Madurai City, Tamil Nadu.
2. Shri. A.K Ganesan, No. 4/268A, Ramnad Main Road, Virudhanur, Madurai - 625 009.
3. The Pr. Commissioner of Customs, Chennai - I (Airport), New Custom House, Meenambakkam, Chennai - 600 027.

Copy To,

1. Aum Associates, Advocate, Suite No. 25, 1st Floor, R.R. Complex, No. 1, Múrthy Lane, Suite No. 25, Rattan Bazaar, Chennai - 600 003.
2. Sr. P.S. to AS (RA), Mumbai.
3. File Copy.
4. Noticeboard.