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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

F.No. 373/89/B/2017-RA

3304

: Date of Issue :

01.08.2022

ORDER NO. 236/2022-CUS (SZ/WZ)/ASRA/MUMBAI DATED 29.07.2022
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

Applicant : Shri. Payangadi Moidu Mohammad Ali.

Respondent : Pr. Commissioner of Customs, Chennai - 1 (Airport),
Chennai.

Subject : Revision Application filed, under Section 129DD of the
Customs Act, 1962 against the Order-in-Appeal
C.Cus-I No. 91/2015 dated 05.03.2015 through No.
C4-I/35/O/2015 passed by the Commissioner of
Customs (Appeals-I), Chennai - 600 001.

ORDER

This revision application has been filed by Shri. Payangadi Moidu Mohammad Ali [herein referred to as the Applicant] against the Order-In-Appeal C.Cus-I No. 91/2015 dated 05.03.2015 through No.C4-I/35/O/2015 passed by the Commissioner of Customs (Appeals-I), Chennai – 600 001.

2(a). Brief facts of the case are that the Customs Officials had intercepted the applicant on 27.06.2014 at the exit gate of Anna International Airport Terminal, Chennai where he had arrived from Jeddah by Saudi Arabian Airlines Flight No. SV-768 / 27.06.2014. The applicant had cleared the immigration and was walking out through the green channel. To query put forth by the Official about possession of any gold / gold jewellery either in baggage or on his person, the applicant had replied in the negative. A personal search of the applicant led to the recovery of (i). Customs declaration form where the total value of the goods brought by him was shown as nil and (ii). three nos. of packets covered with adhesive tapes concealed in a specially stitched pocket in the underwear worn by him. The 3 packets were cut open and two FM gold bars of 1 Kg each of 999.9 purity, bearing nos. 195335 & 195336 and 40 nos of Arabic inscribed gold coins of 22 carats, each weighing 8 gms were found therein. Thus, in all 2320 gms of gold having market value of Rs. 65,61,760/- was recovered and seized from the applicant.

2(b). In his statement recorded under Section 108 of the Customs Act, 1962, the applicant admitted that the impugned gold was not owned by him and that he had carried the gold bars and coins for a monetary consideration of Rs. 50,000/- and did not possess any foreign currency. Investigations revealed that the address of the applicant was incomplete and ambiguous and a search could not be carried out. Attempts made in contacting the mobile nos of the applicant remained futile.

3. After due process of the law, the case was adjudicated and Order-In-Original No. 57/24.01.2015 through F.Nos. OS/86/2014-INT.(AIR) & OS/809/2014-AIU(AIR) was passed by the Original Adjudicating Authority (OAA) viz Jt. Commissioner of Customs (Adjudication-AIR) Chennai-1 Airport, who ordered for the absolute confiscation of the 2 seized gold bars and 40 gold coins, totally weighing 2320 grams, valued at Rs. 65,61,760/- under Sections 111(d) and 111(l)

of the Customs Act, 1962. A penalty of Rs. 5,00,000/- was imposed on the applicant under Section 112(a) of the Customs Act, 1962.

4. Aggrieved by this order, the Applicant filed appeal with the Appellate Authority viz Commissioner of Customs (Appeals-I), Chennai – 600 001 who vide his Order-In-Appeal C.Cus-I No. 91/2015 dated 05.03.2015 through No.C4-I/35/O/2015 rejected the appeal.

5. Aggrieved with the above order, the Applicant filed an appeal with CESTAT, Chennai which vide its Final Order no. 41321/2016 dated 08.08.2016 dismissed the appeal as not being maintainable on the grounds of jurisdiction to entertain a baggage matter and held that the appellant may choose to exercise its right of revision before Revisionary Authority.

6. Thereafter, the applicant filed a writ before the Hon'ble High Court, Madras which at para 7 of its order dated 16.12.2016 in W.A no. 1569 of 2016 passed the following;

"7. The learned Single Judge has erred in directing the appellant herein to approach the CESTAT when the jurisdiction lies only with the Joint Secretary, who is the revisional authority. However, since there is non-compliance of principles of natural justice and even no roving enquiry was held in the matter, it would be better if the appellant approaches the Joint Secretary by filing a revision, if he is so advised. In such event, the revisional authority shall consider the matter afresh, after affording opportunity to the appellant and dispose of the case, on merits and in accordance with law, within a period of three months from the date of receipt of a copy of this judgement. It is open to the appellant to raise all his contentions before the revisional authority. The revisional authority shall also consider the request of the appellant to cross-examine the witnesses. Accordingly, the direction of the learned Single Judge is modified and this writ appeal is disposed of. No. costs. The connected miscellaneous petitions are closed".

6. Aggrieved with the above order of the OIA and after directions from Hon'ble High Court, Madras, the Applicant has filed this revision application on the following grounds;

- 6.01. that the OIA issued by the AA is against the law, weight of evidence and probability of the case.
- 6.02. that Appellate authority while passing the OIA had failed to appreciate the genuine apprehensions and mistakes of facts about the applicability of customs provisions and merits.
- 6.03. that the AA failed to consider that the Mahazar was completely biased and it suffered from grave legal and factual infirmities.
- 6.04. that the AA had ignored the principal contention raised in the submissions that no law in force had been violated and therefore, the confiscation of the gold was illegal, arbitrary and unjust.
- 6.05. that the AA erred in ignoring the submission made during the personal hearings held on 06.02.2015, 11.02.2015 and 19.02.2015 that the appellant was a Non-Resident Indian; that he was an eligible passenger to clear the gold on concessional rate; that he had not availed any "free" allowances till date;
- 6.06. that since the appellant was eligible, the case laws quoted by the OAA lacked credence and were distinguishable;
- 6.07. that the statement of the applicant was not voluntary but was dictated and obtained by coercion; that the appellant was in customs custody (detention) for 22 ¼ hrs as seen from Arrest memo time; that the statement dated 27.06.2014 was first retracted only before OAA and had prayed to quash the entire proceedings and order release of gold on payment of duty.
- 6.08. that the gold had been kept securely kept in pant pocket and for safety concerns he had not declared the gold.
- 6.09. that the retraction of the confessional statement was valid and which had been rebutted in the findings by the OAA that retraction was an afterthought and had placed reliance on the case of Surjeet Singh Chhabra vs. UOI [1997-89-ELT-A244-SC], that the applicant placed reliance in the case of the Commissioner of Customs Vs Sainul Abideen Neelam 2014 (300) ELT, 342 (MAD), where it is held that even though such statement made under Section 108 of the Customs Act is admissible in evidence, the authorities are not necessarily bound to accept the same as such in the absence of further materials to substantiate the contents of such statement.
- 6.10. that the in present case there is no corroborating evidences/materials to substantiate the contents of the coercive statement.
- 6.11. that in the cases of Ekrammuddin 2003 (155) ELT A244 (SC), Krishnanand 2003 (155) ELT A157 (SC) and P. Pratab Rao Sait Vs. Collector of Customs, Cochin 1988 (33) ELT 433 (Tri) were also

distinguishable since the retracted confessional statement dated 26.01.2016 of the Appellant was not corroborated by other evidence.

- 6.12. that the confessional statement of the Appellant dated 26.01.2016 should not be relied upon to confiscate the impugned gold ornaments.
- 6.13. that the impugned goods are not prohibited goods; that the case law cited by OAA / AA of Om Prakash Bhatia Vs. Commissioner of Customs, Delhi 2003 (155) ELT 423 (SC) and Shekih Mohd. Omer Vs. Collector of Customs, Calcutta and Others [(1970) 2 SCC 728] are mis-placed and are distinguishable.
- 6.14. that in RE: Mohd. Zia Ul Haque 2014 (314) ELT 849 (G.O.I.), Gopal Saha Vs. Union of India 2016 (336) ELT 230 (Cal.) and Horizon Ferro Alloys Pvt. Ltd. Vs. Union of India 2016 (340) ELT 27 (P & H), it was held that "goods in respect of which any prohibition is in force" used in Section 112(1) of Customs Act, 1962 would mean only those goods import of which has been expressly prohibited and not goods which have been smuggled and the import of gold, not being prohibited per se, imposition of penalty equal to value is not sustainable; when the goods are not prohibited, the adjudicating officer shall give option to pay redemption fine in lieu of confiscation and also when the passenger neither being a habitual offender nor carrying the said goods for somebody else nor did he conceal the goods in any ingenious manner should be given the option to redeem the goods.
- 6.15. that the applicant has relied on case law of Kartar Singh v. State of Punjab [(1994) 3 SCC 569] where it is held that vague laws offend several important values. The Apex Court had also held that vague laws may trap the innocent by not providing fair warning, that such a law impermissibly delegates basic policy matters to policemen and also to judges for resolution on an ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory application.
- 6.16. the applicant has placed reliance in the case of Vigneswaran Sethuraman Vs. Union of India 2014 (308) EKT 394 (Ker.), passed by Hon'ble High Court of Kerala where a gold chain worn by the foreign tourist had been allowed as it was held that a declaration of items worn was not required as it had not been ingeniously concealed.
- 6.17. that the applicant desires to cross-examine some of the witnesses.

Applicant in the Revision application has prayed for cross-examination of the witnesses and to set aside the order-in-appeal passed by the appellate authority and to order return of the gold on payment of duty and any other orders as deemed fit.

6. Personal hearings in the case were scheduled for 12.11.2018, 12.12.2018. Thereafter, on change of the Revisionary Authority, personal hearing through the online video conferencing mode was scheduled for 02.11.2021, 09.11.2021, 01.12.2021 and for 07.12.2021. Applicant as well as advocate of the applicant were notified. No one appeared for the applicant and the respondent. Sufficient opportunities have been given to the applicant and the respondent to put forth their case. The case is being taken up for a decision on the basis of evidence on record.

7. Government has carefully gone through the Revision Application filed by the applicant, their submissions and prayer therein, the OIO, OIA, the Orders of the Hon'ble High Court, Madras, referred case laws, and all other relevant material on the subject.

8. Government notes that the Applicant was intercepted after he had opted for the green channel and he was given an opportunity to declare the goods in his possession. However, he chose not to do so. The applicant had created a specially stitched undergarment from which the impugned gold bars and coins were recovered. To evade detection, the applicant had devised an innovative and ingenious method to hide the impugned gold and hoodwink the Customs Authorities. A Customs Declaration Form duly filled in with the value of the dutiable goods in his possession shown as 'Nil' was also recovered from the applicant during the personal search, though the same had not been submitted to the authorities. This indicates that the applicant determined not to declare the gold in his possession to the authorities. The applicant had used a very ingenious method to smuggle the gold and evade detection and payment of Customs duty. The lower authorities have recorded that the applicant was a frequent traveler, thus, was aware of the law and had consciously decided not to declare the impugned gold. The Applicant had not declared the gold bars and coins as required under Section 77 of the Customs Act, 1962. The quantity of gold recovered is quite large, for commercial use and it was an ingenious concealment designed to avoid detection. The confiscation of the gold is therefore justified and the Applicant has rendered himself liable for penal action.

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 “ *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 ‘Applicant’ thus, liable for penalty.

11. Hon’ble Supreme Court in case of M/s. Raj Grow Impex [CIVIL APPEAL NO(s). 2217-2218 of 2021 Arising out of SLP(C) Nos. 14633-14634 of 2020 – Order dated 17.06.2021] has laid down the conditions and circumstances under which such discretion can be used. The same are reproduced below.

71. *Thus, when it comes to discretion, the exercise thereof has to be guided by law; has to be according to the rules of reason and justice; and has to be based on the relevant considerations. The exercise of discretion is essentially the discernment of what is right and proper; and such discernment is the critical and cautious judgment of what is correct and proper by differentiating between shadow and substance*

as also between equity and pretence. A holder of public office, when exercising discretion conferred by the statute, has to ensure that such exercise is in furtherance of accomplishment of the purpose underlying conferment of such power. The requirements of reasonableness, rationality, impartiality, fairness and equity are inherent in any exercise of discretion; such an exercise can never be according to the private opinion.

71.1. It is hardly of any debate that discretion has to be exercised judiciously and, for that matter, all the facts and all the relevant surrounding factors as also the implication of exercise of discretion either way have to be properly weighed and a balanced decision is required to be taken.

12. Government also observes that the manner in which the gold was concealed i.e. an ingeniously created undergarment which was required to be cut open to retrieve the impugned gold reveals the intention of the Applicant not to declare the gold and evade payment of Customs duty. It further reveals the demeanor and criminal bent of mind of the applicant and a clear intention to evade duty and smuggle the gold into India. The circumstances of the case especially that the impugned gold had been concealed in an ingenious manner and its raw form which is for commercial purposes, probates that the Applicant had no intention of declaring the gold to the Customs at the airport. Further, during the investigation stage, it is noted that the address of the applicant was not genuine and he was not contactable on his given mobile no. All these have been properly considered by the Appellate Authority while absolutely confiscating the impugned gold bars and coins.

13. The other issue in the case was the quantum of the impugned gold which had been attempted to be brought into the country. The quantum indicates that the same was for commercial use. 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, quantity being large and commercial, clear attempt to smuggle gold bars and coins etc, make it a fit case for absolute confiscation as a deterrent to such offenders. Thus, taking into account the facts on record and the gravity of offence, the adjudicating authority and appellate

authority had both rightly ordered the absolute confiscation of the impugned gold. In the instant case, the gold was secreted cleverly, consciously, ingeniously and in a premeditated, and the applicant did not have any intention to declare the same. But for the intuition and the diligence of the Customs Officer, the gold would have passed undetected. 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.*". 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.

14. The Government notes that the applicant had initially stated that the gold bars and coins in his possession did not belong to him and that the same had been handed over to him. He had agreed to carry the impugned gold for a monetary consideration. The applicant during his averments before the lower adjudicating authorities stated that by virtue of their stay abroad for period exceeding 1 year, he was eligible to import the gold bars and coins. The Government notes that these averments had been made by the applicants both before the original adjudicating authority and appellate authority which has dealt with the same in great detail and rejected this plea. Government for the observations stated at paras 12 & 13 above, notes that the applicant had opted to clear the goods without declaring the same and evading the payment of Customs duty and hence, the Government finds that the lower authorities had rightly held that the applicant was not eligible for any concessional benefits to import the impugned gold.

15. The applicant has sought the cross-examination of the witnesses. Government notes that sufficient opportunities had been given to him to represent and defend his case. However, he has chosen not to do so. Government observes that this plea is just a ploy to somehow delay the proceedings. Further, during

the investigation stage, it is noted that the address of the applicant was not genuine and he was not contactable on his mobile no. This too had stalemated the investigations and then to revert back stating that cross examination of the witnesses had not been allowed causing injustice is impermissible. In any case, cross examination will not alter the fact of recovery of ingeniously concealed 2320 gms gold in primary form from the body of the applicant.

16. Government finds that the penalty of Rs. 5,00,000/- imposed on the applicant under Section 112(a) of the Customs Act, 1962 is commensurate with the omissions and commissions committed and does not find it necessary to interfere in the same.

17. On the issue of plea for re-export of the impugned gold, Government notes that once the gold has been confiscated absolutely, the question of allowing of its re-export does not arise.

18. For the aforesaid reasons, the Revision Application is dismissed.


(SHRAWAN KUMAR)

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

ORDER NO. 236/2022-CUS (SZ/WZ)/ASRA/MUMBAI DATED 28.07.2022

To,

1. Shri. Payangadi Moidu Mohammad Ali, S/o. Shri. Moidu Payangadi Esuf, Halligattu Village & Post, Via Ponnampet Virajpet Taluk, Kodagu, Karnataka - 571 216.
2. Pr. Commissioner of Customs, Chennai - 1(Airport), New Custom House, Meenambakkam, Chennai - 600 027.

Copy to:

1. S. Sivashankar, Advocate, 53/25, Akbar Street - II Lane, Triplicane, Chennai - 600 005.
2. Sr. P.S. to AS (RA), Mumbai.
3. File Copy.
4. Notice Board.