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SPEED POST



GOVERNMENT OF INDIA
MINISTRY OF FINANCE
(DEPARTMENT OF REVENUE)
8th Floor, World Trade Centre, Centre - I, Cuffe Parade,
Mumbai-400 005

F.No. 373/83/B/2020-RA/3314 : Date of Issue : 01.08.2022

ORDER NO. 237 /2022-CUS (SZ)/ASRA/MUMBAI DATED 28.07.2022
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. Mohamed Talib Ahmed

Respondent : Pr. Commissioner of Customs, Kempegowda International
Airport, Bengaluru.

Subject : Revision Application filed, under Section 129DD of the
Customs Act, 1962 against the Order-in-Appeal No.
10/2020 dated 10.01.2020 issued through A.No.
141/2019-CUS(B-AIR), passed by the Commissioner of
Customs (Appeals), Bengaluru - 560 071.

ORDER

This revision application has been filed by Shri. Mohamed Talib Ahmed (herein referred to as Applicant) against the Order-in-Appeal No. 10/2020 dated 10.01.2020 issued through A.No. 141/2019-CUS(B-AIR)40/2020, passed by the Commissioner of Customs (Appeals), Bengaluru – 560 071.

2. Briefly stated the facts of the case are that the Applicant was intercepted by the Customs Officers at the arrival hall of Kempegowda International Airport (KIA), Bengaluru on 20.02.2018 where he had arrived from Dubai by Emirates Flight No. EK 564. As the applicant exited through the Door Frame Metal Detector (DFMD) placed at the exit of the green channel, there was a long beep sound suggesting the presence of some metal on his body. On enquiry, the applicant stated that he did not possess any dutiable or prohibited items. The applicant agreed for a body search and when the hand held metal detector was placed near his buttocks, there was a beep sound clearly indicating the presence of metal object in his body. On persistent enquiry, the applicant confessed to having concealed gold biscuits in his rectum and agreed to remove the same. The applicant in all ejected out two pieces of gold biscuits of 10 tola each, totally weighing 233.240 gms, of 24 carats / 99.5% purity and valued at Rs. 7,41,100/- from his body cavity. The applicant informed that the 2 nos of gold biscuits were concealed by him in his rectum, so as to prevent detection by Customs and to clear the same without payment of any Customs duty.

3. After, due process of law, the Original Adjudicating Authority (OAA) viz, the Dy. Commr. Of Customs, KIA, Bengaluru vide Order-In-Original No. 78 / 2018-19 (AP-ADM) dated 20.03.2019 issued through C.No. VIII/48/160/2017-18 AIU 'D' Batch (OR No. 103/2017-18) ordered the absolute confiscation of the 2 nos of gold biscuits of 10 tolas each, totally

weighing 233.240 gms, valued at Rs. 7,41,000/- under Section 111(d), 111(i) and 111(l) of the Customs Act, 1962 Penalties of Rs. 3,50,000/- each were imposed on the applicant under Section 112(a) and Section 114AA of the Customs Act, 1962, respectively.

4. Aggrieved by the said order, the applicant filed an appeal before the Appellate Authority (AA) viz, Commissioner of Customs (Appeals), Bengaluru who vide Order-in-Appeal No. 10/2020 dated 10.01.2020 issued through A.No. 141/2019-CUS(B-AIR) modified the OIO only to the extent of reduction of the penalty under Section 112(a) to Rs. 2,50,000/- and to Rs. 100,000/- under Section 114AA of the Customs Act, 1962.

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

- 5.01. that the impugned order passed by the AA upholding the imposition of penalty on the applicant is unsustainable and liable to be set aside for the following facts, reasons and grounds.
- 5.02. that the gold jewellery had been purchased from his salary and was from legal sources; that he had a invoice for purchase of the gold; that gold had been purchased for use by his family.
- 5.03. that applicant was under bona fide belief that gold up to 5 kgs was allowed duty free.
- 5.04. that the applicant had not attempted to pass through the green channel; that the applicant had not resorted to any modus operandi such as concealment of the gold jewellery as smugglers would normally do.
- 5.05. that the items seized did not fall within the category of Prohibited goods.
- 5.06. that the natural course for the department was to permit the release of the gold jewellery on payment of appropriate customs duty leviable thereon and impose reasonable redemption fine in lieu of the confiscation.
- 5.07. that reliance was placed on the decision of CESTAT rendered in the case of Yakum Ibrahim Yusuf Versus Commissioner of Customs, Mumbai (2011 (263) E.LT 685 (Tri-Mumbai)) where it was held that the importer was entitled for return of gold with deduction of redemption fine and penalty. In the same case was also held that the option of redemption has to be given to the person from whose

possession impugned goods were recovered in spite of the fact he had not claimed the ownership of the goods. Same view was taken by the Hon'ble High Court of Madras in the case of T Elavarasan Versus Commissioner of Customs [2011 (266) E.L.T 167 (Mad)]

5.08. that the régime for of gold import has seen liberalization over the last few years.

5.09. that the proposal to impose penalty on the applicant under Section 112(a) & 114AA of the Act may be dropped:

Applicant has prayed to set aside the Order-in-Appeal No 10/2020 dated 10-01-2020 passed by the Commissioner of Customs (Appeals), Bangalore and allow the appeal with consequential relief; Pass such order as may be deemed fit and proper in the facts and circumstances.

6. Personal hearings in the case was scheduled through the video conferencing mode for 03.12.2021, 09.12.2021, 05.01.2022, 19.01.2022, 23.02.2022 and on 02.03.2022. No one appeared for the applicant and for the respondent. Sufficient opportunities having been given, the case is being taken up for a decision on the basis of evidence on record.

7. The Government has gone through the facts of the case. The Applicant was intercepted at the exit gate after he had exited through the green channel. To queries whether he was carrying any dutiable goods, the applicant had replied in the negative. The impugned gold was secreted in his body cavity i.e. rectum. It is clear that the applicant had resorted to concealment to smuggle gold and evade duty. This action manifests that applicant had no intention to pay the Customs duty. The Applicant had not declared the impugned gold as required under section 77 of the Customs Act, 1962. The type of concealment adopted to evade duty is important here. The applicant had pre-planned and selected an ingenious and risky method that he used to avoid detection and thereby to evade Customs duty. The confiscation of the gold is therefore justified and thus, the Applicant had rendered himself liable for penal action.

8. 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".

9. 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, is liable for penalty.

10. 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.

11. Government observes that the manner in which the gold was concealed i.e. inside his own body, reveals the intention of the Applicant. It also reveals his criminal bent of mind and a clear intention to evade duty and smuggle the gold into India. The circumstances of the case especially the ingenious concealment method adopted, probates that the Applicant had no intention of declaring the gold to the Customs at the airport. All these have been properly considered by the Appellate Authority and the lower adjudicating authority while confiscating the gold pieces absolutely.

12. The main 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 with a clear attempt to smuggle gold, it is a fit case for absolute confiscation which would also be a deterrent to such offenders. Thus, taking into account the facts on record and the gravity of the offence, the adjudicating authority had rightly ordered the absolute confiscation of gold. 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 non bonafide and unscrupulous elements to resort to concealment and bring gold. 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 upholding the order of the adjudicating authority is therefore liable to be upheld.

13. The Government finds that the penalty of Rs. 2.50,000/- imposed on the applicant under Section 112(a) of the Customs Act, 1962 is appropriate and commensurate with the omission and commission committed by the applicant. The Government does not find it necessary to interfere in the penalty imposed by the appellate authority.

14. Government notes that once penalty has been imposed under Section 112(a) of the Customs Act, 1962, there is no necessity of imposing penalty again under Section 114AA of the Customs Act, 1962. Therefore, the penalty of Rs. 1,00,000/- imposed under Section 114AA of the Customs Act, 1962 by the AA, is set aside.

15. Government upholds the order of absolute confiscation of the impugned gold passed by the AA. The penalty imposed on the applicant under Section 114AA of the Customs Act, 1962 by the AA, is set aside. Government does not find it necessary to interfere in the penalty of Rs. 2,50,000/- imposed on applicant under Section 112(a) of the Customs Act, 1962 by the AA.

16. The Revision Application is disposed of on the above terms.

Shrawan Kumar
28/7/22
(SHRAWAN KUMAR)

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

ORDER No. 237/2022-CUS (SZ) /ASRA/ DATED 28.07.2022

To,

1. Shri. Mohamed Talib Ahmed, S/o. Siddibapa Ummer, Ruqaiya Mansion, Opp. Usmani Masjid, Nawayat Colony, Bhatkal, North Kannada Dist., Karnataka, Pin : 581 320.
2. Pr. Commissioner of Customs, Kempegowda International Airport, Bengaluru.

Copy to:

1. S/Shri. S.S Hiremath & M. Nagendra Murth, Advocates, No. 12, 2nd Floor, Hazarath Hameed Shah Complex, Silk Exchange Building, Cubbonpet Main Road, Bengaluru, Pin : 560 002.
2. Sr. P.S. to AS (RA), Mumbai.
3. File Copy.
4. Notice Board.