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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. 373/103/B/2018-RA : Date of Issue : 01.08.2022
F.No. 380/43/B/SZ/2018-RA/9309

ORDER NO. ²³⁸⁻²³⁹ /2022-CUS.(WZ/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.

(i). F.No. 373/103/B/2018-RA

Applicant : Shri. Segu Erwardy Nathar, S/o. Shri. Mihilar
Respondent-Dept : Commissioner of Customs, Chennai – I,
Meenambakkam, Chennai.

(ii). F.No. 380/43/B/SZ/2018-RA

Applicant-Dept : Commissioner of Customs, Chennai – I
Commissionerate, Chennai - 600 027.

Respondent-Applicant : Shri. Segu Erwardy Nathar, S/o. Shri. Mihilar

Subject : Order-in-Appeal Airport No. C.Cus.I.No. 41/2018 dated
23.03.2018 [F.No. C4- I/23/O/2018-AIR] passed by
the Commissioner of Customs (Appeals - I), Chennai –
600 001.

ORDER

These two revision applications have been filed by (i). Shri. Segu Erwardy Nathar, (hereinafter referred to as the Applicant or alternately as the Applicant No. 1 (A1) or also as Respondent-Applicant.) and (ii). Commissioner of Customs, Commissionerate – I, Meenambakkam, Chennai (hereinafter referred to as the Applicant-department or Respondent-dept.) against the Order in Appeal No. C.Cus.I.No. 41/2018 dated 23.03.2018 [F.No. C4- 1/23/O/2018-AIR] passed by the Commissioner of Customs (Appeals - I), Chennai – 600 001.

F.No. 373/103/B/2018-RA

2(a). Brief facts of the case are that the applicant who is a Sri Lankan National had arrived at the Chennai Airport on 21.08.2017 from Colombo onboard Sri Lankan Airlines Flight No. UL 125/21.08.2017 was intercepted by Customs Officers as he was walking out of the exit gate of the arrival hall of Anna International Terminal, Chennai Airport after clearing Customs green channel. To query put forth to him for possession of any dutiable items, he had replied in the negative. During the personal search of the applicant nothing incriminating was found. Thereafter, a search of the handbag and checked in baggage of the applicant led to the recovery of 18 nos of silver coated buckles of zip. The same were unusually heavy and the applicant was asked whether these buckles of zip were made of gold to which he replied in the negative. The Government Examiner was called who after examination certified that the 18 nos of buckles of zip were made of gold of 24 carats purity and totally weighed 220.5 gms valued at Rs. 6,38,788/-. The buckles made of gold were seized. The applicant did not possess any foreign currency for the payment of Customs duty and admitted that he was aware that smuggling of

gold by way of concealment, non-payment of Customs duty, without valid documents was an offence under the Customs Act; that he had carried the same for a monetary consideration.

3. The Original Adjudicating Authority (OAA) viz, Joint Commissioner of Customs (Adjudication-AIR), Chennai vide vide Order-In-Original No. 200/2017-18 – Airport dated 17.01.2018 [F.No. O.S No. 444/2017-AIR] ordered for the absolute confiscation of the seized 18 nos of gold buckles of the zip, totally weighing 220.5 gms and totally valued at Rs. 6,38,788/- under Section 111(d) and (l) of the Customs Act, 1962 read with Section 3(3) of the Foreign Trade (Development and Regulation) Act, 1992. Penalties of (i). Rs. 65,000/- under Section 112(a) of the Customs Act, 1962 and (ii). Rs. 10,000/- under Section 114AA of the Customs Act, 1962 were also imposed on the applicant.

4. Aggrieved by the said order, the applicant filed an appeals before the Appellate Authority (AA) i.e. Commissioner of Customs (Appeals - I), Chennai – 600 001, who vide Order in Appeal No. C.Cus.I.No. 41/2018 dated 23.03.2018 [F.No. C4- I/23/O/2018-AIR] except for setting aside the penalty on the applicant under Section 114AA of the Customs Act, 1962, did not find it necessary to interfere in the remaining part of the order.

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

5.01. Order of the AA is against law, weight of evidence and circumstances and probabilities of the case; that an order to re-export the seized gold under section 80 of the Customs Act 1962, ought to have been passed; that gold was not a prohibited item and as per the liberalized policy it ought to have been released on payment of redemption fine and baggage duty.

- 5.02. that the AA glossed over all the judgments and points raised in the appeal grounds and no reason had been given to reject their appeals; that the AA had failed to apply his mind and hence the order is liable to be set aside.
- 5.03. that the applicant had retracted his statement on 21.08.2017; that the gold belonged to him and had purchased it at Sri Lanka.
- 5.04. that as per CBEC letter F. NO. 495/3/94-Cus VI dated 2.3.1994. the ownership of gold was not a criterion for import of gold; that the gold receipts were in the name of passengers.
- 5.05. that in the case cited i.e. Madras High Court judgement in CC Chennai Samynathan Murugesan, passenger was of Indian origin and 7.075 kgs of gold had been concealed in the T.V. set and ratio of this case was not applicable to their case.
- 5.06. that no declaration card had been provided at Airport either by Customs or by others. by neither by the customs authority nor by any other agency.
- 5.07. that the Hon'ble Supreme Court (full bench) in OM Prakash case Vs UOI has categorically stated that the main object of the enactment of the said act was the recovery of excise duties and not really to punish for infringement of its provisions.
- 5.08. the gold under seizure being not prohibited, option of redemption in terms of Section 125 of the Customs Act, 1962 was mandatory; the order of absolute confiscation was erroneous and requires be set aside / modified.
- 5.09. The applicant has cited the following case laws to buttress their case,
- (i). Supreme Court (full bench) judgment dated 30.09.2011 in OM Prakash vs UOI.
 - (ii). Shri VELU HARIHARAN (Sri Lankan, national) passed Customs (Appeals); Chennai OS. No. 388/08 Air dated 29.05.2008 in C4/447/0/2008-AIR COUS/428/2008 dated 30.10.2008
 - (iii). RA order no. 198/2010-CUS dated 20.05.2010 in F.NO. 375/14/8/2010-RA-CUS reported in 2011 (270) ELT 447 (GOI) MUKUADAM RAFIQUE AHMED, permitted re-shipment of goods on lesser redemption.
 - (iv). Revision Authority Order in JABBAR ILYAS and others in F.No. 373/6, 8-11, 23-25, 28-29/8/07-RA ORDER NO. 212-221/07 DATED 27.04.2007, reduced the personal penalty and redemption fine.

(v). Shaik Sahabuddin vs. Commr. Of Customs, Chennai [2001-137-ELT-127(Tri-Chennai)], the authorities have to give a clear cut decision whether violation of law has taken place before crossing the green channel ...

Under the circumstances of the case, the applicant prayed to set aside the impugned order and permit him to re-export the gold or release the gold and also to reduce the personal penalty and to render justice.

(ii). F.No. 380/43/B/SZ/2018-RA

6. Agrieved with the above order passed by the AA, the Applicant-Department has filed the revision application i.e. F.No. 380/43/B/SZ/2018-RA on the following limited grounds;

6.01. that the order passed by the appellate authority with reference to setting aside the penalty levied u/s 114AA was neither legal nor proper.

Applicant has prayed that the Order-In-Appeal passed by the appellate authority was not legal and proper to the extent of penalty under Section 114AA was concerned and hence, the same is required to be set aside.

7. Personal hearings in the case through the online video conferencing mode was scheduled for 05.01.2022 / 19.01.2022, 23.02.2022 / 02.03.202. Nobody appeared for the applicant and the applicant-department. Sufficient opportunities have been accorded to the applicant and applicant-department. Therefore, case is taken up for a decision on the basis of evidence on record.

8. The Government has gone through the facts of the case, and notes that the applicant had passed through the green channel and had failed to declare the dutiable goods in his possession to the Customs at the first instance as required under Section 77 of the Customs Act, 1962. The applicant had been granted an opportunity to declare the goods in his possession. However, he

chose not to do so. The applicant had adopted an ingenious concealment to hoodwink the Customs and evade payment of Customs duty. The act committed by the applicant was pre-meditated, well-planned and conscious. The gold of 24 carat purity was melted and converted to buckles of zip which thereafter were silver coated to evade detection and consequently, evade payment of Customs duty. The silver coating and shape in which the gold had been moulded i.e. buckles of the zip, clearly reveals intention of the applicant to ingeniously conceal the gold and it is evident that the applicant had not intended to declare the same to Customs. The Government finds that the confiscation of the gold is therefore justified.

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 Applicants 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 notes that the quantity of gold is not the issue but the manner in which it was concealed and the demeanor of the applicant. The gold was melted and converted in the form of buckles of zip and had been silver coated. An ingenious method was used by the applicant to avoid detection and hoodwink the Customs authorities. An option to declare the goods in his possession was granted to the applicant but he chose not to disclose it. The applicant had made a firm mind to smuggle the gold. The action and demeanor indicate that the act of the applicant was pre-meditated, conscious and having full knowledge. Had it not been due to the alertness and diligence of the officers manning the exit gate, the applicant would have gotten away with the impugned gold without discharging the duty. Government notes that the applicant had deliberately converted the gold having purity of 24 carat into the shape of buckles of zip and the same had been coated which was a deliberate act to hoodwink the Customs and avoid payment of duty. The Applicant has pleaded for setting aside the absolute confiscation order passed by the Original Adjudicating Authority which has been upheld by the Appellate Authority. On considering the form of the gold, manner of ingenious concealment and clear attempt to smuggle gold, plea of the applicant does not deserve consideration. The Government, keeping in mind the facts of the case is in agreement with the observations of the Appellate authority and finds that absolute confiscation is proper and judicious. This also would act as a deterrent for those attempting to smuggle the gold in similar manner. For the aforesaid reasons, the Government is not inclined to interfere in the order passed by the AA.

13. With regard to the penalty imposed on the applicant under Section 112(a) of the Customs Act, 1962, Government finds that the same is

commensurate with the omissions and commissions committed by the applicant.

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 under Section 114AA of the Customs Act, 1962. Therefore, the penalty of Rs. 10,000/- imposed under Section 114AA of the Customs Act, 1962 on the applicant has been correctly set aside by the appellate authority and Government finds the same as legal and judicious.

15. For the aforesaid reasons, Government is not inclined to interfere in the appellate order which has set aside the penalty imposed on the applicant under Section 114AA of the Customs Act, 1962.

16. For the aforesaid reasons, Government rejects the Revision Application i.e. F.No. 373/103/B/2018-RA filed by the applicant and the Revision Application F.No. 380/43/B/SZ/2018-RA filed by the applicant-department.


(SHRAWAN KUMAR)

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

ORDER No. ~~238-239~~ 2022-CUS (WZ/SZ) /ASRA/

DATED 28.07.2022

To,

1. Shri. Segu Erwardy Nathar, S/o. Shri. Mihilar, No. 46-7, Avval Navia Road, Grandpas, Colombo - 14.
2. Pr. Commissioner of Customs, Commissionerate - 1, Chennai Airport, New Custom House, Meenambakkam, Chennai - 600 027.

Copy To,

1. Smt. Kamalamalar Palanikumar, Advocate, No. 10, Sunk Ram Street, Second Floor, Chennai - 600 001.

2. Sr. P.S. to AS (RA), Mumbai:
3. File Copy.
4. Notice Board.