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SPEED POST



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

F.No. 371/31-B/B/16-RA / 5711

Date of Issue / 05/10/21

ORDER NO 241/2021-CUS (WZ)/ASRA/MUMBAI DATED 30.09.2021 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 : Smt. Banarasi M. Zaiyahuhak.

Respondent: Commissioner of Customs, CSI Airport, Mumbai.

Subject : Revision Application filed, under Section 129DD of the Customs Act, 1962 against the Order-in-Appeal No. MUM-CUSTM-PAX-APP-627-15-16 dated 28.01.2016 passed by the Commissioner of Customs (Appeals-III), Mumbai Zone - III.

ORDER

This revision application has been filed by Smt. Banarasi M. Zaiyahuhak (herein after referred to as the Applicant) against the Order in appeal No. MUM-CUSTM-PAX-APP-627-15-16 dated 28.01.2016 passed by the Commissioner of Customs (Appeals-III), Mumbai Zone-III.

2. Briefly stated the facts of the case are that the applicant arrived at the CSI Airport Mumbai from Kuwait on 22.03.2012 on board Kuwait Airway Flight No. 301/22.03.2012. After the applicant had cleared the green channel she was intercepted by AIU Officers on suspicion. To the query whether she was carrying any dutiable goods or jewellery in her baggage or person, she had replied in the negative. On examination of her brown hand purse, 3 pairs of gold ear rings, a gold chain and 1 gold finger ring, totally weighing 18 gms were recovered. Her personal search led to the recovery of 7 gold bangles, a gold necklace with ear ring set and a gold necklace, totally weighing 322 gms. In all 340 gms of gold jewellery valued at Rs. 8,68,292/- was recovered and seized from the applicant.

3. The Original Adjudicating Authority vide Order-In-Original No. ADC/AS/ADJN/16/2013-14 dated 07.06.2013 [12.06.2013] issued through F.No. SD/INT/AIU/32/2012 APA' ordered confiscation of the seized gold and allowed redemption on payment of Rs. 1,50,000/-. Penalty of Rs. 75,000/- under Section 112(a) & (b) of the Customs Act, 1962 alongwith penalty of Rs. 10,000/- under Section 114AA of the Customs Act, 1962 was imposed on the applicant.

4. Aggrieved by the said order, the applicant filed an appeal before the Commissioner of Customs (Appeals-III), Mumbai Zone-III who vide Order-In-Appeal No. MUM-CUSTM-PAX-APP-627-15-16 dated 28.01.2016 rejected the

appeal and declined to interfere in the Order-in-Original passed by the adjudicating authority.

5. Aggrieved with the aforesaid order dated 28.01.2016 passed by the Commissioner of Customs (Appeals-III), Mumbai Zone-III, the Applicant, has filed this revision application inter alia on the grounds that;

5.1. the principles of natural justice were violated as adequate opportunity was not afforded.

5.2. Except for 18 gms of gold jewellery which was new all other gold jewellery was old and used which had been given by her brothers and worn by her while leaving India

5.3. No show cause notice was issued to the applicant.

5.4. Applicant has contended that penalties under Section 112 (a) & (b) and Section 114AA of the Customs Act, 1962 cannot be imposed simultaneously. Applicant has stated that 114AA provides for penalty for use of false and incorrect material. Applicant has reiterated that appellate authority has failed to put on record any material that is false hence imposition of penalty under Section 114AA was unwarranted.

5.5. The applicant has stated that the appellate authority has failed to appreciate the case laws referred in her appeal.

The Applicant has prayed to (a). set aside the impugned Order-in-Appeal No. MUM-CUSTOM-PAX-APP-627-15-16 DATED 28.01.2016 passed by the Commissioner of Customs, CSI Airport, Mumbai and (b). hold that the old and used gold jewellery worn and carried by the applicant was not liable for confiscation and is liable for any penalty.

6. A personal hearing in the case was scheduled on 15.09.2021. However, Shri. N.K Tiwari requested for re-scheduling the same on 16.09.2021 and accordingly, personally hearing was conducted online on 16.09.2021. He

reiterated his earlier submissions and stated that he would submit written submission in two days. He requested to release the gold jewellery or reduce the RF and penalty.

7. In the grounds of appeal, the applicant has stated that natural justice was not accorded. The appellate authority has noted that hearing was initially scheduled for the 7<sup>th</sup> of April, 2015 and was attended by Advocate, Shri. N.K Tiwari. However, the matter was re-fixed for 05.10.2015 and 30.11.2015 and since, no one had attended, the case was taken up on the basis of available records.

8. Further, the applicant has stated that no show cause notice was issued. The Government finds that the lower adjudicating authority has recorded that the applicant had waived the issuance of a show cause notice. Having done so, the applicant cannot renege on her commitment. In this regard, the Government relies on the judgement of the Apex Court in the case of Commissioner of Customs, Mumbai v/s. M/s. Virgo Steels reported in 2002(141) ELT 0598 SC. The relevant paras are reproduced below,

*15. Bearing in mind the above decided principle in law, if we consider the mandatory requirement of issuance of notice under Section 28 of the Act, it will be seen that that requirement is provided by the Statute solely for the benefit of the individual concerned, therefore, he can waive that right. In other words, this Section casts a duty on the Officer to issue notice to the person concerned of the proposed action to be taken. This is not in the nature of a public notice nor any person other than the person against whom the proceedings are initiated has any right for such a notice. Thus, this right of notice being personal to the person concerned, the same can be waived by that person.*

*16. If the above position in law is correct, which we think it is, M/s. Virgo Steels, having specifically waived its right for a notice, cannot now be permitted to turn around and contend that the proceedings initiated against them are void for want of notice under Section 28 of the Act, so as to frustrate the statutory duty of the Revenue to demand and collect customs duty which M/s. Virgo Steels had intentionally evaded.*

*17. Since the sole ground on which the appeal of M/s. Virgo Steels was allowed by the Tribunal is based on non-issuance of a notice under Section 28 and we having found such a notice was not necessary in the facts and circumstances of the case, the appeal of the Revenue as against M/s. Virgo Steels has to be allowed.*

9. 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 goods to the Customs at the first instance as required under Section 77 of the Customs Act, 1962. Only a specified quantity of gold jewellery of personal use is permitted to be brought in which is linked to the period of stay abroad. In this case the applicant resided abroad for a short period of 10 days and the personal gold jewellery worn by her exceeded the specified limit and on this count the Government finds that the applicant is not eligible for the exemption. Coupled with the fact the applicant had not declared the gold jewellery upon arrival and had passed the green channel, The Government finds that the confiscation of the gold was therefore, justified.

10. 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".

11. 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.

12. In a recent judgement by the Hon'ble Supreme Court in the case of M/s Raj Grow Impex and others Vs UOI (CIVIL APPEAL NO(s). 2217-2218 of 2021 Arising out of SLP(C) Nos. 14633-14634 of 2020 – Order dated 17.06.2021), it is stated *".....when it comes to discretion, the exercise thereof has to be guided by law; according to the rules of reason and justice; and has to be based on the relevant considerations.....such an exercise cannot be based on private opinion."*

13. Government notes that there is no past history of such offence/violation by the Applicant. The confiscated gold jewellery has been allowed redemption by appellate authority on payment of fine of Rs. 1,50,000/- which the applicant has stated is quite high and prayed for relief. The appellate authority while denying the prayer of the applicant has observed that the fine is at 17.25% of the value of the offending goods. Since, the applicant is not a habitual offender and has pleaded ignorance of the law and procedures and the fact that the gold jewellery was old and used as noted by the Customs itself, the Government is inclined to reduce the redemption fine. The Government reduces the redemption fine to Rs. 1,10,000/- (Rupees One Lakh Ten Thousand Only)

14. The Government finds that the appellate authority has imposed penalty simultaneously under Section 112 (a) and (b) and also under Section 114A of the Customs Act, 1962. In addressing the issue of penalty under section 114AA of the Customs Act, 1962, Government relies on the observations of 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 that the intention of the amendment be gathered from the objects and reasons which is a part of the amending Bill to the Finance Minister's speech*".

15. In view of the above 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 is reproduced below;

*"Section 114 provides for penalty for improper exports of goods. However, there have been instances where export was on paper only and no goods had ever crossed the border. Such serious manipulations could escape penal action even when no goods were actually exported. The lacuna has an added dimension because of various export incentive schemes. To provide for penalty in such cases of false and incorrect declaration of material particulars and for giving false statements, declaration, etc. for the purpose of transaction of business under the Customs Act, it is proposed to provide expressly the power to levy penalty up to five times the value of the goods. A new Section 114AA is proposed to be inserted after Section 114A."*

16. Government therefore observes, penalty under Section 112 is imposable on a person who has made the goods liable for confiscation. But there could be situation where no goods ever cross the border. Since such situations were not covered for penalty under Section 112/114 of the Customs Act, 1962, Section 114AA was incorporated in the Customs Act by the Taxation Laws (Amendment) Act, 2006. Hence, once the penalty is imposed under Section 112(a), then there is no necessity for a separate penalty under section 114AA for the same act. The penalty of Rs. 10,000/- (Rupees Ten thousand only) imposed under section 114AA of the Customs Act, 1962 is liable to be set aside.

17. In view of the above, the Government observes that once penalty has been imposed under section 112(a) and (b) there is no necessity of imposing penalty under section 114AA of the Customs Act, 1962. Therefore, the Government sets aside the penalty of Rs. 10,000/- (Rupees Ten thousand) imposed under section 114AA of the Customs Act, 1962. Penalty imposed under Section 112 is appropriate.

18. In view of the above, the Government is inclined to take a reasonable view in the matter and partially modifies the impugned order of the Appellate authority on the above terms.

19. Revision Application is disposed of on above terms.

*Shrawan*  
30/9/21

( SHRAWAN KUMAR )

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

ORDER No 24/2021-CUS (WZ) /ASRA/

DATED 30.09.2021

To,

1. Banarasi M. Zaiyahuhak, 12/571, Zulfi Palace, 401, 4<sup>th</sup> Floor, Opp. Union High School, Lal Gate, Surat -
2. Commissioner of Customs, Chhatrapati Shivaji International Airport, Avas Corporate Point, Makwana Lane, Behind S.M Centre, Andheri Kurla Road, Andheri (East), Mumbai - 400 059.

Copy to:

3. Shri N.K Tiwari, Advocate, 21, Surdhara Bungalows, Near Sal Hospital, Drive-in Road, Thaltej, Ahmedabad - 380 054.
4. Sr. P.S. to AS (RA), Mumbai.
5. Guard File. ,
6. Spare Copy.