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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. 373/125/B/15-RA | 579 |

Date of Issue 06/10/2021

ORDER NO. ²⁴⁶ /2021-CUS (SZ)/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 : Shri Vempalli Khaja Peer

Respondent : Commissioner of Customs, Chennai.

Subject : Revision Application filed, under Section 129DD of the
Customs Act, 1962 against the Order-in-Appeal C. CUS.I
No. 38/2015 dated 19.02.2015 passed by the
Commissioner of Customs (Appeals-I), Chennai.

ORDER

This revision application has been filed by Shri Vempalli Khaja Peer (herein after referred to as the Applicant) against the order in appeal Order-in-Appeal C. CUS.I No. 38/2015 dated 19.02.2015 passed by the Commissioner of Customs (Appeals-I), Chennai.

2. Briefly stated the facts of the case are that the Applicant, was intercepted when he arrived at the Anna International Airport on 27.10.2014, while he was attempting to exit the green channel. The examination of his person resulted in the recovery of two gold pieces totally weighing 600gms valued at Rs. 15,37,850/- (Rupees Fifteen Lakhs Thirty seven thousand Eight hundred and fifty) from his pant pockets.

3. The Original Adjudicating Authority vide Order-In-Original No. 917/2014 dated 20.08.2014 ordered confiscation of the two cut pieces of the gold valued at Rs. 15,37,850/- but as the Applicant was an eligible passenger to import gold, allowed redemption of the same on payment of Rs. 5,00,000/- (Rupees Five lakhs) and imposed a penalty of Rs.1,10,000/- (Rupees One lakh ten thousand) under Section 112 (a) of the Customs Act, 1962.

4. Aggrieved by the said order, the respondent filed an appeal before the Commissioner (Appeals) who vide Order-In-Appeal C. CUS.I No. 38/2015 dated 19.02.2015 set aside the order of the Original Adjudicating Authority holding that the Applicant was a carrier and absolutely confiscated the impugned gold.

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

5.1 The learned Appellate authority failed to note that the passenger was intercepted by the Officers of Customs when he was proceeding to the red channel and he was never allowed to declare the gold. Therefore the allegation that the passenger did not declare the same is wrong and it is clear that the statement obtained from the passenger as he did not declare the gold is wrong as the revision applicant signature was taken

forcibly in a computer typed statement which is in English of which the Revision applicant does not understand. Hence the allegation against section 111(1) would not, at any rate is attributable to the present case.

5.2 The learned Appellate authority failed to note that the statement when retracted it will become a tainted statement, is a settled principle of law that the retracted statement has to be corroborated by material evidence. In the alleged confessional statement purported to be given by the revision applicant it is stated that the gold brought by the passenger was given by one Mr Ramesh in Kuwait and the revision applicant has to handover the same to a person who will wait outside the Chennai Airport. If the fact remains that a person is waiting outside the Airport to collect the Gold the Officers of Customs should have sent the Revision applicant out so as the person waiting outside the Airport will approach him and then the officers could have caught that person too. However the officers do not choose to do so. It is because of the very fact that nobody is waiting outside to receive the gold and the revision applicant is the owner of the seized gold. The ownership of the Gold is also corroborated by the purchase receipt produced by the passenger at the time of personal hearing. Therefore in the absence of evidence corroborating the alleged confessional statement, the statement has to be eschewed in toto . As already submitted the ownership of gold is corroborated by the purchased receipt produced by the revision applicant. Therefore the finding of the lower appellate authority is wrong.

5.3 The learned lower appellate authority is wrong in absolutely confiscating the gold since the Division Bench of High Court of Bombay High Court in the Judgment of Abdulla Kallingal Andu Vs Commissioner of Customs has held that ownership of gold is not a criteria provided the passenger satisfied the condition of staying abroad.

5.4 There is no contravention of the above stated Rule by the Noticee in view of the following factual matrix

- a) That the passenger importing the gold is coming to India after a period not less than six months stay abroad.

Admittedly, the noticee has deposed in his statement corroborated by the entries in the passport that he had stayed abroad in Saudi Arabia for 15 months.

b) The quantity of the gold imported in this case did not exceed 5 kilograms

5.5 Therefore there would not be any restriction for the Import of Gold in this case and there will be no restriction on the sale of such imported gold even though if it had foreign markings.

5.6 It is also submitted that the payment of duty by the Foreign exchange is curable defect and it can be rectified after the clearance of gold. In this context it is submitted that in case of persons who does not have sufficient means to pay duty for any goods, the goods shall be detained temporarily under Section.80 of the Customs Act 1962 and has to be returned to the passenger when he is leaving abroad. However this condition is meant only for the purpose of payment of duty and it is not a restriction under the above said rule. In this context the noticee relies on the following decisions wherein the goods were cleared on payment of concessional rate of duty after the adjudication process.

i) Krishna kumari —Vs- Commissioner of Customs, Chennai reported in 2008 (229) ELT 222, decided by CESTAT, SZB, Chennai wherein it has been decided that even though the passenger has brought Foreign exchange for the payment of Gold it was not appropriate towards payment of duty and the duty was subsequently paid by obtaining foreign exchange from the Foreign Exchange dealer on the date of clearance of Goods after the completion of Adjudication proceedings.

ii) The noticee wanted to submit yet another similar order passed in Order in Original No 2/2012 in dated 7.2.2012 wherein the adjudicating authority has released the gold jewellery on the concessional rate of duty, that too for the case which is concealed in the knee cap since he is an

eligible passenger who stayed for a period of 6 months. However, in that case, the passenger did not bring any foreign currency

iii) Similar orders were passed by the adjudicating authority in Order in Original No 29/2012 dated 09.10.2012 wherein the adjudicating authority has released the gold coins and bars on the concessional rate of duty on the payment of redemption fine and penalty though the passenger did not bring foreign currency.

iv) In absolute similar circumstances the adjudicating authority has passed Order in Original No.358/2013 dated 9.4.2013 wherein the gold chain the noticee is released on a concessional rate of duty ,since he is an eligible passenger.

v) Above all, in a recent orders passed by the Government of India in 37-38/ 14 dated 5.3.2014, arising from this commissionerate, has released gold jewelry to passenger, confirming the order of Commissioner of Customs (Appeals),Trichy, though, there is a dispute in ownership and the passenger has disowned the jewellery brought by him subsequently, who did not bring foreign exchange on a concessional rate of Duty after adjudication

5.7 The learned authorities below failed to note that Foreign Trade Development and Regulation, Act has no application in the present case. It is further submitted that adjudicating authority failed to consider even section 11 of the Customs Act has no application as the field is held by the notification issued under Section 25 of the Customs Act. There is no notification issued in the Customs Act under section 11 of the Customs Act with regard to gold.

5.8 The learned authorities below failed to note that Section 111(d) of the Customs Act would not apply to the present case as the gold is not a prohibited item. Gold has not been classified as prohibited item under the ITC HS classification nor is any notification has been issued that the gold is prohibited. It is further submitted that gold is an item under OGL and is freely importable with applicable duties. The prohibition under the

Gold control Act and FERA are repealed a decade ago. It is further submitted that gold is an item under OGL and is freely importable with applicable duties. Therefore section-111 (d) of the Customs Act has no application in the present case. IV. The learned authorities below failed to note that under section - 125 an option of redemption would be given even for prohibited goods since the term used is "may" in case of prohibited goods.

5.9 The learned authorities below failed to note that in the judgment of Yakub Ibrahim Yusuf reported in 2011 (263) E.L.T 685 it is held that prohibited goods refers to goods like arms, ammunition, addictive drugs, whose import in any circumstance would danger or be detrimental to health, welfare or morals of people as whole.

5.10 The order in original says that the noticee is not the owner of goods without verifying the fact that is a person by name Maqbool is really existing or not. The order in original has to findings and to all the allegations in the show cause notice. There is no conclusion nor any finding as to the fact that there is a person by name Maqbool is really existing or not. Without concluding the existence of a person by name Maqbool, the adjudicating authority cannot say that the noticee is not the owner of goods, particularly, since the statement given by the appellant is retracted at the earliest. It is further submitted that even till date there is no iota of evidence that exist that there is an existence of a person by name Maqbool.

5.11 The learned Appellate authority below failed to note that assuming that the passenger is a carrier he is entitle to clear the goods since the department has never caught or proved someone to be the owner, especially the proviso to Section-125 says that if the owner is not known an option of redemption must be given to the person from whom the same was seized.

5.12 The appellant prays that this Hon ble Appellate Authority may be pleased to set aside the Order in Appeal and to release the gold jewelry and payment of fine and penalty or to order Re-export the gold jewelry

and to pass such other reliefs that this Hon'ble Authority may deem fit and proper Authority may deem fit and proper and thus render justice.

6. Personal hearings in the case were scheduled online on 04.03.2021, 12.03.2021, 08.04.2021, 15.04.2021, 02.07.2021 and 16.07.2021. However, neither the Applicant nor the respondents attended the hearings the matter is therefore being decided on merits.

7. At the outset Government notes that the Applicant did not declare the gold as required under section 77 of the Customs Act, 1962 was not made and therefore the confiscation of the gold is justified.

8. Government however notes that the case involves two gold pieces, totally weighing 600gms. The gold pieces were recovered from the Applicants pant pockets and there is no allegation that the gold was ingenuously concealed. There are no allegations that the Applicant was involved in similar incidents earlier. The facts of the case indicate that it is a case of non declaration of gold, rather than a case of smuggling for commercial considerations. Government also notes that the Applicant is an eligible passenger to import gold as held by the original adjudicating authority. The absolute confiscation of the gold, is therefore harsh and disproportionate. Under the circumstances, Government agrees that the impugned gold has been rightly allowed to be redeemed by the original adjudicating authority. The absolute confiscation of the gold, is therefore harsh and disproportionate.

8. Further, Government notes that the Appellate authority has held that the Applicant is only a carrier, while upholding absolute confiscation and has erred in not considering his retraction of the statement. It is also a fact that the Applicant produced the receipts for the purchase of the gold. Government notes that the Appellate authority has relied on the initial statement of the Applicant, ignoring its retraction and lack of efforts at corroborating the statement with further investigations. In the absence of corroboration of the Applicant's statement, absolute confiscation is unjustified. In the absence of any claimant to the gold the person from whom the gold has been seized is considered appropriate for allowing redemption of goods. The Apex court in the case of Hargovind Dash Vs Collector of Customs 1992 (61) ELT 172 (SC) and the several

other cases has pronounced that a quasi judicial authority must exercise discretionary powers in a judicious manner and not in arbitrary manner. As per the provisions of section 125 of the customs act, 1962 in case of goods which are prohibited the option of redemption is left to the discretionary power of the authority who is functioning as a quasi judicial authority and in cases of others goods option to allow redemption is mandatory.

9. Once goods are held to be prohibited, Section 125 still provides discretion to consider release of goods on redemption fine. 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.

10. Government finds that the original adjudicating authority has discussed reasons for allowing redemption of gold under para 9 as under;

However, I find that the OIA C.CUS.No.479/2012 dtd.18.06.2012 in appeal C4/173/0/2012-Air is applicable to this case as he is an eligible passenger. Also in view of above facts & following, lenient view is required to be taken in this case & gold deserves to be released to the passenger on concessional rate of duty:-

a) *No ingenuous concealment as gold was kept by him in his blue colour pant pocket & brought on his Sister's marriage,*

- b) *He was continuously for five years in Kuwait without any short trip to India,*
- c) *No past history of customs offence / violation and he is not a frequent traveller,*
- d) *He is an eligible passenger as he fulfils all the conditions of the Notification for concessional rate of duty.*

Commissioner (A) has raised certain doubts on these findings without any evidence. These doubts can not take place of evidence. These need to be examined by Administrative authorities, if found appropriate.

11. In view of the above Government sets aside the order of the Appellate Authority. The order of the original adjudicating authority is restored. Revision Application is disposed of on above terms.

Shrawan Kumar
30/9/21

(SHRAWAN KUMAR)
Principal Commissioner & ex-officio
Additional Secretary to Government of India

ORDER No. ²⁴⁶ /2021-CUS (SZ) /ASRA/

DATED ~~30~~ 09.2021

To,

1. Vempalli Khaja Peer, 3-110-A, Podigai Street, Chennur (M), Kadappa District, Andhra Pradesh - 516 162.
2. The Commissioner of Customs, New Customs House, ACC, GST Road, Meenambakkam, Chennai - 600 027.

Copy To,

3. Sr. P.S. to AS (RA), Mumbai.
4. Guard File.
5. Spare Copy.