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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. 371/188/B/2019-RA /1117 :

Date of Issue : 21.02.23

ORDER NO. 251 /2023-CUS (WZ)/ASRA/MUMBAI DATED 20 .02.2023
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.

F.No. 371/188/B/2019-RA

Applicant : Shri. Deepak Rupani

Respondent : Pr. Commissioner of Customs, Ahmedabad.

Subject : Revision Application filed, under Section 129DD of the
Customs Act, 1962 against the Order-in-Appeal No. AHD-
CUSTM-000-APP-296-18-19 dated 28.03.2019 through F.No.
S/49-143/CUS/AHD/18-19 passed by the Commissioner of
Customs (Appeals), Ahmedabad.

ORDER

This revision application has been filed by Shri. Deepak Rupani (herein referred to as Applicant) against the Order-In-Appeal AHD-CUSTOM-000-APP-296-18-19 dated 28.03.2019 through F.No. S/49-143/CUS/AHD/18-19 passed by the Commissioner of Customs (Appeals), Ahmedabad

2(a). Briefly stated the facts of the case are that the Applicant, was intercepted on 23.03.2017 at the SVPIA, Ahmedabad where he had arrived from Abu Dhabi onboard Etihad Airlines Flight No. EY-226. Upon screening of his hand bag, two kadas and three gold chains of yellow metal as well as two Apple wrist watches bearing marks MNY2ZP Apple Watch Nile + 42mm Spgr BlkclGR were found. Government Approved Valuer certified that the 2 kadas and 3 chains were made up of gold having purity of 995.0, collectively weighed 1166.680gms and had market value of Rs. 33,95,040/- and tariff value of Rs. 30,27,534/-. The 2 apple watches were valued at Rs. 51,888/-. Free baggage allowance of Rs. 50,000/- were allowed on the other items brought by the applicant.

2(b). The applicant had a bill no. 0529 / 22.03.2017 for the purchase of 1 kada and 2 chains and bill no. 8122 dated March, 2017 for the apple watches and had misplaced the invoice for the purchase of 1 kada and one gold chain. He provided a gift certificate bearing the name of his wife.

3. The Original Adjudicating Authority (OAA) i.e. Addl. Commissioner, Customs, Ahmedabad vide Order-In-Original No. 20/ADC-MSC/SVPIA/O & A/2018-19 dated 26.07.2018 issued through F.No. VIII/10-34/SVPIA/O & A/2017 ordered for the absolute confiscation of the (i). 2 gold kadas and 3 gold chains, totally weighing 1166.680 grams, having tariff value of Rs. 30,27,534/- [MV being Rs. 33,95,040/-], (ii). 2 apple make watches (details as specified in

OIO), totally valued at Rs. 51,888/-. Penalties of Rs. 12,00,000/- (Rupees Twelve Lakhs) and Rs. 16,00,000/- (Rupees Sixteen Lakhs) were also imposed on the applicant under the provisions of Section 112(a) & (b) and Section 114AA of the Customs Act, 1962, respectively.

4. Aggrieved by the said order, the applicant filed an appeal before the Commissioner (Appeals), Ahmedabad who vide AHD-CUSTM-000-APP-296-18-19 dated 28.03.2019 through F.No. S/49-143/CUS/AHD/18-19 observed that he did not find any reason to interfere in the OIO passed by the OAA and accordingly, rejected the appeal.

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

5.01. that the seizure was illegal as the officer making seizure had not passed an appropriate order under Section 110 of the Customs Act, 1962. He has relied upon case of M/s. Worldline Tradecan Private Ltd. vs. Commr. of Customs, passed on 25.07.2016 in WP(C) 5939/2016 and Instruction no. 1/2017 dated 08.02.2017

5.02. that he had orally declared the gold to the officer manning the scanning machine. He had requested for cross-examination of this officer, but OAA had offered a different officer. The concerned officer had not been examined as he was on Election duty at Karnataka.

5.03. that the OAA was against the principles of judicial discipline as in many cases the Revision Authority had allowed the gold to be redeemed.

5.04. Applicant has relied on the undermentioned case laws on this issue that gold is not a prohibited item;

(a) Yakub Ibrahim Yusuf vs CC, Mumbai 2011 (263) E.L.T. 685 (Tri. Mumbai), and subsequently, 20014-TIOL-277-CESTAT-MUM,

(b) Shaik Jamal Basha Vs Government of India 1997 (91) ELT 277(AP)

(c) VP Hameed Vs Collector of Customs Mumbai 1994(73) ELT 425 (Tri)

(d) T. Elavarasan Vs Commissioner of Customs (Airport), Chennai 2011 (266) ELT 167 (Mad)

(e) S.Rajagopal vs CC, Trichy 2007 (219) ELT 435 (Tri-Chennai);

- (f) P. Sinnaswamy vs. CC, Chennai : 2007-200-ELT-308;
- (g) M. Arumugam vs. CC, Thiruchirapally: 2007-220-ELT-311;
- (h) Krishna Kumari vs. CC, Chennai: 2008-229-ELT-222.

5.05. that the penalty imposed was above the prescribed limit of 10%.

5.06. that the statement of the applicant recorded under Section 108 of the Customs Act, 1962 was not relevant as the notices have not been examined.; that the statement had been retracted;

5.07. that inventory of the goods in his baggage had not been made; that the 2 Apple watches should have been included in the baggage allowance of Rs. 50,000/-. Other cheap scents and toiletries had been included in the free allowance, that the goods in his baggage was not in commercial quantity.

5.08. that penalty under Section 114AA of the Customs Act, 1962 was not applicable to Baggage Rules
etc.

The applicant has prayed that the gold articles and 2 Apple watches may be allowed to be re-exported on payment of fine, that penalty imposed under Section 112 of the Customs Act, 1962 be reduced to the prescribed limit of 10%, penalty imposed under Section 114AA of the Customs Act, 1962 be set aside or pass such order as deemed fit and proper.

5(b). In his written submission dated 29.09.2022, the applicant has stated that cross examination of the witnesses had not been granted which was a violation of the principles of natural justice. They have relied upon the case of Andaman Timber Industries vs. Commr. Of C.Ex., Kolkatta {2015(324) ELT 641(SC)} of the Apex Court and a similar case of the Punjab and Haryana High Court in the case of G-Tech Industries vs. UOI. The applicant has also alleged that proper hearings had not been conducted and before the hearing could gain finality, the Order had been passed by the Adjudicating Authority. They have prayed to allow the goods for re-export.

6. Online personal hearings in the case were scheduled for 11.08.2022, 23.08.2022, 23.09.2022 and 30.09.2019. Shri. S.S Shastri, Advocate for the

applicant appeared for online hearing on 30.09.2022 and submitted that gold was for personal use and was gifted to applicant. He submitted that cross examination was not allowed. He requested to release gold on RF and penalty for re-export. He requested to drop penalty u/s 114AA.

7. The Government has gone through the facts of the case. The two gold bars were found only when the hand bag of the applicant was screened. The Applicant had not filed any declaration of dutiable goods before the Customs as required under Section 77 of the Customs Act, 1962. The quantity of gold recovered is substantial and in form of ornaments i.e 2 nos of kada and 3 chains. The confiscation of the gold is therefore justified and thus, the Applicant had rendered himself liable for penal action.

8. Further, 2 Apple watches were found in the handbag of the applicant alongwith an invoice showing the value of the watches. Free baggage allowance of Rs. 50,000/- was given to the applicant.

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. Once goods are held to be prohibited, Section 125 of the Customs Act, 1962 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.

12. Government notes that the gold was in the form of ornaments. The applicant had kept the same in the hand bag and was not concealed in an ingenious. Usually, the hand bags are not screened at the arrival airport. The quantity of the gold is quite substantial. The applicant had not declared the gold ornaments in his possession which indicates that he had no intention to pay duty on the same. All these have been properly considered by the OAA while confiscating the gold ornaments absolutely.

13. 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 quantity being substantial, clear intention to clear the gold ornaments without payment of duty, is 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 had rightly ordered the absolute confiscation of gold ornaments. But for the intuition and the diligence of the Customs Officer, the gold would have passed undetected. 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 absolute confiscation of the gold ornaments passed by the adjudicating authority is therefore liable to be upheld.

14. The 2 watches of Apple make were found in the hand bag of the applicant alongwith its invoice. Government finds that the absolute confiscation of the same is harsh and is inclined to allow the same to be redeemed on payment of a redemption fine and appropriate duty.

15. The Government finds that the penalty of Rs. 12 lakhs imposed under section 112 (a) and (b) is about 40% of the tariff value of the gold seized and the same is quite harsh, excessive and unjustified. Government is inclined to reduce the same. However, once penalty has been imposed under section 112(a) and (b) of the Customs Act, 1962, Government finds that there is no necessity of imposing penalty under Section 114AA of the Customs Act, 1962. The penalty of Rs. 16 lakhs (Rupees Sixteen Lakhs only) imposed under section 114AA of the Customs Act,1962 is set aside.

16. On the issue of baggage allowance being disallowed for the 2 watches of Apple make is concerned, the Government notes that this aspect is dealt with in detail in the OIO and OIA. It is recorded in the facts that the baggage allowance was allowed for the other possessions found in the baggage of the applicant. Government finds the same to have been dealt with in accordance with law.

17. The applicant has prayed for the re-export of the gold ornaments. Government finds that the same has been dealt with in detail by the AA. Anyway, once the gold has been absolutely confiscated, the question of allowing its re-export does not arise.

18. 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 of the gold ornaments is proper and judicious. However, Government is inclined to reduce the penalty imposed under Section 112(a) and (b) of the Customs Act, 1962 and set aside the penalty imposed under Section 114AA of the Customs Act, 1962. Accordingly, Government modifies the OIA to the extent of the penalties imposed on the applicant and the absolute confiscation of the 2 watches of Apple make. The penalty of Rs. 12,00,000/- (Rupees Twelve Lakhs) imposed on the applicant under Section 112(a) and (b) of the Customs Act, 1962 by the OAA and upheld by the AA is reduced to Rs. 3,00,000/- (Rupees Three Lakhs only). The penalty of Rs. 16,00,000/- (Rupees Sixteen Lakhs) imposed on the applicant

under Section 114AA of the Customs Act, 1962 by the OAA and upheld by the AA, is set aside. The absolute confiscation of the 2 watches of Apple make valued at Rs. 51,888/- is set aside and the same are allowed to be redeemed on payment of a redemption fine of Rs. 10,000/- (Rupees Ten Thousand Only) and appropriate duties. However, the absolute confiscation of the gold ornaments i.e. 2 kadas and 3 chains, collectively weighing 1166.680 grams, valued at Rs. 30,27,534/- (TV) is sustained.

19. Revision Application is partly allowed on above terms.


(SHRAWAN KUMAR)

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

ORDER No. 251 /2023-CUS (WZ) /ASRA/MUMBAI DATED 27.02.2023

To,

1. Shri. Deepak Rupani, 14, Sainath Society, Near Patel Society and Indira Bridge, Hansol, Ahmedabad : 382 475.
2. The Commissioner of Customs, Customs House, Navrangpura, Ahmedabad – 380 009.

Copy to:

1. Shri. S.S Shastry, A-4/304, Spring Park Apts, Near Sharanam-11 Apts, Behind Shalby Hospitals, Ramdev Nagar, Ahmedabad – Pin : 380 015.
2. Sr. P.S. to AS (RA), Mumbai.
3. File Copy.
4. Notice Board.