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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. 371/341/B/WZ/2018-RA /1165 : Date of Issue : 23.02.23

ORDER NO. 257 /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.

(i). F.No. 371/341/B/WZ/2018-RA

Applicant : Shri. Abdi Rasid Shariff Ahmed.

Respondent : Principal Commissioner of Customs, CSMI Airport,
Sahar, Andheri East, Mumbai – 400 099.

Subject : Revision Application filed, under Section 129DD of the
Customs Act, 1962 against the Order-in-Appeal No.
MUM-CUSTM-PAX-APP-722/2018-19 dated 15.11.2018
issued on 15.11.2018 through F.No. S/49-237/2016/AP
passed by the Commissioner of Customs (Appeals),
Mumbai – III, Marol, Mumbai – 400 059.

ORDER

This revision application has been filed by Shri. Abdi Rasid Shariff Ahmed (hereinafter referred to as the Applicant) against the Order-in-Appeal No. MUM-CUSTOMS-PAX-APP-722/2018-19 dated 15.11.2018 issued on 15.11.2018 through F.No. S/49-237/2016/AP passed by the Commissioner of Customs (Appeals), Mumbai – III, Marol, Mumbai – 400 059.

2. Brief facts of the case are that on 02.09.2014, Customs Officers at the CSMI Airport, Mumbai had intercepted the applicant, who is a Kenyan national and had arrived from Addis Ababa by Ethiopian Airways Flight No. ET610 / 02.09.2014. The applicant had cleared himself through the green channel and had been intercepted near the exit gate of the Customs Arrival Hall of Terminal - 2. The applicant had made a nil declaration of possession of any dutiable items in the Customs declaration form filed by him. To query, whether he was in possession of any dutiable goods / foreign currency etc, he had replied, in the negative. The applicant was made to pass through the door frame metal detector at the arrival hall which indicated the presence of some metal on his person. A personal search led to the recovery of 7 nos of FM gold bars, totally weighing 816 gms and valued at Rs. 20,99,160/- which had been placed in a packet and had been kept concealed in a knee cap worn by the applicant.

3. The Original Adjudicating Authority (OAA), viz, Addl. Commissioner of Customs, CSMI Airport, Mumbai vide his Order-In-Original no. ADC/RR/ADJN/305/2014-15 dated 29.01.2016 ordered for the absolute confiscation of the impugned 7 nos of FM gold bars, totally weighing 816 gms and valued at Rs. 20,99,160/- under Section 111(d), (l) and (m) of the Customs Act, 1962. Personal penalty of Rs. 2,00,000/- was imposed on the applicant under Section 112(a) and (b) of the Customs Act, 1962.

4. Aggrieved by the said order, the applicant preferred an appeal before the appellate authority (AA) viz, Commissioner of Customs (Appeals), Mumbai – III who vide Order-In-Appeal No. MUM-CUSTOM-PAX-APP-722/2018-19 dated 15.11.2018 issued on 15.11.2018 through F.No. S/49-237/2016/AP, observed that the OAA had rightly confiscated the gold absolutely and did not find it necessary to interfere in the impugned OIO and upheld in to-to, the order passed by OAA.

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

5.01. the applicant was a foreign national and did not know to read and write in English; that he understood only his mother tongue; that the gold bars were not concealed and had been found on his person; that the applicant had brought such type of goods for the first time; that gold was neither restricted nor prohibited item and can be released for re-export under Section 125 of the Customs Act, 1962;

5.02. that the AA had come to the conclusion that the acts and omissions on the part of the applicant were to evade Customs duty and that the evasion of customs duty could be done only in respect of dutiable goods and not prohibited goods; that the department therefore, accepted that the goods are dutiable and hence option of redemption of goods should have been given to the applicant under Section 125 of the Customs Act, 1962.

5.03. that the applicant has relied upon the following case laws on the subject.

(a). Collector of Custom vs. Elephanta Oil and Inds. Ltd [2003(152) ELT 02547 Supreme Court]; once imported article is re-exported as directed by the department, there is no question of levying any penalty or redemption fine.

(b). Kusum Bhai DayaBhai vs. Commr. Of Customs 1995 (79) ELT 292 Tri-Mumbai; If goods are allowed re-export on redemption, fine can be on the lower side and need not relate to margin of profit.

(c). A.K Jewellers vs. Commissioner of Customs, Mumbai, 2003 (155) ELT 585 Tri-Larger Bench; Re-export of confiscated goods, first to be redeemed on payment of fine and then to be exported. Combination of both these actions in one order is not contrary to law.

(c). Patel vs. Commr. Of Customs; 2003-153-ELT-226-Tr. ; that when the importer makes a request for re-export, it has been a general practice in Custom House to consider such a request having regard to the bona-fides of such a request. By re-exporting the goods, the importer can avoid payment of duty but not the fine in lieu of confiscation.

(d). M.V. Marketing and Supplies vs. Commr. of Customs (Import), Chennai, 2004-178-ELT-1034-Tri-Chennai which covers all the citations mentioned at 5.03(a) to (c) above and nearly 31 similar cases.

5.04. the applicant has also relied on the undermentioned cases passed by the GOI wherein re-export had been allowed;

(a). RA Order no. 38/2008 in case of Mrs. Majeeda Mohammed Yonus;

(b). RA Order no. 178/2008 in case of Mr. Ravinder Sadharam Dular;

(c). RA Order no. 33/2008 in case of Shri. Deepak Hiralal Parekh;

(d). RA Order no. 34/2008 in case of Shri. Pradeep Kumar Bhawarlal;

(e). RA Order no. 392/2002 in case of Shri. Nasir Asgar Mirab.

Under the circumstances, the applicant has prayed to the revisionary authority that the gold bars be released for re-export on nominal fine alongwith reduction in the penalty or to pass any other order as deemed fit.

6. Personal hearing through the online video conferencing mode was scheduled for 02.08.2022, 25.08.2022 and 29.09.2022. On all the three occasions, Shri. N.J Heera, Advocate for the applicant appeared in person and sought an adjournment. Thereafter, personal hearing was scheduled for 10.11.2022. Shri. N.J Heera, Advocate appeared for personal hearing and submitted that applicant is a Kenyan national and had brought small quantity of gold while visiting India. He further submitted that applicant is a law abiding person. He requested to allow re-export of goods.

7. The Government has gone through the facts of the case and notes that the applicant had failed to declare the goods in his possession upon arrival as required under Section 77 of the Customs Act, 1962. The applicant had not disclosed that he was carrying dutiable goods and had he not been intercepted,

he would have walked away with the impugned 7 nos of FM gold bars, totally weighing 816 grams, without declaring the same to Customs. By his actions, it was clear that the applicant had no intention to declare the impugned gold to Customs and pay duty on it. 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. 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.

13. The Government notes that the gold bars were found in the knee cap worn by the applicant and had not been ingeniously concealed. The applicant in his submissions has expressed his desire to take back the gold bars. There are no allegations that the Applicant is a habitual offender and was involved in similar offences 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. Under the circumstances, the seriousness of the misdemeanour is required to be kept in mind when using discretion under

Section 125 of Customs Act, 1962 and while imposing quantum of penalty. Government notes that the applicant who is a foreign national has prayed that the absolute confiscation be set aside and he be allowed to re-export the gold.

14. In a recent judgement passed by the Hon'ble High Court, Madras on 08.06.2022 in WP no. 20249 of 2021 and WMP No. 21510 of 2021 in r/o. Shri. Chandrasegaram Vijayasundarm + 5 others in a similar matter of Sri. Lankans wearing 1594 gms of gold jewellery (i.e. around 300 gms worn by each person) upheld the Order no. 165 - 169/2021-Cus (SZ) ASRA, Mumbai dated 14.07.2021 in F.No. 380/59-63/B/SZ/2018-RA/3716, wherein Revisionary Authority had ordered for restoration of OIO wherein adjudicating authority had ordered for the confiscation of the gold jewellery but had allowed the same to be released for re-export on payment of appropriate redemption fine and penalty.

15. In view of the foregoing paras, the Government finds that as the applicant had not declared the gold at the time of arrival, the confiscation of the same was justified. However, considering that the gold bars had been found on the person of the applicant, the same not being concealed in an ingenious manner, applicant being a foreign national, the absolute confiscation of the same was harsh and not justified. In view of the aforesaid facts and considering that the applicant is a foreign national, option to re-export the impugned gold on payment of redemption fine should have been allowed. Considering the above facts, Government is inclined to modify the absolute confiscation and allow the impugned gold bars to be re-exported on payment of a redemption fine.

16. Government finds that the penalty of Rs. 2,00,000/- imposed on the applicant under Section 112(a) and (b) of the Customs Act, 1962 is commensurate with the omissions and commissions committed and is not inclined to interfere in the same.

17. In view of the above, the Government modifies the order passed by the appellate authority and allows the applicant to redeem the impugned 7 nos of FM gold bars, totally weighing 816 grams and valued at Rs. 20,99,160/- for re-export on payment of a redemption fine of Rs. 4,00,000/- (Rupees Four Lakhs only). The penalty of Rs. 2,00,000/- imposed on the applicant under Section 112(a) and (b) of the Customs Act, 1962 by the OAA and upheld by the AA is sustained.

18. Revision Application is disposed of on the above terms.


(SHRAWAN KUMAR)

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

ORDER NO. 257 /2023-CUS (WZ)/ASRA/MUMBAI DATED 20.02.2023.

To,

1. Shri. Abdi Rasid Shariff Ahmed, [Kenyan National; Address not available in the records : Service also through Notice Board and through his Advocate].
2. Pr. Commissioner of Customs, Adjudication Cell, Chhatrapati Shivaji Maharaj International Airport, Sahar, Andheri East, Mumbai – 400 099.

Copy to:

3. Shri. N.J Heera, Advocate, Nulwala Bldg, Ground Floor, 41, Mint Road, Opp. G.P.O, Fort, Mumbai – 400 001.
4. Sr. P.S. to AS (RA), Mumbai.
5. File Copy.
6. Notice Board.