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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, 380/39/B/WZ/2018-RA/3707 : Date of Issue : 15.09.2022

ORDER NO. 260/2022-CUS (WZ)/ASRA/MUMBAI DATED 13.09.2022 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.

File No. : 380/39/B/WZ/2018-RA

Applicant : Pr. Commissioner of Customs, CSI Airport, Mumbai.

Respondent : Shri. Rizwan Amanullah Khan

Subject : Revision Application filed, under Section 129DD of the Customs Act, 1962 against the Order-in-Appeal No. MUM-CUSTM-PAX-APP-66/18-19 dated 27.04.2018 [(F.No. S/49-145/2017)] passed by the Commissioner of Customs (Appeals), Mumbai -III.

ORDER

This revision application has been filed by the Pr. Commissioner of Customs, CSMI Airport, Mumbai (hereinafter referred to as Applicant) against the Order in Appeal No. MUM-CUSTM-PAX-APP-66/18-19 dated 27.04.2018 [(F.No. S/49-145/2017)] passed by the Commissioner of Customs (Appeals), Mumbai -III.

2. Brief facts of the case are that the respondent who had arrived on 01.01.2017 from Dubai onboard Emirates Flight No. EK-500/31.12.2016 was intercepted at the exit gate of the arrival hall of CSMI Airport. The respondent had cleared himself through the green channel. Examination of both the trolley bags of the respondent was conducted which led to the recovery of 8 rectangular pieces of gold each of which had been concealed inside the plastic coating of each of the eight rotating wheels. These 8 rectangular pieces of gold together weighed 232 grams and was valued at Rs. 5,92,476/-.

3. After due investigation and process of the law, the Original Adjudicating Authority (OAA) viz, Addl. Commissioner of Customs CSMI Airport, Mumbai vide Order-In-Original No. ADC/RR/ADJN/520/2016-17 dated 22.02.2017 [AIRCUS/T2/49/608/2016/'B' BATCH] ordered for the absolute confiscation of the 8 pieces of gold bars, totally weighing 232 grams and valued at Rs. 5,92,476/- under Section 111(d), (l) and (m) of the Customs Act, 1962 and imposed a penalty of Rs. 60,000/- on the respondent under Section 112 (a) and (b) of the Customs Act, 1962.

4. Aggrieved by this Order, the respondent filed an appeal before the appellate authority viz Commissioner of Customs (Appeals), Mumbai -III who vide his Order-In-Appeal No. MUM-CUSTM-PAX-APP-66/18-19 dated 27.04.2018 [(F.No. S/49-145/2017)] allowed the redemption of the impugned gold on payment of

redemption fine of Rs. 1,05,000/- as per the provisions of Section 125(2) ibid of the Customs Act, 1962 and observed that the penalty imposed on the applicant was commensurate with the violation committed and did not find it necessary to interfere in the same.

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

- 5.01. the respondent was found in possession of 8 rectangular gold pieces each concealed inside the plastic coating on each rotating wheel of the trolley bags in his possession; the respondent had opted for green channel clearance without declaring the goods in his possession; the manner of recovery of gold clearly indicates that the concealment was not only ingenious but also premeditated.
- 5.02. the respondent had admitted to knowledge. possession carriage, and non-declaration of the gold under seizure.
- 5.03. the respondent had failed to make a true declaration of the contents of the goods imported by him in terms of value as well as quantity in his baggage as required under section 77 of the Customs Acts 1962; that by attempting to clear the impugned gold concealed inside the plastic coating on each rotating wheel of the trolley bags without declaring the same was with mala fide intention to evade customs duty; that the respondent had attempted to smuggle the same in contravention of the aforesaid legal provisions of the Customs Act, 1962.
- 5.04. that the option to redeem the seized goods under Section 125 of the Customs Act, 1962 was the discretionary power of the Adjudicating Authority depending on the facts of each case and after examining the merits. In the present case, the manner of concealment being clever and ingenious is a fit case for absolute confiscation as a deterrent to passengers mis-using the facility of green channel. Thus, taking into account the facts on record and the gravity of the offence, the adjudicating authority had rightly ordered for the absolute confiscation of the impugned 8 rectangular gold pieces.
- 5.05. the respondent had not declared the said gold to Customs on his own and the subject gold was detected only after he was intercepted and detailed search of his baggage had been conducted. Had the respondent not been intercepted, he would have made good with the gold, ingeniously concealed inside the plastic coating on each rotating wheel of the trolley bags; that 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 need to be invoked; the appellate authority ought not to have allowed redemption of the impugned gold.

- 5.06. the applicant has on the Judgment of Hon'ble Delhi High Court in the case of Jain Exports Va Union of India. 1987(29) ELT753 wherein the Court has observed that resort to Section 125 of the CA 1962, to impose fine in lieu of confiscation cannot be so exercised as to give a bonanza or profit for an illegal transaction of imports.
- 5.07. the applicant has stated that the ratio of the judgement of the Apex Court the case of Om Prakash Bhatia v/s Commissioner of Customs was applicable to this case. (In Special Leave to Appeal (Civil) No.22072 of 2009).
- 5.08. that when the original adjudicating authority had taken an informed decision of confiscating the subject goods absolutely and imposed personal penalty, the appellate authority should not have allowed redemption, without pointing out any legal infirmity in the order of the adjudicating authority.
- 5.09. that in Commissioner of Customs, Tuticorin V/S Sai Copiers. (2008 (226) E.L.T. 486 (Mad) it was held that any order of the lower authority could be interfered with only in circumstances in which it was demonstrated that such order was purely arbitrary, whimsical and resulting in miscarriage of justice.
- 5.10. that in view of the foregoing, the appellate order was not legal and proper and the appellate authority had erred in allowing the redemption of the goods.

The applicant has prayed to the revision authority to set aside the order passed by the appellate authority and to restore the original order passed by the OAA or to pass any other order as deemed fit.

6. Personal hearings in the case was scheduled for 03.09.2019 which had been rescheduled for 06.09.2019. Ms. Pushpa Anchan, Supdt. had appeared for the applicant. Thereafter, the personal hearing in the case through the online video conferencing mode was scheduled for 22.10.2021, 29.10.2021, 02.12.2021

and 08.12.2021. Sufficient opportunities having been given to both the applicant and the respondent to put forth their case, the same is being taken up for decision based on available records.

7. Government notes that the respondent had been intercepted at the exit gate while going out of the baggage hall after passing through green channel facility of Customs clearance and had not declared any dutiable goods in his possession. Thereafter, he had been subjected to a detailed examination which resulted in the detection of the 8 rectangular pieces of gold bars which had been cleverly and ingeniously concealed inside the plastic coating on each of the eight rotating wheels of the trolley bag. These 8 rectangular pieces of gold together weighed 232 grams and was valued at Rs. 5,92,476/-. As the gold had not been declared to the Customs; was kept concealed; not bonafide baggage item; for these reasons, the Government notes that the confiscation of the impugned gold was justified.

8. 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".

9. 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.

10. 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 the 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.

11. The quantum of gold under import is small and is not of commercial quantity. The impugned 8 gold bangles had been concealed in an innovative and ingenious manner and Government observes that sometimes passengers / travellers resort to such methods to keep their valuables / precious possessions safe. There are no allegations that the applicant is a habitual offender and was involved in similar offence earlier. There is nothing to the contrary that the respondent was not the owner of the impugned gold. 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 the Customs Act, 1962 and while deciding quantum of penalty to be imposed.

12. The absolute confiscation of the gold as held by the OAA, leading to dispossession of the applicant of the gold in the instant case would be harsh and not reasonable. The appellate authority has allowed the release of the impugned gold on payment of a redemption fine of Rs. 1,05,000/- which is nearly 18% of the value of the seized impugned gold and Government finds the same to be quite adequate. Considering the quantum of the gold in the instant case, the Government does not find it necessary to interfere in the appellate order. Government finds the appellate order is legal and judicious.

13. The Government notes that the penalty of Rs. 60,000/- imposed on the applicant under Section 112(a) & (b) of the Customs Act, 1962 is appropriate and commensurate with the omission and commission committed by the respondent and the same as been upheld by the appellate authority.

14. For the aforesaid reasons, the Government does not find it necessary to interfere in the appellate order and the revision application filed by the applicant, fails.

15. The revision application is dismissed.

Shrawan
13/9/22

(SHRAWAN KUMAR)

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

ORDER No. 260 /2022-CUS (WZ) /ASRA/MUMBAI DATED 13.09.2022

To,

1. Pr. Commissioner of Customs, Chhatrapati Shivaji International Airport, Terminal - 2, Level - II, Sahar, Andheri (East), Mumbai - 400 099.
2. Shri. Rizwan Amanullah Khan, 188, Mohammedi Bldg, (Madina Mansion), R-21, 2nd Floor, Chimna Butcher Street, Mumbai - 400 003.

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