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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. 371/276/B/WZ/2018-RA / 4506 : Date of Issue : ~~09-2022~~
04.10.2022

ORDER NO. 282 /2022-CUS (WZ)/ASRA/MUMBAI DATED 29.09.2022 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.

Applicants : Shri Dipesh Kumar Panchal

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-CUSTOM-000-APP-010-18-19 dated 11.04.2018 [F.No. S/49-22/CUS/AHD/2017-18] passed by the Commissioner of Customs (Appeals), Ahmedabad.

ORDER

The Revision Applications has been filed by Shri Dipesh Kumar Panchal (herein referred to as the Applicant) against the Order-in-Appeal No. AHD-CUSTOM-000-APP-010-18-19 dated 11.04.2018 [F.No. S/49-22/CUS/AHD/2017-18] passed by the Commissioner of Customs (Appeals), Ahmedabad.

2. Brief facts of the case are that on 14.12.2016, the Customs Officers at the Sardar Vallabhbhai Patel International Airport, Ahmedabad intercepted the applicant who had arrived from Dubai by Emirates Flight No. EK-540. As the applicant denied having any dutiable goods, he was asked to pass through the Door Metal Frame Detector after removing all metallic substances from his body. As a beep sound was heard, on questioning he removed one yellow metallic bar from his pant pocket which was wrapped in a transparent plastic. On removing the plastic, one cut yellow metallic bar bearing the marking as 'Al ETIHAD GOLD' written on it was recovered. The gold cut bar weighing 229.140 gms having market value of Rs. 6,61,068/- and tariff value of Rs. 6,08,550/- was seized

3. The Original Adjudicating Authority (OAA) i.e. Additional Commissioner of Customs, Ahmedabad vide his Order-In-Original (OIO) no. 78/ADC-MLM/SVPIA/O & A/2016 dated 10.03.2017 [(DOI : 10.03.2017),(VIII/10-17/SVPIA/O & A/2016)] ordered for the confiscation of the impugned cut gold bar weighing 229.140 gms having tariff value of Rs. 6,08,550/- and market value of Rs. 6,61,068/- under Section 111 (i), (l) & (m) of the Customs Act, 1962. A penalty of Rs. 61,000/- was imposed on the applicant under Section 112(a) and (b) of the Customs Act, 1962 and a penalty of Rs. 50,000/- was imposed under Section 114AA of the Act

4. Aggrieved, with this Order, the applicant filed an appeal before the Appellate Authority (AA) viz, Commissioner of Customs (Appeals), Ahmedabad who vide Order-in-Appeal No.AHD-CUSTOM-000-APP-010-18-19 dated 11.04.2018 upheld the order passed by the OAA

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

- 5.01. that the impugned order is illegal, improper, arbitrary and incorrect and the same deserves to be set aside.
- 5.02. that there was no mention for the mode in which the gold was kept and there was no special arrangement or cavity to hid the same
- 5.03. that the lower authorities have erroneously cited the case of Shaikh Mohammad Azam vs. Commissioner [2015(319) ELT A177 (SC)] and RA order in the case of RE- G Subramanian [2002(142) ELT 224 (GOI)] as they assist the applicant than the department.
- 5.04. that the finding that the applicant was not eligible passenger is patently wrong since the applicant had come to India only after one year and is an eligible NRI and there is no finding that the applicant was a frequent visitor;
- 5.05 that the Appellate Authority has not considered the invoice for purchase of the gold and not opportunity was given to declare the gold and was intercepted before the declaration could be tendered;
- 5.06. that even if the gold was not declared it is a technical glitch which is condonable by appropriate mechanism of fine and penalty under AC, 1962 but never to be a case of absolute confiscation;
- 5.07. that the adjudicating authority had pre-decided to absolutely confiscate the gold without applying himself the crucial fact that he had a discretion to either release the gold on redemption fine or absolutely confiscate only when the goods were 'prohibited' and that the Adjudicating Authority is required to exercise his discretion and how such discretion is to be exercised as laid in the case of Commissioner of Customs (Air) vs. P.Sinnasamy which was decided by the Hon'ble High Court of Madras on 23.08.2016;
- 5.08. that the case of Aero Traders Pvt Ltd vs. Ravinder Kumar Suri [AIR 2005 SC 15] has explained the meaning of the word 'discretion'.
 - (i) Yakub Ibrahim Yousouf [2011(263) E.L.t. 685(Tri.Mum)] and [2014-TIOL-277-CESTAT-MUM]
 - (ii) Shaik Jameel Pasha vs. GOI [1997(91) E.L.T 277(AP)]

- (iii) V.P. Hamid vs. Commissioner of Customs [1994(73) E.L.T. 425(Tri)]
- (iv) Union of India vs. Dhanak M.Ramji [2009(248) E.L.T 127 (HC Bom)] which was upheld by the Hon'ble Supreme Court [2010(252) ELT A102 (SC)]
- (v) A. Rajkumari vs. CC Chennai [2015(321) E.L.T. 540(Tri-Chennai) which was affirmed by the Hon'ble Supreme Court [2015(321)E.L.t. A207(SC)]

5.09. That there are catena of cases where the order of absolute confiscation was challenged and goods released either for re-export or on redemption fine under Section 125 of Customs Act, 1962, some of which are as under:

- (i) S.Rajgopal vs. CC Trichy [2007(219) E.L.T. 435]
- (ii) P.Sinnaswamy vs. CC Chennai [2007 (220) E.L.T. 308]
- (iii) M.Arumugam vs. CC Tiruchirapally [2007(220) E.L.T. 311]
- (iv) Krishna Kumari vs. CC Chennai [2008(229) E.L.T. 222]

5.10. that the Hon'ble High Court of Delhi in the case of M/s Worldline Tradexcan Private Limited vs. Commissioner of Customs emphasised that in the said case in order to make a valid seizure under the Customs Act, the proper officer is required to pass an order under section 110 of the Customs Act 1962 prior to effecting seizure specifying the reasons for the exercise of the power and the grounds of his reasonable belief that the goods were liable to confiscation;

5.11 that in the case of Mrs Mehmuda Harun Tildi vs. CC New (preventive) Amritsar and Mrs Fatema Aslam Kochona vs. CC, Chandigarh, the GOI in RA Order No 04/17-Cus dated 08.09.2017 and Order No 13/17-Cus dated 10.10.2017 held that the import of gold is not expressly prohibited and allowed the applicant to redeem the confiscated gold on payment of applicable customs duties and on payment of redemption fine;

5.12. that since the goods were not prohibited goods, penalty under Section 112 (a) and (b) of the Customs Act, 1962 could not have been more than the duty involved and the passenger is entitled to Notification No 12/2012-Cus as amended and duty charged accordingly;

- 5.13. that penalty under Section 114AA of the Customs Act, 1962 was introduced primarily to cover cases of bogus/fraudulent exports without any documents and where goods were not available for seizure/confiscation;
- 5.14. that imposition of penalty under section 114AA after imposing penalty under section 112 ibid amounts to double jeopardy.
- 5.15. Under the circumstances, the applicant prayed to set aside the Order-in-Appeal in so far as absolute confiscation and levy of penalties were concerned and release the gold forthwith or release on payment of duty and suitable redemption fine or be allowed for re-export on payment of appropriate fines and reduce the penalty under Section 112 (a) & (b) and drop the penalty under Section 114AA of the Customs Act, 1962

6. Personal hearings in the case through the online video conferencing mode was scheduled for 03.08.2022 / 18.08.2022. Shri. Rishikesh Mehra, Advocate appeared on behalf of the applicant and submitted that the small quantity of gold was brought for personal use. He further stated that the applicant is an eligible passenger as he came to India after working over one year abroad and is not a habitual offender. He requested to allow release of goods on nominal redemption fine and penalty. He also requested to set aside personal penalty under Section 114AA of the Customs Act.

7. At the outset Government notes that the Applicant had brought the gold cut bar with the marking as 'Al ETIHAD GOLD' weighing 229.140 gms. A declaration as required under Section 77 of the Customs Act, 1962 was not submitted and the gold bar was kept in the applicants pocket undeclared.

8. Government, however notes that a case has not been made out that the applicant had ingenuously concealed the gold. Government notes that the quantity of gold under import is small and not of commercial quantity. There are no allegations that the Applicant is a habitual offender and was involved

in similar offences earlier. Besides the applicant has also claimed that he had come to India after one year. 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.

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. 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. The quantum of gold under import is small and is not of commercial quantity. The impugned cut gold bar had been kept in the pant pocket of the applicant and Government observes that sometimes passengers 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. 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.

14. Government finds that this is a case of non-declaration of gold. The absolute confiscation of the gold, leading to dispossession of the applicant of the gold in the instant case is therefore harsh and not reasonable. Considering the aforesaid facts, Government therefore, sets aside the impugned order of the Appellate authority. The impugned gold valued at Rs. 6,61,068/- is allowed to be redeemed on payment of Rs. 1,50,000/- (Rupees One Lakh Fifty Thousand only)

15. The Government notes that the penalty of Rs.61,000/- 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 applicant.

16. Government notes that once penalty has been imposed under Section 112(a) & (b) of the Customs Act, 1962, there is no necessity of imposing penalty under Section 114AA of the Customs Act, 1962. Therefore, the penalty of Rs. 50,000/- (Rupees Fifty Thousand only) imposed under Section 114AA of the Customs Act, 1962 by the OAA and upheld by the AA is set aside.

17. Revision Application is disposed of on above terms.


(SHRAWAN KUMAR)

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

ORDER NO. 282 /2022-CUS (WZ)/ASRA/MUMBAI DATED 29.09.2022

To,

1. Shri. Dipesh Kumar Panchal, c/o Shri Basant Kumar Panchal, Ward No 06, Panchal Colony, Village: Chhoti Padal, Tehsil: Ghatol, District: Banswara Rajasthan
2. The Pr. Commissioner of Customs, Custom House, near All India Radio, Navrangpura, Ahmedabad 380 009.

Copy to:

1. Shri Rishikesh J. Mehra, C-11, Rathi Apartments, Opp Dharamnagar, Sabarmati, Ahmedabad- 380 005

2. Sr. P.S. to AS (RA), Mumbai.
3. File copy,
4. Notice Board.