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SPEED POST



GOVERNMENT OF INDIA  
MINISTRY OF FINANCE  
(DEPARTMENT OF REVENUE)  
8<sup>th</sup> Floor, World Trade Centre, Centre - I, Cuffe Parade,  
Mumbai-400 005

F.No. 371/328/B/WZ/2021-RA / 4480 :

Date of Issue 04.10.2022

ORDER NO. 283 /2022-CUS (WZ)/ASRA/MUMBAI DATED 30.09.2022 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.

Applicant : Mr. Methavee Arbvaree

Respondent : Principal Commissioner of Customs, Mumbai.

Subject : Revision Application filed, under Section 129DD of the Customs Act, 1962 against the Order-in-Appeal No. MUM-CUSTOM-PAX-APP-1069/2021-22 dated 23.11.2021 [DIN : 20211167BB00001151A6; S/49-1144/2020] passed by the Commissioner of Customs (Appeals), Mumbai - III.

**ORDER**

This revision application has been filed by Mr. Methavee Arbvaree, a national of Thailand (herein after referred to as the Applicant) against the Order-In-Appeal No. MUM-CUSTOM-PAX-APP-1069/2021-22 dated 23.11.2021 [DIN : 20211167BB00001151A6; S/49-1144/2020] passed by the Commissioner of Customs (Appeals), Mumbai – III.

2. Brief facts of the case are that on 06.08.2019, Customs Officers at CSMI Airport, Mumbai intercepted three passengers (one Indian resident and two Thai nationals) near the exit gate, after they had cleared themselves through the green channel of Customs. All the three passengers had arrived from Bangkok by Smile Flight No. WE 355 dated 05.08.2019. The brief background prior to the interception was that one passenger by name viz, Mr. Aziz Khan who had arrived by the same flight, was identified by the Customs Officers from the flight manifest and was being followed. He entered the family toilet at the arrival hall near the conveyor belt no. 10 with his green coloured backpack and after a few minutes, another passenger later identified as Mr. Ratchapon Buayaem, a Thai national, entered this toilet alongwith his grey printed side bag and one strolley bag which had been placed on a baggage trolley. He entered the same toilet already occupied by Mr. Aziz Khan. After a while, Mr. Aziz Khan came out and proceeded towards the toilet passage and later Mr. Ratchapon Buayaem proceed towards the arrival hall and met the applicant and handed over his baggage trolley. The applicant collected his checked in stroller bag from the conveyor belt and placed it on this baggage trolley which had earlier been handed over to him by Mr. Ratchapon Buayaem. All the three, then proceeded towards Customs Green Channel area where they were intercepted. To the

query whether they are carrying any contraband/ objectionable goods or gold, they had replied in the negative. A personal search and examination of their baggage was carried out and no incriminating documents or material were found on their person or in their baggage. Here, Customs officers noticed some abnormality in the sticker on the back side of the baggage trolley being used by the applicant. Upon peeling of the sticker, a rectangular gold piece was found which had been stuck with double sided tape. In similar manner 5 more rectangular pieces of gold stuck with sticker and double side tape were found. Thus, 06 rectangular pieces of gold of 999% purity and 24 karats, totally weighing 11,990 grams and valued at Rs. 3,85,23,870/- were recovered and seized from the baggage trolley of the applicant.

3. After due process of law, the Original Adjudicating Authority (OAA) i.e. Joint Commissioner of Customs, CSI Airport, Mumbai vide Order-In-Original No. JC/GKG/ADJN/07/2020-21 dated 15.10.2020 [DIN : 202010790B00009WFE47; (S/14-5-316/2019-20/Adjn) (SD/INT/AIU/256/2019 AP'A)] ordered for the absolute confiscation of the 06 rectangular gold pieces, totally weighing 11,990 grams and valued at Rs. 3,85,23,870/- under Section 111 (d), Section 111(1) and Section 111(m) of the Customs Act, 1962 and imposed penalty of Rs. 40,00,000/- on the applicant. under Section 112 (a)(i) of the Customs Act, 1962. (penalty was imposed on the other two persons also, but they are not the subject matter of this revision application).

4. Aggrieved by the imposition of penalty in the said order, the applicant filed an appeal before the Commissioner (Appeals) who vide Order-In-Appeal No. MUM-CUSTM-PAX-APP-1069/2021-22 dated 23.11.2021 [DIN : 20211167BB00001151A6; S/49-1144/2020], did not find it necessary to interfere in the Order-In-Original passed by the OAA.

5. Aggrieved with the above order, the applicant has filed this revision application. Main grounds of the application are as under;

5.01. that there had been a gross violation of principles of natural justice in the adjudication proceedings inasmuch as the relevant copies of the documents and the CCTV footage had not been furnished to him.

5.02. that cross examination of the material witnesses had not been allowed which had resulted in severe prejudice in effectively defending the case.

5.03. that it was recorded in the statement that gold had been brought by Mr. Aziz Khan (one of the accused in the case) and not the applicant.

5.04. that the applicant did not understand English language and statement had been recorded in English and therefore the same had been retracted.

5.05. that the department had called for the mobile records of all the three accused persons and it is recorded in the SCN that nothing incriminating was found to associate the applicant with the other two accused.

5.06. that the adjudicating authority had not applied his mind as the applicant had not asked for CCTV footage of inside the toilet but of near the toilet; that the CCTV would reveal that the applicant did not know the other accused in the case; that CCTV footage was the only evidence to connect the other persons to the applicant and the same had not been made available.

5.07. that the entire case is registered on the basis of the statements not written by the applicant himself; that the statement had been typed without interpreter being present.

5.08. that the adjudicating authority had merely relied upon assumptions and presumptions without cogent and reliable evidence and had observed that there was a chain of events in the alleged smuggling of the gold and had held that the applicant was involved in the alleged seizure of the gold.

5.09. that the adjudicating authority had recorded that *the scale of preponderance heavily tilts to the noticee.*; that the adjudicating

authority on the basis of preponderance of probability had assumed, presumed and being a quasi judicial authority had not applied the law of natural justice; that the adjudicating authority had merely endorsed the allegations in the SCN the SC without giving fair and natural justice.

5.10. that the trolley belonging to the Mumbai Airport had not been seized and the adjudicating authority had observed that these trolleys did not have any serial number and that the seizure made in presence of panch witnesses is sufficient.

5.11. that the adjudicating authority ought to have seen that the applicant had not entered the toilet; it was a trolley for the public; that applicant had never touched the trolley; that the applicant did not know the co-noticee; therefore, there was no cogent and material evidence against the applicant for imposing the penalty of Rs. 40 lakhs.

5.12. that the above grounds had been pointed out and the appellate authority had not considered the same.

5.13. that the appellate authority in the order had discussed on the point of declaration even though the applicant had nothing to do with this. The applicant had not claimed the gold.

5.14. that since the applicant had not claimed the gold, the judgement of OM BHATIA regarding prohibition and prohibited goods was not applicable to the applicant.

5.15. that in the appellate order the issue of Section 111 of the Customs Act, 1962, red channel too have been discussed but since the applicant had not claimed the gold, the same were not applicable.

5.16. that the appellate authority had taken recourse to the judgement of the Apex Court in the case of CC vs. D. Bhoormull [1983 (13) ELT 1546 (SC)] that the department should not prove the case in mathematical precision but what is required is the establishment of such degree of probability. Therefore, in the applicant's case the circumstantial evidences had been taken against him.

5.17. that the appellate authority had not applied his mind as it is stated that *the adjudicating authority had rightly confiscated the seized gold absolutely and redemption in such cases cannot be claimed as a right*. The applicant had never claimed the gold and this shows that the appellate authority had merely confirmed the adjudication order without appreciating the facts and circumstances of the case.

Applicant in the revision application has prayed to set aside the penalty of Rs. 40 lakhs and to remand the case back to the adjudicating authority for cross examination of the panchas, interpreter and Customs Officers.

6. Personal hearings in the case through the online video conferencing mode was scheduled for 02.02.2022 / 09.02.2022. Shri. A.M Sachwani and Shri. N.H Heera, both Advocates, appeared on 09.02.2022 for physical hearing and reiterated their earlier submissions. They submitted that the applicant did not know that main accused had attached gold in the trolley. They informed that the applicant was still in India and was not able to fly back due to excessive penalty.

7. The Government has gone through the facts of the case. Government notes that before the interception of the applicant, a surveillance was kept on the other 2 persons involved in this case. Their movements to the washroom alongwith their possessions and the baggage trolley were observed. Thereafter, when they moved out of the washroom, their movements were under observation. Applicant had met the person and had placed his stroller bag on the baggage trolley. Thereafter, a large quantity of gold was recovered which had been ingeniously and cleverly pasted to the baggage trolley with the help of stickers. The applicant had been asked about possession of any dutiable goods and he had replied in the negative. The 6 rectangular gold pieces, totally weighing 11990 grams had been ingeniously pasted on the baggage trolley with the help of stickers. An ingenious and innovative modus was used to smuggle a large quantity of gold and the applicant was a part of the smuggling attempt. The 6 rectangular pieces of gold were discovered only when the applicant was thoroughly checked. An attempt was made to smuggle a large quantity of gold without declaring the same to Customs. The applicant had not declared the gold bars as required under section 77 of the Customs Act, 1962. The quantity of gold recovered is quite large, of commercial quantity and it was ingeniously

concealed to avoid detection. The confiscation of the gold is therefore justified and the applicant for his role in the smuggling attempt, had rendered himself liable for penal action.

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 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 issue in the case is the quantum and manner in which the impugned gold was being brought into the Country. The quantum is huge and it is clear that the same was for commercial use. 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 manner of concealment being clever, innovative and ingenious, quantity being large and commercial, there being clear attempt to smuggle rectangular gold



pieces, 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 the offence, the adjudicating authority had rightly ordered the absolute confiscation of gold. The same was upheld by the appellate authority. In the instant case, the gold was cleverly and ingeniously concealed and the modus adopted was innovative with an intent to avoid detection and evade payment of duty. Hon'ble Delhi High Court in the case of Jain Exports Vs Union of India 1987(29) ELT753 has observed that, "*the resort to Section 125 of the C.A. 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.*". The redemption of the gold will encourage such concealment as, if the gold is not detected by the Custom authorities the passenger gets away with smuggling and if not, he has the option of redeeming the gold. 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.

12(a). The applicant has made this revision application for limited purpose of reducing penalty on him and has made multiple averments stating that (i). principles of natural justice were not followed as CCTV footage had not been given to him; (ii). cross examination of witnesses had not been allowed; (iii). case be remanded back to OAA; (iv). that he did not understand English and interpreter was not present during the recording of statement; (v). that statement had been retracted; (vi). that nothing incriminating was found in mobile call records to associate him with the other 2 persons; (vii). that the trolley had not been seized; (viii). That he had not claimed the gold; (ix). that since gold did not belong to him question of declaring it did not arise; (x). that circumstantial evidence had been taken against him; (xi). that he had never claimed redemption of the gold as it did not belong to him.

12(b). The main contention of the applicant is that the gold does not belong to him and that he has not claimed the gold and hence, the penalty imposed on him was mis-placed and steep. While doing so, Government notes that other issues too have been taken up by the applicant and the same is also taken up while deciding the reasoning / justification of the imposition of the penalty.

12(c). On the issue of CCTV, Government notes that this is an afterthought. What is material is the recovery of huge quantum of gold. The fact remains that all the 3 persons i.e. the applicant and his 2 other accomplices had acted in concert and had specific role in the smuggling of the huge quantity of gold through the baggage route. The role played by these 3 persons including the applicant has been recorded in the panchanama and all were apprehended. Possession of the gold had been found with the applicant. The interlinking statements have been recorded and they have admitted their role in the smuggling attempt. The CCTV footage at this stage does not change the material fact of the seizure of huge quantity of gold.

12(d). The allegation that the applicant did not know English language and hence, the statement cannot be relied upon. Government on perusal of the facts finds that this allegation made by the applicant is baseless as the documents indicate that the interpreter from the Thai Consulate was present and it is recorded that the contents of the panchanama and his statement were explained to the applicant by the interpreter. This issue has been dealt with in detail by the OAA and Government agrees with the same.


12(e). On the issue of the retraction of statement by the applicant, Government notes that the same has been rebutted by the respondent. Government notes that the material facts of the case especially the seizure of such a large quantum of gold does not alter the facts with this submission.

12(f). The applicant has made an averment that there was nothing in the CDR to link him with the other 2 persons. Government notes that even in the SCN the respondent has acknowledged the fact that nothing conclusive was found in the CDR. That nothing incriminating was found in the forensic examination of the mobile phones too has been highlighted in the SCN. Since, a mention of the same has been made by the respondent in the SCN, Government finds that non-sharing of the reports, does not put the applicant in an adverse position.

13. The huge quantity of gold seized and the primary form of the gold elucidates that the same was not bonafide baggage item and confiscation of the same is justified. The applicant has made an averment that the gold does not belong to him and hence, he was not required to declare it. Government notes that the applicant alongwith his 2 accomplices have admitted to possession, carriage, handling, handing over, taking over, concealment, non-declaration, etc of the seized gold. Considering the manner in which the impugned gold was attempted to be brought into the country using an ingenious and innovative method, Government finds that applicant has made himself liable to penalty and is in agreement with the order passed by the lower authorities.

14. For the aforesaid reasons, the order passed by the Appellate authority on the issue of penalty on applicant is upheld.

15. Accordingly, the revision application is disposed of in the above terms.

  
( SHRAWAN KUMAR )

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

ORDER No. <sup>282</sup> /2022-CUS (WZ) /ASRA/

DATED 30 09.2022

To,

1. Mr. Methavee Arbvaree, 18, Moo ban nakkee la Laem Thong, Tab Chang,

Saphansoong, Bangkok, 10250.

2. Principal Commissioner of Customs, Chhatrapati Shivaji Maharaj International Airport, Sahar, Andheri (East), Mumbai – 400 099.

Copy to:

3. Mr. N.J Heera, Advocate, Nulwala Building, 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