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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. 371/59/B/WZ/2019-RA/4489 : Date of Issue : 04.10.2022

ORDER NO. 284/2022-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.

(i). F.No. 371/59/B/WZ/2019-RA

Applicant : Prakash Gurbani

Respondent : Pr. Commissioner of Customs, Custom House,
Navrangpura, Ahmedabad.

Subject : Revision Application filed, under Section 129DD of the
Customs Act, 1962 against the Order-in-Appeal
No. AHD-CUSTOM-000-APP-184/18-19 dated 20.12.2018
issued through F.No. S/49-49/CUS/AHD/18-19 passed by
the Commissioner of Customs (Appeals), Ahmedabad.

ORDER

This revision application has been filed by Prakash Gurbani (hereinafter referred to as the Applicant) against the Order-in-Appeal No. AHD-CUSTOM-000-APP-184/18-19 dated 20.12.2018 issued through F.No. S/49-49/CUS/AHD/18-19 passed by the Commissioner of Customs (Appeals), Ahmedabad.

2. Brief facts of the case are that the applicant was intercepted by Customs Officers on 28.09.2017 at Ahmedabad International Airport, having earlier arrived from Dubai onboard Spice Jet Flight No. SG-16. To specific query put forth by the Officers whether he had anything to declare, he replied that he had nothing to declare. He was asked to walk through the door frame metal detector (DFMD) which indicated presence of metal. A search of his person, led to the recovery of 3 FM gold bars, weighing 349.980 gms and valued at Rs. 10,74,393/- kept inside the socks worn by him.

3. The Original Adjudicating Authority (OAA), viz, Addl. Commissioner, Air Customs, Ahmedabad vide Order-In-Original No. 08/ADC-MSC/SVPIA/O & A/2018-19 dated 26.04.2018 issued through F.No. VIII/10-90/SVPIA/O&A/2018-19 ordered for the absolute confiscation of the three gold bars weighing 349.980 gms valued at Rs. 9,86,503/- (T.V) and Rs. 10,74,393/- (MV) under Sections 111(d), 111(i), 111(l) & 111(m) of the Customs Act, 1962 and a penalty of Rs. 5,00,000/- under Section 112 (a) & (b) of the Customs Act, 1962 was imposed on the applicant.

4. Aggrieved by the said order, the applicant preferred an appeal before the appellate authority (AA) viz, Commissioner of Customs (Appeals), Ahmedabad vide Order-In-Appeal No. AHD-CUSTOM-000-APP-184/18-19 dated 20.12.2018 issued through F.No. S/49-49/CUS/AHD/18-19 rejected the appeal.

5. Aggrieved with the above order of the appellate authority, the Applicant has filed this revision application on the following grounds;
- 5.01. that OIA was bad in law and displayed non-application of mind.
 - 5.02. that the lower authorities had failed to appreciate that the applicant had produced sufficient documents to establish that the gold was purchased by him from his hard money through banks and was meant for his marriage purpose,
 - 5.03. that as per the provisions of Section 125 of the Customs Act, 1962 confiscation of goods is authorized only if the goods are prohibited and in all other cases, the officer adjudging the case should give an option to the owner of the goods to pay fine in lieu of confiscation
 - 5.04. that as per Section 2(33) of the Customs Act, 'Prohibited goods' means any goods, the import or export of which is subject to any prohibition under this Act, that the prohibition can be ordered only under Section 11 of the Act.;
 - 5.05. that there was no notification/order issued under Section 11 prohibiting import of gold, that on the contrary, it is allowed to be imported on payment of duty @ 10% under CTH 71 subject to certain conditions of eligibility and 1 kg quantity restrictions under Notification 50/2017; that non declaration does not make the gold a prohibited item when the gold is allowed to be imported under certain conditions; that the import is only restricted and can be allowed to be cleared on payment of duty, fine and penalty;
 - 5.06. that they rely on the following case laws;
 - (a). Dinker Khindria (2009(237)E.L.T.41 (Tri.-Del.)),
 - (b). Yakub Ibrahim Yusuf [2011 (263) E.L.T.685 (Tri-Mumbai)],
 - (c). Mohd. Nayab & Imtiyaz Idris [2017 (357)E.L.T.213(Tri. All.)],
 - (d). Shaik Jamal Bashavesus [1997(91) E.L.T. (AP)].,
 - (e). Haja Mohideen Abdul Jaleel [2017 (346)E.L.T. (Mad)],
 - (f). Mazaharul Haq [2016 (341)E.L.T. 450 (Tri.-All)], wherein it has been held that certain quantity of gold is permitted to be imported on payment of duty by certain persons/companies on certain conditions and it not being prohibited goods can be allowed clearance on payment of duty with appropriate fine and penalty in the facts and circumstances of each case.
 - 5.07. that the lower authorities ought not to have imposed such harsh and excessive penalty on Applicant. The quantum of penalty is exorbitant and deterrent.

Under the circumstances, the applicant has prayed to the Revision Authority to quash and set aside the impugned appellate order, that the goods may be

ordered to be released on payment of duty and fine in lieu of confiscation but without any penalty or pass any other order as deemed fit in matter.

6(a). Personal hearing through the online video conferencing mode was scheduled for 11.08.2022, 23.08.2022, 15.09.2022 and 22.09.2022. Shri N.J Heera, Advocate for the applicant appeared for personal hearing on 22.09.2022 and submitted that applicant is working in U.A.E since 2016 and brought the small quantity of gold for personal use. He requested to allow re-export of goods as applicant is based in U.A.E. He submitted a written submission.

6(b). In his written submission dated 22.09.2022, the applicant has reiterated his earlier submissions. Applicant has claimed ownership of the gold and enclosed an invoice. In his statement before the respondent he had stated that the gold was brought for his ensuing marriage which was scheduled on 06.12.2017.

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 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 would have walked away with the impugned 3 gold bars without declaring the same to Customs. By his actions, it was clear that the applicant had no intention of declaring the impugned gold to Customs and pay Customs duty on it. Government finds that the confiscation of the gold bars was therefore 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 'Applicant' 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 quantity of gold bars under import is small and is not of commercial quantity. The applicant claimed ownership of the gold bars and had produced an invoice for the purchase of the same. 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. Government notes that at times, passengers adopt innovative methods to bring valuables and attempt to evade payment of duty. That is why goods are liable to confiscation. 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 imposing quantum of penalty.

12. The absolute confiscation of the gold bars, leading to dispossession of the applicant of the gold in the instant case is therefore, harsh and not reasonable. Considering the above stated facts, Government is inclined to set aside the OIA and grant an option to the applicant to redeem the 3 gold bars on payment of redemption fine. Since applicant is based in UAE, therefore, request for re-export is accepted.

13. Government finds that the penalty of Rs. 5,00,000/- imposed on the applicant under Section 112(a) & (b) of the Customs Act, 1962 constitutes nearly 50% of the value of the seized impugned gold bars. Government's notes that the said penalty of Rs. 5,00,000/- imposed on the applicant is not commensurate with the value of gold bars seized and is harsh and excessive and disproportionate to the omissions and commissions committed by him and the same deserves to be substantially reduced.

14. For the aforesaid reasons, Government sets aside the absolute confiscation upheld by the appellate authority. The impugned 3 gold bars, totally weighing 349.980 grams and valued at Rs. 9,86,503/- (T.V) and Rs. 10,74,393/- (M.V) 9,09,781/- are allowed to be re-exported on payment of a redemption fine of Rs. 2,00,000/- (Rupees Two Lakhs only). The penalty of Rs. 5,00,000/- imposed on the applicant under Section 112(a) & (b) of the Customs Act, 1962 is reduced to Rs. 95,000/- (Rupees Ninety-Five Thousand only).

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

Shrawan
30/9/22

(SHRAWAN KUMAR)

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

ORDER NO. 284/2022-CUS (WZ)/ASRA/MUMBAI DATED 30.09.2022.

To,

1. Prakash Gurbani, 122, Roop Nagar, Shiv Shakti Nagar, Bhadasiya, Jodhpur
2. Pr. Commissioner of Customs, Custom House, Navrangpura, Ahmedabad.

Copy to:

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