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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. 380/32/B/WZ/2017-RA / 6074 :

Date of Issue 27.10.22

ORDER NO. 299/2022-CUS (WZ/SZ)/ASRA/MUMBAI DATED 20.10.2022
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 : Pr. Commissioner of Customs, CSMI Airport, Mumbai.

Respondent : Shri. Shawkath Shaikh

Subject : Revision Application filed, under Section 129DD of the
Customs Act, 1962 against the Order-in-Appeal Nos.
MUM-CUSTM-PAX-APP-35/17-18 dated 28.04.2017 [(DOI
: 03.05.2017)(S/49-923/2015/AP)] passed by the
Commissioner of Customs (Appeals), Mumbai - III.

ORDER

This revision application has been filed by Pr. Commissioner of Customs, CSMI Airport, Mumbai (herein referred to as Applicant) against the Order in Appeal Nos. MUM-CUSTM-PAX-APP-35/17-18 dated 28.04.2017 [(DOI : 03.05.2017)(S/49-923/2015/AP)] passed by the Commissioner of Customs (Appeals), Mumbai – III against Shri. Shawkath Shaikh (hereinafter referred to as the Respondent).

2. Briefly stated the facts of the case are that the Respondent was intercepted on 18.07.2014 at the exit gate of Chhatrapati Shivaji Maharaj International Airport, Mumbai where he had arrived from Riyadh via Bahrain onboard Gulf Airways Flight No. GF-056/18.07.2014. The respondent had cleared himself and his baggage through the green channel. Respondent had in possession a Customs declaration form showing the details of the goods carried by him, however, the value column 9 had been left blank. Respondent was asked to pass through the metal detector which indicated the presence of some metal in his possession. Since, the chappals worn by him appeared heavy, they were screened which indicated the presence of metal inside the soles of the chappals. The soles of both the chappals were cut open which led to the recovery of 6 gold bars each of 999.9% purity having foreign markings. The total weight of the 6 gold bars was 699 gms, having market value of Rs. 17,85,421/-. 3 bars each were recovered from both the chappals which had been wrapped in carbon paper and concealed in the soles of the chappals. The impugned gold was seized.

3. The Original Adjudicating Authority (OAA) viz, Addl. Commissioner of Customs, Mumbai vide Order-In-Original No. ADC/ML/ADJN/192/2015-16 dated 21.10.2015 issued on 23.10.2015 through F.No. S/14-5-544/2014-15

Adj (SD/INT/AIU/518/2014-AP'B' ordered for the absolute confiscation of the 6 gold bars, totally weighing 699 gms,m valued at Rs. 17,84,421/- under Sections 111(d), (l) & (m) of the Customs Act, 1962. A penalty of Rs. 1,70,000/- was imposed on the respondent under Section 112(a) and (b) of the Customs Act, 1962.

4(a). Aggrieved by the said order, the respondent had filed an appeal before the Appellate Authority (AA) viz, Commissioner of Customs (Appeals), Mumbai - III who vide his Order-In-Appeal Nos. MUM-CUSTOM-PAX-APP-35/17-18 dated 28.04.2017 [(DOI : 03.05.2017)(S/49-923/2015/AP)] allowed (the respondent) to redeem the impugned six FM gold bars on payment of a redemption fine of Rs. 3,25,000/-.

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

- 5.01. that the respondent had opted for the green channel without declaring the gold bars in his possession; that the respondent had failed to make a true declaration as required under Section 77 of the Customs Act, 1962; the respondent in his statement recorded under Section 108 of the Customs Act, 1962 had admitted that the impugned gold bars did not belong to him; that respondent had concealed the gold bars in his chappals to avoid detection and to save Customs duty.
- 5.02. the decision of the Hon'ble Supreme Court in Samynathan. Murugesan Vs. Commissioner-2010 (254) ELT A 15 (SC) is applicable to this case and gold ought to have been confiscated absolutely and the OIO should be upheld.
- 5.03. that the decision of the Hon'ble High Court in the similar case of Md. Akhtar v/s. Commr. Of C.Ex, Cus. & S.T, Patna which had been upheld by the Apex Court [2015-323-ELT-A27(SC)] where gold had been found in the shoes was applicable to the extant case.
- 5.04. that the AA had erred in releasing the impugned gold and had wrongly applied discretion under Section 125 of the Customs Act, 1962 and had not considered that the gold bars had been ingeniously concealed.
- 5.05. that the 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 on the issue of prohibited goods was applicable to the extant case.

5.06. that the appellate authority had relied upon order of CESTAT, Chennai in the case of A. Rajkumari Vs CC (Chennai) 2015 (321) ELT 540 (Tri.-Chennai) for drawing the conclusion for release of the impugned gold on redemption fine and also held that the Hon'ble Apex Court vide order in the case as reported in 2015 (321) ELT A 207 (SC) had affirmed the said CESTAT Order; that this Order had been dismissed by the Apex Court on the grounds of delay and not on merits;

5.07. that the redemption on payment of fine and penalty would depend on the facts and circumstances of the case and other cases cannot be binding as a precedent; that judgment of Hon'ble Delhi High Court in the case of Jain Exports Vs Union of India 1987(29) ELT753 would be squarely applicable in this case.

Applicant prayed to the revisionary authority to set aside the order of the appellate authority and to restore the OIO or pass any order as deemed fit.

6. Personal hearing in the case was scheduled through the online video conferencing mode for 13.10.2021, 20.10.2021, 17.11.2021, 24.11.2021, 11.01.2022 and 03.02.2022. However, none appeared for the applicant or the respondent. Sufficient opportunities have been given to both the applicant and the respondent to put forth their case. As none appeared, the case is being taken up for a decision on the basis of evidence on record.

7. The Government has gone through the facts of the case, and observes that the respondent had failed to declare the goods to the Customs at the first instance as required under Section 77 of the Customs Act, 1962. The respondent had not disclosed that he was carrying dutiable goods. The 6 gold bars had been kept inside the soles of the shoes worn by him. The concealment adopted by the respondent clearly reveals his intention not to declare the gold and thereby evade payment of Customs Duty. Therefore, the confiscation of the gold is 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 ‘Repondent’ 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. Government notes that the quantity of gold is small and not in commercial quantity. The same had been kept concealed in the soles of the shoes worn by the respondent. Government notes that at times travellers resort to such innovative methods of concealment for safe keeping and safety of their valuables to avoid theft in transit. There are no allegations that the respondent 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 of gold. Considering the seriousness of the misdemeanour, Government notes that the appellate authority has used his discretion under Section 125 of the Customs Act, 1962 in granting an option to the respondent to redeem the gold bars on payment of a redemption fine.

The dispossessing the respondent of the gold in this case is harsh and unreasonable. Government notes that the AA has rightly and judiciously used his discretion in allowing the respondent to redeem the gold bars.

12. Government finds that the penalty of Rs. 1,70,000/- imposed on the respondent by the OAA under Section 112(a) & (b) of the Customs Act, 1962 is commensurate with the omissions and commissions committed and is not inclined to interfere in the same.

13. For the aforesaid reasons, Government is in agreement with the OIA passed by the AA and does not find it necessary to interfere in the same.

14. Revision Application filed by the applicant is disposed of on above terms.

Shrawan Kumar
20/10/22
(SHRAWAN KUMAR)

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

ORDER NO. 299/2022-CUS (WZ/SZ)/ASRA/MUMBAI DATED 20.10.2022

To,

1. Pr. Commissioner of Customs, CSI Airport, Terminal - 2, Level - 2, Andheri East, Mumbai - 400 099.
2. Shri. Shawkath Shaikh, S/o. Abdul Latif Shaikh, 699, Mavinakatte Manki Honnavar, Uttar Kannada, Karnataka, India - Pin : 581348.

Copy to:

1. Shri. P.K Shingrani, Advocate, 12/334, Vivek, New MIG Colony, Bandra (East), Mumbai - 400 051. [As appearing in OIA].
2. P.S. to AS (RA), Mumbai.
3. File Copy.
4. Notice Board.