



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

F.No 373/56/B/17-RA & 380/15/B/17-RA / 7077 Date of Issue 07.12.21

ORDER NO. 308 - 309 /2021-CUS (SZ)/ASRA/MUMBAI
DATED 06.12.2021 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. : **373/56/B/17-RA**

Applicant : Shri. Parambangodi Chalil Abdul Wahab

Respondent : Commissioner of C.Ex, Customs & Service Tax, Calicut.

File No. : **380/15/B/17-RA**

Applicant : Commissioner of C.Ex, Customs & Service Tax, Calicut.

Respondent : Shri. Parambangodi Chalil Abdul Wahab

Subject : Revision Application filed, under Section 129DD of the
Customs Act, 1962 against the Order-in-Appeal No.
CAL-EXCUS 000-APP-22-2017 dated 20-01-2017 [A.No. 19
CUS/CLT/2014 passed by the Commissioner (Appeals-II),
Cochin - 18.

ORDER

These revision applications have been filed by Shri. Parambangodi Chalil Abdul Wahab (hereinafter referred to as Applicant) and Commissioner of C.Ex, Customs, Service Tax, Calicut (hereinafter referred to as the Applicant –Department) against the Order-In-Appeal No. CAL-EXCUS 000-APP-22-2017 dated 20-01-2017 [A.No. 19 CUS/CLT/2014 passed by the Commissioner (Appeals-II), Cochin - 18.

2. Brief facts of the case are that a gold chain and a gold necklace, together weighing 261.27 gms and valued at Rs.6,68,008/- and 9 mobile phones and 28 perfume bottles, totally valued Rs.4,63,856/- (Import Value) and Rs.6,49,398/- (Market Value) were seized from the applicant by the AIU, Calicut Airport on 22.10.2014. The applicant had arrived from Dubai onboard flight no. AI-938/ 22.10.2014. As the applicant was not having eligibility to import gold and the goods were of commercial quantity, the said goods i.e gold chain, gold necklace, 9 mobile phones and 28 bottles of perfumes, totally valued at Rs. 13,17,406/- (M.V) were seized.

3. The applicant had requested for waiver of the show cause notice and accordingly, the Original Authority i.e. Joint Commissioner vide Order-In-Original No. 16/2014 dated 30.X.2014 [Part-A Seizure report - O.S No. 98/2014 dated 23.10.2014] ordered for the (i). absolute confiscation of the impugned gold chain and necklace under Section 111(d), (1) & (m) of the Customs Act, 1962, (ii). the confiscation of the 2 mobile phones and 28 perfumes as they were found to be in commercial quantity but allowed to be redeemed on payment of redemption fine of Rs. 1,50,000/- (iii). penalty of Rs.1,50,000/- was imposed under Section 112(a) of the Customs Act, 1962 and also a penalty of Rs.25,000/- was imposed under Section 114AA of the Customs Act, 1962 on the applicant.

4. Aggrieved by the said Order dated 30.10.2014, the applicant filed an appeal before the Commissioner (Appeals-II), Cochin - 18 who vide CAL-EXCUS 000-APP-22-2017 dated 20-01-2017 [A.No. 19 CUS/CLT/2014, modified the Order-in-Original only to the extent of setting aside the penalty of Rs. 25,000/- imposed on the applicant by the Original Adjudicating Authority under Section 114AA of

the Customs Act, 1962 whereas, the remaining part of the Order of the Adjudicating Authority was upheld.

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

- 5.1. that the order of the appellate authority was erroneous, unfair and against the principles of law and the order deserves to be set aside.
- 5.2. the submission that the quantity involved was small and was within the permissible limit of gold ornaments that can be brought by two passengers, one of whom happened to be a lady had not been considered by the appellate authority.
- 5.3. that the appellate authority had failed to consider the submission that the two gold chains each weighing 116.2 gms had been worn by his wife and there was no concealment.
- 5.4. that the appellate authority had absolutely confiscated the gold ornaments treating it as prohibited goods based on the case of Sheik Mohammed Omar Vs Collector. That this case happened in 1983 when laws such as 'Import Trade Control Act', 'Gold (Control) Act', etc., was in existence and gold was prohibited for import. Subsequently, liberalization of economic policies had taken place and the Foreign Trade (Development and Regulation) Act had been enacted and gold was removed from prohibited category for import purpose.
- 5.5. that gold was allowed to be redeemed by various judicial forums of the Country including by Revisionary Authority.
- 5.6. considering that the quantity of the gold ornaments imported was small; applicant was not a member of an organised gang; that gold was brought for own use and that there was no ingenious method of concealment, the same should have been released on payment of RF.
- 5.7. that various case laws cited had not been considered by the appellate authority.
- 5.8. for the mobile phones & perfumes, higher value was fixed by Customs i.e. Rs. 4,63,856/- and applicant had to pay excessive fine and penalty.

The applicant in his revision application has prayed to allow the outright release of the impugned gold ornaments on payment of nominal fine and duty at the

appropriate rate; to reduce the RF imposed on the perfumes and mobile phones; to reduce the penalty imposed under Section 112(a) of Customs Act, 1962 and for any other benefits as deemed fit.

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

6.1. Penalty under Section 114AA of the Customs Act, 1962 arises for making wrong declaration or using false document and since the applicant had not declared the goods at the time of clearance, the penalty under Section 114AA of the Customs Act, 1962 was justified.

Applicant – Department has prayed that the Order-In-Appeal passed by the appellate authority was not legal and proper to the extent of penalty under Section 114AA was concerned and hence, the same was required to be set aside.

7. Personal hearings in the case through the online video conferencing mode was scheduled for 03.11.2021 / 10.11.2021. Shri. Mitra Prasad, Advocate for the applicant appeared online on 10.11.2021 and submitted that gold jewellery was small quantity, it was for personal use. Therefore, it should be released on reasonable RF. He requested to reduce RF and penalty on other goods. No one appeared for the applicant department.

8. At the outset, from the Part-A Seizure Report O.S No. 98/2014 dated 23.10.2014, the Government notes that the Applicant had not declared the goods at the time of Customs clearance and the same were recovered only on examination of his baggage. Also, the applicant was not eligible to import gold and other goods which were of commercial quantity. The said goods i.e. a gold chain, a gold necklace, 9 mobile phones and 28 bottles of perfume had been recovered from the possession of the applicant. As the said aforesaid goods had not been declared to the Customs, the Government notes that the confiscation of the same was justified.

9. Government observes that 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.), 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. 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.

11. 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.

12. The quantum of gold under import is small and is not of commercial quantity. The Part-A Seizure Memo does not indicate that the gold chain and gold necklace had been concealed. There are no allegations that the applicant is a habitual offender and was involved in similar offence earlier. The applicant has stated that at the time of interception he was travelling with his wife and has submitted her travel documents in the revision application filed. 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.

13. 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. Government, therefore, to the extent of the impugned gold jewellery i.e. chain and necklace are concerned, sets aside the impugned order of the appellate authority. The impugned gold chain and gold necklace, totally weighing 261.27 gms and valued at Rs. 6,68,008/- are allowed redemption on payment of Rs. 1,75,000/- (Rupees One Lakh Seventy Five thousand only).

14. On the issue of the release of the 9 mobile phones and 28 bottles of perfumes, the Government finds that the redemption fine of Rs. 1,50,000/- imposed by the original adjudicating authority and upheld by the appellate authority is appropriate as the were in commercial quantity. Government is not inclined to interfere in the same.

15. The Government notes that the penalty of Rs. 1,50,000/- imposed on the applicant under Section 112(a) of the Customs Act, 1962 is appropriate and commensurate with the omission and commission committed by the applicant.

16. Government notes that the Applicant-department has contested the setting aside of the penalty imposed on the applicant under Section 114AA of the Customs Act, 1962. In addressing the issue of penalty under section 114AA of the Customs Act, 1962, Government relies on the observations of the Hon'ble High Court of

Karnataka in the case of Khoday Industries Ltd. Vs UOI reported in 1986(23)ELT 337 (Kar), has held that " *Interpretation of taxing statutes – one of the accepted canons of Interpretation of taxing statutes is that the intention of the amendment be gathered from the objects and reasons which is a part of the amending Bill to the Finance Minister's speech*".

17. In view of the above the objective of introduction of Section 114AA in Customs Act as explained in para 63 of the report of the Standing Committee of Finance (2005-06) of the 14th Lok Sabha is reproduced below;

"Section 114 provides for penalty for improper exports of goods. However, there have been instances where export was on paper only and no goods had ever crossed the border. Such serious manipulations could escape penal action even when no goods were actually exported. The lacuna has an added dimension because of various export incentive schemes. To provide for penalty in such cases of false and incorrect declaration of material particulars and for giving false statements, declaration, etc. for the purpose of transaction of business under the Customs Act, it is proposed to provide expressly the power to levy penalty up to five times the value of the goods. A new Section 114AA is proposed to be inserted after Section 114A."

18. Government therefore observes, penalty under Section 112 is imposable on a person who has made the goods liable for confiscation. But there could be situation where no goods ever cross the border. Since such situations were not covered for penalty under Section 112/114 of the Customs Act, 1962, Section 114AA was incorporated in the Customs Act by the Taxation Laws (Amendment) Act, 2006. Hence, once the penalty is imposed under Section 112(a), then there is no necessity for a separate penalty under section 114AA for the same act. The penalty of Rs. 25,000/- (Rupees Twenty five thousand only) imposed under section 114AA of the Customs Act, 1962 is liable to be set aside.

19. In view of the above, the Government observes that once penalty has been imposed under section 112(a) / (b) there is no necessity of imposing penalty under section 114AA of the Customs Act, 1962. Therefore, the Government notes that the appellate authority has rightly set aside the penalty of Rs. 25,000/- (Rupees Twenty five thousand only) imposed under section 114AA of the Customs Act, 1962.

20. For the aforesaid reasons, the Government is not inclined to interfere in the Order of the appellate authority setting aside the penalty of Rs. 25,000/- imposed on the applicant by the adjudicating authority under Section 114AA of the Customs Act, 1962.

21. The Government notes that all the averments made in the revision application by the applicant pleading that bonafide allowance was not allowed, that the goods were brought for gifting purposes etc have all been considered by the appellate authority and Government does not find any merit in this plea..

22. Revision Application no. 373/56/B/17-RA filed by the applicant is disposed of on the above terms wherein, the subject appellate order is modified only to the extent of para 13 above and Government does not find it necessary to interfere in the remaining part of the order passed by the appellate authority. Revision Application no. 380/15/B/17-RA filed by the applicant-department is rejected.

Shrawan
6/12/21
(SHRAWAN KUMAR)

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

ORDER No. ³⁰⁸⁻³⁰⁹ /2021-CUS (SZ) /ASRA/

DATED 06-12-2021

To,

1. Shri. Parambangodi Chalil Abdul Wahab, Cholakkara House, Koduvally PO, Kozhikode.
2. The Commissioner of Central Excise, Customs & Service Tax, C.R Buildingm Mananchira, Calicut : 673 001land, Cochin, Kerala : Pin 682 009.Pin : 620 001.

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