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SPEED POST



GOVERNMENT OF INDIA  
MINISTRY OF FINANCE  
(DEPARTMENT OF REVENUE)  
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Mumbai-400 005

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F.No. 371/273/B/WZ/2018-RA/6250 : Date of Issue : ~~10.2022~~

03.11.2022

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ORDER NO. 314/2022-CUS (WZ)/ASRA/MUMBAI DATED 31.10.2022 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.

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Applicants : Shri Sanjay Kumar Bhavsar

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-008-18-19 dated 11.04.2018 [F.No. S/49-21/CUS/AHD/2017-18] passed by the Commissioner of Customs (Appeals), Ahmedabad.

ORDER

The Revision Applications has been filed by Shri Sanjay Kumar Bhavsar (herein referred to as the Applicant) against the Order-in-Appeal No. AHD-CUSTM-000-APP-008-18-19 dated 11.04.2018 [F.No. S/49-21/CUS/AHD/2017-18] passed by the Commissioner of Customs (Appeals), Ahmedabad.

2. Brief facts of the case are that on 23.01.2016, the Customs Officers at the Sardar Vallabhbhai Patel International Airport, Ahmedabad, on suspicion, intercepted the applicant who had arrived from Sharjah by Air Arabia Flight No. G9 0483. As the applicant denied having any dutiable goods, he was asked to pass through the Door Frame Metal Detector (DFMD). On questioning and verifying his purse, one yellow metallic bar was found. Further, on screening two more bags, it was noticed that there were two other bags wrapped in a pair of clothes. On screening of the smaller sling bags, 12 pieces of buckles and 4 pieces of hooks having a golden hue were recovered. On testing of the said items it was ascertained that the items were of gold and the cut gold bar weighing 103.940 gms, the 12 chrome plated gold buckles contained 589.650 gms and the 4 chrome plated gold hooks containing 17.860 gms totally weighing 711.450 gms were recovered. The gold, totally weighing 711.450gms having market value of Rs. 18,92,457/- and tariff value of Rs. 16,98,750 were seized

3. The Original Adjudicating Authority (OAA) i.e. Additional Commissioner of Customs, Ahmedabad vide his Order-In-Original (OIO) no. 77/ADC-MLM/SVPIA/O & A/2016 dated 10.03.2017 [(DOI: 10.03.2017),(VIII/10-18/SVPIA/O & A/2016) ] ordered for the confiscation of the impugned one cut gold bar as well as 12 buckles and 4 hooks made of gold totally weighing 711.450 gms having tariff value of Rs. 16,98,750/- and market value of Rs.

18,92,457/- under Section 111 (i), (l) & (m) of the Customs Act, 1962. A penalty of Rs. 1,70,000/- was imposed on the applicant under Section 112(a) and (b) of the Customs Act, 1962 and a penalty of Rs. 1,50,000/- 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-CUSTM-000-APP-008-18-19 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 hide the same;
- 5.03. that the Panchanama does not mention the word 'conceal' and there is no mention of any material used for concealing the gold and thus the mention of the word 'conceal' in the impugned Order-in-Appeal is misconceived and needs to be expunged;
- 5.04. 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;
- 5.05. 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;

- 5.06. that the applicant had come to India after a years' time and was on a resident visa in Kuwait and therefore is an 'eligible passenger and Foreign Trade Exemption Order 1993 was applicable to him;
- 5.07. 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;
- 5.08. 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;
- 5.09. 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;
- 5.10. that the case of Aero Traders Pvt Ltd vs. Ravinder Kumar Suri [AIR 2005 SC 15] has explained the meaning of the word 'discretion';
- 5.11. that gold may be treated as 'prohibited' depending on the circumstances of the each case and the profile anof the person involved and despite the goods being 'prohibited' the same can be released or re-exported on the discretion of the Adjudicating Authority. Some case laws are as under:
- (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)]

5.12. that the impugned goods are not prohibited for use by society at large and release of the same will not cause any loss to society and its import and/or redemption would not be detrimental to the health, welfare or morals of people;

5.13. 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 the 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. Cases relied upon are Orders-In-Originals in the case of (i) Hukumuddin Ali Hussain Kata and (ii) Manjit Singh and Karamjit Singh.
- 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 04.08.2022 / 18.08.2022. Shri. Rishikesh Mehra, Advocate appeared online on behalf of the applicant on 04.08.2022 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, 1962

7. Government has gone through the facts of the case and the submissions. At the outset Government notes that the Applicant had brought gold totally weighing 711.450 gms comprising of cut gold bar weighing 103.940 gms, 12 chrome plated gold 'buckles' weighing 589.650 gms and the 4 chrome plated gold 'hooks' containing 17.860 gms gold. A declaration as required under Section 77 of the Customs Act, 1962 was not submitted and the gold bar was kept in a purse in the applicant's pocket and the gold 'buckles' and gold 'hooks' were in sling bags which were wrapped in a pair of clothes and were all undeclared.

8. The Government has gone through the facts of the case and notes that the applicant had failed to declare the dutiable goods in his possession to the Customs at the first instance as required under Section 77 of the Customs Act, 1962 while availing the green channel facility. Thereafter, on interception he had been asked whether he was carrying any dutiable items to which he had replied in the negative. The impugned gold in the form of 'cut bar' and also in the form of 'buckles' and 'hooks' were concealed with the express intention of hoodwinking the Customs and evading payment of Customs duty. The applicant clearly had failed to declare the goods to the Customs at the first instance, as required under Section 77 of the Customs Act, 1962. The cut bar and the shape in which the gold had been moulded i.e. buckles and hooks, clearly reveals intention of the applicant to not declare the same to Customs. The applicant would have gotten away with the gold had he not been intercepted. Therefore, the confiscation of the gold was justified.

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 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 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 quantity of the gold under import is small and is not of commercial quantity. The gold being in the form of cut bar and in the form of 'buckles' and 'hooks' were not concealed in any part of the baggage of the applicant or on his person. There are no allegations that the applicant is a habitual offender and was involved in similar offence earlier. The quantity of gold and 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 imposing quantum of penalty.

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 for the aforesaid reasons, is inclined to set aside the absolute confiscation held in the OIA and grant option to release the impugned gold on payment of a redemption fine.

14. With regard to the penalty of Rs. 1,70,000/- imposed under Section 112(a) of the Customs Act, 1962 on the applicant, the Government finds that the same is commensurate with the omissions and commissions committed and is not inclined to interfere in the same.

15. Government notes that once penalty has been imposed under section 112(a) 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. 1,50,000/- imposed under Section 114AA of the Customs Act, 1962 by the OAA and upheld by the AA, is set aside.

16. Accordingly, the Government sets aside the impugned order of the Appellate Authority. The impugned gold in the form of cut gold bar weighing 103.940 gms, 12 chrome plated gold buckles weighing 589.650 gms and the 4 chrome plated gold hooks containing 17.860 gms gold, totally weighing 711.450 grams and having tariff value of Rs. 16,98,750/- and market value of Rs. 18,92,457/- are allowed redemption on payment of fine of Rs. 4,00,000/- (Rupees Four Lakhs only). The Government finds that the penalty of Rs. 1,70,000/- (Rupees One lakh Seventy Thousand only) imposed on the applicant under Section 112(a) & (b) of the Customs Act, 1962 is appropriate and commensurate with the omission and commission committed. The penalty

of Rs. 1,50,000/- imposed on the applicant under Section 114AA of the Customs Act, 1962 is set aside.

17. The Revision Application is disposed of on the above terms.

  
( SHRAWAN KUMAR )

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

ORDER NO. 314/2022-CUS (WZ)/ASRA/MUMBAI DATED 31.10.2022

To,

1. Shri. Sanjay Kumar Bhavsar, S/o Mr Bapu Lalji Bhavsar, Bhavsar Auto Centre, Custam Road, 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.