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GOVERNMENT OF INDIA
MINISTRY OF FINANCE
(DEPARTMENT OF REVENUE)

8th Floor, World Trade Centre, Centre – I, Cuffe Parade,
Mumbai-400 005

F.No. 373/23/B/17-RA/2331

Date of Issue 22/12/2021

ORDER NO. 320/2021-CUS (SZ)/ASRA/MUMBAI
DATED 15.12.2021 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.

Applicant : Shri. Shankar Chandumal Kukreja

Respondent : Commissioner of Central Excise, Customs and Service
Tax, Thiruvanthapuram.

Subject : Revision Application filed, under Section 129DD of the
Customs Act, 1962 against the Order-in-Appeal No.
TVM-EXCUS-000-APP-122/2017 [A.No. 16/CUS/TVM/
2016-17 dated 12.05.2017 passed by Commissioner
(Appeals-III), Cochin-18.



ORDER

This revision application has been filed by Shri Shankar Chandumal Kukreja (hereinafter referred to as the Applicant) against the Order-in-Appeal No. Order-in-Appeal No. TVM-EXCUS-000-APP-122/2017 [A.No. 16/CUS/TVM/2016-17 dated 12.05.2017 passed by Commissioner (Appeals-III), Cochin-18.

2. Brief facts of the case are that the applicant had arrived at the Thiruvanthapuram International Airport on 09.10.2015 by Air India flight AI-264 from Male to Chennai via Thiruvananthapuram. On basis of suspicion, the Officers of the Directorate of Revenue Intelligence had boarded the flight and had identified the applicant who had kept a shoulder bag in the luggage cabin. On being repeatedly queried whether he was carrying any dutiable goods, the applicant had replied in the negative. The applicant was offloaded from the flight and examination of his baggage led to the recovery of 12 pieces of foreign marked gold biscuits totally weighing 1399.7 grams and valued at Rs. 36,81,211/-. The 12 gold biscuits which were all of 24 carats purity had been kept concealed in a special cavity created at the bottom of the shoulder bag carried by the applicant in the luggage cabin. The applicant revealed that he was to hand over the shoulder bag containing the gold to an unidentified passenger who would board the flight at Thiruvanthapuram on the domestic leg to Chennai. Since, the applicant had not stayed abroad for a period of 6 months prior to his arrival into India and had not declared the gold in his baggage declaration made under Section 77 of the Customs Act 1962, the gold was prohibited goods in terms of the Foreign Trade Policy and the Customs Act 1962 and was liable to confiscation under Section 111 (d), (i), (l) and (m) of the Act *ibid*.

3. After due process of investigations and the law, the Original Adjudicating Authority viz, Joint Commissioner of C.Ex, Customs and Service Tax, Thiruvanthapuram vide Order-In-Original No. 04/2017 (EXCUS) (JC) dated



28.07.2016 [C.No. VIII/10/01/2016 Cus Adj] ordered for the absolute confiscation of the 12 gold biscuits, totally weighing 1399.7 gms and valued at Rs. 36,81,211 and a penalty of Rs.11,00,000/- was imposed on the applicant under Section 112(a) and (b) of the Customs Act, 1962 and a further penalty of Rs.7,50,000/- under Section 114AA of the Customs Act, 1962 was also imposed on the applicant.

4. Aggrieved by the said order, the applicant filed appeal before the Commissioner (Appeals-III), Cochin - 18 who vide Order-in-Appeal No. Order-in-Appeal No. TVM-EXCUS-000-APP-122/2017 [A.No. 16/CUS/TVM/2016-17 dated 12.05.2017 upheld the (i). absolute confiscation of the 12 foreign marked gold biscuits and (ii). Penalty of Rs. 11,00,000/- imposed on the applicant under Section 112 (a) & (b) of the Customs Act, 1962 by the Original Adjudicating Authority. However, the penalty of Rs. 7,50,000/- imposed on the applicant under Section 114AA of the Customs Act, 1962 was set aside.

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

- 5.1. that the order passed by the lower authority was not in conformity with the spirit of the Baggage Rules, 1998 and deserves to be set aside in the interest of justice,
- 5.2. that he had no malafide intention to hide anything from Customs to avoid payment of duty which has been wrongly alleged and the value of the gold has been taken on the higher side.
- 5.3. that all the gold bars belonged to him only which he had brought for his personal & household use & some were meant for presentation among his near & dear ones and these gold biscuits were never meant for any sale or trade purpose.
- 5.4. that gold was neither banned nor restricted under the B. Rules. 1998.



5.5. that he had not made the proper declaration through oversight as he was disoriented on being offloaded at Thiruvanthapuram. The gold had been in his bag for safety purposes only as he was afraid of being robbed outside the airport by the taxi drivers in the odd hours in the night. Even otherwise the penalty of 33% of the value under Section 112 of the Customs Act, 1962 was not warranted.

5.6. that he had brought the gold for the first time and claimed ownership of the same. The frequency of the visits made by the applicant should not be used against him as nobody can afford to travel abroad again & again simply for the sake of gaining from paltry allowances under the Baggage Rules, 1998. Hence this charge had no weight at all.

5.7. that to buttress his case, a few case laws have been cited.

Applicant has prayed that the order of the appellate authority be set aside and the gold be released on nominal fine and the penalty of Rs. 11 lakhs be waived / reduced.

6. Personal hearings in the case through the online video conferencing mode were scheduled for 17.11.2021 / 21.11.2021. Shri. O.M Rohira, Advocate appeared and reiterated that applicant is not a habitual offender and was not allowed to declare the goods. He submitted that penalty imposed is too severe and submitted a copy of order of Commissioner (Appeals) No. Aircus/49/T2/2053/18 dated 02.02.2018.

7. The Government has gone through the facts of the case. The Applicant had been asked repeatedly whether he was carrying any dutiable goods and he had replied in the negative. The 12 gold bars had been kept concealed in a specially created cavity which indicates that the applicant had no intention to declare the gold and pay Customs Duty. Moreover, the applicant had revealed that he was scheduled to hand over the shoulder bag to an unidentified passenger who would board the flight at Thiruvanthapuram on its domestic stage of the journey to Chennai. The 12 gold biscuits / bars were discovered only when the Applicant was thoroughly checked. The Applicant did not declare 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 in the form of biscuits (of 1 tola each) and it was ingeniously concealed to avoid detection.. The confiscation of the gold is therefore justified and the Applicant has 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 main issue in the case is the quantum and manner in which the impugned gold was being brought into the Country. 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 and ingenious, quantity being large and commercial, there being clear attempt to smuggle gold bars, is a fit case for absolute confiscation as a deterrent to such offenders. Applicant had identified an International flight which turns to a domestic flight and had planned his sortie in such a manner to transfer the impugned gold on



the domestic leg of the journey such that it could be unscrupulously taken out without payment of Customs duty. Had it not been to the alertness of the Officers, the applicant would have very well succeeded in his plan. Thus, taking into account the facts on record and the gravity of 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 kept concealed in a specially created cavity of the shoulder bag which the applicant had carried in as personal luggage which he admittedly was scheduled to transfer to another passenger on the domestic leg of the journey. This clearly indicates that the applicant had no intention to declare the same. 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. During the personal hearing, Advocate of the applicants produced a copy of Commissioner of Customs (Appeals), Mumbai-III Order No. MUM-CUSTOM-PAX-APP-559/18-19 dated 25.09.2018. Government's notes that the said case cited does not assist in the rescue of the applicant. Revisionary Authority hears cases decided by Commissioner (Appeals). Therefore, Orders of the Commissioner (Appeals) are not precedent for Revisionary Authority. Hence, this order does not help the applicant.

13.1. The Government notes that the appellate authority has upheld the penalty imposed by the adjudicating authority under Section 112 (a) and (b) of the Customs Act, 1962. The Government is in agreement that a heavy penalty in this case is warranted as the applicant had tried to smuggle such a large



quantity of gold with impunity using ingenious concealment and an innovative plan of transferring the gold on to a domestic passenger. The penalty would act as a deterrent to others too who would harbor such plans to defraud the exchequer.

13.2 The Government notes that the appellate authority has set aside the penalty imposed on the applicant under Section 114AA of the Customs Act, 1962. The Government is in agreement with the same as simultaneous penalty under Section 112 and Section 114AA is not warranted.

14. The order of the Appellate authority is therefore liable to be upheld in its entirety and the Revision Application is liable to be dismissed.

15. Accordingly, the revision application fails and is dismissed.

Shrawan
15/12/21
(SHRAWAN KUMAR)

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

ORDER No 370/2021-CUS (SZ) /ASRA/

DATED 15.12.2021.

To,

1. Shri. Shankar Chandumal Kukreja, S/o. Shri. Chandumal Gokaldas Kukreja, BK-1934, RM No. 10, O.T Section, Nr. Gas Godown, Ulhasnagar, Thane Maharashtra. Pin : 421 005.
2. Commissioner of Central Excise, Customs & Service Tax, P.B. No. 13. I,C,E Bhavan, Press Club Road, Thiruvanthapuram, Kerala. Pin : 695001.

Copy To,

1. Shri. O.M.Rohira, Advocate, 148/5, Uphaar, 10th Road, Khar (W) Bombay- 400 052.
2. Sr. P.S. to AS (RA), Mumbai.
3. Guard File.
4. File Copy.
5. Notice Board.

