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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. 371/187/B/WZ/2019-RA

7556:

Date of Issue 14.12.2022

ORDER NO. 368/2022-CUS (WZ)/ASRA/MUMBAI DATED 09.12.2022
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 : Shri Kinnar Fichadia

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

Subject : Revision Application filed, under Section 129DD of
the Customs Act, 1962 against the Order-in-Appeal
No. AHD-CUSTM-000-APP-295 / 18-19 through
F.No. S/49-142/CUS/AHD/18-19 dated
28.03.2019 passed by the Commissioner of Customs
(Appeals), Ahmedabad.

ORDER

This revision application has been filed by Shri Kinnar Fichadia (herein after referred to as the Applicant) against the Order-in-Appeal No. AHD-CUSTOM-000-APP-295 / 18-19 dated 28.03.2019 issued through F.No. S/49-142/CUS/AHD/18-19 passed by the Commissioner of Customs (Appeals), Ahmedabad.

2. Briefly stated the facts of the case are that the Applicant, who had arrived from Dubai onboard Spice Jet Flight No. SG16 was intercepted on 06.12.2017 while he was about to exit the green channel of the SVPI Airport, Ahmedabad. To query whether he was carrying any dutiable good, he had replied in the negative. The applicant was asked to pass through the Door Frame Metal Detector (DFMD) and he removed the metallic objects which were on his person / worn by him. It was noticed that the two kadas worn by him on both his hands and the chain worn around his neck were unusually heavy. On being asked, the applicant admitted that the same were made of gold and he intended to evade the payment of Customs duty. The Government Approved Valuer certified that the two kadas and the chain were made of gold of 0.999% purity. The 2 kadas weighed 149.750 grams each i.e. total 299.500 grams and the gold chain weighed 249.510 grams. The total weight of the gold in the 2 kadas and gold chain was 549.010 grams, valued at Rs. 16,41,539/- (M.V) and Rs. 15,01,048/- (T.V).

3. The Original Adjudicating Authority (OAA) viz, Addl. Commissioner of Customs, Ahmedabad vide Order-In-Original No. 15/ADC-MSV/SVPIA/O & A/2018-19 dated 20.06.2018 issued vide F.No. VIII/10-17/SVPIA/O & A/2018 ordered for the absolute confiscation of the 2 gold kadas, collectively weighing 299.500 grams and one gold chain weighing

249.510 grams, total weight being 549.010 grams recovered from the applicant, having a tariff value of Rs. 15,01,048/- (Rs. 15,41,539/- M.V) under Section 111 (d), (i), (l) & (m) of the Customs Act, 1962, and imposed a penalty of Rs. 6,00,000/- (Rupees Six Lakhs only) under Section 112 (a) of the Customs Act, 1962.

4. Aggrieved by the said order, the applicant filed appeal before the Appellate Authority (AA) viz, Commissioner of Customs (Appeals), Ahmedabad who vide Order-in-Appeal No. AHD-CUSTM-000-APP-295 / 18-19 dated 28.03.2019 issued through F.No. S/49-142/CUS/AHD/18-19 did not find it necessary to interfere in the OIO passed by the OAA and rejected the appeal.

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

- 5.01 that the OIA is based on conjectures and surmises, without any concrete evidence and is devoid of any merits.
- 5.02. that the applicant had shown the gold kadas and chain by his own will and action and had shown the invoice also.; that the gold had not been concealed.
- 5.03. that the respondent should have allowed the applicant to declare the gold and pay the duty on it or allowed him to re-export the same.
- 5.04. that the gold ornaments had been purchased by the applicant from his own savings and he possessed the invoice.
- 5.05. that as per sr. no. 356 of Not^a No. 50/2017-Cus, gold ornaments were freely importable on payment of Customs duty.
- 5.06. that applicant was returning to India after a period of 20 months of stay abroad as his short visits did not exceed 30 days and hence was eligible to bring gold.
- 5.07. that the only mistake committed by the applicant was that he had not declared the gold and filled the form; that option to redeem the gold ornaments had not been given to him.
- 5.08. that applicant was working in Dubai and was eligible to take back the gold; his request for re-export had been rejected by the OAA;
- 5.09. that they rely on the following judgements;

- (a). Commr. Of Customs, Lucknow vs. Mohd. Nayam & Imtiaz Idris [2017 (357) ELT 213 (Tri-ALL)],
- (b). Gain Chand & others vs. State of Punjab [1983-13-ELT-1365-SC],
- (c). State of Maharashtra vs. Prithviraj Pokhraj Jain [2000-126-ELT-180(Bom)]
- (d). etc.

Under the above facts and circumstances of the case, the Applicant has prayed to the Revision Authority to set aside the OIA and allow the gold ornaments to be released on redemption fine and payment of appropriate duty or may give further relief as deemed fit.

6. Personal hearing in the case were scheduled online for 11.08.2022 or 23.08.2022. Shri. Rishikesh Mehra, Advocate for the applicant appeared for personal hearing on 23.08.2022 and submitted that gold is not in commercial quantity, there was no concealment, gold is not prohibited goods. He requested for taking lenient view in the matter.

7. At the outset, Government notes that the Applicant had brought the gold of high purity in the form of a kadas and a thick chain and had not declared the same. A declaration as required under Section 77 of the Customs Act, 1962 had not been submitted. The applicant disclosed that the kadas and chain worn by him were made of gold only when he was confronted with its composition at the DFMD. The applicant admitted that he had not declared the gold in his possession as he harboured an intention to evade the 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 ‘Applicant’ thus, liable for penalty.

10. Government, however notes that the gold ornaments had been worn by the applicant and had not been ingeniously concealed. The ownership of the gold is not disputed. The quantity of gold under import is small. There are no allegations that the Applicant is a habitual offender and was involved in similar offences earlier. Moreover, the applicant had stated in his averments

before the OAA that he was an eligible passenger having returned back after a period of 20 months with short visits not exceeding 30 days. Also, he had produced the invoices, evidencing purchase of the gold. This claim had not been refuted by the respondent before the lower authorities. In the OIO it is stated that the invoices were issued 6 months prior to the booking of the case and had been produced only during their defence of the case. The facts of the case indicate that it is a case of non-declaration of gold ornaments, 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 Customs Act, 1962 and while imposing quantum of 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. In view of the foregoing paras, the Government finds that as the applicant had not declared the gold at the time of arrival, the confiscation of the gold was justified. However, the absolute confiscation of the same was not justified in view of the aforesaid facts and option to redeem the same on payment of redemption fine should have been allowed.

13. The Government finds that neither original authority nor the appellate authority has given any findings on the applicant's submission of being eligible passenger. It is evident that by virtue of his continuous stay abroad, he has claimed to be eligible to bring upto 1 kg gold at concessional duty. Government observes that gold brought by such eligible persons is not prohibited, provided that payment of the concessional duty is made through foreign currency. Original authority is directed to examine this aspect while charging duty on gold jewellery to be released on payment of redemption fine.

14. Government finds that the penalty of Rs. 6,00,000/- imposed on the applicant under Section 112(a) and (b) of the Customs Act, 1962 by the OAA and upheld by the AA constitutes to nearly 40% of the tariff value of the seized gold ornaments. Government notes that the applicant besides claiming to be eligible to bring gold by virtue of his stay abroad, had worn the ornaments and when confronted near the DFMD, had admitted to carrying gold. Therefore, Government finds the quantum of the penalty is quite harsh and excessive and not commensurate with the omissions and commissions committed by him. Government is inclined to reduce the same.

15. For the aforesaid reasons, Government therefore, sets aside the impugned order of the Appellate authority. The impugned 2 gold kadas and a gold chain, totally weighing 549.010 grams, valued at Rs. 15,01,0148 (T.V) are allowed redemption on payment of Rs. 3,00,000/- (Rupees Three Lakhs only). The impugned gold is allowed to be cleared at appropriate rate of duty. The penalty of Rs. 6,00,000/- (Rupees Six Lakhs only) imposed under section 112 (a) & (b) of the Customs Act, 1962 is reduced to Rs. 2,00,000/- (Rupees Two Lakhs only).

18. Revision Application is decided on the above terms.

Shrawan Kumar
9/12/22

(SHRAWAN KUMAR)

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

ORDER No 368/2022-CUS (WZ) /ASRA/MUMBAI DATED 09.12.2022

To,

1. Shri. Kinnar Fichadia, 22, Ram Vihar Society, PT, College Road, Paldi, Ahmedabad – 380 007.
2. Pr. Commissioner of Customs, Custom House, Navrangpura, Ahmedabad – 380 009.

Copy To,

1. Shri. Kinnar Fichadia,, C/o. Rishikesh Mehra, B/1103, Dev Vihaan, Behind Third Eye Residency, Opp. Motera Stadium, Sabarmati, Ahmedabad – 380 005.
2. Sr. P.S. to AS (RA), Mumbai.
3. File Copy,
4. Notice Board.