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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. 380/22/B/2017-RA

Date of Issue 14.12.2022

ORDER NO. 370/2022-CUS (WZ)/ASRA/MUMBAI DATED 12.12.2022 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 : Commissioner of Customs, Goa.

Respondent : Shri. Farhan Abdulla Haneef Abdulla

Subject : Revision Application filed, under Section 129DD of the Customs Act, 1962 against the Order-in-Appeal No. GOA-CUSTM-000-APP-041-2017-18 dated 05.06.2017 [F.No. A-24/CUS/GOA/2017-18] passed by Commissioner of Customs (Appeals), Pune Appeal – II CX (at Goa).

ORDER

This revision application has been filed by Commissioner of Customs, Goa (herein referred to as Applicant) against the Order-in-Appeal No. the Order-in-Appeal No. GOA-CUSTOM-000-APP-041-2017-18 dated 05.06.2017 [F.No. A-24/CUS/GOA/2017-18] passed by Commissioner of Customs (Appeals), Pune Appeal – II CX (at Goa).

2. Brief facts of the case are that the respondent who had arrived at the Dabolim Airport, Goa on 27.10.2015 from Dubai-Doha-Goa onboard Qatar Airways Flight QR 522 was intercepted at the exit point on the basis of a suspicion that he might be carrying gold/contraband in his baggage or person. Respondent had opted for the green channel and had filed a NIL Customs Declaration Form, indicating that he did not possess any dutiable items. Examination of his checked-in baggage resulted in the recovery of (i). 25 cartons of cigarettes of 'BLACK' brand made by 'PT DJARUM KUDUS-INDONESIA', valued at Rs. 20,000/-; (ii). a silver coloured object was found stuck below the base of the baggage trolley which on opening was found to contain one gold bar weighing 1 Kg having foreign markings and valued at Rs. 24,96,370/- and (iii). I-Phone dual SIM. The gold and cigarettes were seized under Section 110 of Customs Act, 1962 under reasonable belief that the same was smuggled into India and was liable for confiscation under Section 111 of the Customs Act, 1962.

3. The Original Adjudicating Authority (OAA) viz, Addl. Commissioner of Customs, Goa vide Order-in-Original no. 57/2016-17-ADC (CUS) dated 27.03.2017 (F.No. 11/54/2015-R&I (APT)) ordered for the (i). absolute confiscation of the 1000 grams of gold valued at Rs. 24,96,370/- under Section 111(d), 111(l) and 111(m) of the Customs Act, 1962, (ii). absolute confiscation of the 25 cartons of Black –PT DJARUM KUDUS-INDONESIA brand cigarettes valued at Rs. 20,000/- under Section 111(d), 111(1) and (m) of the Customs Act, 1962 read with Section 7(1), (3) of the Cigarettes and Other Tobacco

Products (Prohibition of Advertisement and Regulation of Trade and Commerce, Production, Supply and Distribution), Act 2003(34 of 2003), and the rules as per the amended para 1(i), Para 2(2), Para 3(a), (b) made under the act vide the Cigarettes and Other Tobacco Products (Packaging and Labelling) Amendments Rules, 2012 dated 27.09.2012 and (iii) imposed a penalty of Rs. 2,50,000/- on the respondent under Section 112(a) of Customs Act, 1962.

4. Aggrieved with the Order, the respondent filed an appeal before the appellate authority viz, Commissioner of Customs (Appeals), Pune Appeal – II CX (at Goa), who vide Order-in-Appeal No. GOA-CUSTOM-000-APP-041-2017-18 dated 05.06.2017 [F.No. A-24/CUS/GOA/2017-18] upheld the

(i). absolute confiscation of 25 cartons of Black –PT DJARUM KUDUS-INDONESIA brand cigarettes valued at Rs. 20,000/- under Section 111(d), 111(1) and (m) of the Customs Act, 1962 read with Section 7(1), (3) of the Cigarettes and Other Tobacco Products (Prohibition of Advertisement and Regulation of Trade and Commerce, Production, Supply and Distribution), Act 2003(34 of 2003), and the rules as per the amended para 1(i), Para 2(2), Para 3(a), (b) made under the act vide the Cigarettes and Other Tobacco Products (Packaging and Labelling) Amendments Rules, 2012 dated 27.09.2012;

(ii). the absolute confiscation of the gold bar weighing 1000 grams was set aside and the option to redeem the same on payment of redemption fine of Rs. 4,00,000/- in terms of Section 125(1) of the Customs Act, 1962 and payment of appropriate duty and other charges under Section 125(2) of the Customs Act, 1962 was allowed to the respondent and

(iii). the penalty of Rs. 2,50,000/- imposed on the respondent by the OAA under Section 112(a) of the Customs Act, 1962 was upheld.

5. Aggrieved with the order of the Appellate authority, the Applicant has filed this revision application inter alia on the grounds that;

- 5.1. the ratio of the judgement of the Hon'ble Supreme Court in the case of Om Prakash Bhatia vs. Commissioner of Customs [2003(155) ELT 423 (SC)] pertaining to 'prohibited goods' had not been considered by the appellate authority.
- 5.2. the ratio of the judgement of the Hon'ble Madras High Court in the case of Malabar Diamond Gallery Pvt. Ltd vs. Addl. Director General, DRI in Writ Appel no. 377 of 2016 had not been considered by the appellate authority.
- 5.3. the ratio of the judgement of the Hon'ble Supreme Court in the case of Samynathan Murugesan Vs. Commissioner [2010 (254) ELT A15 (SC)] pertaining to ingenious concealment of gold had not been considered by the appellate authority
- 5.4. the ratio of the judgement of the Hon'ble Kerala High Court in the case of Abdul Razak vs. UOI [2012 (275 (ELT 300 (Kerala-DB))] pertaining to statutory conditions of import being violated even if gold was not enumerated as prohibited item, its release could not be ordered had not been considered by the appellate authority.
- 5.4. that the gold had been ingeniously concealed to avoid detection had not been considered by the appellate authority.

Applicant has made a fervent plea to the revision authority that the order passed by the appellate authority was not legal and proper and has prayed that the same be set aside and to pass any order as deemed fit.

6. Personal hearings in the case was scheduled through the video conferencing mode for 16.09.2021 / 23.09.2021, 26.10.2021 / 02.11.2021, 02.12.2021. No one attended for the applicant and respondent. Sufficient opportunities have been accorded to the applicant as well as respondent to put forth their case. The case is being taken up for a decision on the basis of evidence on record.

8. The Government has gone through the facts of the case. Governments notes that this revision application is confined only on the issue of release of

the gold bar to the respondent. The Government observes that the respondent had not declared the goods. The impugned gold was innovatively stuck to the base of trolley using double sided adhesive tape. It is clear that the respondent had resorted to an ingenious method of concealment to evade duty. By this action, it is clear that respondent did not harbor any intention to pay the Customs duty. The respondent had not declared the impugned gold as required under Section 77 of the Customs Act, 1962. In this case, the quantity of gold seized too is quite substantial, in primary form, clearly indicating that the same was for commercial use. The respondent had consciously and in a pre-meditated manner adopted this ingenious method of concealment to avoid detection and thereby to evade Customs duty. The confiscation of the gold is therefore justified and thus, the respondent had rendered himself liable for penal action.

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".

11. 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 'respondent' thus liable for penalty.

12. 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.

13. Government also observes that the manner in which the gold was ingeniously concealed by using double side tape adhesive and sticking it at the

base of the trolley, clearly reveals the intention of the respondent. It also revealed his stubborn and clear intention to evade duty and smuggle the gold into India. The respondent had a short stay abroad and was ineligible for import of the gold. The circumstances of the case especially the concealment method adopted, probates that the respondent had no intention of declaring the gold to the Customs at the airport. All these had been properly considered by the original adjudicating authority while confiscating the gold absolutely.

14. The main issue in the case is the 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, a clear attempt to smuggle gold, is a fit case for absolute confiscation as a deterrent to such offenders. Thus, taking into account the facts on record and the gravity of offence, the original adjudicating authority had rightly ordered the absolute confiscation of gold. But for the intuition and the diligence of the Customs Officer, the gold would have passed undetected. Further, respondent was also attempting to smuggle cigarettes and mobile phone alongwith gold. This further confirms that the respondent was indulging in blatant contravention of Customs law. 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. The order of the Appellate authority allowing to redeem the gold on payment of redemption fine is therefore liable to be set aside.

18. Government notes that the appellate authority has upheld the penalty of Rs. 2,50,000/- imposed on the respondent by the original adjudicating authority. Government finds that the penalty imposed on the respondent is commensurate with the omissions and commissions committed and is not inclined to interfere in the same.

19. From the foregoing paras, the Government modifies the order passed by the appellate authority and the release of the gold bar on payment of redemption fine of Rs. 4 lakhs held by the appellate authority is set aside and the order-in-original passed by the OAA ordering the absolute confiscation of the gold bar weighing 1000 grams is hereby, restored. The revision application filed by the applicant succeeds.

20. The revision application is allowed on the above terms.


(SHRAWAN KUMAR)

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

ORDER No. 370 /2022-CUS (SZ) /ASRA/

DATED 2.12.2022

To,

1. Commissioner of Customs, Goa Custom House, Marmagao, Goa - 403 803.
2. Shri. Farhan Abdulla Haneef Abdulla, S/o. Shri. Haneef Abdulla, Barikkad House, PO Thekkil Ferry, Kasargod, Kerala - 671 541.

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