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SPEED POST

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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. 371/93/B/2019-RA /1696 **Date of Issue** 21 **.03.2023**

ORDER NO.371/2023-CUS (WZ)/ASRA/MUMBAI DATED 20.03.2023 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 : Mr. Mohammed Aboobacker

Respondent : Pr. Commissioner of Customs, CSI Airport, Mumbai.

Subject : Revision Application filed, under Section 129DD of the Customs Act, 1962 against the Order-in-Appeal No. MUM-CUSTM-PAX-APP-874/2018-19 dated 27.12.2018 [Date of issue: 31.12.2018] [S/49-207/2016] passed by the Commissioner of Customs (Appeals), Mumbai Zone – III.

ORDER

This Revision Application has been filed by Mr Mohammed Aboobacker (herein referred to as 'Applicant') against the Order-in-Appeal No. MUM-CUSTM-PAX-APP-874/2018-19 dated 27.12.2018 [Date of issue: 31.12.2018] [S/49-207/2016] passed by the Commissioner of Customs (Appeals), Mumbai Zone-III.

2. Brief facts of the case are that on 11.05.2014, on suspicion, the Applicant, who had arrived at Mumbai from Dubai via Muscat by Oman Air Flight No WY 0201, was intercepted by the customs officers at the Chattrapati Shivaji Maharaj (CSI) Airport. The Applicant was intercepted near the exit gate of the arrival hall while he was trying to clear customs in the disguise of a 'loader' working at the CSI Airport, Mumbai. The Applicant was wearing a navy blue t-shirt with an identity card hanging around his neck and was carrying one black colour back sack bag, as a staff member to mislead the customs officials. During the search of back sack bag of the Applicant, four heavy packets wrapped with white adhesive tape and one gold bar packed in transparent polythene pouch was recovered and 02 packets packed in white adhesive tape were recovered from specially made left and right inner pockets of the jeans pant worn by the applicant and one packet packed with white adhesive tape was recovered from the purse kept in the right side hip pocket of the jeans pant worn by him. In all, the detailed search of the black sack bag and the Applicant led to the recovery of 13 gold bars of 01kg each and 02 gold bars of 10 tolas each, collectively weighing 13232 grams and valued at Rs. 3,39,78,056/-,which were seized under the reasonable belief the same were attempted to be smuggled into India in contravention of the provisions of the Customs Act, 1962

2.1. The Applicant admitted that the seized gold did not belong to him and he had carried it for monetary consideration and had disguised himself as a 'loader' so that he could clear customs without declaring the gold. The Applicant admitted to knowledge, possession, carriage, non-declaration, concealment and recovery of the gold.

2.2. The Applicant also admitted that he had made 10 trips from Dubai to Mumbai from 15.03.2014 to 11.05.2014 and returned the same day and that he used to carry 50 to 75 cigarette cartons, which were cleared without payment of duty and on three occasions he was caught by Customs and penalized for the same.

3. After due process of investigations and the law, the Original Adjudicating Authority viz, Additional Commissioner of Customs, CSI Airport, Mumbai, vide Order-In-Original No. ADC/RR/ADJN/329/2015-16 dated 11.02.2016 [Date of issue: 15.02.2016] [S/14-5-393/2014-15 Adjn (SD/INT/AIU/319/2014 AP 'A')], ordered for the absolute confiscation of the impugned gold totally weighing 13232 grams and valued at Rs. 3,39,78,056/- under Section 111 (d), (l) and (m) of Customs Act, 1962 and a penalty of Rs. 40,00,000/- under Section 112(a) & (b) of the Customs Act, 1962 was imposed on the Applicant. The packing materials used to pack the seized gold was confiscated under Section 119 of the Customs Act, 1962

4. Being aggrieved by the order, the Applicant filed an appeal before the Appellate Authority viz, Commissioner of Customs (Appeals), Mumbai Zone-III, who vide Order-In-Appeal MUM-CUSTM-PAX-APP-874/2018-19 dated 27.12.2018 [Date of issue: 31.12.2018] [S/49-207/2016] upheld the Order-in-Original 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 OAA has grossly erred in holding that the show cause notice was issued within the prescribed time limit of 6 months;

5.02. That the assertion of the OAA that the dispatch of the show cause notice on the last day of the expiry of 6 months is valid is not based on findings arrived at by the higher forums;

5.03. That while rejecting the request for returning the seized goods back for not giving the show cause notice within the prescribed time limit, the OAA has

attempted that nothing could stop the adjudication as Section 110 and 124 were independent;

5.04. That though the scope of the both the sections are independent, it was incorrect to say that the sequence of action was not warranted because it is not mandated by any section of the Customs Act, 1962;

5.05. That if as stated by the OAA that the adjudicating proceedings can be taken up before deciding the fate of action under Section 110(2) of the Customs Act, 1962, then there was no need for law makers to make the provisions of Section 110(2) because everytime if a notice became entitled for return of goods the adjudicating authorities would adjudicate the matter first and order for confiscation of the goods;

5.06. That the OAA has grossly erred in treating the Applicant to be part of an organized smuggling syndicate as nowhere has the Applicant admitted to be part of one;

5.07. That provisions of Section 125(1) of the Customs Act, 1962 clearly suggests that wherever the owner of goods is not known, then the seized goods can be allowed to be redeemed to the person from whom the goods are seized and so absolute confiscation is not justified.

Under the circumstances, the Applicant prayed that the OIO be set aside with directions to the OAA to first return the gold as the SCN was not given to the Applicant within the prescribed time limit and the copy of the submissions of the respondent be given for countering the same.

7. Personal hearing in the case was scheduled for 29.12.2022 or 06.01.2023. Shri N.J.Heera, Advocate appeared for the hearing on 06.01.2023 on behalf of the Applicant. He submitted that the SCN was issued after 06 months of seizure. He further submitted that gold is restricted item and is not prohibited and therefore goods should be released on redemption fine and penalty as per Section 125 of the Customs Act, 1962. He requested for three weeks time to make additional submissions. No further submissions have been made by the Applicant or his representative.

7.1. Government notes that the Applicant has averred that the show cause notice under Section 110 of the Customs Act, 1962 was not issued and has argued that the impugned goods should be released first and then adjudication of the show cause notice should be done.

7.2. Section 110 of the Customs Act, 1962 mandates that once the goods are seized, a show cause notice is required to be given within six months or within another extended time of six months form the date of seizure and if no notice is given within the prescribed limit, then the seizure no longer holds good.

7.3. Section 124 of the Customs Act, 1962 deals with the confiscation of goods and imposition of penalties. Government notes that Section 110 of the Customs Act, 1962 and Section 124 of the Customs Act, 1962 operate on different goals and aims and are exclusive of each other.

7.4. Government notes that even though seizure no longer holds good after expiry of the period envisaged under Section 110 of the Customs Act, the violation or non-issue of show cause notice within six months from the date of seizure or within the extended period does not vitiate the proceedings under Section 124 of the Customs Act, 1962 as the Sections are distinct and independent of each other.

7.5. Government observes that the lower authorities in deference of the directions of the Hon'ble Bombay High Court in the writ petition No 3740 of 2015, filed by the Applicant, have addressed and passed a speaking order with findings on the point of question of delay and the same have been echoed by the Appellate Authority.

7.6. The Appellate Authority, at Para 7 of the impugned Order-in-Appeal has addressed the prime contention of the Applicant as under

"7. In view of above, I find that a notice under Section 110(2) must be given within the time as specified in the said section and it has not been mentioned in the section itself as to how such notice should be given, but at the same time a notice under Section 110(2) should be a notice issued under Section 124 of the Act and any notice, issued under the Act, which obviously includes a notice under Section 124 of the Act, should be served in the manner provided in Section 153 of the Act. Having said that one basic question which comes to my mind is that whether the issuance of the notice should be within six months or the act of giving the notice to the noticee should be within six months. In this regard, I rely on the judgement of the Karnataka High court in the matter of K.AbdullaKunhi Abdul Rahaman Vs. Additional Commissioner of Customs, Bengaluru 2015 (330)ELT 148 (Kar.) wherein it was held that:

Date of service of notice cannot be held as one which entitles the petitioner to seek for return of the goods on the ground that six months period prescribed under Section 110(2) ibid had expired-Words used in Section 110(2) is "and no notice in respect thereof is given" it has to be construed to mean "date of dispatch of notice" inasmuch as a conjoint reading of Section 110(2), 124(a) and 153 ibid would clearly indicate that any notice which is required to be issued under the Act can be served by such authority either by tendering such notice to the addressee/noticee in person or by sending/dispatching it by registered post and this exercise of issuing such notice should be undertaken before expiry of six months period"

7.7. Government observes that the lower authorities have after examining the issue under the prism of law and procedures have rightly held the issue of the show cause notice to be in order and that the Applicants' raising of the issue of issuance of show cause notice within six month of the seizure is seen as deliberate attempt on the part of the Applicant, to sidetrack the act of smuggling of the huge quantity of gold by an organized smuggling syndicate and indiscretions of the Applicant and goes on to the merits of the case.

7.8. Thus, in the instant case, lower authorities have held that once show cause notice has been dispatched within six months, Section 110 of the Customs Act, 1962 stands complied. Even otherwise, non issue of show cause notice within

six months, has effect of making seizure no longer good. This does not vitiate offending nature of goods and does not affect the proposal to confiscate the goods under relevant Sections of the Customs Act, 1962.

8. Government observes that the Applicant had failed to declare the goods to the Customs at the first instance as required under Section 77 of the Customs Act, 1962. The Applicant had not disclosed that he was carrying prohibited goods. The Applicant had used a very ingenious method to smuggle the gold into the country. The Applicant tried to clear customs in the disguise of a 'loader' working at the CSI Airport, Mumbai and was wearing a navy blue t-shirt with an identity card hanging around his neck and was carrying one black colour back sack bag, as a staff member, to mislead the customs officials. The gold was recovered from specially made left and right inner pockets of the jeans pant worn by the Applicant and the purse kept in the right side hip pocket and was wrapped in white adhesive tapes. Even after interception, when the Applicant was asked about the possession of any gold or contraband he had replied in the negative. The Applicant had not declared the huge quantity of gold in his possession in the Customs declaration form and had thus clearly failed to declare the goods to the Customs at the first instance as required under Section 77 of the Customs Act, 1962. The manner in which the Applicant had cleverly and innovatively concealed the huge quantity of gold and tries to pass off as a 'loader' working at the airport reveals his mindset to smuggle the goods and evade the duty. The quantum of gold and the manner of attempting to smuggle indicates that the same was for commercial use. The Applicant's admission that the gold was attempted to be smuggled for monetary considerations and that the gold had been given to him in Dubai by an accomplice i.e his brother-in-law, who was also involved in other cases of smuggling and that the Applicant was also a frequent traveller and was earlier involved in smuggling of cigarettes, red sanders, gold and foreign currency made it amply clear that the Applicant was part of a smuggling syndicate. Applicant had meticulously pre-planned to pass off as a 'loader' at the CSI, Airport and had adopted a clever method to smuggle the gold

and avoid payment of Customs duty. Had it not been for the alertness exhibited by the Customs, the Applicant in cahoots with his accomplices would have been successful in smuggling out the gold and evading Customs duty. This method used by the Applicant can be termed well planned and ingenious, as he had successfully passed through the security of the overseas departing airport and also the security at the arrival airport and tried to smuggle the gold. It also reveals that the act committed by the Applicant was conscious and pre-meditated. The Applicant did not intend to declare the gold in his possession to Customs. The Government finds that the confiscation of the gold is therefore justified and the Applicant had rendered himself liable for penalty for his ommissions and commissions.

9.1 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.

9.2. 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, is 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.*
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> *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. Government observes that the Applicant had used a very ingenious method to smuggle the impugned gold i.e. the gold was recovered from specially made left and right inner pockets of the jeans pant worn by the Applicant and from the purse kept in the right side hip pocket and was wrapped in white adhesive tapes and the Applicant tried to pass off as a 'loader' and was wearing a navy blue t-shirt with an identity card hanging around his neck and was carrying one black colour back sack bag, as a staff member to mislead the customs officials. This indicates that the Applicant was part of a syndicate engaged in the smuggling of gold and evading payment of duty. It also revealed

his criminal bent of mind and a clear intention on the part of the Applicant and his accomplice to evade duty and smuggle the gold into India. Allowing the redemption of the gold would be an incentive to smuggle gold with impunity.

12. Government observes that the quantum of gold was very large, of commercial quantity and it was cleverly, consciously and premeditatedly concealed and meticulous planning was involved in attempting to smuggle the gold. The Applicant, a habitual offender, was a carrier and the gold was being smuggled by him for monetary consideration, on the instruction of his handlers. The Applicant by his own admission, had been caught and penalized by the Customs on three occasions and on a previous occasion he was caught while smuggling 'Red Sanders' alongwith Indian and foreign currency. It revealed his clear intention to evade duty and smuggle the gold into India, in cahoots with his accomplices. The circumstances of the case especially that it is of huge commercial quantity and was cleverly concealed, and the applicant was in disguise as a 'loader', clearly brings out that the Applicant had no intention of declaring the gold to the Customs at the airport. All these facts have been properly considered by the Original Adjudicating Authority while absolutely confiscating the gold bars weighing 13232 grams and by the Appellate Authority while dealing with the appeal filed by the Applicant.

13. Further, the Appellate Authority at para 5 of the impugned Order-in-Appeal has stated as under:

> *"5. I find that the appellant in his statements dated 11.05.2014,04.07.2014 and 24.07.2014 recorded under Section 108 of Customs Act, 1962 had inter alia admitted that he was intentionally wearing the dress similar to the uniform being worn by the loaders at CSI Airport, Mumbai and was also wearing a identification card to mislead the Customs officials; that the impugned gold belong to one Mr. Haris Mundakai; that he was acting as a carrier for Mr Haris Mundakal for monetary consideration of Rs. 50,000/-. That he had made 10 trips from Dubai to Mumbai and used to smuggle cigarette and supari during his previous visits. I find that the appellant had filed retraction of his statement and 11.05.2014 which*

was rebutted by the department. I find that in his statement dated 11.05.2014 he admitted that his statement dated 11.05.2014 was recorded correctly as per his say. I find that during Investigation it was revealed that he was caught and penalized by Customs on previous three occasions and I find that on one previous occasion he was caught while smuggling 25 Kg of Red Sanders along with Indian and foreign currency and had admitted that the red sanders was handed over to him by Mr. Haris. I find that Mr. Haris is also related to some previous cases of gold smuggling at CSI Airport, Mumbai. From the above facts, and the categorical admission on part of the appellant in his statement, it goes to establish that he is a repeated offender and acting as a carrier for an organized smuggling racket."

14. The option to allow redemption of the seized goods is the discretionary power of the adjudicating authority depending on the facts of each case and the discretion to release the gold is based on various factors such as methodology of smuggling, manner of concealment, quantity, form, attempt of smuggling as part of a syndicate etc and after examining the merits. In the present case, the quantum of the gold being very large, the applicant being a frequent traveller and habitual offender, having been caught smuggling 'Red sanders', Indian and foreign currency on earlier occasions. The Applicant, in the instant case had tried to pass off in the disguise of a 'loader' and the accomplices of the Applicant being involved in smuggling of gold and red sanders and also Indian and foreign currency, reveal an organized and pre-planned attempt by an organized syndicate to smuggle the gold bars totally weighing 13,232 grams, and is a fit case for absolute confiscation which would act as a deterrent to such offenders. Thus, taking into account the facts on record and the serious, grave and bold modus operandi, the Appellate Authority has rightly upheld the absolute confiscation of the impugned gold. But for the intuition, intelligence and the diligence of the Customs Officers, the gold would have passed undetected. The redemption of the gold will encourage such concealment as, if the gold is not detected by the Custom authorities, the passenger and the syndicate gets away with smuggling and if not, the Applicant 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. Government thus concurs with the findings of the lower authorities and holds that the absolute confiscation of the gold is in order and the order of the Appellate authority upholding the order of the adjudicating authority is therefore liable to be upheld and the Revision Application is liable to be dismissed.

15. As regards the imposition of penalty on the Applicant, the entire chain of events has been unearthed by investigations and the act of smuggling has been confirmed by way of confessional statement of the Applicant and thus the imposition of penalty of Rs. 40,00,000/- for the act of smuggling is justified as held by the Appellate Authority.

16. Government thus notes that the penalty of Rs. 40,00,000/- imposed on the Applicant under Section 112 (a) and (b) of the Customs Act, 1962 by the Original Adjudicating Authority and upheld by the Appellate Authority is commensurate with the omissions and commissions committed and Government is not inclined to interfere with the same.

17. In view of the above, the Government upholds the Order-in-Appeal No. MUM-CUSTM-PAX-APP-874/2018-19 dated 27.12.2018 [Date of issue: 31.12.2018] [S/49-207/2016/AP] passed by the Commissioner of Customs (Appeals), Mumbai Zone-III and is not inclined to interfere with the same.

18. The Revision Application is dismissed.

Shrawan 20/3/23

(SHRAWAN KUMAR)
Principal Commissioner & ex-officio
Additional Secretary to Government of India

ORDER No. 371 **/2023-CUS (WZ) /ASRA/ DATED** 20-**03.2023**

To,

1. Mr. Mohammed Aboobacker, House No. MP 1-193,Ottacahl House, PO Kotoor, Kasargod Distt, Kerala.

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1. The Pr. Commissioner of Customs, C.S.I Airport, Terminal 2, Level-II, Sahar, Andheri (East), Mumbai - 400 099.
2. The Commissioner of Customs (Appeals), Mumbai-III, 5th Floor, Avas Corporate Point, Makwana Lane, Behind S.M.Centre, Andheri Kurla Road, Andheri (East), Mumbai 400 059

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2. Sr. P.S. to AS (RA), Mumbai.
3. File copy.
4. Notice Board.