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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. 371/274/B/WZ/2018-RA / 2003 Date of Issue : 30/12/2022

ORDER NO. 416 /2022-CUS (WZ)/ASRA/MUMBAI DATED 29.12.2022
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. Riyas Kadannoli

Respondent : Commissioner of Customs, Marmagoa, Goa.

Subject : Revision Application filed, under Section 129DD of the
Customs Act, 1962 against the Order-in-Appeal No. GOA-
CUSTM-000-APP-011-2017-18 dated 23.05.2018 issued
on 21.06.2018 through F.No. A-01/CUS/GOA/2018-19
passed by the Commissioner Appeals, CGST & Customs,
Goa.

ORDER

This revision application has been filed by Shri. Riyas Kadannoli (herein after referred to as the Applicant) against the Order-In-Appeal No. GOA-CUSTOM-000-APP-011-2017-18 dated 23.05.2018 issued on 21.06.2018 through F.No. A-01/CUS/GOA/2018-19 passed by the Commissioner Appeals, CGST & Customs, Goa.

2. Brief facts of the case are that the applicant on arrival at Goa Airport on 19.02.2017 from Dubai by Air India Flight No. AI-994 was intercepted at the exit gate by the Customs Officers after he had cleared the Customs. To the query whether he was carrying any dutiable goods, the applicant had replied in the negative. Examination of the backpack of the applicant led to the recovery of two gold bars bearing foreign markings and weighing 1Kg each. Thus, 2 nos of FM gold bars, weighing 1 Kg each, totally weighing 2000 grams and valued at Rs. 54,28,000/- were recovered from the applicant.

3. After due process of the law, the Original Adjudicating Authority (OAA), viz Additional Commissioner Of Customs, Marmagoa, Goa, vide Order-In-Original No. 11/2017-18-ADC(CUS) dated 22.12.2017 issued through F.No. 11/05/2017-R&I (APT)(AIU) ordered for the absolute confiscation of the 2 gold bars, totally weighing 2000 gms, valued at Rs. 54,28,000/- under Section 111(d), 111(1) and 111 (m) of the Customs Act, 1962 and a penalty of Rs. 7,50,000/- was also imposed on the applicant under Section of 112 (a) of Customs Act, 1962.

4. Aggrieved by the said order, the applicant filed an appeal before the appellate authority (AA) viz, Commissioner Appeals, CGST & Customs, Goa who vide Order-In-Appeal No. GOA-CUSTOM-000-APP-011-2017-18 dated

23.05.2018 issued on 21.06.2018 through F.No. A-01/CUS/GOA/2018-19 upheld the Order-in-Original passed by the OAA and disposed of the appeal.

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

- 5.01. that a copy of the parawise comments sent to the Adjudicating Authority by the respondent had not been given to them which is violation of the principles of natural justice and therefore, was bad in law.
- 5.02. that the Order-in-Appeal was not a speaking order and had been passed in a mechanical and sweeping manner without application of mind;
- 5.03. that A.A had relied on case laws which were totally inapplicable to this case;
- 5.04. the infirmities and illegalities which had been pointed out in the panchanama had not been considered by the A.A.
- 5.05. that interception of the applicant was at the aerobridge and was not after he had opted for the green channel; that applicant's right to declare the goods had been curtailed;
- 5.06. that no deceptive method had been adopted by the applicant to conceal the gold which had been kept in the front pocket of the backpack;
- 5.07. that the lower authorities had placed heavy reliance on the statement of the applicant; that applicant had not been allowed to write his statement in his own handwriting;
- 5.08. that the invocation of Section 123 of the Customs Act, 1962 by the lower authorities was not proper;
- 5.09. that the characters mentioned in the statement of the applicant were only imaginary characters created by the officers;
- 5.10. that the applicant possessed USD 8500/- for the payment of duty had not been considered.
- 5.11. that the case laws cited by the lower authorities were totally inapplicable to the case of the applicant.
- 5.12. that neither possession of an invoice nor any legal document regarding source of money for the purchase of the gold were pre-requisites for the import of gold;
- 5.13. that the rejection of the plea of the applicant to allow the re-export of the gold on the grounds that the gold did not belong to him was unfounded; that the re-export of the gold should have been allowed;

5.14. that the penalty of Rs. 7,50,000/- imposed under Section 112(a) of the Customs Act, 1962 was illegal, highly excessive and disproportionate to the gravity of the alleged violation.

Applicant has prayed to the revision authority to set aside the order passed by the appellate authority and to allow the re-export the gold bars or to allow clearance of the 2 kgs of the gold bars on payment of appropriate duty.

6. Personal hearings in the case were scheduled through online video conferencing mode was scheduled for 04.08.2022, 26.08.2022. Shri. Mohammed Zahir, Advocate, appeared online on 26.08.2022 and reiterated earlier submissions. He requested to allow re-export. He further requested to reduce the penalty as the same is very high.

7. The Government has gone through the facts of the case and notes that the applicant was carrying a large quantity of gold which had been kept in his backpack and had not declared the same to the Customs. Even after interception, when the applicant had been asked about the possession of any gold or dutiable items, he had stoically denied that he was carrying any gold. The applicant had not filed a declaration to the Customs and had clearly failed to declare the goods to the Customs at the first instance as required under Section 77 of the Customs Act, 1962. The gold was in primary form indicating that the same was for commercial purposes. Non-declaration of the gold 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. Had he not been intercepted, the applicant would have gotten away with such a large quantity of gold. The Government finds that the confiscation of the gold is therefore 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. 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. Government observes that the quantum of gold was large, in primary form, of commercial quantity and had been consciously not declared. The act of misdeclaration of the applicant was premeditated. Applicant was acting for monetary benefit. It revealed his clear intention to evade duty and smuggle the gold into India. The circumstances of the case especially that quantity of gold is substantial, in primary form indicates that the same is for commercial purpose. Non-declaration of the gold bars 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 2 gold bar, weighing 2000 grams, valued at Rs. 54,28,000/-.

12. Appellate Authority has rightly upheld the order passed by the OAA as legal and proper. The applicant made a plea to allow the re-export of the gold which the A.A had rejected as the gold was in primary form. Also, once the gold has been held to be confiscated absolutely, there is no question of redemption.

13. 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 quantity and primary nature of the gold coupled with non-declaration clearly shows the intent of the applicant to bypass the Customs and evade payment of duty. Quantity of gold being large and commercial, this being a clear attempt to smuggle gold bars in primary form, 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 adjudicating authority had rightly ordered the absolute confiscation of the gold. But for the intuition and the diligence of the Customs Officer, the large quantity of gold would have passed undetected. The redemption of the gold will encourage non bonafide and unscrupulous elements to resort to concealment and bring gold. Such blatant 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 absolute confiscation of the gold would act as a deterrent against such attempts and would deter persons who indulge in such acts with impunity. The same has been rightly upheld by the appellate authority. The lower authorities have judiciously applied discretion in light of directions of Hon'ble Supreme Court as contained in decision at para 10, above.

14. The Government finds that the penalty of Rs. 7,50,000/-imposed under Section 112 (a) by the original adjudicating authority constitutes to nearly 14%

of the value of the gold. Government finds the same is harsh and excessive and is inclined to reduce the same.

15. In view of the above, the Government modifies the order passed by the appellate authority only to the extent of reduction of the penalty i.e. the absolute confiscation of the gold is upheld. The penalty of Rs. 7,50,000/- imposed under Section 112(a) of the Customs Act, 1962 and upheld by the appellate authority is reduced to Rs. 5,00,000/- (Rupees Five Lakhs only).

16. Revision Application is decided on the above terms.


(SHRAWAN KUMAR)

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

ORDER No. 416 /2022-CUS (WZ) /ASRA/MUMBAI DATED 29.12.2022

To,

1. Shri. Riyas Kadannoli, Kadannoli House, Poomala (P), Manichitra, Sultan Battery, Wayanand, Kerala, Pin : 673592
2. Commissioner of Customs, Goa Custom House, Marmagao, Goa - 403 803.

Copy To,

1. Shri. Mohammed Zahir, Advocate, 3/57-A, Nedungadi Gardens, West Nadakkavu, Calicut - 673 011.
2. Sr. P.S. to AS (RA), Mumbai.
3. File Copy.
4. Notice Board.