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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. 371/333A/B/WZ/2018-RA : Date of Issue 05.04.2023
& F.No. 371/333B/B/WZ/2018-RA

2017

ORDER NO. 318-119 /2023-CUS (WZ)/ASRA/MUMBAI DATED 31.03.2023
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.

F.No. 371/333A & 333B/B/WZ/2018-RA

Applicant No. 1 : Shri. Raza Abbas Sayed
Applicant No. 2 : Shri. Saad Shoeb Hafiz. } APPLICANTS

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

Subject : Revision Applications filed, under Section 129DD of the
Customs Act, 1962 against the Order-in-Appeal F.No.
MUM-CUSTM-PAX-APP-619/2018-19 dated 28.09.2018
issued on 10.10.2018 through F.Nos. S/49-
227/2016/AP
passed by the Commissioner of Customs (Appeals),
Mumbai-III.

ORDER

These two revision applications have been filed by (i). Shri. Raza Abbas Sayed and (ii). Shri. Saad Shoeb Hafiz [herein after both referred to as the Applicants; alternatively and more specifically, Shri. Raza Abbas Sayed is also referred to as Applicant No. 1 (A1) and Shri. Saad Shoeb Hafiz is referred to as Applicant no. 2(A2)] against the common Order-in-Appeal F.Nos. MUM-CUSTOM-PAX-APP-619/2018-19 dated 28.09.2018 issued on 10.10.2018 through F.Nos. S/49-227/2016/AP passed by the Commissioner of Customs (Appeals), Mumbai-III.

2(a). Briefly stated facts of the case are that the Applicant No. 1 i.e. Shri Raza Abbas Sayed an International passenger who had arrived at the 'CSMI Airport, Mumbai from Bangkok by Thai Airways Flight No. TG-317 / 15.07.2014 was intercepted by the Customs Officers as soon as he had handed over a packet to A2 inside a duty free shop (DFS). A2 was an employee of the DFS located within the airport. A1 had crossed immigration after completing the formalities. Examination of the packet led to the recovery of one gold bar weighing 1 kg and valued at Rs. 25,72,280/-

2(b). A1 admitted that he had carried the gold bar for a monetary consideration and that the gold bar did not belong to him; that he had been instructed to hand over the gold bar to A2; that thereafter, A2 would have handed over the gold bar to him outside the airport; that in the past also, he had handed over gold to A2 in similar manner.

2(c). A2 admitted that he had agreed to collect the gold from A1 on the instruction of one Mohd. Abbas; that he did it for monetary consideration; that

in the past, on two occasions, in similar manner he had smuggled gold; that since he had an Entry Pass, he could easily smuggle gold outside CSMIA.

3. The Original Adjudicating Authority i.e. Addl. Commissioner of Customs, CSMI Airport, Mumbai by a common Order-In-Original i.e. OIO No. ADC/RR/ADJN/319/2015-16 dated 09.02.2016 issued through F.No. S/14-5-557/2014-15 Adjn (SD/INT/AIU/511/2014 AP"D") ordered for the absolute confiscation of the impugned gold bar, having foreign markings and serial no., weighing 1 kg valued at Rs. 25,72,280/- under Section 111(d), (l) and (m) of the Customs Act, 1962. Penalties of Rs. 2,00,000/- and Rs. 50,000/- were imposed on the Applicants No. 1&2 resp., under Section 112 (a) and (b) of the Customs Act, 1962.

4. Aggrieved by the said order, both the applicants filed appeals before the Appellate Authority i.e Commissioner of Customs (Appeals), Mumbai - III who vide Order-in-Appeal F.Nos. MUM-CUSTM-PAX-APP-619/2018-19 dated 28.09.2018 issued on 10.10.2018 through F.Nos. S/49-227/2016/AP did not find it necessary to interfere in the OIO passed by the OAA and rejected the Appeals.

5. Aggrieved with the above order, both the Applicants have filed these revision applications and the grounds of revision are as under;

5.01. that the case against A1 had been falsified; that he was carrying 1 Kg gold which he had brought to make profit' that he did not intend to evade Customs duty; that he wanted to pay Customs duty but did not have money; that he went to the duty free shop and met A2; that he wanted to buy liquour and for safety reasons had handed over the packet to A2; that at this point, they had been intercepted by Customs; that the panchas were not present during the shadowing of the A1 from the aerobridge and the alleged handing over of the packet

to the DFS employee; that the fact of recovery of the packet containing gold from A2 was based on hearsay; that their meeting A1 & A2 was unplanned;

- 5.02. that the panchas were not independent; both the panchas were employees of DFS (Duty Free Shop), Since, A2 was an employee of DFS, the panchas cannot be considered as independent.; that they have relied on (i). Supreme Court case in Shiv Bahadur Singh Vs State of Vindhya Pradesh AIR 1954 SC 322; that panchas have contacts with the Officers; (ii). case of Gujarat High Court - Intezar Ahmed Sultan Ahmed Shaikh vs State Of Gujarat Anr, 12.02.1996, (iii). Supreme Court in the case of State of Punjab v. Balbir Singh; (iv). Supreme Court in the matter of Mohtesham Mohd. Ismail [2007 (220) ELT 3 (S.C.)] held that even confession of an accused is not a substantive evidence. The statement is part of the evidence only if it is voluntary and free from any sort of pressure; (v). in Asstt. Coll. Of C.Ex, Rajamundry vs. Duncan Agro Industries Ltd. - JT 2000 (8) SC 530 Supreme Courts Order; (vi). Apex Court Order in Vinod Solanki Vs. U.I.O. 2009 (233) ELT 157 (S.C.);
- 5.03. that the OAA and AA have not applied their mind to the retraction filed by the applicants; that the Delhi High in Vinod Solanki (Supra) in the matter of DRI vs. Mahendera Kumar Singhal 2016 (333) ELT (250) (Del.) held that burden is on the department to show that retraction made by the maker of the statement is invalid. ; that they have also relied on the case of Commr. of C.Ex, Ahmedabad-III vs Deora Wires N Machines Pvt Ltd 2016 (332) ELT 393 (Guj.); Delhi High Court in CCE, Delhi-I Vs. Vishnu & Co Pvt. Ltd., 2016 (332) ELT 793 (Del.), etc
- 5.04. that their self-incriminating statements cannot be used against them; on this score they have relied upon a host of case laws; that the applicants were within the Customs area and had not got an opportunity to declare the goods; they had been intercepted before they had crossed the green channel; that in the case of T.Elavarasan vs CC (Airport), Chennai, 2011 (266) ELT 167 (Mad), the Madras High Court had held that gold is not prohibited goods and a mandatory

option is available to the owner of the goods to redeem the gold on payment of fine under Section 125 of Customs Act, 1962; that in the case of Shaikh Jamal Basha vs GOI, 1997 (91) ELT 277 (AP), the Andhra High Court held that as per Rule 9 of Baggage Rules, 1979 read with Annexure-B, gold in any form other than ornament could be imported on payment of Customs Duty only and if the same was imported unauthorizedly the option to owner of the gold is to be given for redemption of the confiscated gold on payment of fine;

5.05. that investigations had been conducted in a in a haphazard manner. The entire case was based only on presumption: that investigations against others named by the applicant in the case had not been carried out; that in the case of the State of Maharashtra vs Laxmichand Varhomal Chugani 1977, the Bombay High Court had held that "*..... It does not appeal to us that a person who is mere carrier is much less involved in this nefarious trade of smuggling than the person at whose instance the goods are carried.*"

5.06. that the applicants have reiterated that they had not committed any offence of smuggling and have been falsely implicated in the case on the basis of suspicion, presumption and assumption and hence the O-i-O is totally unsustainable in law; that the OIA was on merits and not a speaking order; that natural justice had not been followed; that A1 had claimed ownership of the gold and had requested for redemption of goods on payment of duty; that Section 125 of the Customs Act, 1962 provides for redemption of the goods; on the issue of redemption of goods, the applicants have relied upon a host of case laws including those of the GOI;

Under the circumstances, (i). A1 has prayed to the revision authority to set aside the OIA and allow the redemption of the goods and (ii). A2 has prayed to the revision authority for reduction in the penalty amount.

6. Personal hearing in the case was scheduled for 06.12.2022. Shri. Prakash Shingrani, Advocate appeared for personal hearing on 06.12.2022

and submitted that small quantity of gold was brought by applicant 1 and the same was seized inside Customs area when applicant (A1) was buying goods from duty free shop. He further submitted that applicant was prevented from declaring goods. He requested to release the goods to be cleared on payment of applicable duty.

7. The Government has gone through the facts of the case and notes that the quantum of gold was quite substantial and it was in primary form. The applicants had used a unique modus operandi to smuggle the gold. A1 who was an international passenger was intercepted as soon as he had handed over the gold bar to A2 who was an employee of DFS located within the airport. An ingenious method was attempted by the applicants to smuggle the gold. A1 had attempted to smuggle the gold by bypassing the declaration required under Section 77 of the Customs Act, 1962. The act committed by the applicants were conscious, pre-conceived and pre-meditated. The unique modus operandi used by the applicants reveals their mindset to not only evade duty but smuggle the gold. Had the applicants not been intercepted, they would have gotten away with the gold without payment of Customs duty. Government finds that the confiscation of the gold was 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 Applicants thus, liable for penalty.

10. 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 besides the quantum of gold which was substantial, the primary form of the gold indicating the same was for commercial use, the manner in which the gold was attempted to be brought into the country is vital. The applicants had used a unique modus operandi to smuggle the gold. A1 who was an international passenger was intercepted as soon as he had handed over the gold to A2 who was an employee of a DFS located within the airport. The act committed by the applicants was conscious and pre-meditated which reveals their intention of not declaring the gold and to evade payment of duty. The aforesaid quantity, unique modus operandi, ingenious method, applicant no. 1 being a carrier, applicants committing the act for monetary consideration, probates that they did not have any intention of declaring the gold to the Customs at the airport. All these have been properly considered by the Original Adjudicating Authority while ordering the absolute confiscation of the gold and appellate authority had rightly upheld the same.

12. 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

unique nature of the modus operandi and the ingenuity of using an airport personnel in the smuggling activity, clearly shows the brazenness and the firm intention to smuggle the impugned gold and therefore, it 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 impugned gold. But for the intuition and the diligence of the Customs Officer, the gold would have passed undetected. 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 is in agreement with the order of the AA absolutely confiscating the impugned gold. The absolute confiscation of the gold would act as a deterrent against such persons who indulge in such acts with impunity. Considering the aforesaid facts, Government is inclined not to interfere in the order of absolute confiscation passed by the AA.

13(a). The Government finds that the penalty of Rs. 2,00,000/- imposed on A1 under Section 112(a) & (b) of the Customs Act, 1962 is appropriate and commensurate with the omission and commission committed by him. A1 had carried the gold from abroad and had handed over the same to A2. Therefore, Government does not find it necessary to interfere in the quantum of penalty imposed on A1 by the lower authorities.

13(b). With regard to the penalty of Rs. 50,000/- imposed on A2, under section 112(a) and (b) of the Customs Act, 1962 imposed by the OAA and upheld by AA, Government finds the same to be commensurate with the omissions and commissions committed. The gold bar was found in the possession of A2 at the point of interception. Hence, Government does not find it necessary to interfere in the quantum of penalty imposed on A2 by the lower authorities.

14. For the aforesaid reasons, the Government finds that the OIA passed by the AA is legal and proper and does not find it necessary to interfere in the same. The Revision Application filed by the two applicants, fails.

15. Accordingly, for the reasons stated above, these two Revision Applications filed by the applicants are dismissed.

Shrawan
3/3/23
(SHRAWAN KUMAR)

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

ORDER No. ^{MIG-419} /2023-CUS (WZ) /ASRA/MUMBAI DATED 31.03.2023

To,

1. Shri. Raza Abbas Sayed, Goribindur, Tondebabi, Opp. Masjid Alipur, Chickbalapur District, Karnataka – 562 101.
2. Shri. Saad Shoeb Hafiz, Sahjadi Chawl, Near Al-Madina Masjid, Aman Welfare Society, Cama Road, Dongri, Andheri (West), Mumbai – 400 058.
3. The Pr. Commissioner of Customs, Chhatrapati Shivaji International Airport, Terminal – 2, Sahar, Andheri East, Mumbai – 400 099.

Copy to:

4. Shri. Prakash Shingrani, Advocate, 12/334, Vivek New MIG Colony, Bandra East, Mumbai – 400 051.
5. Sr. P.S. to AS (RA), Mumbai.
6. File Copy.
7. Notice Board.