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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. 371/343/B/WZ/2019-RA

Date of Issue : 03.01.23

ORDER NO. 425 /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.

F.No. 371/343/B/WZ/2019-RA

Applicant : Shri. Akash Kumar Makhijani

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

Subject : Revision Application filed, under Section 129DD of the
Customs Act, 1962 against the Order-in-Appeal No.
MUM-CUSTM-PAX-APP-134/19-20 dated 24.05.2019
issued on 12.06.2019 through F.No. S/49-172/2018),
passed by the Commissioner of Customs (Appeals),
Mumbai - III.

ORDER

This revision application has been filed by Shri. Akash Kumar Makhijani (herein referred to as Applicant) against the Order-in-Appeal No. MUM-CUSTOM-PAX-APP-134/19-20 dated 24.05.2019 issued on 12.06.2019 through F.No. S/49-172/2018) passed by the Commissioner of Customs (Appeals), Mumbai – III.

2. Briefly stated the facts of the case are that the Applicant was intercepted by the Customs Officers near the exit gate of CSMI Airport, Mumbai on 15.02.2017 after he had cleared himself through the green channel. Applicant had arrived at Mumbai from Bangkok onboard Air India Flight No. AI-331. He was asked to pass through the door frame metal detector (DFMD) which gave a positive indication of concealment of metal in his body. On sustained inquiry, the applicant admitted that he had concealed two cut pieces of gold bars in his body cavity i.e. rectum to evade payment of Customs duty and voluntarily agreed to eject it out on his own. Two cut pieces of gold bars, totally weighing 270 grams, purity of 24K valued at Rs. 7,16,558/- were recovered from the applicant.

3. After, due process of law, the Original Adjudicating Authority (OAA) viz, the Addl. Commr. Of Customs, CSMI Airport, Mumbai vide Order-In-Original No. ADC/AK/ADJN/210/2017-18 dated 26.03.2018 issued through F.No. S/14-5-43/2017-18.Adj [SD/INT/AIU/39/2017-AP'D] ordered for the absolute confiscation of the 2 cut pieces of gold bars, totally weighing 270 grams, valued at Rs. 7,16,558/- under Section 111(d), 111(l) and 111(m) of the Customs Act, 1962. Penalty of Rs. 90,000/- was also imposed on the applicant under Section 112(a) & (b) of the Customs Act, 1962.

4. Aggrieved by the said order, the applicant filed an appeal before the Appellate Authority (AA) viz, Commissioner of Customs (Appeals), Mumbai - III who vide Order-in-Appeal No. MUM-CUSTOM-PAX-APP-134/19-20 dated

24.05.2019 issued on 12.06.2019 through F.No. S/49-172/2018) who disposed of the appeal holding that he did not find it necessary to interfere in the OIO passed by OAA which was legal and proper.

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

- 5.01. that the order passed by the lower authorities are not in conformity with the spirit of the B. Rules, 1998 & the Customs Act 1962 and deserves to be set aside in the interest of justice.
- 5.02. that the Applicant submits that the order of the absolute confiscation of the gold bar was not justified and that he had no malafide intention to hide anything from Customs to avoid payment of duty as wrongly alleged. The Applicant had brought the Gold Bar for the first time for his personal &
- 5.03. that Commr. (A) Hyderabad, who vide O/A No. HYD-CUS-000 APP-017-16-17 dated 10/5/2016 had allowed the non-declared concealed gold bars in rectum to the frequent visitor on redemption. Various judgments of Tribunal, High Court & Supreme Court were relied upon while allowing the release of Gold.
- 5.04. that the gold bar was bonafide item of the baggage and it was not meant for sale or trade purpose. The Applicant was not a carrier and was the actual owner of the gold. Gold was not a prohibited item & it is also not the charge of the Dept. that the applicant was involved in the racket of organized smuggling activities.

The applicant has prayed to the Revision Authority to release the gold bars and to waive / reduce the personal penalty imposed on the applicant.

6. Personal hearing in the case was scheduled through the online video conferencing mode for 26.08.2022. Shri. O.M Rohira, Advocate for the applicant appeared for personal hearing on 26.08.2022 and reiterated earlier submissions. He requested to release the goods on nominal fine and penalty.

7. The Government has gone through the facts of the case. The Applicant was intercepted near exit gate after he had passed through the green channel. The applicant had not declared the gold bars and only upon passing through

the DFMD, he admitted to having concealed gold bars in his body cavity. It is clear that the applicant had resorted to concealment to smuggle gold and evade duty. The gold is in primary form of high purity. This action manifests that applicant had no intention to pay the Customs duty. The Applicant had not declared the impugned gold as required under section 77 of the Customs Act, 1962. The type of concealment adopted to evade duty is important here. The applicant had pre-planned and selected an ingenious and risky method that he had used to avoid detection and thereby to evade Customs duty. The confiscation of the gold is therefore, justified and thus, the Applicant had rendered himself liable for penal action.

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, is 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 the manner in which the gold was concealed i.e. inside his own body, reveals the intention of the Applicant. It also reveals his criminal bent of mind and a clear intention to evade duty and smuggle the gold

into India. Quantity of gold is not important, the method adopted is of relevance,. Also, the gold was in primary form which indicates that the same was for commercial use. Government notes that applicant did not make himself available for the investigations. The circumstances of the case especially the ingenious concealment which could be risky to the applicant's life, adopted by him, probates that the Applicant had no intention of declaring the gold to the Customs at the airport. The method of concealment indicates and the same was conscious and pre-meditated. All these have been properly considered by the Appellate Authority and the lower adjudicating authority while absolutely confiscating the gold bars.

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 manner of concealment being clever, ingenious and risky with a clear attempt to smuggle gold, it is a fit case for absolute confiscation which would also be a deterrent to such offenders. Thus, taking into account the facts on record and the gravity of the offence, the 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. The redemption of the gold will encourage non-bonafide and unscrupulous elements to resort to concealment and bring 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. The order of the Appellate authority upholding the order of the adjudicating authority is therefore liable to be upheld.

13. The Government finds that the penalty of Rs. 90,000/- imposed on the applicant under Section 112(a) & (b) of the Customs Act, 1962 is appropriate

and commensurate with the omission and commission committed by the applicant. The Government does not find it necessary to interfere in the penalty imposed by the appellate authority.

14. Government upholds the order of absolute confiscation of the impugned gold bars passed by the AA. Government does not find it necessary to interfere in the penalty of Rs. 90,000/- imposed on the applicant under Section 112(a) & (b) of the Customs Act, 1962 by the OAA and confirmed by the AA.

15. The Revision Application filed by the applicant is dismissed.

Shrawan
9/12/22
(SHRAWAN KUMAR)
Principal Commissioner & ex-officio
Additional Secretary to Government of India

ORDER No. 425 /2022-CUS(WZ) /ASRA/MUMBAI DATED 09.12.2022

To,

1. Shri. Akash Kumar Makhijani, H.No. 32, Old, 262 New, Bhagat Kavar Das Marg, Meghan Camp, Sindhi Basti, Burhanpur, Madhya Pradesh - 450 331.
2. Pr. Commissioner of Customs, Terminal - 2, Level - II, Chhatrapati Shivaji International Airport, Sahar, Mumbai - 400 099.

Copy to:

1. Shri. Akash Kumar Makhijani, C/o. O.M Rohira, Advocate, 148/301, Uphaar, 10th Road, Khar (W), Mumbai - 400 052.
2. Sr. P.S. to AS (RA), Mumbai.
3. File Copy.
4. Notice Board.