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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. 371/325/B/WZ/2018-RA / 2998 : Date of Issue : 03.01.23

ORDER NO. 26/2022-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.

Applicant : Shri. Shamsuddin

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

Subject : Revision Application filed, under Section 129DD of the
Customs Act, 1962 against the Order-in-Appeal No.
MUM-CUSTM-PAX-APP-93/2018-19 dated 16.05.2018
[F.No. S/49-127/2017] passed by the Commissioner of
Customs (Appeals), Mumbai – III.

ORDER

This revision application has been filed by Shri. Shamsuddin (herein referred to as Applicant) against the Order-in-Appeal No. MUM-CUSTOM-PAX-APP-93/2018-19 dated 16.05.2018 [F.No. S/49-127/2017] passed by the Commissioner of Customs (Appeals), Mumbai – III.

2(a). Brief facts of the case are that on 21.12.2015, the Officers of Customs had intercepted the Applicant at CSMI Airport where he had arrived from Dubai by Spice Jet Flight No. SG-014 / 21.12.2015. The Applicant had been intercepted near the exit gate of the Arrival Hall, T2, CSMI Airport, Mumbai after he had cleared himself through the green channel of Customs. To the query put forth to him regarding possession of any dutiable goods, he had replied in the negative. The applicant was asked to pass through the door frame metal detector which had not indicated the presence of metal on his person. Thereafter, the checked-in and hand baggages of the applicant were screened which indicated presence of metal.

2(b). Thereafter, the check-in trolley bag was opened and the following were found therein.

- (i). 12 boxes of 'Standard' brand containing 12 bras,
- (ii). One red coloured box of 12 pieces "Miracle' brand ballpoint,
- (iii). 02 kids white writing pads,
- (iv). 02 black coloured ladies hand purses and one brown coloured ladies hand purse having marking 'G' and
- (v). 2 boxes of 'Zenidor' logo containing multicoloured watches.

2(c). The aforesaid items were subjected to detailed examination and the following items purported to be gold were recovered.

Table No. 01.

Sr. no.	Description of the items recovered	Concealed in	Tot.Wt. (in gms)	Value in Rs.
1.	12 pieces silver coloured metallic refills.	Cleverly concealed in 12 pieces of refills, 12 'Miracle brand ball point pens kept in one red coloured box	83	1,93,543/-
2.	08 pieces silver coloured metallic foils.	Pasted on brown coloured cardboard sheet and kept inside 02 kids white writing pads.	275	6,41,256/-
3.	09 pieces silver coloured metallic strips.	Concealed in the outer lining portion of the said 3 ladies purses.	122	2,84,484/-
4.	64 pieces silver coloured dial rigs & bra rings (40 dial rings & 24 bra rings)	40 dial rings were concealed in the two boxes of 'Zenidor' logo containing multi-coloured watches and 24 rings were attached to the bras.	200	4,66,368/-
5.	24 pieces silver coloured buckles	Attached to bras as buckles and kept in 12 boxes of 'Standard' brand containing 01 bra each.	66	1,53,901/-
		TOTAL	746	17,39,552/-

2(d). Later, the aforesaid items purported to be gold were examined by a Government Approved valuer who confirmed that the same were of gold of 999% (24 Karats) purity, totally weighing 746 grams and collectively valued at Rs. 17,39,552/-.

2(e). Investigations had revealed that the applicant was a frequent traveller and had had made 09 foreign trips in 1 year.

3. After due process of investigations and the law, the Original Adjudicating Authority i.e. the Addl. Commissioner of Customs, CSI Airport, Mumbai, vide Order-In-Original No. ADC/RR/ADJN/490/2016-17 dated 23.01.2017 issued through F.No. S/14-5-41/2016-17 Adjn {SD/INT/AIU/419/2015 AP 'C'} ordered for the absolute confiscation of the 12 pieces of silver coloured metallic refills; 08 pieces of silver coloured metallic foils; 09 pieces of silver coloured metallic strips; 64 pieces of silver coloured dial rings & bra rings; and 24 pieces of silver coloured buckles; all of gold, totally weighing 746 grams and valued at Rs. 17,39,552/- under Section 111

(d), (1) and (m) of the Customs Act, 1962. Further, a penalty of Rs. 1,74,000/- was imposed on the applicant under Section 112 (a) and (b) of the Customs Act, 1962.

4. Aggrieved by this Order, the applicant preferred an appeal before the appellate authority i.e. Commissioner of Customs (Appeal), Mumbai – III, who vide Order-in-Appeal No. MUM-CUSTOM-PAX-APP-93/2018-19 dated 16.05.2018 [F.No. S/49-127/2017] did not find it necessary to interfere with the impugned OIO and upheld the same.

5. Aggrieved by this Order, the applicant has filed this revision application on the undermentioned grounds of revision;

5.01. that the order passed by the appellate authority was bad in law and unjust; that the OIA has been passed without due consideration to the documents on record and facts of the case; that the goods were neither restricted nor prohibited was not appreciated by the AA; that no previous case has been registered against applicant; that evasion of Customs duty can be done only in respect of dutiable goods and not on prohibited goods; that option to redeem the goods under Section 125 of the Customs Act, 1962 ought to have been granted by the AA; that various judgements passed by the Apex Court, High Courts, Tribunal have held that gold was neither restricted nor prohibited and therefore it should not be confiscated absolutely.

5.02. to buttress their case, the applicant has relied upon the following case laws;

(i). Hargovind Das K Joshi v/s. Collector of Customs [1992 (61) ELT 172 SC], Absolute confiscation of goods without considering question of redemption on payment of fine although having discretion to do so under Section 125, matter remanded back.

(ii). Alfred Menezes v/s. Commissioner of Customs (Mumbai) [2011 (236) ELT 587 (Tri-Mumbai)], Section 125(1) ibid clearly mandates that it is within the power of the adjudicating authority to offer redemption of goods even in respect of prohibited goods.

(iii). T. Elvarasan v/s. Commr. Of Customs (Airport), 2011-266-ELT-167-Tri-Madras on the issue of gold chains brought from Singapore and seized on the ground of non-declaration on arrival; passenger living abroad for more than 6 months and entitled to import gold; gold not prohibited item option to redeem the goods; impugned gold ordered to be released provisionally subject to adjudication proceedings.

(iv). Yakub Ibrahim Yusuf v/s. Commissioner of Customs, Mumbai [Final Order No. A/362/2010-WBZ-II/(CSTB) dated 28.10.2010 in Appeal no. C/51/1996-Mum] [2011-263-ELT-685-Tri-Mumbai]. *Term prohibited goods refers to goods like arms, ammunition, addictive drugs, whose import in any circumstance would danger or be detriment to health, welfare or morals of people as whole and makes them liable to absolute confiscation.*

(v). Mohini Bhatia vs. Commr. Of Customs [1999-106-ELT-485-Tri-Mumbai on prohibited goods and restricted goods. Gold was not included in the part II of restricted item.

(vi). In Universal Traders vs. Commissioner [2009-240-ELT-A78-SC], the apex court allowed redemption of exported goods being not prohibited.

(vii). In Gauri Enterprises vs. C.C Pune [2002-145-ELT-706-Tri-Bang], held that if similar goods had been released on fine earlier, selective absolute confiscation was not called for, Absolute Confiscation should be exception rather than a rule.

(vi). Etc.

Applicant has prayed that the impugned gold be released under Section 125 of the Customs Act, 1962 on nominal RF alongwith applicable duty and Personal penalty be reduced or to pass any other order as deemed fit

6. The applicants have filed applications for condonation of delay of 3 months and have expressed their apologies and have prayed that the delay may be condoned. The applicant has claimed that the revision application was filed on 09.11.2018.

7. Personal hearing in the case was scheduled through the online video conferencing mode for 02.08.2022. Shri. N.J Heera, Advocate for the

applicant appeared for physical hearing and submitted that a small quantity of gold was recovered. He stated that in similar case Tribunal allowed redemption of goods. He submitted a copy of order, Commr of Customs (Prev), Lucknow vs. Ibrahim Abdullah Rahiman [2018-363-ELT-534-Tri-Allahabad]. He requested to allow redemption of goods on reasonable fine and penalty.

8. On the issue of condonation of delay, Government notes that the revision application was filed on 15.11.2018 and not 09.11.2018 as claimed by the applicant in his COD application. The OIA was issued on 16.05.2018. The applicant has stated that they had received the OIA on 19.05.2018. Accordingly, the applicants were required to file the same by 17.08.2018 i.e. within 3 months. Further, an extension period of 3 months was available to the applicants which would have expired on 15.11.2018. Government notes that the revision application was filed on 15.11.2018 i.e. on the last day of extension available. Since, revision application has been filed within the extension period i.e. 3 months + 3 months, the prayer for condonation is accepted and Government condones the delay.

9. The Government has gone through the facts of the case and notes that the applicant had not declared the gold while availing the green channel facility. Thereafter, on interception he had been asked whether he was carrying any dutiable items to which he had replied in the negative. The impugned gold had been ingeniously converted into metallic refills, metallic foils, metallic strips, dial rings, bra ring, buckles and had been coated with the express intention of hoodwinking the Customs and evading payment of Customs duty. The quantity of gold was quite substantial and the gold was of very high purity and was in primary form, indicates that the same was for commercial use. The applicant clearly 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 is a frequent traveller and was well versed with the law and procedure. Further, the applicant

had cleverly and ingeniously converted the gold and lot of effort had gone into the same. The ingenuity used reveals the mindset of the applicant to not only evade duty but smuggle the gold. It also reveals that the act committed by the applicant was conscious and pre-meditated. The applicant had been given an opportunity to declare the dutiable goods in his possession but having confidence in the nature of his concealment, he denied carrying any gold. Had he not been intercepted, the applicant would have gotten away with the gold concealed ingeniously and cleverly in the various items. Therefore, the confiscation of the gold was justified.

10. 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 ‘applicant’ 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 observes that besides the substantial quantum of gold which indicates that it was for commercial use, the manner in which it was attempted to be brought into the country is vital. The impugned gold was cleverly, consciously and ingeniously converted into metallic refills, metallic foils, metallic strips, dial rings, bra ring, buckles and had been coated which reveals the intention of the applicant. It also revealed his criminal bent of mind and a clear intention to evade duty and smuggle the gold into India. The aforesaid circumstances of the case and ingenious method used to convert the gold, probates that the applicant had no 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 upheld the same.

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, conscious and ingenious, type of gold being for commercial use, this being a clear attempt to brazenly smuggle the impugned 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 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 OAA 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 to uphold the orders of absolute confiscation passed by the both the lower authorities.

15. For the aforesaid reasons, the Government upholds the OIO passed by the OAA which has been also been upheld by the AA. Thus, the Revision application filed by the applicant fails.

16. Accordingly, the Revision Application filed by the applicant is dismissed.


(SHRAWAN KUMAR)

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

ORDER No. 126/2022-CUS (WZ) /ASRA/MUMBAI DATED 09.12.2022

To,

1. Shri. Shamsuddin, 313/56, F2, 2nd Floor, Anand Nagar, Inderlok, Delhi – 110 035.
2. Pr. Commissioner of Customs, CSI Airport, Terminal – 2, Mumbai : 400 099.

Copy to:

1. Shri. N.J Heera, Advocate, Nulwala Bldg, Ground Floor, 41, Mint Road, Opp. GPO, Fort, Mumbai – 400 001.
2. Sr. P.S. to AS (RA), Mumbai.
3. File Copy.
4. Notice Board.