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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

(i). F.No. 371/401/B/WZ/2019-RA/2148 Date of Issue 12.04.2023

ORDER NO. 433/2023 CUS (WZ)/ASRA/MUMBAI DATED 11.04.2023
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.

(i). F.No. 371/401/B/WZ/2019-RA

Applicant : Shri. Dipesh Pravinbhai Kashiyani

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

Subject : Revision Applications filed respectively, under Section 129DD
of the Customs Act, 1962 against the Order-in-Appeal No.
MUM-CUSTM-PAX-APP-363/2019-20 dated 31.07.2019
issued on 13.08.2019 through F.No. S/49-713/2018
passed by the Commissioner of Customs (Appeals),
Mumbai – III.

ORDER

This revision application has been filed by Shri. Dipesh Pravinbhai Kashiyani (hereinafter referred to as the Applicant) against the Order-in-Appeal No. MUM-CUSTOM-PAX-APP-363/2019-20 dated 31.07.2019 issued on 13.08.2019 through F.No. S/49-713/2018 passed by the Commissioner of Customs (Appeals), Mumbai – III.

2. Brief facts of the case are that the applicant on arrival at CSMI Airport, Mumbai on 30/31.07.2017 from Bangkok by Air India Flight No. AI 331 / 30.07.2017 was intercepted by the Customs Officers after he had crossed the green channel. To the query put forth to him about possession of dutiable goods / gold or other precious goods or contraband in his baggage or person, the applicant had replied in the negative. Screening of his baggage showed dark images and the applicant stated it was a statue but did not state anything about gold. The yellow coloured metal statue of Buddha was unusually heavy. The same was cut open and two pieces of metal bars were found concealed inside the statue. These two pieces of metal bars were assayed and the Government Approved Valuer certified that the same were gold of purity 24karats, together weighed 998 grams and valued at Rs. 25,76,756/-. The applicant admitted that the two pieces of gold bars did not belong to him and that he had carried the same for a monetary consideration. He was abroad only for a day.

3. After due process of the law, the Original Adjudicating Authority, viz Addl. Commissioner of Customs, CSI Airport, Mumbai vide Order-in-Original No. ADC/AK/ADJN/304/2018-19 dated 11.10.2018 issued from F.No. S/14-5-17/2017-18-ADJN (SD/INT/AIU/184/2017-AP'B)] ordered

for the absolute confiscation of the two pieces of gold bars of 24K purity, totally weighing 998 grams and valued at Rs. 25,76,756/- under Section 111(d), 111(l) & 111(m) of the Customs Act, 1962 and penalty of Rs. 3,10,000/- was also imposed on the applicant under Section of 112 (a) and (b) of 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-363/2019-20 dated 31.07.2019 issued on 13.08.2019 through F.No. S/49-713/2018 did not find it necessary to interfere in the OIO passed by the OAA.

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

5.01. that the appellate authority had shifted his stand in similar cases and had granted option of redemption.

5.02. that they crave to refer and rely upon orders in similar cases to establish that the appellate authority had allowed redemption.

Applicant prayed to the revisionary authority to set aside the order of the appellate authority and to reduce the personal penalty or pass any order as deemed fit.

6. Personal hearing in the case was scheduled for 10.08.2022, 24.08.2022 and 05.12.2022. Shri. Prakash Shingrani appeared on 06.12.2022 for the personal hearing and submitted that applicant brought small quantity of gold for personal use. He further submitted that applicant

is not a habitual offender. He requested to release the goods on nominal RF and penalty.

7. 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. The impugned gold had been ingeniously concealed inside the metal statue. The gold was of 24Kts i.e. it was in primary form which 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 nature of concealment reveals the mindset of the applicant was to evade duty. It also reveals that the act committed by the applicant was conscious and pre-meditated. The applicant had an opportunity to declare the dutiable goods in his possession before the statue was taken up for detailed examination. But having confidence in the nature of his concealment, he failed to avail the same. Had he not been intercepted, the applicant would have gotten away with the gold concealed in the metal statue. 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 ‘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 besides the gold was of high purity and was in primary form, indicating that the same was for commercial use, the manner in which the gold was attempted to be brought into the country is vital. The impugned gold was put inside a metal statue. The gold bars had been cleverly, consciously and ingeniously concealed which reveals the intention of the applicant. The metal statue was used to hoodwink the Customs authorities. The aforesaid quantity, purity and ingenious concealment, probates that the applicant had no intention of declaring the gold to the Customs at the airport. The applicant is a frequent traveler and on this occasion was abroad only for a day. 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 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 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. Government finds that the penalty of Rs. 3,10,000/- imposed on the applicant by the OAA under Section 112(a) & (b) of the Customs Act, 1962 and upheld by the AA is harsh and unjust and not commensurate with the omissions and commissions committed and is inclined to marginally reduce the same.

14. For the aforesaid reasons, the Government to the extent of the absolute confiscation of the gold is concerned finds that the OIA passed by the AA is legal and proper and does not find it necessary to interfere in the same. However, Government hereby reduces the penalty of Rs. 3,10,000/-

imposed under Section 112(a) and (b) of the Customs Act, 1962 on the applicant by the OAA and upheld by the AA to Rs. 2,50,000/-. (Rupees Two Lakhs Fifty thousand only).

15. Accordingly, for the reasons stated above, the Revision Application filed by the applicant is partly allowed as above.


11/4/23
(SHRAWAN KUMAR)

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

ORDER No. A33/2023-CUS (WZ) /ASRA/MUMBAI DATED 11.04.2023

To,

1. Shri. Dipesh Pravinbhai Kashiyani, Sukhshanti Bldgs, Room No. 1, B-Wing, 1st Floor, S.N. Road, Mumbai – 400 080.
2. Pr. Commissioner of Customs, CSI Airport, Terminal – 2, Level II, Sahar, Andheri East, Mumbai – 400 099.

Copy to:

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