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SPEED POST



GOVERNMENT OF INDIA  
MINISTRY OF FINANCE  
(DEPARTMENT OF REVENUE)  
8<sup>th</sup> Floor, World Trade Centre, Centre – I, Cuffe Parade,  
Mumbai-400 005

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F.No. 371/267 & 268/B/WZ/2018-RA/3616 Date of Issue 09.05.2023

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ORDER NO 450 - 451 /2023-CUS (WZ)/ASRA/MUMBAI DATED 08.05.2023  
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.

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Applicant : Shri Rakshit Kapoor

Respondent : Principal Commissioner of Customs, Mumbai.

Subject : Revision Application filed, under Section 129DD of the  
Customs Act, 1962 against the Orders-in-Appeal Nos.  
MUM-CUSTOMS-PAX-APP-517 & 518/17-18 dated  
19.09.2017 issued on 22.09.2017 through F.No.  
S/49-600 & 601 (Stay)/2013/AP passed by the  
Commissioner of Customs (Appeals), Mumbai – III.

**ORDER**

This Revision application along with an application for condonation of delay has been filed by Shri Rakshit Kapoor [hereinafter referred to as the Applicant) against the Orders-In-Appeal Nos. MUM-CUSTOM-PAX-APP-517 & 518/17-18 dated 19.09.2017 issued on 22.09.2017 through F.No. S/49-600 & 601 (Stay)/2013/AP passed by the Commissioner of Customs (Appeals), Mumbai – III. The Order in Appeal was issued in respect of the appeal filed by the Applicant against penalty imposed on him by the Additional Commissioner of Customs vide OIO No ADC/AS/.ADJN/02/2013-14 dated 19.04.2013.

2 Brief facts of the case are that acting upon specific information that one passenger, Shri Sayyed Mohammed Hanif Hasan Ali, arriving by Thai Airways Flight No. TG-317 dated 12.03.2012 from Hong Kong via Bangkok was likely to smuggle memory cards in commercial quantity into India. The passenger was intercepted by AIU officers, while proceeding towards exit gate after getting himself cleared through the Customs "Green Channel". It was noticed by the officers of AIU during surveillance that the said passenger was being escorted by one MIAL staff namely Shri Mahesh Bamne in a golf cart. Subsequent examination of the baggage by AIU before independent panchas resulted in recovery of 10880 micro SD memory cards of 2GB. Interrogation of Shri Mahesh Bamne revealed the involvement of the Applicant viz Rakshit Kapoor in a previous case in which 12000 memory cards (hereinafter referred to as impugned goods) were smuggled out of the airport for monetary consideration. Impugned goods were handed over by housekeeping staff to the Applicant after they were found in the dustbin. The Applicant accepted the same without making any entry in lost and found register and later smuggled them out of the airport. The Applicant was interrogated and his premises were searched which lead to the recovery of 600 memory cards (which were a part of said 12000 memory cards) and Rs. 34,500/- (which was remaining amount paid to the Applicant for his assistance in smuggling after spending the balance out of Rs. 50,000/-). After the investigation A.C. Customs (AIU) issued SCN to the

passenger, the applicant Shri Rakshit Kapoor and Shri Mahesh Bamne. The applicant was asked to Show cause as to why the 600 memory cards out of 12000 should not be confiscated under Section 111(d), (j), (l) and (m) along with Rs. 34,500/- seized, remaining amount of Rs.15,500/-(out of Rs. 50,000/) and why penalty should not be imposed under Sec 112(a) and (b) of the Customs Act, 1962

3. After due process of law, the Original Adjudicating Authority (OAA) viz Additional Commissioner of Customs (Airport) vide OIO No. ADC/AS/ADJN/02/2013-14 dated 19.04.2013 ordered absolute confiscation of the impugned goods of the said 600 memory cards under section 111(d), (j) & (m) and Rs. 34,500/- under section 111(d), (j), (l) & (m) of the Customs Act, 1962. Penalty of Rs. 2,00,000/- was also imposed on the appellant under section 112(a) & (b) of the Customs Act, 1962 in respect to the Applicant.

4. Aggrieved by the imposition of penalty in the said OIO, the Applicant had filed an appeal with the Commissioner of Customs (Appeal) (AA) who vide his OIA No. MUM-CUSTOM-PAX-APP-517&518/2017-18 dated 19.09.2017 rejected the appeal and upheld the OAA's Order.

5. Aggrieved with the above order, the applicant has filed this revision application along with an application for condonation of delay stating:

5.1 That the appellate authority erred in confirming penalty of Rs. 2,00,000/- on the applicant for his conduct leading to confiscation of goods u/s 111 of the Customs Act, 1962.

That it is a settled law that ordinarily penalty is imposable on a person who deliberately acts in defiance of law or by virtue of his conduct the goods become offending goods liable to confiscation under the statute. The Hon'ble Supreme Court in the case of Hindustan Steel Ltd. Vs. State of Orissa reported at 1978 (2) ELT J-159 (S.C) held that "penalty will not ordinarily be imposed unless the person oblige either

acted deliberately in defiance of law or was guilty contumacious or dishonest conduct.

5.2 That as far as clause (a) of section 112 is concerned, the applicant submitted that the offending goods viz. 12000 pieces of memory cards were found in a black pouch as abandoned goods in the dustbin by the housekeeping staff / cleaner. Nobody claimed ownership of the goods at the relevant time. The cleaner handed over the pouch to the applicant in the presence of his colleague Mr. Parwez Imam. The applicant immediately kept the packet in his locker with a view to deliver the same to the bonafide claimant. The applicant had no knowledge that the goods contained in the packet were already liable to confiscation under Section 111 of the Act.

5.3 That the appellate authority failed to appreciate that the applicant has not done any act or omitted to do any act which would render the goods liable to confiscation under Section 111. The goods were already liable to confiscation being imported in an illicit manner for removal without payment of customs duty. In the absence of any act done by the applicant to make the goods to be confiscated, clause (a) of section 112 is not applicable.

5.4 That it is a settled law that mens rea is sine qua non for inviting mischief of clause (b) of section 112. The words "which he knows or has reason to believe" used in clause (b) clearly mandates that it should be in the mind of the person while carrying, keeping, selling, purchasing or otherwise dealing with the goods that the goods dealt by him are liable to confiscation. This has been clearly held so by the Hon'ble Tribunal in several decided case law. The applicant, inter alia, refers to the judgment of Hon'ble Tribunal Kolkata in the case of Vijay Kumar Chaudhary Vs. Commissioner of Customs, Patna - 2015 (325) ELT 788 (Tri-Kol.).

5.5 That the only lapse on the part of the applicant was that he did not enter the particulars of the goods in the Lost and found Register. In case the applicant had malafide intention he would have taken the goods secretly from his office and sold the entire memory cards for handsome consideration. However the applicant in a hurry to leave the office to catch next morning flight to Delhi, kept the packet in the locker. In the meantime in Delhi, the applicant got threatening anonymous calls including calls from his colleague Mr. Mahesh Bamne as to whereabouts of the packet. In order to save his life from any risk from mafia, the applicant was forced to deliver the packet to one Mr. Amar after joining the duty on 26.02.2012. Under the circumstances, mens rea on the part of the applicant could not be said to be present. Hence no penalty is imposable under clause (b) of section 112.

5.6 That the appellate authority failed to appreciate that the memory cards recovered by the customs from the residence of the applicant were not prohibited goods under the Customs Act or under any other law for the time being in force. On the other hand, these goods were dutiable goods classified under tariff SH 8523.52.20 of Customs Tariff Act, 1975. Customs duty @ 5.30% was leviable on the said goods. The amount of duty sought to be evaded was Rs. 79,500/- only, the appellate authority ignored this fact while confirming entire penalty of Rs. 2 lacs imposed by the adjudicating authority. To this extent, the impugned order is bad in law and the same is not sustainable on this ground alone.

5.7 That it is a settled law that burden is on the Department to prove that the person accused had knowledge as to non-duty paid or offending nature of the goods dealt by the accused. In the absence of

any cogent evidence, the burden cannot be said to be discharged by the Revenue. The applicant, inter alia, rely upon the following judgments:

- (i) Motilal Padampat Udyog Vs. Commissioner of Central Excise, Patna - 1998 (104) ELT 39 (Trib)
- (ii) Cipta Coated Steels Ltd. Vs. Commissioner of Central Excise, Aurangabad - 1999 (113) ELT 490 (Trib-Delhi)
- (iii) Lalsons Vs. Collector of Customs, Bombay - 1999 (109) ELT 709 (Tribunal)

In view of the above, the applicant requested the Hon'ble Revisional Authority, to set aside the impugned Order-in-Appeal No. MUM-CUSTOM-PAX-APP-517 & 518/2017-18 dated 19.09.2017 passed by the Commissioner of Customs (Appeals), Mumbai-III, Andheri-Kurla Road, Marol, Mumbai and allow the present revision petition with consequential relief.

6. Personal hearings in the case was scheduled for 04.08.2022, 26.08.2022, 23.09.2022, 30.09.2022, 6.12.2022, 20.12.2022, 03.01.2023, 17.01.2023 and 21.02.2023. Shri S. C. Kamra, Advocate appeared online on 21.02.2023 and submitted that applicant has been made co-accused in a case and penalised. He further submitted that applicant was not named by the passenger and applicant fully cooperated with investigations. He requested to waive off or substantially reduce the penalty as applicant has already suffered too much.

7. The Government has gone through the facts of the case, the oral and written submissions, Order in Original, Order in Appeal, Condonation of Delay Application and the Revision Applications.

8.1 Government observes that the applicant has filed a Condonation of Delay application along with the Revision Application wherein they informed that the Order in Appeal dated 19.09.2017 was received by them on 27-09-2017. Unknowingly, they filed the appeal against the OIA in CESTAT instead of the Revisionary Authority. CESTAT vide Order dated 16-08-2018 dismissed the

appeal as non-maintainable and also held that the time spent on account of pendency of the appeal before CESTAT will not be counted as delay by the Revisionary Authority. The applicant has now filed the Appeal here on 18-09-2018.

8.2 From the above, it is clear that applicant has filed this revision application before 3 months when the time period spent in proceedings before CESTAT is excluded. As per provisions of Section 129DD(2) of the Customs Act, 1962 the revision application can be filed within 3 months of the communication of Order-in-Appeal and the delay up to another 3 months can be condoned provided there are justified reasons for such delay. Government, in exercise of power under Section 129DD (2) of the Customs Act, 1962 condones the said delay and takes up revision application for decision on merits.

9. Government notes that in this case the applicant has filed the appeal against the penalty imposed on him vide the impugned OIA. A perusal of the grounds of revision filed by the Applicant indicates that his main plea is that he did not have a malafide intention in removing the goods in an illicit manner. Government observes that in this case the AIU officers intercepted a passenger who was being escorted by the MIAL staff viz Shri Mahesh Bamne towards the exit gate and personal search of the passenger led to the recovery of 10880 micro SD Memory cards of 2GB. Interrogation of the said MIAL staff revealed the involvement of the applicant in a previous case in which 12000 memory cards were removed from the airport. The applicant in his statement informed that the housekeeping staff handed over a black pouch containing the memory cards recovered from the dustbin of the Gents toilet which he kept in his airport locker and left for leave for two weeks. He did not enter the recovery of the packet in the 'Lost and Found Register' and after he rejoined the duty he handed over the packet to one Shri Amar. The applicant took Rs. 50,000/- for handing over the pouch (he had removed 600 memory cards from the pouch before

handing over). The said 600 cards and an amount of Rs35,000/- (out of Rs. 50,000/-) was recovered from the applicant's residence

10. Government finds there is no dispute by the applicant that he had removed the memory cards from the Airport without informing any authorities, the dispute is only of his intent and that he was not aware that the goods had to be confiscated and that since he did not have a malafide intention, penalty under Section 112(a) & (b) cannot be imposed. The applicant also claimed that he kept the pouch to give to the bonafide owner. However the chain of events clearly reveals that the applicant with the anticipation of getting easy money, made the deal with Shri Amar and removed the pouch from the airport and handed the same to him. He did not confirm whether i) Shri Amar was the rightful (bonafide) owner and how did he loose the pouch and as to how did the pouch reach the dustbin of the toilet; or ii) whether the duty was paid on the impugned goods. If his intent was licit he could have informed/deposited the impugned goods with the Customs Authorities and would have directed Shri Amar to approach the Authorities to get his claim.

11. Government notes that the applicant has also claimed that he handed over the pouch to Shri Amar as his life was at risk and he was getting threatening calls. However it is clearly found and admitted by the applicant that he had removed 600 memory cards from the pouch and also received Rs.50,000/- from Shri Amar. It is very difficult to believe that when one's life is at risk that person could still negotiate with the final recipient of the goods for handing over of the goods and also have the courage and gumption to remove 600 memory cards from the pouch before handing over of the pouch to the alleged claimant. Hence Government finds that the penalty imposed by the lower Authorities is justified and Commissioner Appeal's Order to be judicious, while upholding the penalty imposed by the OAA, which is detailed as under:

*"6. There is no dispute of the fact that the impugned goods were taken out of the airport and handed over in return for Rs. 50,000/-. The*



*appellant neither paid any duty nor took approval from any proper officer. Thus the impugned goods were smuggled out without paying any relevant duty. Such an act renders the impugned goods liable for confiscation under section 111 and appellant liable for penal action under section 112(a). I also find that the appellant misused his position to bring out the impugned goods out of the airport. The appellant not only aided in smuggling of the impugned goods by carrying the same but also kept a part of the smuggled goods with himself which were recovered from his premises. By doing so the appellant has invited penal action under section 112(b) of the Customs Act, 1962. Considering the said facts, the adjudicating authority has rightly imposed the penalty on the appellant under Section 112 (a) & (b) of the Customs Act, 1962.*

*7. With regard to appeal contention that appellant had delivered the impugned goods as lost & found property, I find that the argument is unconvincing. Even if the impugned goods were lost and found property, they should have been given to the rightful owners after following proper procedure and after ascertaining that relevant duties have been paid. Furthermore, it is an admitted fact that the appellant has also failed to keep the record of the impugned goods in the Lost & Found Register. The appellant neither informed his superiors nor customs officials about the impugned goods and accepted Rs. 50,000/- in return for the delivery. Clearly, the appellant has aided in smuggling activity for monetary consideration.”*

12. Government finds that the applicant was working as an Asst. Manager, MIAL since 17<sup>th</sup> May, 2010. Thus he belongs to the management cadre (a responsible position) and was having an experience of over a year handling the operations at the Airport. Hence his plea of ignorance of the rules of Airport Operations, its security or the rules of Customs is naive and farfetched. The

very fact that 600 nos. of memory cards and cash were found in his possession is in itself proof of his malafide intentions to defraud the exchequer for monetary gain and is liable for penal action under the provisions of Customs Act, 1962. Government finds that the OIA passed by the AA is legal and proper and finds no infirmity in the impugned order.

13. In view of above discussions, Government upholds the impugned Order in Appeal No. who vide his OIA No. MUM-CUSTOM-PAX-APP-517 & 518/17-18 dated 19.09.2017 issued on 22.09.2017, passed by Commissioner of Customs (Appeals), Mumbai Customs – Zone III and dismisses the instant revision applications as being devoid of merit.

14. The revision application is dismissed on the above terms.

  
(SHRAWAN KUMAR)

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

ORDER No. <sup>450-</sup>451/2023-CUS (WZ)/ASRA/Mumbai

DATED 08.05.2023

To,

1. Shri Rakshit Kapoor, 37/56, West Punjabi Bagh, New Delhi-110026.
2. Principal Commissioner of Customs, Chhatrapati Shivaji Maharaj International Airport, Sahar, Andheri (East), Mumbai – 400 099.

Copy to:

3. Shri S.C.Kamra & Co., Advocates & Solicitors, B-2/210 (Basement), Safdarjung Enclave, New Delhi-110029.
4. Sr. P.S. to AS (RA), Mumbai.
5. File Copy,
6. Notice Board