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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. 371/38/B/WZ/2020-RA / 4576 Date of Issue : 06.02.2023

ORDER NO. 508 /2023-CUS (WZ)/ASRA/MUMBAI DATED 30.06.2023 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. 371/38/B/WZ/2020-RA

Applicant : Shri. Junaid Beejanthadka

Respondent : Pr. Commissioner of Customs, CSMI Airport, Mumbai
400 099.

Subject : Revision Application filed under Section 129DD of the Customs Act, 1962 against the Order-in-Appeal. No. MUM-CUSTOM-PAX-APP-218/19-20 dated 25.06.2019 issued on 04.07.2019 through F.No. S/49-438/2018 passed by the Commissioner of Customs (Appeals), Mumbai - III.

ORDER

This revision application has been filed by Shri. Junaid Beejanthadka (hereinafter referred to as the Applicant) against the Order-in-Appeal No. MUM-CUSTM-PAX-APP-218/19-20 dated 25.06.2019 issued on 04.07.2019 through F.No. S/49-438/2018 passed by the Commissioner of Customs (Appeals), Mumbai - III.

2. Brief facts of the case are that on 14.08.2018, the applicant who had arrived at CSMI Airport from Dubai onboard Jet Airways Flight No. 579/14.08.2019 was intercepted by Customs Officers after he had crossed the green channel. Personal search of the applicant and examination of the baggage of the applicant led to the recovery of 2 gold biscuits weighing 116 grams each which had been concealed at the bottom of the vase carried by the applicant. The two gold biscuits collectively weighed 232 grams and was valued at Rs. 6,33,000/-. The applicant admitted to having carried the gold biscuits for a monetary consideration.

3. The Original Adjudicating Authority (OAA), viz, Dy. Commissioner of Customs, CSMI Airport, Mumbai vide Order-In-Original No. Air Cus/49/T2/400/2018-Batch'B' dated 14.08.2018 ordered for the absolute confiscation of the two gold biscuits, collectively weighing 232 grams, valued at Rs. 6,33,000/- under Section 111(d) of the Customs Act, 1962. A penalty of Rs. 1,00,000/- under Section 112 of the Customs Act, 1962 was imposed on the applicant.

4. Aggrieved by the said order, the applicant preferred an appeal before the appellate authority (AA) viz, Commissioner of Customs (Appeals), Mumbai - III, who vide Order-In-Appeal No. MUM-CUSTM-PAX-APP-218/19-20 dated 25.06.2019 issued on 04.07.2019 through F.No. S/49-438/2018 did not find

any reason to interfere in the impugned OIO passed by the OAA. Also, the personal penalty imposed on the applicant under Section 112 (a) and (b) of the Customs Act, 1962 was found commensurate with the offence committed.

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

5.01. that the order passed by the appellate authority was bad in law and unjust and has been passed without application of mind; that the applicant had not crossed the green channel and had been intercepted prior to the crossing of the line; that no panchanama was drawn and no statement of the applicant had been recorded; that on being questioned the applicant had made an oral submission that he had declared the gold bars; that the oral declaration ought to have been considered as a declaration as provided under section 77 of the Customs Act, 1961; that the gold bars had not been concealed and therefore, there was no intentions to evade payment of Customs duty; that non-concealment indicated that there was no mensrea; that the charges had not been explained;

Under the circumstances, the applicant has prayed to the Revision Authority that the OIA be set aside and the two gold biscuits may be allowed to be re-shipped out of India or be allowed to be cleared without payment of duty; that the fine and penalty be set aside or pass any other order as deemed fit and proper.

6. Personal hearing in the case was scheduled for 11.05.2023, 18.05.2023. Ms. Sayed Shabana, Advocate for the applicant appeared for personal hearing on 18.05.2023 and reiterated the earlier submissions. She further stated that the applicant brought small quantity of gold for personal use. She further stated that gold was not concealed and applicant is not a habitual offender. She requested to release the gold on on nominal fine and penalty.

7(a). Records submitted indicates that the applicant had initially approached the Hon'ble Cestat, Mumbai Bench which vide Final Order no. M/85044/2020 dated 16.01.2020 held that ' 4. since the issue relates to import of goods as baggage, and the impugned Order-in-Appeal passed by Commissioner of Customs (Appeals), therefore, the revision application lies before the Government of India. Consequently, the appeal is dismissed being not maintainable.

5. *The applicant is at liberty to file necessary application before the appropriate forum, if deems fit.'*

7(b). In view of the said Order passed by Hon'ble Cestat, Mumbai, it is observed that the revision application has been filed by the applicant on time. Accordingly, the same is being taken up for a decision.

8. Government has gone through the facts of the case and notes that the applicant had failed to declare the goods in his possession as required under Section 77 of the Customs Act, 1962. The applicant had not disclosed the goods and had he not been intercepted would have walked away with the impugned goods without declaring the same to Customs. By his actions, it was clear that the applicant had no intention to declare the impugned gold biscuits to Customs and pay Customs duty on it. The Government finds that the confiscation of the impugned gold / goods was therefore, justified.

9. 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".

10. 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.

11. 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 the 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.

12. The quantity of the gold under import is small and is not of commercial quantity. The impugned two gold biscuits, totally weighing 232 grams had not been declared by applicant and a case that the same were ingeniously concealed, has not been made out. There are no allegations that the applicant is a habitual offender and was involved in similar offence earlier. The facts of the case indicate that it is a case of non-declaration of gold, rather than a case of smuggling for commercial considerations. Under the circumstances, the seriousness of the misdemeanour is required to be kept in mind when using discretion under Section 125 of the Customs Act, 1962 and while imposing quantum of penalty.

13. The absolute confiscation of the gold, leading to dispossession of the applicant of the impugned two gold biscuits, totally weighing 232 grams and valued at Rs. 6,33,000/- in the instant case is therefore, harsh and not reasonable. Government therefore, is inclined to modify the OIA passed by the AA and allow the same to be redeemed on payment of a redemption fine.

14. Government finds that the penalty amount of Rs. 1,00,000/- imposed on the applicant under Section 112 of the Customs Act, 1962 by the OAA and upheld by the AA is a bit harsh and unreasonable and not commensurate with the omissions and commissions committed. Government is inclined to reduce the same.

15. In view of the above, (i). Government modifies the OIA passed by the AA by setting aside the absolute confiscation of the 2 gold biscuits / bars, totally weighing 232 grams valued at Rs. 6,33,000/- and the same is allowed to be redeemed on payment of a fine of Rs. 1,25,000/- (Rupees One Lakh Twenty Five Thousand only).

(ii). the penalty of Rs. 1,00,000/- (Rupees One Lakh only) imposed on the applicant under Section 112 of the Customs Act, 1962 by the OAA and upheld by the AA, is reduced to Rs. 60,000/- (Rupees Sixty Thousand only).

16. Revision Application is disposed of on the above terms.

Shrawan
30/6/23
(SHRAWAN KUMAR)

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

ORDER NO. 508 /2023-CUS (WZ)/ASRA/MUMBAI DATED 30.06.2023.

To,

1. Shri. Junaid Beejanthadka, Beejanthadka House Perdalla P.O., Badiadka, Kasargod, Kerala - 671 123.
2. Pr. Commissioner of Customs, Chhatrapati Shivaji Maharaj International Airport, Level - II, Terminal 2, Sahar, Andheri (East), Mumbai 400 099.

Copy to:

1. Ms. Sayed Sabana, Advocate, 43,45,47,9. M. Merchant Road, City Heights, 10th Floor, Flat No. 1005, Mumbai - 400 009.
2. Sr. P.S. to AS (RA), Mumbai.
3. File Copy.
4. Notice Board.