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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. 371/204 & 205/WZ/2021-RA / 6002 : Date of Issue : 04.08.23

ORDER NO. 539-540 /2023-CUS (WZ)/ASRA/MUMBAI DATED 28.07.2023
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.

Applicants : (i). Mr Prateek Shehraj Nagarkar,
(ii). Ms Shamma Khatoon

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

Subject : Revision Application filed, under Section 129DD of the
Customs Act, 1962 against the Orders-in-Appeal Nos.
MUM-CUSTOM-PAX-APP-204-205/2020-21 dated 31-07-
2020 issued on 04.08.2020 through F.No. S/49-184-
185/2019 passed by the Commissioner of Customs
(Appeals), Mumbai – III.

ORDER

These revision applications have been filed by (i). Mr Prateek Shehroo Nagarkar and (ii). Ms Shamma Khatoon (herein after referred to as the Applicants or alternately as Applicant no. 1 and Applicant no. 2 respectively) against the Order-In-Appeal Nos. MUM-CUSTOM-PAX-APP-204-205/2020-21 dated 31-07-2020 issued on 04-08.2020 through F.No. S/49-184,185/2019 passed by the Commissioner of Customs (Appeals), Mumbai – III.

2. Brief facts of the case are that on 16.11.2017, the Officers of AIU at CSMI Airport, Mumbai had intercepted two passengers, Applicant No.1 viz Mr Prateek Shehroo Nagarkar holding Indian Passport No. R 5361896 and Applicant No. 2 viz Ms Shamma Khatoon holding Indian Passport No. N-671707 on their arrival from Bangkok to Mumbai by Air India Flight No. A1331 dated 15-11-2017, after they had cleared themselves through the green channel of Customs. Personal search of the Applicants, resulted into recovery of 3 cut pieces of gold bars weighing 606 grams of 24KT (999% purity) and valued at Rs.16,24,928/- concealed in the inner side pocket of the underwear worn by the Applicant No.1 and 4 cut pieces of gold bars weighing 596 grams of 24KT (999% purity) and valued at Rs.15,98,114/-concealed in the plastic dildo inside the bra worn by the Applicant No. 2. On enquiry the Applicants revealed that the impugned gold belongs to one Mr. Abbas Hussain who was waiting outside the Airport to collect the gold; that Mr. Abbas Hussain had arranged to and fro free air tickets to Bangkok of both the Applicants; that the Applicants met each other in Mumbai and travelled together to Bangkok as per the instruction of Mr. Abbas Hussain and that one Mr Shajji had handed over the gold at Bangkok to both of the Applicants. The Applicants also admitted that they carried the gold for monetary consideration. The AIU officers seized the impugned gold i.e weighing 606 grams of 24KT (999% purity) and valued at Rs.16,24,928/- from Applicant No.1 and 4 cut pieces of gold bars weighing

596 grams of 24KT (999% purity) and valued at Rs.15,98,114/- from Applicant No. 2 (collectively weighing 1202 grams and collectively valued at Rs.32,23,042/-) in the reasonable belief that the same were attempted to be smuggled into India in contravention of the provisions of the Customs Act, 1962 and hence were liable for confiscation under the provisions of the said Act. Accordingly Show Cause Notice was issued to the Applicants on 10-05-2018 proposing to confiscate the seized gold and for imposing penalty on both the Applicants.

3. The Original Adjudicating Authority viz, Addl. Commissioner of Customs, CSMI Airport, Mumbai vide Order-In-Original No. ADC/AK/ADJN/369/2018-19 dated 26.11.2018 ordered for the absolute confiscation of the seized gold weighing 606 grams of 24KT (999% purity) and valued at Rs.16,24,928/- from Applicant No.1 and 4 cut pieces of gold bars weighing 596 grams of 24KT (999% purity) and valued at Rs.15,98,114/- from Applicant No. 2 (collectively weighing 1202 grams and collectively valued at Rs.32,23,042/-) under Section 111(d), (l) and (m) of the Customs Act, 1962 and imposed a personal penalty of Rs. 1,80,000/- and Rs. 1,75,000/- on Applicant 1 and Applicant 2 respectively under Section 112(a) and (b) of the Customs Act, 1962.

4. Aggrieved by the said order, applicants filed appeals before the Appellate Authority (AA) viz, Commissioner of Customs (Appeals), Mumbai – III, who vide his Orders-In-Appeal Nos. MUM-CUSTM-PAX-APP-204-205/2020-21 dated 31-07-2020 issued on 04-08-2020 through F.No. S/49-184,185/2019, did not find any reason to interfere in the impugned OIO passed by the OAA.

5. Aggrieved with the above order, the Applicants have made an exhaustive submission of case laws and have submitted copies including their

submissions made before the lower authorities etc. They have filed these revision applications on the following grounds:

5.1 That the Applicants deny the allegations that they acted as Carriers for monetary consideration, they submitted that they purchased the gold bars on credit and carried by concealing them as they wanted to evade the payment of Customs duty, because of their poor financial position;

5.2 That Panchnama dated 16-11-17 drawn in English was invalid;

5.3 That no valid seizure was made and there was no seizure order issued by the Investigating agency. Therefore proposal for confiscation of goods is not sustainable and no penalty can be imposed;

5.4 That the Applicants statements were involuntary and against the truth and hence it should not have been relied upon;

5.5 That Gold is not a prohibited item and not liable for absolute confiscation and that the Applicants claim ownership and redemption of the gold under absolute confiscation

5.6 That the Order in Appeal is not an order on merits and not a speaking order.

The Applicants concluded that it was a single and solitary incident of an alleged act of smuggling of goods which can never be justifiable ground for absolute confiscation invoking the provision of Section 111 of the Customs Act, 1962. That they committed the mistake only with an intention to save little

money and make some profit. The Applicants requested to release the confiscated gold on payment of appropriate fine, penalty and duty and to drop further proceedings against them.

6. Personal hearings in the case was scheduled on 23-05-2023. Shri. Prakash Shingarani, Advocate appeared for personal hearing and submitted that both the applicants brought small quantity of gold, and they are not habitual offenders. He further submitted that though applicants failed to declare the same, absolute confiscations is too harsh. He requested to give an option to redeem the goods under Section 125 of the Customs Act on reasonable fine and penalty.

7. The Government has gone through the facts of the case. The Applicants were intercepted when they had attempted to walk through the green channel. Government observes that the applicant had failed to declare the goods to the Customs at the first instance as required under Section 77 of the Customs Act, 1962. Government finds that the 3 cut pieces of gold bars weighing 606 grams of 24KT (999% purity) and valued at Rs.16,24,928/- was kept in a cylindrical shaped package and concealed in the inner side pocket of the underwear worn by the Applicant No.1 and 4 cut pieces of gold bars weighing 596 grams of 24KT (999% purity) and valued at Rs.15,98,114/- was kept in a cylindrical shaped package in a hollow plastic dildo, concealed inside the bra worn by the Applicant No. 2. The applicants had adopted such a method to conceal the gold bars which reveals that they did not intend to declare the gold and thereby evade payment of Customs Duty. The act was pre-planned and used to avoid detection and thereby to evade Customs duty. The absolute confiscation of the golds, therefore, 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 Applicants 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 the manner in which the gold was attempted to be brought in i.e. the applicants had concealed the gold in the innerware. The statement of both the applicants revealed that the impugned gold belonged to one Mr. Abbas Hussain who was waiting outside the Airport to collect the gold and that he had arranged the to and fro free air tickets to Bangkok of both the Applicants and that one Mr Shajji had handed over the gold at Bangkok to both of the Applicants to be handed over to Mr Abbas Hussain. The Applicants also admitted that they carried the gold for monetary consideration. This revealed clear intention and a systematic attempt to evade duty and smuggle the gold into India. The circumstances of the case probates that they did not have any intention of declaring the gold to the Customs at the airport. These

facts 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 and ingenious, clear attempt to smuggle gold by concealing in the inner wear; the method adopted to smuggle the gold along with other accomplices, this 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 gold. 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 and the Revision Application is liable to be dismissed.

13. The Applicant has also pleaded for reduction of the penalty imposed on him. The value of the Gold in this case is Rs. 32,23,042/-. From the facts of the case as discussed above, Government finds that the penalty of Rs. 1,80,000/- imposed on the Applicant 1 and Rs. 1,75,000/- imposed on the Applicant 2 under Section 112(a) & (b) of the Customs Act, 1962 is appropriate and commensurate to the omissions and commissions of the Applicant.

14. The Government, keeping in mind the facts of the case is in agreement with the observations of the Appellate authority and finds that absolute confiscation is proper, legal and judicious and also penalty imposed under

Section 112 (a) and (b) of the Customs Act 1962 is appropriate. Government does not find it necessary to interfere in the OIA passed by the AA.

15. Accordingly, the Revision Applications filed by the applicants is dismissed.

Shrawan
28/7/23
(SHRAWAN KUMAR)

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

ORDER NO. ⁵³⁹⁻540 /2023-CUS (WZ)/ASRA/MUMBAI DATED 28.07.2023

To,

1. Mr Prateek Sheshrao Nagarkar, Flat No. 507, Utkarsha Nirman, Mankalwari Bazar Sadar, Nagpur City-440001
2. Ms Shamma Khatoon, 43,3rd Floor, Second Main road, Fourth Cross Mummi Ghoda Garden, Neel Sandra, Bangalore-560057
3. Principal Commissioner of Customs, Chhatrapati Shivaji International Airport, Terminal - 2, Level - II, Sahar, Andheri (East), Mumbai - 400 099.

Copy to:

1. Shri. Prakash K. Shingrani, Advocate, 12/334, Vivek, New MIG Colony, Bandra (East), Mumbai - 400 051.
2. Sr. P.S. to AS (RA), Mumbai.
3. File Copy.
4. Notice Board.

