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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. 371/296/B/WZ/2022-RA / 430 : Date of Issue 19.01.2024

ORDER NO. 59/2024-CUS (WZ)/ASRA/MUMBAI DATED 18.01.2024
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. Mahmadi Abbasbhai Vora

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

Subject : Revision Application filed, under Section 129DD of
the Customs Act, 1962 against the Order-in-Appeal
No. MUM-CUSTOM-PAX-APP-1531/2021-22 through
F.No. S/49-1228/2020 dated 18.01.2022 issued on
19.01.2022 passed by the Commissioner of Customs
(Appeals), Mumbai - III.

ORDER

This revision application has been filed by Shri Mahmadi Abbasbhai Vora (herein after referred to as the Applicant) against the Order-in-Appeal F.No.. MUM-CUSTM-PAX-APP-1531/2021-22 through F.No. S/49-1228/2020 dated 18.01.2022 issued on 19.01.2022 passed by the Commissioner of Customs (Appeals), Mumbai – III.

2. Briefly stated the facts of the case are that on 14.10.2020, the Customs Officers at CSMI Airport had intercepted the applicant who had arrived from Kuwait onboard Emirates Flight No. 504 / 14.10.2020 and had passed through the green channel. A crude gold kada weighing 60 grams and valued at Rs. 2,71,332/- was recovered from the applicant.

3. The Original Adjudicating Authority (OAA) viz, Dy./Asstt. Commissioner of Customs, CSMI Airport, Mumbai vide Order-In-Original No. AirCus/49/T2/1762/2020/UNI-A dated 14.10.2020 ordered for the absolute confiscation of the crude gold kada weighing 60 grams and valued at Rs. 2,71,332/- under Section 111 (d) of the Customs Act,1962, and imposed a penalty of Rs. 30,000/- (Rupees Forty thousand only) under Section 112 of the 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 F.No.. MUM-CUSTM-PAX-APP-1531/2021-22 through F.No. S/49-1228/2020 dated 18.01.2022 issued on 19.01.2022, upheld the OIO in toto.

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

- 5.01 that before arrival in Mumbai, the applicant had been residing continuously in Dubai for 10 months and 23 days; that absolute confiscation was not sustainable; that applicant was an eligible passenger and had come to India after residing abroad for a period above six months; that they have relied upon a host of case laws;
- 5.02.that the decision of the AA cannot be made applicable to the case of the applicant.;
- 5.03. that Circular no. 495/5/92-Cus VI dated 10.05.93 cannot prevail over the statute; that Circulars are issued only to clarify the statutory provisions and cannot alter or prevail over the statutory provisions;
- 5.04. that the penalty imposed on the applicant was not sustainable;
- 5.05. that gold was not a prohibited item; that order of absolute confiscation of the gold under Section 111(d) was not sustainable; that the OAA had failed to exercise his power to allow redemption of the gold; that the OIA upholding the absolute confiscation was not sustainable;
- 5.06. that the applicant claimed ownership of the goods under absolute confiscation and prayed for the redemption of the gold kada on payment of reasonable fine and penalty;
- 5.07. that the applicant has relied on an exhaustive list of case laws to buttress his case on the above points.

Under the above facts and circumstances of the case, the Applicant has prayed to the Revision Authority to set aside the OIA and allow the gold kada to be released on payment of reasonable redemption fine and penalty and to drop the further proceedings.

6. Personal hearing in the case was scheduled for 18.10.2023, 25.10.2023. Shri. Prakash Shingrani, Advocate for the applicant appeared and submitted that applicant was wearing one gold kada which was for personal use. He further submitted that applicant has no past history of any offence. He requested to allow unconditional release of the gold kada.

7. At the outset, Government notes that the Applicant had brought the gold in the form of a kada and had not declared the same. A declaration as required under Section 77 of the Customs Act, 1962 had not been submitted.

The applicant admitted that he had not declared the gold in his possession and this action on his part indicated clearly that he had not harboured any intention to pay the Customs duty. Therefore, the confiscation of the gold is 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, however notes that the gold kada had not been ingeniously concealed. The ownership of the gold is not disputed. The quantity of gold under import is small. There are no allegations that the Applicant is a habitual offender and was involved in similar offences earlier. Government notes that in the OIO itself, it is recorded that the applicant had stayed abroad for a period of 10 months and 23 days. As per the notification no. 50/2017 -

Cus 30.06.2017, when passenger had stayed abroad for 6 months and more, he was eligible to bring gold and concessional duty would be applicable to him. Government notes that the aforesaid facts of the case indicate that it is a case of non-declaration of gold kada, 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 Customs Act, 1962 and while imposing quantum of penalty. Government is inclined to release the impugned gold on redemption fine.

12. In view of the foregoing paras, the Government finds that as the applicant had not declared the gold at the time of arrival, the confiscation of the gold was justified. However, the absolute confiscation of the same was not justified in view of the aforesaid facts and option to redeem the same on payment of redemption fine should have been allowed. Also, considering his stay abroad which has been recorded as 10 months and 23 days, the applicant was an eligible passenger entitled to concessional rate of duty.

13. The Government finds that neither original authority nor the appellate authority have given any findings on the applicant's submission of being eligible passenger, though the same has been recorded in the OIO and the inventory list. It is evident that by virtue of his continuous stay abroad, the applicant was eligible to bring upto 1 kg gold at concessional duty. Government observes that gold brought by such eligible persons is not prohibited, provided that payment of the concessional duty is made through foreign currency. The non-availability of foreign currency at the time of arrival was not an issue since, the same can be arranged later. Government is inclined to release the impugned gold on payment of a redemption fine.

14. Government finds that the OAA has imposed a penalty of Rs. 30,000/- under Section 112(a) and (b) of the Customs Act, 1962 which has been upheld by the AA. Considering that the applicant was eligible to bring gold, the

quantum of penalty is harsh and excessive and Government is inclined to reduce the same.

15. For the aforesaid reasons, Government therefore, modifies the impugned order passed by the Appellate authority. The absolute confiscation of the impugned crude gold kada weighing 60 grams, valued at Rs. 2,71,332/- is allowed to be redeemed on payment of a redemption fine of Rs. 50,000/- (Rupees Fifty Thousand only). The applicant being an eligible passenger by virtue of his stay abroad, is allowed to clear the impugned crude gold kada at concessional rate of duty. The penalty of Rs. 30,000/- imposed under section 112 of the Customs Act, 1962 is reduced to Rs. 20,000/- (Rupees Twenty Thousand only).

16. Revision Application is allowed on the above terms.


(SHRAWAN KUMAR)

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

ORDER No. 59/2024-CUS (WZ) /ASRA/MUMBAI DATED 18.01.2024.

To,

1. Shri. Mahmadi Abbasbhai Vora, Flat no. 204, Meena Tower, Sattubir Street, Navsari, Gujarat – 396 445.
2. Pr. Commissioner of Customs, CSMI Aiprot, Leverl – II, Terminal – 2, Sahar, Andheri East, Mumbai – 400 099.

Copy To,

1. Shri. Mahmadi Abbasbhai Vora, C/o. Shri. Prakash Shingrani, Advocate, New MIG Colony, 6th Floor, Vivek Bldg, Behind PF Office, Bandra (East), Mumbai – 400 051.

2. Sr. P.S. to AS (RA), Mumbai.
3. File Copy,
4. Notice Board.