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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. 371/367/B/WZ/2019-RA/520 : Date of Issue : 22.01.2023

ORDER NO. 61/2023-CUS (WZ)/ASRA/MUMBAI DATED 23.01.2023
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. 371/367/B/WZ/2019-RA

Applicant : Elrashid Mohammed Elzain.

Respondent : Principal Commissioner of Customs, CSMI Airport,
Sahar, Andheri East, Mumbai - 400 099.

Subject : Revision Application filed, under Section 129DD of the
Customs Act, 1962 against the Order-in-Appeal No.
MUM-CUSTM-PAX-APP-145/2019-20 dated 24.05.2019
issued on 17.06.2019 through F.No. S/49-664/2018
passed by the Commissioner of Customs (Appeals),
Mumbai - III, Marol, Mumbai - 400 059.

ORDER

This revision application has been filed by Elrashid Mohammed Elzain (hereinafter referred to as the Applicant) against the Order-in-Appeal No. MUM-CUSTM-PAX-APP-145/2019-20 dated 24.05.2019 issued on 17.06.2019 through F.No. S/49-664/2018 passed by the Commissioner of Customs (Appeals), Mumbai – III, Marol, Mumbai – 400 059.

2. Brief facts of the case are that on 27.09.2018, Customs Officers at the CSMI Airport, Mumbai had intercepted the applicant, who is a Sudanese national who had arrived from Dubai. Search of the applicant resulted in the recovery of 03 FM gold bars, collectively weighing 250gms and valued at Rs. 7,16,246/-.

3. The Original Adjudicating Authority (OAA), viz, Asstt. Commissioner of Customs, CSMI Airport, Mumbai vide his Order-In-Original no. Aircus/49/T2/620/2018-'B' dated 27.09.2018 ordered for the absolute confiscation of the 3 nos of impugned FM gold bars, collectively weighing 250gms and valued at Rs. 7,16,246/- under Section 111(d), of the Customs Act, 1962. Personal penalty of Rs. 50,000/- was imposed on the applicant under Section 112 of the Customs Act, 1962.

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-145/2019-20 dated 24.05.2019 issued on 17.06.2019 through F.No. S/49-664/2018 did not find it necessary to interfere in the impugned OIO and upheld the order passed by OAA.

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

- 5.01. the lower authorities had failed to appreciate that the applicant being a Sudanese national did not know the law of our country i.e. India and did not know English and could not read the boards put up at the Airport as the same were also only in English language.
- 5.02. the lower authorities had failed to appreciate that the 3 gold bars, collectively weighing 250gms and valued at Rs. 7,16,246/-was his personal gold and he possessed the invoice. He intended to make jewellery for his mother and sister and then take it back to Sudan.
- 5.03. the lower authorities had failed to appreciate that Applicant was also holding foreign currency to pay duty and he was ready and willing to pay the duty.
- 5.04. the lower authorities had failed to appreciate that applicant was not a carrier.
- 5.05. the lower authorities had failed to appreciate that gold was not in commercial quantity and it was meant for personal use.
- 5.06. the lower authorities had failed to appreciate that the gold belonged to the applicant and he had purchased it from his own personal savings.
- 5.07. the Appellate Authority had given the conclusion and findings which were contrary and inconsistent with the findings of Adjudicating Authority.
- 5.08. the lower authorities have decided the case on the basis of presumptions and assumptions only and not on the real and true facts put by the Applicant.
- 5.09. the orders of the lower authorities are illegal and bad in law and the same requires to be quashed and set aside.

The applicant has prayed to the revisionary authority to quash and set aside the order passed by both the lower authorities and to allow the 3 gold bars, collectively weighing 250gms and valued at Rs. 7,16,246/-to be re-shipped on nominal reshipment fine and to grant any other reliefs as deemed fit.

6. Personal hearing through the online video conferencing mode was scheduled for 23.09.2022. Smt. Shivangi Kherajani, Advocate for the

applicant appeared for personal hearing on 23.09.2022 and submitted that applicant came with small quantity of gold for personal use and was not concealed. She requested to allow re-export of gold on nominal fine and penalty.

7. The 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 that he was carrying dutiable goods and had he not been intercepted, would have walked away with the impugned 03 nos of FM gold bars without declaring the same to Customs. By his actions, it was clear that the applicant had no intention to declare the impugned gold to Customs and pay duty on it. The Government finds that the confiscation of the gold was therefore, 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. 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. The Government notes that the quantity of gold was small. The applicant has claimed ownership of the gold and his desire to take it back on his return trip. There are no allegations that the Applicant is a habitual offender and was involved in similar offences 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 Customs Act, 1962 and while imposing quantum of penalty. Government notes that the applicant who is a foreign national has prayed that the absolute confiscation be set aside and he be allowed to re-export the gold.

12. In a recent judgement passed by the Hon'ble High Court, Madras on 08.06.2022 in WP no. 20249 of 2021 and WMP No. 21510 of 2021 in r/o. Shri. Chandrasegaram Vijayasundaram + 5 others in a similar matter of Sri. Lankans wearing 1594 gms of gold jewellery (i.e. around 300 gms worn by each person) upheld the Order no. 165 – 169/2021-Cus (SZ) ASRA, Mumbai dated 14.07.2021 in F.No. 380/59-63/B/SZ/2018-RA/3716, wherein Revisionary Authority had ordered for restoration of OIO wherein adjudicating authority had ordered for the confiscation of the gold jewellery but had allowed the same to be released for re-export on payment of appropriate redemption fine and penalty.

13. 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 same was justified. However, considering the quantity of gold, the same not being concealed in an ingenious manner, applicant being a foreign

national, the absolute confiscation of the same was harsh and not justified. Considering the above facts, Government is inclined to modify the absolute confiscation upheld by the AA and allow the impugned gold jewellery to be re-exported on payment of a redemption fine.

14. Government finds that the penalty of Rs. 50,000/- imposed on the applicant under Section 112 of the Customs Act, 1962 is commensurate with the omissions and commissions committed and is not inclined to interfere in the same.

15. In view of the above, the Government modifies the order passed by the appellate authority and allows the applicant to redeem the 3 nos of impugned gold bars, collectively weighing 250 gms and valued at Rs. 7,16,246/- for re-export on payment of a redemption fine of Rs. 1,50,000/- (Rupees One Lakh Fifty Thousand only). The penalty of Rs. 50,000/- imposed on applicant under Section 112 of the Customs Act, 1962 by the OAA and upheld by the AA is sustained.

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


(SHRAWAN KUMAR)

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

ORDER NO. 6 (/2023-CUS (WZ)/ASRA/MUMBAI DATED 23.01.2023.

To,

1. Elrashid Mohammed Elzain, [Sudanese National; Address not available in the records; Service through Notice Board and his Advocate].
2. Pr. Commissioner of Customs, Adjudication Cell, Chhatrapati Shivaji Maharaj International Airport, Sahar, Andheri East, Mumbai – 400 099.

Copy to:

3. Smt. Shivangi Kherajani / Smt. Kiran Kanal, Advocates, Satyam, 2/5, R.C. Marg, Opp. Vijaya Bank, Chembur, Mumbai – 400 071.
4. Sr. P.S. to AS (RA), Mumbai.
5. File Copy.
6. Notice Board.