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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. 371/212/B/WZ/2021-RA / 6816 Date of Issue 14.09.2023

ORDER NO. 663/2023-CUS (WZ)/ASRA/MUMBAI DATED 14.09.2023
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.

F.No. 371/212/B/WZ/2021-RA

Applicant : Shri. Mohammed Mutwali Ali Mohammed

Respondent : Pr. Commissioner of Customs, Chhatrapati Shivaji
Maharaj International 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-1484/2020-21 dated 18.02.2021
issued on 23.02.2023 through F.No. S/49-941/2019
passed by the Commissioner of Customs (Appeals),
Mumbai - III.

ORDER

This revision application has been filed by Shri. Mohammed Mutwali Ali Mohammed (herein referred to as Applicant) against the Order-in-Appeal No. MUM-CUSTOM-PAX-APP-1484/2020-21 dated 18.02.2021 issued on 23.02.2023 through F.No. S/49-941/2019 passed by the Commissioner of Customs (Appeals), Mumbai – III.

2(a). Brief facts of the case are that on 10.08.2018, the Officers of Customs were observing the movement of the Applicant at baggage hall of CSMI Airport, Mumbai. Applicant had earlier arrived from Dubai by Jet Airways Flight No. 9W-0535/10.08.2018. The Applicant who was a Sudanese national opted for the green channel and when his checked-in baggage was being screened in the baggage screening machine [BSM], some dark striped images were seen. Here upon, the applicant was intercepted by the Customs Officers. Detailed examination of his checked-in baggage resulted in recovery of 'silver coloured metallic wire' which had been kept concealed under the 'silver coloured metallic inner frame of his trolley bag' and had been covered by silver coloured adhesive tape on the inner side of metallic frame of bag. The weight of the 'silver coloured metallic wire' purported to be of gold was 551 grams.

2(b). The 'silver coloured metallic wire' was assayed through a Government Approved Valuer who certified that the wire was of gold of 24KT purity, weighing 551 grams and valued at Rs. 15,03,376/-

2(b). The applicant in his statement under Section 108 of the Customs Act, 1962 admitted the possession, carriage, non-declaration and recovery of the silver coated gold wire; that he was the owner of the gold; that he had purchased the gold from a gold shop based at Khartoum; that he had

concealed the gold wire inside the metallic frame of his checked-in trolley bag with an intention to evade payment of Customs duty; that he was aware that import of gold without declaring to the authorities at the airport was an offence which was punishable under the Customs Act, that this was his first visit to India and was carrying gold for the first time.

2(c). Scrutiny of the arrival / departure details of the applicant revealed that he was a frequent traveller and had travelled 13 times through the CSMI Airport, Mumbai during the period 01.01.2017 to 11.09.2018.

3. After due process of investigations and the law, the Original Adjudicating Authority i.e. the Addl. Commissioner of Customs, CSMI Airport, Mumbai vide Order-In-Original No. ADC/AK/ADJN/68/2019-20 dated 17.06.2019 [DOI : 20.06.2019] issued through S/14-5-354/2018-19/Adjn (SD/INT/AIU/UNI/365/2018 AP'A), ordered for the absolute confiscation of the 551 grams of silver coated wire of gold, valued at Rs. 15,03,376/- under under Section 111 (d), (1) and (m) of the Customs Act, 1962. Further, a penalty of Rs. 1,75,000/- was imposed on the applicant under Section 112 (a) of the Customs Act, 1962.

4. Aggrieved by this Order, the applicant preferred an appeal before the appellate authority (AA) i.e. Commissioner of Customs (Appeals), Mumbai - III who vide Order-in-Appeal No. MUM-CUSTOM-PAX-APP-1484/2020-21 dated 18.02.2021 issued on 23.02.2023 through F.No. S/49-941/2019 observed that he did not find any reason to interfere in the OIO passed by the OAA and upheld the same in to-to.

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 hence, he could not state his intentions to Customs.
- 5.02. the lower authorities had failed to appreciate that the gold wire was his personal gold purchased by him to be given to his mother and sister after making designer jewellery on the occasion of Eid; that it was not meant for sale; that he had kept the same in his trolley bag;
- 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 that the lower authorities failed to appreciate that he was not a carrier for anybody;
- 5.05. that the lower authorities had failed to appreciate that there were no foreign markings on the gold;
- 5.06. the Appellate Authority had given the conclusion and findings which were contrary and inconsistent with the findings of Adjudicating Authority.
- 5.07. 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.
- 5.08. that the gold was not in commercial quantity.
- 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 gold wire, totally weighing 551 grams and valued at Rs. 15,03,376/-, to be re-shipped on nominal reshipment fine and to grant any other reliefs as deemed fit.

6. The applicant has filed an application for condonation of delay of 24 days. This delay has been attributed by the applicant was due to Covid condition and the prevalent lockdown in India.

7. Personal hearing was scheduled for 07.08.2023. Smt. Shivangi Kherajani, Advocate for the applicant appeared for personal hearing on appointed date i.e. 07.08.2023. Smt. Shivangi Kherajani, Advocate submitted that applicant is a foreign national and brought small quantity of gold for making jewellery. She requested to allow redemption of gold on reasonable RF and penalty re-export.

8. On the issue of condonation of delay, Government notes that the OIA dated 18.02.2021 was issued on 23.02.2021. The applicant in the FORM CA-8 has claimed that the OIA dated 18.02.2021 was received by him on or about 01.03.2021. Government notes that during this period, due to the Covid pandemic, the Apex Court had granted a moratorium for filing appeals etc. This moratorium was from 15.03.2020 to 28.02.2022 [Misc. Appln. No. 21/2022]. The applicant has filed the Revision Application on 06.07.2021. Considering the said moratorium period granted by the Apex Court, it is seen that the applicant had filed the revision application within time.

9. The Government has gone through the facts of the case and notes that the applicant who was a foreign national had not declared the gold while availing the green channel facility. The impugned gold had been ingeniously concealed inside the metallic frame of the trolley bag. Moreover, the gold of high purity was in the form of wire which had been silver coloured. Applicant was a foreign national. All this was adopted by the applicant with the express intention of hoodwinking the Customs and evading payment of Customs duty. When a doubt was raised at the BSM, the applicant did not disclose that he was carrying gold. The applicant clearly had failed to declare the goods to the Customs at the first instance as required under Section 77 of the Customs Act, 1962. As per the records, the applicant was a frequent traveller and had travelled to India many times, however, in his statement he had stated that this was his first visit

to India. Being a frequent traveller to India, he was well versed with the law and procedure. The concealment used reveals the mindset of the applicant to evade the payment of duty. It reveals that the act committed by the applicant was conscious and pre-meditated. Had he not been intercepted; the applicant would have gotten away with the gold concealed in the metallic frame of his trolley bag. Therefore, the confiscation of the gold was justified.

10. 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".

11. 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.

12. 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.

13. Government observes that the quantum of gold attempted to be smuggled into the country is not paramount, the manner in which the gold

was attempted to be brought into the country is vital. The impugned gold was ingeniously concealed inside the metallic inner frame of the trolley bag. The gold was in the form of wire which had been painted with a silver colour. The gold was of high purity. The applicant is a foreigner and a frequent traveller to India. This act was conscious, pre-planned and pre-meditated which reveals the intention of the applicant. The aforesaid quantity, purity, ingenious concealment, probates that he did not have any intention of declaring the gold to the Customs at the airport. All these have been properly considered by the Original Adjudicating Authority while ordering the absolute confiscation of the gold and appellate authority had rightly upheld the same.

14. 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, conscious, pre-planned and ingenious, this being a clear attempt to brazenly smuggle the impugned gold, 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 the impugned gold. But for the intuition and the diligence of the Customs Officer, the gold would have passed undetected. 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. Government is in agreement with the order of the AA absolutely confiscating the impugned gold. The absolute confiscation of the gold would act as a deterrent against such persons who indulge in such acts with impunity. Considering the aforesaid facts, Government is inclined not to interfere in the order of absolute confiscation passed by the AA.

15. Government notes that the penalty of Rs. 1,75,000/- imposed on the applicant under Section 112(a) of the Customs Act, 1962 by the OAA and upheld by the AA is commensurate with the omissions and commissions committed in carrying the gold in an ingenious manner and therefore, is not inclined to interfere in the same.

16. Since, the absolute confiscation of the gold is upheld, Government finds that the prayer of the applicant to allow the re-export of the gold becomes infructuous.

17. For the aforesaid reasons, the Government finds that the OIA passed by the AA is legal and proper and does not find it necessary to interfere in the same. The Revision Application filed by the applicant, fails.

18. Accordingly, for the reasons stated above, the Revision Application filed by the applicant is dismissed.


(SHRAWAN KUMAR)

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

ORDER No. 663 /2023-CUS (WZ)/ASRA/MUMBAI DATED 14.09.2023

To,

1. Shri. Mohammed Mutwali Ali Mohammed, Jabra, Shimal-6, H.No. 89, Khartoum, Sudan **(Since, address is located out of India - Service through noticeboard and Advocate on record).**
2. Pr. Commissioner of Customs, Adjudication Cell, Chhatrapati Shivaji Maharaj International Airport, Sahar, Andheri East, Mumbai - 400 099.

Copy to:

3. Smt. Shivangi Kherajani, Advocates, 501, Savitri Navbahar CHS, 19th Road, Khar West, Mumbai - 400 052.
4. Sr. P.S. to AS (RA), Mumbai.

5. File Copy.
6. Notice Board.

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