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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. 380/120/B/2016-RA

५/१२

Date of Issue

29.11.2018

ORDER NO. 892/2018-CUS (SZ)/ASRA/MUMBAI/ DATED 30.10.2018
OF THE GOVERNMENT OF INDIA PASSED BY SHRI ASHOK KUMAR
MEHTA, PRINCIPAL COMMISSIONER & EX-OFFICIO ADDITIONAL
SECRETARY TO THE GOVERNMENT OF INDIA, UNDER SECTION
129DD OF THE CUSTOMS ACT, 1962.

Applicants : Commissioner of Customs, Mangalore.

Respondent: Shri Madhusoodhanan Kunhi Parayil

Subject : Revision Application filed, under Section 129DD of
the Customs Act, 1962 against the Order-in-Appeal
No. 368/2016 dated 21.04.2016 passed by the
Commissioner of Customs (Appeals), Bangalore.



ORDER

This Revision Applications have been filed by Commissioner of Customs, Mangalore (herein referred to as Applicants) against the Order-in-Appeal No. 368/2016 dated 21.04.2016 passed by the Commissioner of Customs (Appeals), Bangalore.

2. The brief issue of the cases is that on 27.12.2014 Shri Madhusoodhanan Kunhi Parayil had arrived from Dubai from Dubai by Air India Flight NO. IX 814. While exiting through the Green Channel of the Customs area of the Mangalore International Airport, the officers of Customs intercept the Respondent as he had not declared any dutiable goods but left blank in the Customs Declaration Form. On examination of his baggage, it was found to contain personal effects, foodstuff and chocolates, but nothing objectionable. However, upon his personal search, it was found that he had secreted two numbers of yellow coloured metallic ring shaped object in his waist portion, underneath the grey coloured trouser worn by him and was also carrying Indian currency of Rs. 750/- and 200 UAE Dirham in his wallet. Shri Rathnakar, Jewellery Valuer of M/s Rathan Jewellers, Mangaluru reported that these two yellow coloured metallic ring shapped objects where that of 22 carat purity gold weighing 99.400 gms valued at Rs. 2,48,500/- (Rupees Two Lakhs Forty Eight Thousand Five Hundred Only).

3. After due process of the law, the Asstt. Commissioner of Customs, Mangalore International Airport vide Order-in-Original No. 20/2015 (AP) dated 06.05.2015 ordered absolute confiscation of the weighing 99.400 grams and valued Rs. 2,48,500/- (Rupees Two Lakhs Forty Eight Thousand Five Hundred Only) under Section 111(d) , (l) & (m) of the Customs Act, 1962 and imposed a personal penalty of Rs. 25,000/- (Rupees Twenty Five Thousand Only) under Section 111 of the Customs Act, 1962 and also imposed a penalty of Rs. 15,000/- (Rupees Fifteen Thousand Only) under Section 114AA of the Customs Act, 1962.



4. Aggrieved, the Respondent then filed appeal with the Commissioner of Customs, Bangalore who vide Order-in-Appeal No. 368/2016 dated 21.04.2016 allowed his Appeal and allowed release of the jewellery on payment of Redemption fine of Rs. 50,000/- (Rupees Fifty Thousand Only) and imposed Rs. 25,000/- (Rupees Twenty Five Thousand) under Section 112(a). Further the Commissioner(Appeal) held that penalty imposed under Section 114AA is not applicable due to the fact that no false declaration was made.

5. Aggrieved with the above order, the Department has filed this Revision Application on the following grounds:

- 5.1 The Respondent had just stayed for one day in UAE and he did not have the convertible foreign currency to pay the import duty. Thus he failed to comply with the conditions as per the saving clause 3(1)(h) of the Foreign Trade (Exemption from Application of Rules in Certain Cases) Order, 1993 and hence, the gold brought by him attracts the restrictions.
- 5.2 The shape of the gold pieces was like a big ring with average weight of around 49 grams and by no stretch of imagination it can be said as jewellery. Just because the gold is of 22.5 gold carat, it will not make the gold an ornament or a jewellery.. Thus, the gold becomes 'prohibited goods' and hence the same cannot be released on payment of redemption fine under Section 125 of the Customs Act, 1962.
- 5.3 The Commissioner (Appeals) has overlooked the fact that the Gold was concealed in the waist region and has come to the conclusion that the ornaments were worn on the body. The Commissioner (Appeals) has overlooked the admissions and confirmations made by the Respondent in his unretracted statements deposed before the customs officers.
- 5.4 The Commissioner (Appeals) has also overlooked the facts mentioned in the Mahazar drawn on 27/12/2014 before



independent witnesses. And also failed to take into cognizance that the Respondent is a frequent flier to foreign countries and of the source of finance for such frequent travelling.

5.5 He concealed the gold in his waist region and made an attempt to pass through green channel without payment of duty. Hence, the intention to smuggle the goods is very clear.

5.6 In the baggage declaration he purposely left the relevant columns blank which indicates that there is nothing to declare. This tantamounts to mis-declaration and the baggage declaration cannot be considered to be true in material particulars. He had admitted that he wanted to sell the gold brought by him to earn profit. Buying and selling is commonly called as trading and is a type of business. Further, the signing of the baggage declaration leaving certain columns blank, while concealing the gold in his waist region, does not absolve off his responsibilities. In view of this, the provisions of Section 114AA, ibid, are applicable and penalty is imposable.

6. In view of the above, the Respondent and his Advocate was called upon to show cause as to why the order in Appeal should be annulled or modified as deemed fit. In reply, the Respondent vide his letter dated 17.09.2018 stated that he do not wish to be heard before the Revision Application is decided and submitted his cross objections as follows :

- 6.1 When it is evident that Government vide Notification No. 12/2012-Cus dated 17.3.2012 considers importing gold is of public interest, to consider gold as prohibited item is not legal.
- 6.2 Section 125(1) stipulates that gold may be released on payment of RF. Considering the fact that the quantity involved was less than 100 gms, that there was no ingenious method of concealment and that the same was brought on personal earnings for the purpose of marriage. Hence the Order-in-Appeal is correct in law and justifiable.



- 6.3 On the question of concealment, keeping the gold rings in the pocket of trouser worn by the Respondent for safety reason cannot be treated as concealment.
- 6.4 Regarding the ground that Commissioner(Appeals) failed to take notice of the source of finance for frequent travels abroad, the Respondent stated that he was working in Dubai more than one year as in-charge of loading and unloading of steel scrap and when there was not work, he use to come to India and return back. Sometimes, he used to stay for days together and sometimes on reaching there, he was told that work will start few days only and at that time he use to return back. For his journey, the money was paid by his company M/s Anwin Steel Trading Co., Dubai. The gold rings were purchased from his earnings abroad, for his daughter who is of marriageable age. This explains his source and the Customs Act, 1962 does not stipulate that a passenger has to explain the source for the items brought by him from abroad.
- 6.5 On the question of imposition of penalty under Section 114AA, the Respondent submitted the two gold rings weighing less than 100 gms brought into India by him cannot be treated as transaction of business. Further, this being a case of import of goods, Section 114AA ibid is not applicable as the intention of inserting the said section is clearly brought out in Clause 24 of the Taxation Laws (Amendment) Bill, 2005 by the Finance Ministry.
- 6.6 Non filling of columns in the baggage declaration occurred due to the fact the he was intercepted before going to the Customs Counter and to treat it as tantamounting to mis-declaration and punishing under Section 114AA is erroneous for penalty under Section 112(a) has already been imposed.
- 6.7 He prayed, to reject the Revision Application filed by the department against the justifiable and correct decision of the learned Commissioner(Appeals)



7. A personal hearing in the case was scheduled held on 28.08.2018. and 29.9.2018. The Additional Commissioner of Customs, Mangaluru vide his letter C.No. VIII/28/180/2018 Cus Review dated 23.8.2018 stated that while deciding the Application filed by the Department, the ground of appeal submitted by the department may be taken on record. Since the Applicant and the Respondent are not available for the hearing, the case is being decided on merits.

8. The Government notes that the Respondent is holding an Indian Passport and is not a foreign national. Hence the findings of the Commissioner(Appeal) in this context is wrong. The Government observes that though the two gold rings was kept in the trousers worn by the Respondent, they were not declared by the Respondent and therefore the confiscation of the gold is justified. However, the two gold rings were not indigenously concealed. Import of gold jewellery for personal use is not restricted or prohibited and the Respondent is the owner of the two gold rings, There are no instances of any previous offences recorded against the Respondent. Mere non-submission of the declaration cannot be held against the Respondent. The absolute confiscation in such cases appears to be a harsh option and not justified.

9. Further, there are a catena of judgments which align with the view that the discretionary powers vested with the lower authorities under section 125(1) of the Customs Act, 1962 have to be exercised. In view of the above facts, the Government is of the opinion that absolute confiscation of the goods is harsh and unjustified and therefore a lenient view can be taken in the matter. The Government therefore is inclined to agree with the Order-in-Appeal in allowing the goods on redemption fine and reduced penalty. Further, the Government holds that no penalty is imposable under Section 114AA of the Customs Act, 1962.

10. Government holds that the redemption fine and penalties imposed in the Order in Appeal to be appropriate and therefore the impugned Order



Appeal is liable to be upheld and the Revision Application is liable to be dismissed.

11. The Government therefore upholds the impugned order of the Commissioner(Appeals), Order-in-Appeal No. 368/2016 dated 21.04.2016. Revision application is accordingly dismissed.

12. So, ordered.

(Signature)
30.10.18

(ASHOK KUMAR MEHTA)

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

ORDER No. ⁸⁹²892/2018-CUS (SZ) /ASRA/MUMBAI DATED 30.10.2018

To,

1. The Commissioner of Customs,
New Customs House,
Panambur, Mangalore - 10
2. Shri Madhusoodhanan Kunhi Purayil,
S/o Narayanan,
Panoth House, Naduvile Kunhi,
Eraman Desom,
Payannur, Kannur Dist.
Kerala 670 307.

Copy to:

1. Commissioner of Customs(Appeals), C.R. Building. P.B. No. 6500,
Queen's Road, Bangalore 560 001.
2. Sr. P.S. to AS (RA), Mumbai.
3. Guard File.
4. Spare Copy.

