

REGISTERED
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. 371/174/B/2021-RA / 815 :

Date of Issue: 01.02.2024

ORDER NO. 122 /2024-CUS (WZ)/ASRA/MUMBAI DATED 31.01.2024 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.

Applicants : Mrs. Jayshreeben Nileshkumar Ghariwala

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

Subject : Revision Application filed, under Section 129DD of the Customs Act, 1962 against the Order-in-Appeal No. MUM-CUSTM-PAX-APP-2099/2020-21 dated 25.03.2021 passed by the Commissioner of Customs (Appeals), Mumbai-III.

ORDER

This Revision Application has been filed by Mrs. Jayshreeben Nileshkumar Ghariwala (herein referred to as the "Applicant") against the Order-in-Appeal No.MUM-CUSTOM-PAX-APP-2099/2020-21 dated 25.03.2021 passed by the Commissioner of Customs (Appeals), Mumbai-III.

2. Brief facts of the case are that the AIU officers intercepted the Applicant, who had arrived from Dubai by Flight No. 9W-537 on 07.03.2015, after she had cleared herself through Customs Green Channel. The passenger was found in possession of Customs Declaration Form vide which the column No.9, i.e., the declared value of the imported goods has been kept blank. The personal search of the passenger resulted in recovery of 20 gold bars of 10 tolas each totally weighing 2333 grams which were concealed in waist belt worn by the passenger and valued at Rs.57,57,937/-. The case was adjudicated vide Order-in-Original No.ADC/RR/ADJN/226/15-16 dated 03.11.2015 and the impugned gold was confiscated under Section 111 (d), (1) & (m) with an option to redeem the same on payment of a fine of Rs. 10,00,000/- under section 125 (1) of the Customs Act, 1962 Personal Penalty of Rs.5,75,000/- was also imposed on the Applicant under Section 112 (a) and (b). The Department (Revenue) preferred an appeal against the said Order-in-Original dated 03.11.2015 pursuant to Review Order vide F. No. Air -Cus/ Review/915/2015-16 dated 29.01.2016 as per provisions 129 (D) (2) of Customs Act, 1962 passed by Principal Commissioner of Customs (Airport), C.S.I. Airport, Mumbai. The Appeal filed by the Revenue was allowed and the case was remanded back to the Original Authority for fresh Adjudication in light of the Order-in-Appeal No. MUM-CUSTOM-PAX-APP-1020/17-18 dated 19.02.2018.

3. The Adjudicating Authority vide Order-in-Original No.ADC/AK/ADJN/157/2019-20 dated 27.09.2019 confiscated the impugned

gold absolutely under Section 111(d)(1) & (m) of Customs Act, 1962 and imposed personal penalty of Rs.5,75,000/- on the Applicant under Section 112 (a) and (b) of Customs Act, 1962.

4. Aggrieved, with this Order, the Applicant filed an appeal before the Appellate Authority (AA) viz, Commissioner of Customs (Appeals), Mumbai-III, who vide impugned Order-in-Appeal upheld the order passed by the OAA.

5. Aggrieved with the above order, the Applicant has 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 main points:

5.1 Order of absolute confiscation of gold already released for home consumption on payment of fine, penalty and duty is not sustainable: The Applicant submits that when the O-i-O dated 3-11-15 was issued, she got the gold released to her on payment of fine, penalty and duty. Since the goods against which order of absolute confiscation has been upheld in the impugned O-i-A dated 25-3-2021 are not available for confiscation, the order of absolute confiscation issued by the Respondent is not sustainable.

5.2 when goods are not available, option to redeem can't be given, therefore confiscation not possible. Only goods imported or attempted to be exported can be confiscated, goods cleared for export/home consumption cannot be confiscated.

5.4 Applicant has placed reliance on various case laws.

5.5 Gold is not a prohibited item. Gold imported by the Applicant was not liable for absolute confiscation.

5.6 Gold is not 'prohibited goods', but only 'restricted goods'. Import of gold is no longer prohibited and therefore, it is the duty on the part of the adjudicating authority, if he is of the view that it is liable for confiscation, to permit its redemption on appropriate fine. Many adjudicating authorities and appellate authorities commit an error while differentiating between restriction and prohibition in import. One of the main objectives of prohibition of any import into India is that import of such goods should not weaken the economic status of the country. Restriction of import does not mean prohibition to import.

5.7 Under the above circumstances of the case, the applicants prayed to Revision Authority to set aside the impugned order in appeal and further proceedings against her may be dropped.

6. Personal hearing in the case was scheduled on 17.08.2023. Shri. Prakash Shingarani, Advocate for the applicant appeared for personal hearing and submitted that applicant brought some quantity of gold for personal purpose. He further submitted that initially original authority has correctly allowed redemption of gold on reasonable redemption fine and penalty. He requested to restore the earlier OIO as the same is legal and proper.

7. The Government has gone through the facts of the case and notes that the applicant had not declared the gold bars while availing the green channel facility. The applicant was found in possession of Custom declaration Form wherein she had not declared the impugned gold bars. The impugned gold was recovered only during the personal search of the applicant. The quantity of gold was quite substantial and the gold was of high purity, indicates that the same was for commercial use. 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. It reveals that the act committed by the applicant was conscious and pre-

meditated. Had she not been intercepted; the applicant would have gotten away with the gold bars. Therefore, the confiscation of the gold 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 ‘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 notes that the quantity of gold bars is quite substantial. Had it not been due to the alertness and diligence of the officers manning the exit gate, the applicant would have gotten away with the impugned gold bars without discharging the duty. The Applicant has pleaded for setting aside the Order passed by the Lower Adjudicating Authority which has been upheld by the Appellate Authority. On considering quantum, form, nature of concealment and clear attempt to smuggle gold, plea of the applicant does not deserve consideration. 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 and judicious. This also would act as a deterrent for attempting to smuggle the gold. Further, it has been recorded in the impugned OIA that a case for smuggling of 7375 grams gold was also booked against her husband on the same date. More so, the applicant has failed in to submit the purchase invoice of the impugned gold. The aforesaid circumstances of the case probates that the applicant had no 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 upheld the same.

12. 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 and pre-meditated, quantity and type of gold being for commercial use, 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 OAA 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.

13. 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. Government does not find it necessary to interfere with the same.

14 Government finds that the penalty of Rs. 5,75,000/- imposed under Section 112 (a) and (b) of the Customs Act 1962 is appropriate and commensurate with the omissions and commissions of the Applicant.

15. Accordingly, the Revision Application filed by the applicant is disposed of as above

(SHRAWAN KUMAR)

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

ORDER NO. 122 /2024-CUS (WZ)/ASRA/MUMBAI DATED 31.01.2024

To,

1. Mrs. Jayshreeben Nileshkumar Ghariwala, 203, Parth Apartment, Sumul Diary Road, Opp. Alkapuri, Surat, Gujrat-359008.
2. The Pr. Commissioner of Customs, C.S.I Airport, Terminal 2, Level-II, Sahar, Andheri (East), Mumbai 400 099.
3. The Commissioner of Customs (Appeals), Mumbai-III, 5th Floor, Avas Corporate Point, Makwana Lane, Behind S.M.Centre, Andheri Kurla Road, Andheri (East), Mumbai 400 059.

Copy to:

1. Shri. P.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.

