

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. 373/139/B/16-RA

2959

Date of Issue

02/06/21

ORDER NO. 124 /2021-CUS (SZ)/ASRA/MUMBAI DATED 12.5.2021 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 : Smt. Kanimathul Rahuma Dawood

Respondent : Commissioner of Customs, Bangalore.

Subject : Revision Application filed, under Section 129DD of the
Customs Act, 1962 against the Order-in-Appeal No. 374-
376/2016 dated 21.04.2016 passed by the Commissioner of
Customs (Appeals), Bangalore.

ORDER

This revision application has been filed by Smt. Kanimathul Rahuma Dawood (herein after referred to as the Applicant) against the order in appeal Order-in-Appeal No. 374-376/2016 dated 21.04.2016 passed by the Commissioner of Customs (Appeals), Bangalore.

2. Briefly stated the facts of the case are that the Applicant, a Sri Lankan citizen was intercepted when she arrived at the Kempegowda International Airport on 11.10.2014. It was noticed from her passports that she was a frequent passenger using both Chennai and Bangalore airports. Scanning of her hand baggage indicated heavy metals. On examination the officers recovered two gold chains with pendants totally weighing 716 grams and valued at Rs. 19,51,100/- (Rupees Nineteen lacs Fifty one thousand one hundred). The Applicant informed that she had brought the gold for sale in India and to purchase textiles with the sale proceeds.

3. The Original Adjudicating Authority vide Order-In-Original No. 257/2014 – Cus ordered absolute confiscation of the impugned gold under Section 111 (d) (i) (l) & (m) of the Customs Act,1962, and imposed penalty of Rs. 3,91,000/- (Rupees Three lacs Ninety thousand) under Section 112 (a) of the Customs Act, 1962. A penalty of Rs. 1,96,000/- (Rupees One lac Ninety six thousand) under Section 114AA of the Customs Act, 1962.

4. Aggrieved by the said order, the applicant filed appeal before the Commissioner (Appeals) who vide Order-In-Appeal No. 374-376/2016 dated 21.04.2016 rejected the appeal of the Applicant.

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

5.1 The order passed by the Respondent is opposed to the facts of the case and one, which can be termed as not appreciating the legal requirements and hence oppose to the law.

5.2 The respondent as erred in passing the impugned order on the basis of assumptions and presumptions. The seizure made by the respondent is illegal, since she was taken into illegal custody on 11/10/2014 at about 3:30 am, at the arrival hall and the mahazar was drawn at 3:30 am on 11/10/2014 and ended at 09:00 hrs on 11/10/2014, as stated in para-7 of the remand application and the statements was recorded on 11/10/2014 at 03:25 hrs and

was produced before the Hon'ble court on 12/10/2014 at 12:30 pm who was remanded to judicial custody and released on bail on 13/10/2014.

5.3 The Applicant has immediately retracted her statements. The applicant submits that the two gold chains with pendants are of personal and of daily use. And the two gold chains with pendants was worn by her on her body and on her arrival at Bangalore from the flight, she had removed the two gold chains with pendants and had kept it in her hand bag only because of her safety.

5.4 The Respondent has erred in not considering the facts that no show-cause notice was issued and the matter was adjudicated very hastily without giving a proper opportunity to the appellant to effectively reply and the respondent has failed to appreciate that the goods under seizure were gold ornaments i.e. two gold chains with pendants in the handbag but were ornaments in the mode chains, weighting 716.00 Grams. The said gold seized are gold ornaments of the appellant, of her daily personal use and are not new but 8 to 9 months old.

5.5 The applicant submits that the gold under the seizure are of personal and of daily use and submits that she is a foreigner i.e. Srilankan and did not know nor had the knowledge that she cannot bring gold ornaments while arriving into the India, as per the Law in India.

5.6 The applicant submits that the customs officers did not even tell her nor warn her, as she was a foreign tourist entering India cannot bring gold ornaments or carry them. But just seized the gold and arrested her. She told the customs officers that I am ready to pay the applicable duty and if not the same may be retained by them and returned when leaving the country, but the officers failed to listen.

5.6 Neither the Custom Act nor baggage rules 1998 stipulate that a foreign tourist entering India cannot wear gold ornaments on its person. Further no such warning is provided to foreign tourists, thus foreign tourists, thus foreign tourist entering into India are in a boundless sea of uncertainty as to whether same is prohibited or not. Thus, state has duty to specify with a degree of certainty as what is prohibited and what is not, without leaving it to guesswork by the foreign tourist.

5.7 The Applicant submit that under section 125 of the customs Act When even confiscation of any good is authorized by this act, the officer adjudging it may, in the case of any goods, the importation or exportation whereof is

prohibited under this act or under any other law for the time being in force, and shall, in the case of any other goods, give to the owner of the goods or where such owner is not known, the person from whose possession or custody been such goods have seized. the same may be retained by them and return it back while leaving the country/ India.

5.8 The applicant further submits that, instead of affording an opportunity to the appellant to explain the facts and circumstances of the case, the authority concerned arrived at a purported finding in the Order-In-Original, which is totally arbitrary, perverse and unjust and have been erroneously made with total non application of mind.

5.9 Further section 125 of the act leaves option to the officer to grant the benefit or not so far as goods whose import is prohibited but no such option is available in respect of goods which can be imported, but because of the method of importation adopted become liable for confiscation. A perusal of the order of the deputy collector of customs shows him to have not kept this discretion in mind and to have straightaway proceeded to confiscate the gold without grant of opportunity to the him to pay in lieu of confiscation.

5.10 The Applicant submit that the department cannot argue that the appellant is not the owner of the gold or carrier. The Customs Act clearly stated that under section 125 of the Customs Act, When even confiscation of any good is authorized by this act, the officer adjudging it may, in the case of any goods, the importation or exportation whereof is prohibited) under this act or under any other law for the time being in force, and shall, in the case of any other goods, give to the owner of the goods, where such owner is not known, the person from whose possession custody been such goods have seized.

5.11 The Applicant submit that the adjudication authority should excise power given under section 125 of the customs act. Further the release of the goods on payment of duty is not against the policy or Act. Further, I am ready to comply the order of adjudication if re export or release order is passed. Applicant submits that the gold sold during the pendency of a the appeal before Commissioner's (Appeals) which is against the existing departmental instructions is not justified. Therefore I am requesting the Honble adjudication authority to instruct the concern authority not to dispose the gold till the adjudication, appeal and revision proceedings are over.

5.12 The applicant further submits that the Additional Commissioner of Customs at Para 5.2 in Order-In-Original states that the goods are deemed to be imported into India. The department has not adduced any evidence to prove that the goods are illicitly imported in contravention of Section 11 of the Customs Act. The department has failed to discharge the burden cast upon them. The applicant submits that mere foreign origin of the goods does not indicate that the goods are smuggled. The entire case is based on mere suspicion, assumption and presumption and on surmise and conjunctions. It is settled law that suspicion however grave is not a substitute for proof.

5.13 The Applicant cited case laws in her favour and in view of the above the Order in Appeal may be set aside and orders issued to for the release of the gold and refund the penalty deposited in the interest of justice and equity.

6. Personal hearings in the case were scheduled online on 08.12.2020, 15.12.2020, 22.12.2020 and on 25.02.2021. However neither the Applicant nor the Respondents attended the hearings the matter is therefore being decided on merits.

7. At the outset Government notes that the Applicant being a frequent traveller to India the Applicant should have been aware that gold has to be mandatorily declared as gold is not a freely importable item. A proper declaration was not filed by the Applicant as required under section 77 of the Customs Act, 1962 and therefore the confiscation of the gold is justified.

8. Government however notes that the Applicant is a foreign national. The impugned gold jewellery was carried by her in her handbag and therefore was not ingenuously concealed. The ownership of the gold is not disputed. The quantity of gold jewellery under import is not very large. There are no allegations that the Applicant is a habitual offender and was involved in similar offences earlier in spite of being a regular visitor to India.. The facts of the case indicate that it is more of a case of non declaration of gold jewellery, rather than a case of smuggling for commercial considerations. Under the circumstances, keeping the seriousness of the misdemeanor in mind, absolute confiscation and dispossessing the Applicant of the gold jewellery is harsh and unjustified. The Apex court in the case of Hargovind Dash Vs Collector of Customs 1992 (61) ELT 172 (SC) and the several other cases has pronounced that a quasi judicial authority must exercise discretionary powers in a judicious manner and not in arbitrary manner. In the case of Vigneswaran vs UO1 in W.P. 6281 of 2014 (I) dated 12.03.2014, the High Court of Kerala has directed the revenue to unconditionally return the gold to the petitioner, a foreign national, observing that only because of not declaring the gold, the absolute confiscation is bad

under law, further stating, the only allegation is that she (the passenger) a foreigner, did not declare the gold.

9.1 Under the circumstances, the absolute confiscation of the gold is required to be set aside and the impugned gold jewellery is required to be allowed redemption for re-export on payment of suitable redemption fine and penalty. The order of the Appellate authority is liable to be set aside.

9.2. In addressing the issue of penalty imposed under section 114AA, Government relies on the observations of the Hon'ble High Court of Karnataka in the case of Khoday Industries Ltd. Vs UOI reported in 1986(23)ELT 337 (Kar), which states that "*Interpretation of taxing statutes – one of the accepted canons of Interpretation of taxing statutes is that the intention of the amendment be gathered from the objects and reasons which is a part of the amending Bill to the Finance Minister's speech*". The objective of introduction of Section 114AA in Customs Act is explained in para 63 of the report of the Standing Committee of Finance (2005-06) of the 14th Lok Sabha which states.....

" Section 114 provides for penalty for improper exports of goods. However, there have been instances where export was on paper only and no goods had ever crossed the border. Such serious manipulations could escape penal action even when no goods were actually exported The lacuna has an added dimension because of various export incentive schemes. To provide for penalty in such cases of false and incorrect declaration of material particulars and for giving false statements, declaration, etc. for the purpose of transaction of business under the Customs Act, it is proposed to provide expressly the power to levy penalty up to five times the value of the goods. A new Section 114AA is proposed to be inserted after Section 114A."

Thus Government concludes, penalty under Section 112 is imposable on a person who has made the goods liable for confiscation. But there could be situation where no goods ever cross the border. Since such situations were not covered for penalty under Section 112/114 of the Customs Act, 1962, Section 114AA was incorporated in the Customs Act by the Taxation Laws (Amendment) Act, 2006. Hence, once the penalty is imposed under Section 112, then there is no necessity for a separate penalty under section 114AA for the same act.

10. In view of the above facts, The Government sets aside impugned Order in Appeal, the impugned gold jewellery is allowed to be redeemed for re-export on payment of Rs.

6,00,000/- (Rupees Six Lakhs). The penalty of Rs. 3,91,000/- (Rupees Three lacs Ninety one thousand) imposed is maintained. The penalty of Rs. 1,96,000/- (Rupees One lakh Ninety six thousand) imposed under section 114AA of the Customs Act, 1962 is set aside.

11. Revision application is disposed of on above terms.

Shrawan Kumar
12/05/21

(SHRAWAN KUMAR)
Principal Commissioner & ex-officio
Additional Secretary to Government of India

ORDER No. 24/2021-CUS (SZ) /ASRA/

DATED 20.05.2021

To,

1. Smt. Kanimathul Rahuma Dawood, No. 130/1, Brindyabath, Velampatti, Colombo, Sri Lanka.

Copy To,

1. The Commissioner of Customs, Kempegowda International Airport, C. R. Building, Queens Road, Bangalore.
2. Shri B. S. Girish, Advocate, No. 2, 1st Cross Road, *th Main, Vasanthnagar, Bangalore-560 053.
3. Sr. P.S. to AS (RA), Mumbai.
4. Guard File.
- ✓ 5. Spare Copy.