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GOVERNMENT OF INDIA
MINISTRY OF FINANCE
(DEPARTMENT OF REVENUE)
8th Floor, World Trade Centre, Centre – I, Cuffe Parade,
Mumbai-400 005

F.No. 371/137/B/2022-RA/635 : Date of Issue: 01.02.2023

ORDER NO. 144/2023-CUS (WZ)/ASRA/MUMBAI DATED 30.01.2023 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.

Applicants : Mr. Jean Claude Kazadi Landu

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-695/20-21 dated 22.09.2021 [F.No. S/49-1076/2020] [Date of issue: 23.09.2021] passed by the Commissioner of Customs (Appeals), Mumbai-III.

ORDER

This Revision Application has been filed by Mr. Jean Claude Kazadi Landu (herein referred to as the "Applicant") against the Order-in-Appeal No. MUM-CUSTM-PAX-APP-695/20-21 dated 22.09.2021 [F.No. S/49-1076/ 2020] [Date of issue: 23.09.2021] passed by the Commissioner of Customs (Appeals), Mumbai-III.

2. Brief facts of the case are that on 16.08.2019, the Customs Officers at CSI Airport Mumbai noticed suspicious activity of one passenger Mrs. Jean Claude Kazadi Landu, the applicant, holding Congo passport number OP0326588 and he was diverted for detailed examination from the Red Channel counter No. 6-10. He had arrived in Mumbai from Lubumbashi, Congo via Adis Ababa by Ethiopian Airways Flight No. ET 610 dated 16.08.2019. The applicant was then questioned if he was carrying any contraband/ dutiable goods /foreign/ Indian currency in her carriage or on her person to which he replied in negative. During personal search the Officers recovered 02 gold kada and 01 Gold ring totally weighing 678 gms and valued at Rs. 20,54,526/-. The same were seized by the officers in the reasonable belief that the same was smuggled into India in a clandestine manner in contravention of the provisions of the Customs act, 1962.

3. The Original Adjudicating Authority (OAA) viz the Additional Commissioner of Customs, C.S.I. Airport, Mumbai, vide his OIO no. ADC/SKR/ADJN/65/2020-21 dated 29-07-2020 ordered absolutely confiscation of the recovered 02 gold kada and 01 Gold ring totally weighing 678 gms and valued at Rs. 20,54,526/- under Section 111 (d), (l) and (m) of Customs Act, 1962. A personal penalty of Rs 1,00,000/- under section 112(a) & (b) of the Customs Act, 1962 was also imposed on the applicant.

4. Aggrieved, with this Order, the Applicant filed an appeal before the Appellate Authority (AA) viz, Additional Commissioner of Customs (Appeals), Mumbai-III, who vide Order-in-Appeal No. MUM-CUSTM-PAX-APP-695/20-21 dated 22.09.2021 [F.No. S/49-1076/ 2020] [Date of issue: 23.09.2021] upheld the order passed by the OAA.

5. Aggrieved by this Order, the applicant has filed this revision application on the undermentioned grounds of revision;

5.1 That the jewellery seized from the applicant were his personal jewellery and not liable for confiscation.

5.2 That the Applicant is a tourist and was eligible to import personal jewellery.

5.3 That the applicant was not involved in smuggling activity

5.4 That the goods were not dutiable.

5.5 That the Gold is not a prohibited item and hence not liable for confiscation

5.6 That the Applicant claims the ownership of the goods and redemption of the gold under absolute confiscation for re-export. That the Gold brought by the Applicant is neither restricted nor prohibited and can be released for Re-export under section 125 of the Customs Act, 1962.

5.7 The applicant has relied to various case laws in support of his submissions.

5.8 The applicant has requested to release the jewellery for re-export and to drop further proceedings against him.

6. Personal hearing in the matter was scheduled for 1.11.2022 and 15.11.2022. Shri Prakash Shingarani, Advocate of the applicant, appeared for the hearing and submitted that the applicant has come to India for medical

treatment and brought gold jewellery for personal use. He requested to allow re-export of the same.

7. The Government has gone through the facts of the case, and observes that the applicant had failed to declare the impugned gold carried by him to the Customs at the first instance as required under Section 77 of the Customs Act, 1962. The applicant had not disclosed that he was carrying the dutiable goods. By not declaring the gold carried by him, the applicant clearly revealed his intention not to declare the gold and pay Customs duty on it. The Government finds that the confiscation of the impugned gold was therefore justified.

8.1 The relevant sections of the Customs Act are reproduced below:

Section 2(33)

"prohibited goods" means any goods the import or export of which is subject to any prohibition under this Act or any other law for the time being in force but does not include any such goods in respect of which the conditions subject to which the goods are permitted to be imported or exported have been complied with"

Section 125

"Option to pay fine in lieu of confiscation. - (1) Whenever confiscation of any goods is authorised 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 such goods have been seized, an option to pay in lieu of confiscation such fine as the said officer thinks fit :

Provided that where the proceedings are deemed to be concluded under the proviso to sub-section (2) of section 28 or under clause (i) of sub-section (6) of that section in respect of the goods which are not prohibited or restricted, the provisions of this section shall not apply :

Provided further that, without prejudice to the provisions of the proviso to sub-section (2) of section 115, such fine shall not exceed the market price

of the goods confiscated, less in the case of imported goods the duty chargeable thereon.

(2) Where any fine in lieu of confiscation of goods is imposed under sub-section (1), the owner of such goods or the person referred to in sub-section (1), shall, in addition, be liable to any duty and charges payable in respect of such goods.

(3) Where the fine imposed under sub-section (1) is not paid within a period of one hundred and twenty days from the date of option given thereunder, such option shall become void, unless an appeal against such order is pending."

8.2 It is undisputed that as per the Foreign Trade Policy applicable during the period, gold was not freely importable and it could be imported only by the banks authorized by the RBI or by others authorized by DGFT and to some extent by passengers. Therefore, gold which is a restricted item for import but which was imported without fulfilling the conditions for import becomes a prohibited goods in terms of Section 2(33) and hence it liable for confiscation under Section 111(d) of the Customs Act.

9. 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" in terms of Section 2(33) and hence it is liable for confiscation under Section 111(d) of the Customs Act, 1962.

10. 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.

11. 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."

12. In the instant case, the quantum of gold involved is small i.e 678 grams and is not of commercial quantity. The quantum of the same does not suggest the act to be one of organized smuggling by a syndicate. Government, notes that the impugned gold were not ingeniously concealed, it was carried in person. The applicant has claimed ownership of the gold for personal use and his desire to take it back. Government, notes that there were 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 misdemeanor is required to be kept in mind when using discretion under Section 125 of the 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.

13. 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 respect of Shri Chandrasegaram Vijayasundaram and 5 others in similar matter of Shri Lankans wearing 1594 grams of gold jewellery (i.e. around 300 grams 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.

14. 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 02 gold kada and 01 Gold ring totally weighing 678 gms, to be re-exported on payment of redemption fine.

15. The Applicant has also pleaded for reduction of the penalty imposed on him. The value of the gold in this case is Rs. 20,54,526/-. Government finds that the penalty of Rs. 1,00,000/- imposed on the Applicant under Section 112(a) & (b) of the Customs Act, 1962 is appropriate and commensurate to the omissions and commissions of the Applicant.

16.1 In view of the above, the Government modifies the impugned order passed by the Appellate authority and allows the applicant to redeem 02 gold kada and 01 Gold ring totally weighing 678 gms and valued at Rs. 20,54,526/- for re-export on payment of redemption fine of Rs.4,00,000/- (Rupees Four Lakhs Only).

16.2 The penalty of Rs. 1,00,000/- imposed by the OAA, under Section 112(a) and (b) of the Customs Act, 1962, being appropriate and commensurate

with the omissions and commissions of the Applicant and upheld by the AA, is sustained.

17. The Revision Application is disposed of on the above terms.

Shrawan 30/1/23

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

ORDER NO. 144/2023-CUS (WZ)/ASRA/MUMBAI DATED 30.01.2023

To,

1. Mr. Jean Claude Kazadi Landu, 558, Mizumi, Labumbashi, Congo
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. Mr. Jean Claude Kazadi Landu, C/o Advocate Prakash K. Shingarani, 12/334, Vivek, New MIG Colony, Bandra East, Mumbai-400051
2. Sr. P.S. to AS (RA), Mumbai.
3. File Copy.
4. Notice Board.