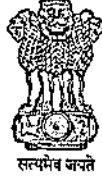


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GOVERNMENT OF INDIA  
MINISTRY OF FINANCE  
(DEPARTMENT OF REVENUE)

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Mumbai-400 005

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F.No. 380/33/B/15-RA / 3228

Date of Issue 28.06.2021

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ORDER NO. 149/201 CUS (SZ)/ASRA/MUMBAI DATED 17.06.2021 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.

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Applicant : Commissioner of Customs, Chennai.

Respondent : Smt. Shaik Shamim Banu

Subject : Revision Application filed, under Section 129DD of the Customs Act, 1962 against the Order-in-Appeal C. Cus-I No. 400/2015 dated 06.08.2015 and 331/2015 dated 24.06.2015 passed by the Commissioner of Customs (Appeals-I), Chennai.

ORDER

This revision application has been filed by Commissioner of Customs, Chennai (herein referred to as Applicant department) against the order C. Cus-I No. 400/2015 dated 06.08.2015 passed by the Commissioner of Customs (Appeals-I), Chennai.

2. On 14.05.2014 the officers of AIU intercepted the respondent as she was walking out of the green channel declaring the value of the dutiable goods carried by her valued at Rs. 4000/-. A personal examination of the respondent resulted in the recovery of gold bars and jewelry totally weighing 1375 gms, valued at Rs. 35,30,821/- ( Rupees Thirty five lakhs Thirty thousand Eight hundred and Twenty one). The gold was recovered from her brassiere worn by her. In her statements recorded immediately after seizure she informed that the her husband, was working in Kuwait, as a driver for the last thirty years and the gold was given to her by her husband to be handed over to a person who would in turn give her Rs.1,00,000/-.

3. After due process of the law vide Order-In-Original No. 17/20.04.2015 the Original Adjudicating Authority ordered confiscation of the gold, but allowed redemption for re-export on payment of Rs. 17,50,000 (Rupees Seventeen lakhs Fifty thousand) as redemption fine and imposed penalty of Rs. 2,50,000/- ( Rupees Two lakhs Fifty thousand) under Section 112 (a) and (b) of the Customs Act,1962 on the respondent.

4. Aggrieved by this order the respondent and the applicant department both filed appeals with the Commissioner of Customs (Appeals), Commissioner (Appeals) vide his order C. Cus-I No. 331/2015 dated 24.06.2015 reduced the redemption fine to Rs. 7,00,000/- ( Rupees Seven Lakhs ) and also reduced the penalty to Rs. 1,00,000/- ( Rupees One Lakh ). The Applicant department filed their Appeal before the Commissioner of Customs (Appeals) on 09.07.2015, Commissioner (Appeals) vide his order C.

Cus-I No. 400/2015 dated 06.08.2015 dismissed the appeal as infructuous as the departmental Appeal was filed after issue of the Order in Appeal dated 24.06.2015.

5. Aggrieved with the above order the Applicant department had filed this this revision application interalia on the grounds that;

5.1 That the Orders-in-Appeal are neither legal nor proper in as much as the passenger had attempted to smuggle the gold by way of concealment and by way of non-declaration knowing well that she was not an eligible passenger to import gold and thus had a culpable mind to smuggle them into India without payment of duty.

5.2 That the passenger has not declared to the Customs officer, the possession of gold which was concealed under brassier worn by her. The passenger, has contravened Sections 77 and 11 of Customs Act, 1962 read with Regulation 3(1) of Foreign Exchange Management (Export and import of Currency Regulations 2000 which made the smuggled gold liable for absolute confiscation under Section 111(d) and (l) of the Customs Act, 1962. The appellate authority without considering the following aspects has given an option to redeem the gold on payment of redemption fine of Rs.7,00,000/- and penalty of Rs.1,00,000/- for re-export.

5.3 That the eligibility of a passenger to clear the gold imported by him is covered under Notification No. 12/2012-Cus dated 17.3.2012. The said notification states that the passenger of Indian origin or a passenger holding a valid Indian Passport issued under the Passport Act, 1967 who is coming to India after a period of stay not less than six months of stay abroad and short visits, if any, made by this eligible passenger during the above said period of six months shall be ignored if the total duration of stay on such visit does not exceed thirty days can bring gold upto 1 kg. and the duty has to be paid @ 10% on the value of the gold and the duty has to be paid in foreign currency.

5.4 That Rule 6 of Baggage Rules, 1998 states that a passenger who stayed abroad for more than one year can bring gold jewellery (22 carat ) to an extent of Rs. 1 lakh(female passenger) and to an extent of Rs. 50,000/- (male passenger) and the same can be cleared from Customs without payment of duty.

5.5 That in the present case, the passenger did not declare the gold possessed by her under Section 77 of the Customs Act, 1962 and was not in possession of Foreign Currency for the payment of duty and that the passenger has not fulfilled the conditions stipulated under Notification No. 12/2012 and Baggage Rules. That the passenger was ineligible to import the gold and accordingly the Order-in-Appeal permitting the ineligible passenger to re-export the smuggled gold is incorrect in law.

5.6 That the decision of the appellate authority to allow the re-export of goods on payment of redemption fine is not acceptable as the passenger with an intention to smuggle did not declare the gold in her possession and mis-declared the same in the Customs Declaration Card as 'Personal effects' of worth Rs. 4000/- only and attempted to smuggle the gold out of the Airport by adopting ingenious modus operandi of concealment. In support of the contention, the following case laws are relied upon:- Hon'ble Apex Court in the case of Om Prakash Bhatia Vs Commissioner of Customs reported in 2003 (155) ELT 423 (SC) has held that if there is any prohibition of import or export of goods under the Act or any other law subject to certain conditions prescribed are not complied with it would be considered to be prohibited goods.

5.7 That the appellate authority in his order has stated that ownership of the gold is established in para 21 of the Order-in-Original is not acceptable as the passenger herself in her voluntary statement given under Section 108 of Customs Act, 1962 has stated that her husband gave her 4 gold cut bars and 2 nos. bangles weighing 1375 grams and asked her to conceal them in her bra by wrapping the gold in a tissue paper and polythene cover and to take them out to India without declaring to Customs, to be handed over to Shri Mahaboob Basha who

would come to their home in India and he in turn would give her Rs. 1,00,000/-. She needed the money for her daughter's marriage. The gold did not belong to her or her husband and she did not carry any money (foreign currency to pay duty) since she intended to smuggle the gold by way of concealment. She also replied that she did not have any bill or document for the purchase of the gold. Hence, the passenger is a carrier of smuggled gold and not the owner. The Board vide Circular No.6/2014-CUS dated 06.03.2014 in para 3 (iii) has cited as under: *"(iii) Wherever possible, the field officer, may inter alia, ascertain the antecedents of such passengers, source of funding for gold as well as duty being paid in foreign currency, person responsible for booking of tickets etc. so as to prevent the possibility of the misuse of the facility by unscrupulous elements who may hire such eligible passengers to carry gold for them."* However, both the original and appellate authority failed to examine the above aspect which are vital to prove the ownership of gold by producing documentary evidence regarding the source for funding of gold as well as duty to be paid in foreign currency.

5.8 Once the passenger is ineligible to bring/import the gold or gold jewellery, which is restricted item, as discussed above, and if the same is still attempted to be smuggled by him, then it becomes prohibited from bringing/importing by such ineligible passenger. Hence, the Order-in-Original passed by the lower adjudicating authority allowing the re-export of the gold (which is prohibited for the subject passenger), instead of ordering for the absolute confiscation, is not correct, especially when the passenger acted as carrier and when he is not the owner of the seized gold. In such cases, the seized gold should invariably be confiscated absolutely and Re-export option should not be given by the Adjudicating Authority or by the Appellate Authority.

5.9 That re-export of goods is covered in Section 80 of the Customs Act, 1962. That as per the said Act, where the baggage of the passenger contains any article which is dutiable or import of which is prohibited and in respect which a true declaration has been made under the Section 77, the proper officer may, at the request of the passenger, detain such

article for the purpose of being returned to him on his leaving India. That in this case, the passenger has not filed true declaration and hence the appellate authority's order to allow the re-export of the gold is not in order.

5.10 That the order of the appellate authority has the effect of making smuggling an attractive proposition, since the passenger retains the benefit of redeeming the offending goods even when caught by Customs which totally works against deterrence.

6. Accordingly a show cause notice was issued to the respondent by the then Revisionary Authority under Section 129 DD of the Customs Act, 1962 to enable the respondent to file their counter reply. The respondent vide reply received on 26.08.2015 submitted that grounds raised by the Revision Applicant are not maintainable since the Order-in-Appeal speaks for itself and an opportunity for hearing be given. Meanwhile, respondent filed W.P. No.22438 of 2015 in the High Court of Madras under article 226 of the Constitution of India to issue writ of Mandamus directing the Government authority to implement the order passed by the Commissioner(Appeals-I) Chennai, No. 349-350/2015 dated 29.06.2015. The Hon'ble High Court disposed of the Writ Petition vide its order dated 31.08.2015 which was received in this office on 26.11.2015 with the direction to the petitioner to place all their submissions so as to substantiate their case before Revisionary Authority and upon hearing them, Revisionary Authority would pass the order within eight weeks of receiving the order.

7. In compliance of Hon'ble High Court's Order, personal hearings were as held in this case and the then Revision Authority decided the case vide its order No. 02-03/2016-CUS Dated 22.01.2016. Upholding the Applicant departments contention the Revisionary Authority disallowed the redemption and re-export of the gold allowed by the Appellate order and absolutely confiscated the gold.

8. The respondent again a filed W.P. No. 16681 of 2016 in the High Court of Madras against the order of the Revisionary Authority No. 01/2016-CUS Dated 22.01.2016 contending that;

8.1 The impugned order of the Revisionary authority has been passed by an officer, who was not vested with the jurisdiction to hear and adjudicate upon the matter. The reason according to the learned counsel for the petitioner, which propels the petitioner to take such a stand is the fact that the officer, who exercised the jurisdiction in the matter was of the same rank, as that of the Commissioner of Appeals whose order was assailed before him.

8.2 To be noted, the impugned order been passed by the Joint Secretary to the GOI, It is common ground that the Commissioner of Appeals holds the same rank as the Joint Secretary to GOI.

8.3 Therefore, according to the learned counsel, this singular fact has impregnated the impugned order with a jurisdictional flaw. In support of his submission, learned counsel for the petitioner relied upon the judgement of the Punjab and Haryana High Court in the NVR Forgings V/s UOI, 201+ (335) ELT 675.

8.4 Learned counsel for the petitioner further stated that a special leave Petition was preferred against the afore mentioned judgement of the Punjab and Haryana High Court, which was dismissed in Limine by the Supreme Court on 17.10 2016.

8.5 Accordingly the Hon'ble High Court set aside the order of the Revisionary authority (No. 01/2016-CUS Dated 22.01.20116 ) with liberty to the GOI to pass a fresh order within a period of eight weeks from the date of the receipt of a copy of the order after corrective measures are taken. Further stating "In case the requisite steps are not taken , respondents No.4, (Principle Commissioner of Customs, Chennai) will ensure compliance of the order dated 29.06.2015, passed by the Commisioner ( Appeals).

9. In view of the Hon'ble High Court of Madras order personal hearings in the case were scheduled on 05.02.2021, 06.04.2021 and 08.06.04.2021. However neither the Applicant department nor the respondent in the case attended the scheduled hearings. The case is therefore being decided on merits.

10. The Government has gone through the facts of the case, and notes that it is an uncontested fact that the goods were not declared to the customs under Section 77 of the Act and the passenger had attempted to pass through the green channel. In her declaration form she did not inform that she was carrying dutiable goods and had she not been intercepted she would have walked away with the impugned goods without declaring the same to Customs. The confiscation of the gold is therefore justified.

11. The main contention of the Department is that the passenger has accepted that she was carrying the gold for monetary consideration and had obviously concealed the gold, and the same had not been declared in the customs declaration card. The passenger has also not fulfilled the conditions stipulated under Notification No: 12/2012-Cus dated 17.03.2012 as amended and Rule 6 of the Baggage Rules. Therefore, it is pleaded that the passenger was not eligible to import the gold and accordingly the impugned Order-in-Appeal allowing redeeming of the goods for re-export is unlawful and has the effect of making smuggling an attractive proposition and be set aside.

12. Government however notes that the original adjudicating authority has in its order para18 has stated that the passenger submitted a detailed explanation which is reproduced, " The passenger stated that her husband married another woman, but as this lady has three daughters of marriageable age from her husband, therefore, he gave money to her for their marriage. This passenger brought gold for the same and kept them as usually kept by ladies in bra, that she had not concealed in any ingenious manner." The passenger also produced copy of purchase bills and copy of letter / Certificate from the Embassy of India in Kuwait that she was the wife of Shri Shaik Mujeeb and requested a lenient view and release of the gold for re-export.



13. The original adjudicating authority has relied on the decision of Honble Supreme Court in the Case of Sapana Sanjeev Kohli Vs Commissioner of Customs( Mumbai) reported in 2010 253)ELT,A52(SC) wherein the Apex Court has upheld the order of Hon'ble Bombay High Court Order reported in 2009(240)ELT 207(Bom.) & CESTAT Order reported in 2008(230)ELT 305, wherein it has been held that gold jewellery was not prohibited, therefore, mandatory redemption was required to have been given by Commissioner (para-22) & accordingly redeeming of the jewellery, on payment of fine was allowed even though the passenger was ineligible for bringing gold. The Original Adjudicating authority has further justified the redemption of the gold, finding that gold is not prohibited as the same is importable throughout India at a duty of 10% by eligible passengers up to 1 kg and restricted for others as per ITC HSN 9803(non bonafide baggage), In this regard, the Hon ble Apex Courts in the case of Hargovind Das Vs Collector ,of Customs.1992(61) ELT 172(SC) had pronounced that a quasi-judicial authority must exercise discretionary powers in a judicious manner and not in arbitrary manner. As per section 125 of the C.A.1962 in case of goods which are prohibited the option of redemption left to the discretion of the authority who is functioning as a quasi judicial authority and in cases of other goods option to allow redemption is mandatory.

14. Under the circumstances the Government would not like to interfere with discretion exercised by the Original Adjudicating authority and the Appellate authority in their orders to allow the gold for redemption. However the quantity of gold under import, is large and in commercial quantities ie totally weighing 1375 gms, valued at Rs. 35,30,821/- the statement of the respondent regarding ownership of the gold and keeping in mind the instructions of the Board vide Circular No.6/2014-CUS dated 06.03.2014 the option for re-export reduction of the redemption fine and penalty by the Appellate authority is unwarranted. Considering the above facts in totality, allowing the impugned gold bars and jewelry for re-export on the redemption fine and penalties imposed by the original adjudicating authority are appropriate. The Order in Appeals C. Cus-I No. 400/2015 dated 06.08.2015 and 331/2015 dated

24.06.2015 are therefore both liable to be set aside. The order of the Original adjudicating authority is liable to be upheld.

14. The impugned order in Appeals C. Cus-I No. 400/2015 dated 06.08.2015 and 331/2015 dated 24.06.2015 are both set aside. The order of the Original adjudicating authority is upheld. Revision application is disposed of accordingly.

*Shrawan*  
17/06/21  
( SHRAWAN KUMAR )

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

ORDER No. ~~10~~/2021-CUS (SZ) /ASRA/

DATED 17.06.2021

To,

1. The Commissioner of Customs, New Customs House, Meenambakkam, Chennai -27.
2. Smt. Shaik Shamim Banu, Piler Road, T. Sundupally, Kadapa, YSR District, Andhra Pradesh.

Copy to:

3. Shri T. Chezhiyan, Advocate, No. 8 Eldams Road, Alwarpet, Chennai 600 018.
4. Sr. P.S. to AS (RA), Mumbai.
5. Guard File.
6. Spare Copy.