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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. 373/167/B/2018-RA / 1643 : Date of Issue 05.05.2022

ORDER NO. 160 /2022-CUS (WZ/SZ)/ASRA/MUMBAI DATED 29.04.2022
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 : Ms. Jeinul Abdeen Hajara Umma

Respondent : Pr. Commissioner of Customs, Custom House, Port Area,
Visakhapatnam, 530 035.

Subject : Revision Applications filed respectively, under Section 129DD
of the Customs Act, 1962 against Orders-in-Appeal No. VIZ-CUSTOM-
APP-043 to 046-17-18 dated 30.11.2017 [A.No. 63,64,65,73/2017-
VCH] passed by the Commissioner (Appeals), Guntur, Central Tax &
Customs, Visakhapatnam.

ORDER

This revision application has been filed by Ms. Jeinul Abdeen Hajara Umma (herein after referred to as the Applicant) against the Orders-in-Appeal No. VIZ-CUSTM-APP-043 to 046-17-18 dated 30.11.2017 [A.No. ~~63,64,65~~,73/2017-VCH] passed by the Commissioner (Appeals), Guntur, Central Tax & Customs, Visakhapatnam.

2. Briefly stated the facts of the case are that the Applicant who is a Sri Lankan national arrived at International Airport, Visakhapatnam from Colombo onboard Sri Lankan Airlines Flight No. UL-159, was intercepted by Customs Officers on 26.10.2017. Personal search of the applicant led to the recovery of four gold bangles and one gold chain with pendant, all totally weighing 87.930 grams and valued at Rs. 2,40,313/- The applicant had neither filed a Customs declaration form for the gold jewellery nor was she in possession of any foreign currency and she intended to clear the same without payment of duty. The applicant had passed through the green channel without declaring the gold ornaments. The applicant had waived the issuance of show cause notice

3. The Original Adjudicating Authority (OAA) viz, Asstt. Commissioner of Customs, Preventive Dept., Airport, Visakhapatnam vide Order-In-Original No. O.S No. 21/2017 dated 26.10.2017, ordered for the absolute confiscation of the assorted gold jewellery, totally weighing 87.930 grams and valued at Rs. 2,40,13/- (T.V) under Section 111 (d) & 111(l) of the Customs Act,1962. A penalty of Rs. 50,000/- (Rupees Fifty thousand thousand only) under Section 112(a) & (b) of the Customs Act, 1962 was also imposed on the applicant. At para 10 of the OIO it is held that the applicant as per the APIS, a case of

concealment of 146 gms of gold of 24 carat purity valued at Rs. 4,42,380/- has also been registered against the applicant by AIU, RGIA, Hyderabad.

4. Aggrieved by the said order, the applicant filed appeal before the Appellate Authority (AA) viz, Commissioner (Appeals), Guntur, Central Tax & Customs, Visakhapatnam who vide Orders-in-Appeal No. VIZ-CUSTOM-APP-043 to 046-17-18 dated 30.11.2017 [A.No. ~~63,64,65~~,73/2017-VCH] upheld in to-to the Order passed by OAA and rejected the appeal.

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

- 5.01. Order of the AA is against law, weight of evidence and circumstances and probabilities of the case; that gold was not a prohibited item and as per the liberalized policy it ought to have been released on payment of redemption fine and baggage duty. that the AA glossed over all the judgments and points raised in the grounds of appeal and no reason had been given to reject their appeals; that the AA had failed to apply his mind and hence the order is liable to be set aside.
- 5.02. that applicant never attempted or passed through green channel and she had been intercepted while she was still in the red channel area.
- 5.03. that she was the owner of the gold jewellery and she had worn the same; that the gold jewellery were all of 22 carats purity; and had brought the same for personal / family; that baggage rules was not applicable to her as she was found wearing the gold; that no declaration card was provided to her; besides as she was wearing the gold provisions of Section 77 of the Customs Act, 1962 are not attracted.
- 5.04. that the applicant has submitted that as per Circular F. no. 201/01/2014-CX.6 of Government of India, Ministry of Finance, Department of Revenue, CBEC, New Delhi dated 26.06.2016 it has been categorically directed that binding precedent should be followed to avoid unnecessary litigation and adverse observations of the Courts should be avoided.

5.06. that CBEC vide letter F.No. 495/3/94-Cus VI dated 02.03.1994 had stated that ownership is not the criteria for import of gold; that the gold receipts are in the name of the applicant.

5.07. that the applicant has cited the following case laws to buttress their case,

(i). The Commissioner (Appeals), Cochin, F. NO. C27/243,252 & 255/Air/2013 AU CUS in OS. NO. 370, 349, 364/2013 dated 18.12.2014, Shri. Hamsa Mohideen Mohammed Shajahan Srilanka, Rismila Begam Samsudeen Arip and Hussain Samsudeen Farhan.

(ii). that Vigneswaran Sethuraman's case (WP no. 6281 of 2014 dated 12.03.2014) is squarely applicable to them and the department is bound to accept and follow the order of the Hon'ble High Court of Kerala. In this case, it was held that merely because the applicant had not filed a declaration, the same cannot be seized and directed the release of small quantity of gold.

(iii). that in O-i-O no. 161 to 164 dated 10.03.2012, Sri Lankan nationals viz (i). Mohamed Ansar, (ii). H.M Naushad, (iii). Seiyed Faizan Mohamed, (iv). Mohamed Rafeek and (v). Imtiyas Mohammed, the Commissioner of Customs (Appeals) had released the gold on payment of redemption fine; that Revision Authority, New Delhi had confirmed these order dated 31.07.2012.

(iv). Apex Court case in respect of DRI v/s. Pushpa Lekhumal Tolani reported in 2017(353) E.L.T 129 (S.C) where it was held that '*It was immaterial whether jewellery was new or used or meant to be taken out of India – On basis of return ticket, no inference can be drawn that jewellery was meant for import into India*'.

(v). Etc.

Under the circumstances of the case, the applicant has prayed to set aside the impugned order and permit her to re-export the gold chain and to set aside or reduce the penalty of Rs. 50,000/- and thus, to render justice,

6(a). Personal hearings in the case through the online video conferencing mode was scheduled for 23.03.2022 / 30.03.2022. Smt. Kamalamalar Palanikumar appeared for physical hearing on 30.03.2022 and submitted an additional written submission. She submitted that the applicant was a Sri Lankan national

and had been wearing the gold jewellery. She requested to allow re-export of gold jewellery.

6(b). In her written submission dated 30.03.2022 handed over at the time of the physical hearing, she has reiterated her submissions made in the grounds of appeal. Applicant has relied on some more case citations as under;

- (i). that CESTAT Bangalore has passed an order in C/21257/2018-S.M. dated 01.01.2019- Final Order No. 20020-20021/2019- Smt. Abitha Tahillainathan & Smt. Kirthucase Mary Thawamani v/s. Commissioner of Customs, Cochin, Kerala, to has passed an order to re- export the gold jewellery citing that gold jewellery recovered from person is personal belonging and the same is not covered under the baggage rules.
- ii). JS (RA) Mumbai in Order no. 65/2020-CUS(SZ) ASRA/Mumbai dated 26.05.2020 in F.NO. 380/58/B/15-RA/3693 held that gold recovered from a pouch kept in the pocket of kurta worn by respondent cannot be termed as ingenious concealment.

Applicant has prayed that the gold jewellery may be permitted to be re-exported and has also prayed for reduction of penalty imposed under Section 112(a) & (b) of the Customs Act, 1962.

7. At the outset Government notes that the Applicant had brought the gold ornaments comprising of four gold bangles and one gold chain with pendant, all totally weighing 87.930 grams and valued at Rs. 2,40,313/- A declaration as required under Section 77 of the Customs Act, 1962 was not submitted and therefore the confiscation of the gold is justified.

10. At the outset, from the facts of the case, especially, para 10 of the OIO, the Government notes that the applicant is a repeat offender. The Government observes that the Applicant is a habitual offender and was involved in a similar offence earlier. The facts of the case indicate that though it is a case of non-declaration of

gold, rather than a case of smuggling for commercial considerations, the fact that the applicant was involved in a similar previous offence indicates that the applicant knew about the procedure and processes of declaration to be made at the time of arrival and it is clear that the applicant did not have any intention of declaring the gold in her possession and was inclined to evade payment of Customs duty. Further, Government notes that the applicant has nowhere refuted this charge made against her. Under the circumstances, the seriousness of the misdemeanour / past offences are required to be kept in mind when using discretion under Section 125 of Customs Act, 1962 and while imposing quantum of penalty.

11. Section 125 of the Customs Act, 1962 leaves option 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. 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. As per the provisions of section 125 of the Customs Act, 1962, in case of goods which are prohibited the option of redemption is left to the discretionary power of the authority who is functioning as a quasi judicial authority and in cases of other goods option to allow redemption is mandatory. In this case, considering that the applicant was involved in similar offence in the past, the Government finds that the lower authorities were right and justified in holding absolute confiscation of the impugned gold.

12. 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.

However, in this case as the applicant was involved in similar offence in the past, the lower authorities did not allow release of the gold on payment of redemption fine and the Government does not find any infirmity with the order passed.

13. The absolute confiscation of the small quantity of gold ornaments, leading to dispossession of the Applicant of the gold in the instant case appears harsh but the fact that applicant had a previous similar offence and had not declared the gold jewellery upon arrival, displays mensrea on the part of the applicant and as a deterrent, the lower authorities have ordered for absolute confiscation of the gold ornaments. The Government finds no infirmity in the order passed by the lower authorities.

14. On the issue of penalty under Section 112(a) & (b) of the Customs Act, the Government finds that the quantum of the penalty is commensurate with the omission and commissions committed by the applicant.

15. On the issue of re-export, the fact that absolute confiscation has been ordered, this plea of the applicant has become infructuous as goods absolutely confiscated cannot be allowed to be redeemed.

16. Revision Application is dismissed.

Shrawan
29/4/22
(SHRAWAN KUMAR)

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

ORDER NO. 160 /2022-CUS (WZ/SZ)/ASRA/MUMBAI DATED 29.04.2022.

To,

1. Ms. Jeinul Abdeen Hajara Umma, [address in OIO], C/o. Green Palace, Mannady, Chennai.
2. Pr. Commissioner of Customs, Custom House, Port Area, Visakhapatnam, 530 035.

Copy To.

1. Smt. Kamalamalar Palanikumar, Advocate, No. 10, Sunkurama Street, Chennai - 600 001.
2. Sr. P.S. to AS (RA), Mumbai.
3. File Copy.
4. Notice Board.