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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. 371/340/B/2019-RA / 79) : Date of Issue : 06.02.2023

ORDER NO. 169/2023-CUS (WZ)/ASRA/MUMBAI DATED 31.01.2023 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 : Ms. Rayan Elzubeir Badawi Dodia

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-101/19-20 dated 22.05.2019 [Date of issue: 24.05.2019] [F.No. S/49-117/2018] passed by the Commissioner of Customs (Appeals), Mumbai Zone-III.

ORDER

The Revision Application has been filed by Ms. Rayan Elzubeir Badawi Dodia (herein referred to as the "Applicant") against the Order-in-Appeal No. MUM-CUSTOM-PAX-APP-101/19-20 dated 22.05.2019 [Date of issue: 24.05.2019] [F.No. S/49-117/2018] passed by the Commissioner of Customs (Appeals), Mumbai Zone-III.

2. Brief facts of the case are that on 19.03.2018, the Applicant, a Sudanese national, who arrived at the Chhatrapati Shivaji International Airport (CSI), Mumbai from Jeddah, by Flight No. SV 772, was intercepted by the officers of Customs, after she had opted for the green channel of customs and one crude gold chain weighing 173 grams and valued at Rs. 4,84,933/- was recovered from her person.

3. On the Applicants' request for waiver of show cause notice, the Original Adjudicating Authority ie, Assistant Commissioner of Customs, CSI Airport, Mumbai, vide Order-In-Original (OIO) No. AirCus/T2/49/2229/2018 'A' dated 19.03.2018 ordered for the absolute confiscation of the crude gold chain weighing 173 grams, valued at Rs. 4,84,933/-, under Section 111 (d) of the Customs Act, 1962. A penalty of Rs. 10,000/- was imposed on the Applicant under Section 112(a) and (b) of the Customs Act, 1962.

4. Aggrieved, with this Order, the Applicant filed an appeal before the Appellate Authority (AA) viz, Commissioner of Customs (Appeals), Mumbai Zone-III, who vide Order-in-Appeal No. MUM-CUSTOM-PAX-APP-101/19-20 dated 22.05.2019 [Date of issue: 24.05.2019] [F.No. S/49-117/2018] upheld the order passed by the OAA.

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

5.01. That the Applicant is a foreign national and does not know to read and write English and understands her mother tongue only;

5.02. That when asked whether she was carrying gold she replied in the affirmative and took out the gold from the front pocket of her jeans and handed it over;

5.03. That her statement and other papers were prepared in English which was not known to her and her signature was obtained on the papers and a case of non-declaration of gold was made out against her;

5.04. That the statement was duly retracted by her at the first available opportunity;

5.05. That the gold was not concealed by her but was found on her person, in the jeans worn by her;

5.06. That the Applicant was the owner of gold and ready to pay the customs dues and she was not aware that being a foreign national, she was not supposed to import gold;

5.07. 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;

5.08. that the evasion of customs duty can be done only in respect of dutiable goods and not prohibited goods;

5.09. that once it is accepted by the department that the goods are dutiable, the option of redemption of goods as provided under Section 125 of the Customs Act, 1962 will have to be given to the Applicant;

5.10. That in view of the various judgements passed by various authorities, wherein re-export of goods have been granted even when the goods were not declared, in the instant case the same ought to have been considered:

- (i) Collector of Customs vs. Elephanta Oil and Ind Ltd [2003 (152) E.L.T. 257 (SC)
- (ii) Kusumbhai Dayabhai Patel vs. Commr. of Customs [1995(79) E.L.T. 292(Tri Mum)
- (iii) A.K.Jewellers vs. CC. Mumbai [2003(155) E.L.T. 585(Tri-LB)]
- (iv) Patel vs. Commr. of Customs [2003(153) E.L.T. 226 Tr]
- (v) Revision Order No 38/2008 in the case of Mrs. Majeeda Mohd. Yunus
- (v) Revision Order No 178/2008 in the case of Ravinder S Dulari
- (vi) Revision Order No 33/2008 in the case of Deepak Hiralal Parekh
- (vii) Revision Order No 34/2008 in the case of Pradeep kumar Bhanwarlal
- (viii) Revision Order No 392/2002 in case of Nasir Asgar Mirab

Under the circumstances the Applicant prayed that the gold be released under Section 125 of the Customs Act, 1962 for re-export on nominal redemption fine and personal penalty may be reduced substantially.

6. Personal hearing in the case was scheduled for 29.09.2022. Shri N.J. Heera, Advocate appeared for the personal hearing on 29.09.2022 on behalf of the Applicant and submitted that the Applicant was a foreign national who came to India with a small quantity of personal jewellery and requested to release the goods and 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 goods to the Customs at the first instance as required under Section 77 of the Customs Act, 1962. The Applicant had not disclosed that she was carrying dutiable goods. However, pursuant to

personal search, after interception, after she had cleared herself through the Green channel, the crude gold chain was recovered from her person and the method of carrying the gold adopted by the Applicant clearly revealed her intention not to declare the impugned gold jewellery and thereby evade payment of Customs Duty.

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”.

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. A plain reading of the section 125 shows that the Adjudicating Authority is bound to give an option of redemption when goods are not subjected to any prohibition. In case of prohibited goods, such as, the gold, the Adjudicating Authority may allow redemption. There is no bar on the Adjudicating Authority allowing redemption of prohibited goods. This exercise of discretion will depend on the nature of the goods and the nature of the prohibition. For instance, spurious drugs, arms, ammunition, hazardous goods, contaminated flora or fauna, food which does not meet the food safety standards, etc. are harmful to the society if allowed to find their way into the domestic market. On the other hand, release of certain goods on redemption fine, even though the same becomes prohibited as conditions of import have not been satisfied, may not be harmful to the society at large.

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.”

13.1. Government further observes that there are a catena of judgements, over a period of time, of the Hon'ble Courts and other forums which have been categorical in the view that grant of the option of redemption under Section 125 of the Customs Act, 1962 can be exercised in the interest of justice. Government places reliance on some of the judgements as under:

- a) In the case of Commissioner of Customs, Aliganj, Lucknow vs. Rajesh Jhamatmal Bhat, [2022(382) E.L.T. 345 (All)], the Lucknow Bench of the Hon'ble High Court of Allahabad, has held at Para 22 that “*Customs Excise & Service Tax Appellate Tribunal Allahabad has not committed any error in upholding the order dated 27.08.2018 passed by the Commissioner (Appeals) holding that Gold is not a prohibited item and, therefore, it should be offered for redemption in terms of Section 125 of the Act.*”

- b) The Hon'ble High Court of Judicature at Madras, in the judgment in the case of Shik Mastani Bi vs. Principal Commissioner of Customs, Chennai-I [2017(345) E.L.T. 201 (Mad)] upheld the order of the Appellate Authority allowing re-export of gold on payment of redemption fine.
- c) The Hon'ble High Court of Kerala at Ernakulam in the case of R. Mohandas vs. Commissioner of Cochin [2016(336) E.L.T, 399 (Ker.)] has, observed at Para 8 that *"The intention of Section 125 is that, after adjudication, the Customs Authority is bound to release the goods to any such person from whom such custody has been seized..."*
- d) Also, in the case of Union of India vs Dhanak M Ramji [2010(252)E.L.T. A102(S.C)], the Hon'ble Apex Court vide its judgement dated 08.03.2010 upheld the decision of the Hon'ble High Court of Judicature at Bombay [2009(248) E.L.T. 127 (Bom)], and approved redemption of absolutely confiscated goods to the passenger.

13.2. 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 r/o. Shri. Chandrasegaram Vijayasundarm + 5 others in a similar matter of Sri. Lankans wearing 1594 gms of gold jewellery (i.e. around 300 gms 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 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.

13.3. Government, observing the ratios of the above judicial pronouncements, arrives at the conclusion that decision to grant the option of redemption would be appropriate in the facts and circumstances of the instant case.

14. Government notes that the Applicant is a foreign national and the gold had been recovered from her person but the same had not been ingeniously concealed. Government notes that the quantity of gold jewellery under import is small and not of commercial quantity. The Applicant was not a frequent visitor and there is nothing on record that the Applicant was a habitual offender and was involved in similar offences earlier or was part of an organised smuggling syndicate. 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 misdemeanour is required to be kept in mind when using discretion under Section 125 of Customs Act, 1962 and while imposing quantum of penalty. Considering the aforesaid facts, Government is inclined to accede to her request.

15. Applicant has also pleaded for reduction of the penalty imposed on her. The value of the gold in this case is Rs. 4,84,933/-. From the facts of the case as discussed above, Government finds that the penalty of Rs. 10,000/- 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. For the aforesaid reasons, Government is inclined to allow the prayer put forth by the Applicant for re-export of the impugned gold jewellery and accordingly, modifies the order passed by the Appellate Authority to the extent of allowing the re-export of the crude gold chain weighing 173 grams, valued at Rs. 4,84,933/-, on payment of redemption fine. The impugned crude gold chain is allowed to be redeemed for re-export on payment of Rs. 90,000/- (Rupees Ninety Thousand only). The penalty of Rs. 10,000/- (Rupees Ten Thousand only) imposed under section 112 (a) & (b) of the Customs Act, 1962

is commensurate with the omissions and commissions committed by the Applicant.

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


(SHRAWAN KUMAR)

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

ORDER NO. \69/2023-CUS (WZ)/ASRA/MUMBAI DATED 31.01.2023

To,

1. Ms. Rayan Elzubeir Badawi Dodia, C/o Advani, Sachwani & Heera Associates, Nulwala Building, Ground Floor, 41, Mint Road, Opp. G.P.O, Fort, Mumbai 400 001.
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 N.J. Heera, Advocate, Nulwala Building, Ground Floor, 41, Mint Road, Opp. G.P.O, Fort, Mumbai 400 001.
2. Sr. P.S. to AS (RA), Mumbai.
3. File Copy.
4. Notice Board.