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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. 371/51-52/B/2022-RA/1809 : Date of Issue: 12.05.2022

ORDER NO. 173-174/2022-CUS (WZ/SZ)/ASRA/MUMBAI DATED 10.05.2022
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.

Applicants : (i). Shri. Nishant Bipinkumar Jagada,
(ii). Smt. Sneha Dilipkumar Jinadra

Respondent : Pr. Commissioner of Customs, CSI, Sahar, Mumbai.

Subject : Revision Application filed, under Section 129DD of the
Customs Act, 1962 against the Order-in-Appeal No.
MUM-CUSTOMS-APSCAPP-1271/2021-22 dated 08.12.2021
[F.No. S/49-705/2021; DIN-20211267BB0000333EBF]
passed by the Commissioner of Customs (Appeals),
Mumbai - III.

ORDER

These two revision applications have been filed by (i). Shri. Nishant Bipinkumar Jagada and (ii). Smt. Sneha Dilipkumar Jinadra (herein referred to as the Applicants or alternately as Applicant No. 1 / Applicant No. 2 resp.) against the Order-in-Appeal No.MUM-CUSTM-APSCAPP-1271/2021-22 dated 08.12.2021 [F.No. S/49-705/2021; DIN-20211267BB0000333EBF] passed by the Commissioner of Customs (Appeals), Mumbai – III.

2. Brief facts of the case are that on 12 / 13:08.2019, the Customs Officers at the CSI Airport, Mumbai had intercepted the applicants who had arrived from Sharjah by Air India Express Flight No. IX-252/13.08.2019. The applicants had cleared themselves through the Customs Green Channel and to the query about possession of any contraband, gold, silver etc put forth to them by the Customs Officers, the applicants had replied in the negative. A personal search of the applicant no. 1 had resulted in the recovery of one gold kada and a gold chain, together weighing 235 grams which had been concealed under the clothes worn by him. Personal search of applicant no. 2 had resulted in the recovery of 4 gold bangles and 1 gold chain, totally weighing 196 grams which had been concealed under the clothes worn by her. The total gold recovered from both the applicants weighed 431 grams and the assay indicated that the same i.e. 4 gold bangles, 1 gold kada and 2 gold chains were of 22 carats and having purity of 916 and collectively valued at Rs. 12,68,480/-.

3. The Original Adjudicating Authority (OAA) i.e. Addl. Commissioner of Customs, CSI Airport, Mumbai vide his Order-In-Original (OIO) no. ADC/VDJ/ADJN/142/2020-21 dated 25.03.2021 [(DOI : 30.03.2021),(S/14-5-322/2019-20/Adjn)(SD/INT/AIU/258/2019-'B" had ordered for the confiscation of the impugned gold i.e. 4 gold bangles, one gold kada and two gold chains, collectively weighing 431 grams, all 22 carat purity and totally valued at Rs. 12,68,480/- under Section 111 (d), (l) & (m) of the Customs Act, 1962 with an option granted to the applicants to redeem the gold on payment of a fine of Rs. 2,00,000/- under section 125 of the Customs Act, 1962

alongwith applicable duty within 60 days of the order. A penalty of Rs. 50,000/- each had been imposed on the applicants under Section 112(a)(i) of the Customs Act, 1962.

4. Aggrieved, with this Order, the respondent (i.e. Addl. Commissioner of Customs (Review), CSI Airport, Mumbai) filed an appeal before the Appellate Authority (AA) viz, Commissioner of Customs (Appeals), Mumbai – III who vide Order-in-Appeal No.MUM-CUSTM-APSCAPP-1271/2021-22 dated 08.12.2021 set aside the order passed by the OAA and ordered for the absolute confiscation of the impugned gold and maintained the personal penalty imposed on the applicants.

5. Aggrieved with the above order of the appellate authority, the Applicants have filed these revision applications on the following grounds;

- 5.01. that the impugned order is not legal and proper and the same is thus not sustainable.
- 5.02. that the impugned order is a non-speaking order as no findings in respect of their various submissions have been considered.
- 5.03. that the they had worn the seized articles while leaving for abroad on 30.07.2019 and the said seized goods were worn again by them while arriving at CSI airport on 13.08.2019 and the said fact had been duly recorded in the statements of both the applicants recorded on 13.08.2019 immediately and on the spot at the time of seizure of the goods. The said statements having been recorded u/s 108 of the Customs Act, 1962 is admissible piece of evidence.
- 5.04. that the lower authorities had erroneously confiscated the goods on the ground that the same were brought to India from abroad ignoring the evidence recorded by the department itself which is admissible as per the judgment of Hon'ble Supreme Court in the matter of Surjeet Singh Chabra 1997 (89) E.L.T. 646 (S.C.), which held that each part of the statement recorded under Section 108 is admissible itself.
- 5.05. that it was a fact that both the applicants had admitted the fact that they did not declare the ornaments while going abroad and the same was a mistake on their part and thus the procedural requirement of obtaining a certificate was required to be condoned when there was no evidence that the ornaments were of foreign origin and/or were having any foreign marking and were not made of pure

gold but were of standard 22 Carat; that the confiscation of the goods was wrongly ordered, merely on the ground of procedural lapse.

- 5.06. that the lower authorities had erroneously rejected the evidence of the applicant no. 1 recorded under statement dated 27.01.2020 supported with documentary evidences of having taken a loan of Rs. 56 Lakhs from Axis Bank for purchase of pure gold of 24 KT weighing 1630.500 grams out of which seized jewellery weighed 431 Grams of 22 KT which had been made by him; that the statement which was corroborated by the documents which were in existence prior to seizure of the goods, had been wrongly and erroneously discarded without adducing any positive or cognizant evidence to show that the statement is not true and is false; that thus on this ground itself the orders are required to be set aside.
- 5.07. that the applicants were not regular visitors and were not conversant and aware of the procedures of taking endorsement or certificates while leaving abroad and thus they could not produce any export certificate or declaration to Custom; that on legal advice they co-operated with the department and opted for payment of duty; that legally no duty was leviable as the same goods were being brought back; that the offer to pay the duty was only made to get release of the seized goods having emotional value
- 5.08. that the applicants have been wrongly held by the authorities that they had been intercepted on the basis of profiling, being suspected carriers for others; that it has been wrongly alleged that the applicants were carriers and frequent travelers and SCN wrongly attempts to demonstrate that the applicant no. I has travelled to Sharjah, Singapore Indonesia and Thailand and thus is a frequent traveller; that the applicant no. 1 had travelled to Sharjah in 2008 and now in 2019; that apart from this, he had made a trip along with his wife in a tour arranged by a Travel in the year 2018 and said tour was for Singapore, Indonesia and Thailand; that it was wrongly alleged that applicant no.1 had made trips to Sharjah, Singapore Indonesia & Thailand so as to mislead the adjudicating and the Appellate Authority.
- 5.09. that it had been wrongly held that the applicants had failed to prove the ownership of the seized goods whereas evidence of purchase of Gold and taking of Loan and balance Gold available with them had been produced.
- 5.10. that the copies of passport of both the applicants shows that they have made only 3 visits in period of 11 years till 2019 and thus cannot be called as frequent travellers or bringing goods on behalf of any persons or belonging to any persons.

- 5.11. that the failure to take the export certificate cannot be a reason for confiscation of the goods as the goods were ornaments which are normally worn by any Indian man and woman and there was no requirement of any export certificate in respect of the said ornament more so when the applicants were not frequent traveller as they have made only 3 trips including the present one, in a period of 11 year.
- 5.12. that the CBIC Circular No. 66/96-CUS-IV dated 26.12.1996 as amended vide Circular No. 2/2002-CUS VI dated 08.01.2002 wherein the requirement of obtaining export certificate has been stated is only for international passenger travelling frequently and the nature of expensive equipment covered therein are camera, cam corded, cellular phone, notebook, computers etc. having manufactures names, marks, numbers, model and year of manufacturer; that thus it had been wrongly held by lower authorities that failure to take export certificate in the case of ornament attracts penal provisions like confiscation and levy of penalty.
- 5.13. that the seized goods had been worn by them on their wrists and around necks, in the normal course as any normal Indian male or female wears and the same had not been concealed in any manner; that at para 24.6 of OIO it was held that the concealment was not ingenious and thus the goods had been allowed to be redeemed on payment of fine.
- 5.14 that in the appeal filed by the department it was not even a case of any ingenious concealment and that the findings of the original authority were erroneous in any manner.
- 5.15. that the CBIC Circular No. 495/5/92-Cus VI dated 10.05.1993 or any circular are not binding on the quasi-judicial authorities; that even otherwise this CBIC Circular categorically lays down that articles such as bangles/ necklaces won by a passenger may not be considered as a concealment whereas the gold kept in a medicine bottle will be treated as a concealment; that the said circular recommended that the redemption of the the ornaments worn on the body.
- 5.16. that merely because the applicants had walked through the Green Channel, it cannot be held that the ornaments were concealed when the same had been worn in the manner.
- 5.17. that the applicants relied upon the judgement of the Honorable Supreme Court in the matter of DRI v/s. Pushpa Lekhumal Tolani 2017 (353) E.L.T. 129 (SC) where in the Honorable Supreme Court held that even in the case where the jewellery had been kept in the bagggge and passenger had walked through the green channel without making a declaration, the same cannot be said to be

concealed as the same had been kept in a usual manner in the luggage.

- 5.18. that reliance has been placed on the judgement of the Hon'ble Tribunal in the case of R.N Palaksha v/s. Commr. Of Customs, Bangalore – 2019(370) ELT 590 (Tri-Bang) wherein it was held that the jewellery had been worn in a usual manner and had not been concealed in a manner that it could not be detected by ordinary means; that gold was not a prohibited item; that absolute confiscation was not sustainable in law and option to redeem the goods was granted.
- 5.19. Reliance has been placed in the GOI case against Muhammad Zia-Ul-Haq 2014 (314)ELT 849 (GOI) where it was held that when the goods are not prohibited, the adjudicating officer shall give option to redeem the same; that there was no ingenious concealment.
- 5.20. Reliance was placed on Tribunal case of Yakum Ibrahim Yusuf v/s. Commr of Customs, Mumbai 2011 (263) ELT 685 (Tri.-Mumbai); that prohibited goods refers to goods like arms, ammuniton, addictive drugs, whose import in any circumstance would danger or be detriment to health, welfare or morals of people as a whole and makes them liable to absolute confiscation. It does not refer to goods whose import is permitted subject to restrictions, but liable to be released on payment of redemption fine since they do not cause danger or detriment to health.
- 5.21. Reliance has been placed in the Tribunal case of CC E & C v/s. Dharmesh Panchariya – 2018 (363) ELT 555 (Tri-Ahmd.) wherein it was held that Section 125 of the Customs Act, 1962 has to be applied insofar as the prohibited goods are concerned, there is discretion in the officer to release the confiscated goods in terms as set out therein. Insofar as other goods are concerned, the officer is bound to release the goods.
- 5.22. In the same lines, the applicants have stated that the Hon'ble Bombay High Court case of Commr. Of Customs (P) v/s. Alfred Menezes 2009 9242) ELT 334 (Bom.) was squarely applicable to their case.
- 5.23. etc.

Under the circumstances, the applicants prayed to set aside the impugned order passed by the Lower Authorities and the goods be ordered to be released for home consumption. Demand of duty, fine and penalty be set aside or pass any order as deemed fit.

6. Personal hearings in the case through the online video conferencing mode was scheduled for 28.04.2022 / 04.05.2022. Shri. A.S. Sahota, Consultant for the applicants appeared physically on 28.04.2022 and reiterated the points already made in their revision applications. He submitted that the OIO is reasoned, legal and correct and therefore requested to restore the same.

7. Government notes that the Applicants had both opted for the green channel and were intercepted thereafter while attempting to carry the 4 gold bangles, one gold kada and 2 gold chains without declaring the same to Customs. Applicants had admitted that they had not declared the gold ornaments. A declaration as required under section 77 of the Customs Act, 1962 was not submitted, therefore, confiscation of the gold is justified.

8. There is no doubt that gold brought by non-eligible person without fulfilling required conditions becomes prohibited. 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".

9. 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 Applicants thus, liable for penalty.

10. Even when 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.

11. Government, however notes that the gold ornaments were not ingeniously concealed and had been worn by the applicants. The ornaments were of 22 carats and had purity of 916. The quantity of gold ornaments under import were not of commercial in nature. Also, a case of the applicants being habitual offenders had not been made out. The facts of the case indicate that it is a case of non-declaration of gold ornaments/jewellery, 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.

12. The absolute confiscation of the gold, leading to dispossession of the Applicants of the gold ornaments in the instant case is harsh and not justified. Government finds that the original adjudicating authority had passed a reasonable order and had used his discretionary power quite judiciously to allow to redeem the 4 gold bangles, one gold kada and two gold chains, collectively weighing 431 grams and valued at Rs. 12,68,480/- on a redemption fine. The Government finds that the personal penalty imposed on the applicants by the lower adjudicating authority is reasonable. The Government finds that the Order of the lower adjudicating authority is well balanced and judicious.

13. Government therefore, sets aside the impugned order of the Appellate authority and restores the Order-in-Original passed by the original adjudicating authority.

14. The two Revision Applications are disposed of on the above terms.

Shrawan
10/05/22
(SHRAWAN KUMAR)

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

173-174

ORDER NO. /2022-CUS (WZ/SZ)/ASRA/MUMBAI DATED 10.05.2022

To,

1. Shri. Nishant Bipinkumar Jagada, Prerna, Flat No. 2004, Near Westside, L.T. Road, Borivali (West), Mumbai - 400 092.
2. Smt. Sneha Dilipkumar Jinadra, Prerna, Flat No. 2004, Near Westside, L.T. Road, Borivali (West), Mumbai - 400 092.
3. The Pr. Commissioner of Customs, Chhatrapati Shivaji International Airport, Terminal - 2, Mumbai - 400 099.

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1. Sr. P.S. to AS (RA), Mumbai.
2. File copy,
3. Notice Board.