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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. 371/164/B/2021-RA/760 : Date of Issue: 2.02.2023

ORDER NO. 176 /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 Roshnara Mohamed Hanif.

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-28/2021-22 dated 05.04.2021 [F.No. S/49-132/2020] [Date of issue: 15.04.2021] passed by the Commissioner of Customs (Appeals), Mumbai-III.

ORDER

This Revision Application has been filed by Ms Roshnara Mohamed Hanif (herein referred to as the "Applicant") against the Order-in-Appeal No. MUM-CUSTM-PAX-APP-28/2021-22 dated 05.4.2021 [F.No. S/49-132/2020] [Date of issue: 15.04.2021] passed by the Commissioner of Customs (Appeals), Mumbai-III.

2. Brief facts of the case are that on 28.01.2020, the Officers of AIU at CSI Airport Mumbai on the basis of suspicion, intercepted one passenger Ms Roshnara Mohamed Hanif, the applicant, holding Indian passport number T8867742 after she had cleared herself through Green channel of Customs, CSI Airport, Mumbai. She had arrived from Dubai by Flight No. SG 006. During personal search the Officers recovered 04 gold bangles totally weighing 233 grams valued at Rs.8,29,714/- which was not declared. 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 Deputy Commissioner of Customs, C.S.I. Airport, Mumbai, vide his OIO No. AirCus/T2/9/ 1564/2020 'Uni D' dated 28-01-2020 ordered absolute confiscation of the recovered 233 grams valued at Rs.8,29,714/- under Section 111 (d), (l) and (m) of Customs Act, 1962. A personal penalty of Rs 85,000/- under section 112(a) 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, Commissioner of Customs (Appeals), Mumbai-III, who vide Order-in-Appeal No. MUM-CUSTM-PAX-APP-28/2021-22 dated

dated 05.4.2021 [F.No. S/49-132/2020] [Date of issue: 15.04.2021] 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 Gold is not a prohibited item. Gold imported by the petitioner was not liable for absolute confiscation. Gold is not prohibited goods, but only restricted goods. Import of gold is no longer prohibited and therefore, it is the duty on the part of the adjudicating authority, if he is of the view that it is liable for confiscation, to permit its redemption on appropriate fine. The applicant referred to various case laws in support of the same.

5.2 The intention behind the provisions of Section 125 is clear that import of such goods under any circumstances would cause danger to the health, welfare or morals of people as a whole. This would not apply to a case where import/export of goods is permitted subject to certain conditions or to a certain category of persons and which are ordered to be confiscated for the reason that the condition has not been complied.

5.3 The applicant in favor of their appeal have relied on the undermentioned clutch of cases;

i) Yakub Ibrahim Yusuf vs CC, Mumbai 201 1 (263) E.LT. 685 (Tri. Mumbai);

ii) Neyveli Lignite Cor Ltd vs UOI 2009 (242) E.L.T. 487 (Mad);

iii) Hargovind Das K. Joshi Vs Collector of customs 1992 (61) ELT 172(SC);

iv) Universal Traders v. Commissioner 2009 (240) E.L.T. A78 (SC);

v) Gauri Enterprises Vs CC, Pune 2002 (145) ELT (705) (Tri Bangalore);

vi) CC (Airport), Mumbai Vs Alfred Menezes 2009 (242) ELT 334 (Bom.);

vii) Yakub Ibrahim Yusuf 2011 (263) EL. T. 685 (Tri. - Mumbai);

ix) Shaik Jamal Basha Vs Government of India 1997 (91) ELT 277(AP);

x) VP Hameed Vs Collector of Customs Mumbai 1994(73) ELT 425 (Tri);

xi) T. Elavarasan Vs Commissioner of Customs (Airport), Chennai 2011 (266) ELT 167 (Mad);

xii) Kadar Mydin v/s Commissioner of Customs (Preventive), West Bengal 2011 (136) ELT 758;

xiii) Sapna Sanjeeva Kolhi v/s Commissioner of Customs, Airport, Mumbai ELT 305 ;

xiv) Vatakkal Moosa v/s collector of Customs, Cochin 1994 (72) ELT (G.O.1.);

xv) Halithu Ibrahim vs CC [2002-TIOL 195- CESTAT-MAD.;

xvi) Krishnakumari vs CC, Chennai 2008 (229) ELT 222 (Tri-Chennai);

xvii) S.Rajagopal vs CC, Trichy 2007 (219) ELT 435 (Tri- Chennai);

xviii) M. Arumugam Vs CC, Trichirapalli 2007 (220) ELT 311 (Tri- Chennai);

xix) Union of India vs Dhanak M. Ramji 2009 (248) E.L.T. 127 (Bom.),

xx) etc

5.4 For concluding that the imported gold was prohibited goods and for ordering absolute confiscation of the gold, the OAA relied upon the judgement in the case of Om Prakash Bhatia which has been overruled by a Larger Bench of Supreme Court.

5.5 Decisions relied upon by the Commissioner of Customs (Appeals) cannot be made applicable to the case of the petitioner.

5.6 Petitioner claims ownership of the goods under absolute confiscation and prays for redemption of the gold bangles on redemption fine and penalty.

Under the circumstances of the case, the applicant has prayed to the Revision Authority to set aside the absolute confiscation of the 233 grams valued at Rs.8,29,714/- and to redeem the gold on payment of fine and reduce the penalty imposed.

6. Personal hearing in the matter was scheduled for 14.11.2022. Shri Prakash Shingarani, Advocate of the applicant, appeared for the hearing and submitted that the applicant brought small quantity of jewellery for personal use. He requested to release the same on nominal fine and penalty.

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 her 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 the dutiable goods. By not declaring the gold carried by her, the applicant clearly revealed her 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, in the form of jewellery, found on person, which indicates that the same was not for commercial purpose. It also 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 found on person. The applicant has claimed ownership of the gold for personal use. Government, notes that there were no allegations that the Applicant is a habitual offender or that it was ingeniously concealed or that it 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. The absolute confiscation of the gold, is therefore harsh and disproportionate. Government considers granting an option to the Applicant to redeem the gold on payment of a suitable redemption fine, as the same would be more reasonable and fair.

14. The Applicant has also pleaded for reduction of the penalty imposed on him. The value of the gold in this case is Rs.8,29,714/-. Government finds that the penalty of Rs. 85,000/- 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.

15.1 In view of the above, the Government sets aside the impugned order of the Appellate authority in respect of the impugned gold bars. The impugned gold bars totally weighing 233 grams and valued at Rs. 8,29,714/- are allowed redemption on payment of Rs.1,50,000/- (Rupees One Lakh fifty Thousand Only).

15.2 The penalty of Rs. 85,000/- imposed under Section 112(a) and (b) of the Customs Act, 1962 being appropriate and commensurate with the omissions and commissions of the Applicant, Government does not feel it necessary to interfere with the imposition of the same.

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

31/1/23

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

ORDER NO. 176/2023-CUS (WZ)/ASRA/MUMBAI DATED31 .01.2023

To,

1. Ms. Roshnara Mohmed Hanif, 12/2622, Amar Wadi hospital, Surat.
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. 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.