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SPEED-POST



GOVERNMENT OF INDIA  
MINISTRY OF FINANCE  
(DEPARTMENT OF REVENUE)

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Mumbai-400 005

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F.No. 373/166/B/2018-RA / 2041 : Date of Issue 30.06.2022

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ORDER NO. 195 /2022-CUS (WZ/SZ)/ASRA/MUMBAI DATED 28.06.2022  
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.

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Applicant : Ms. Agustín Rosita Virgin

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. Agustín Rosita Virgin (herein after referred to as the Applicant) against the 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.

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 29.08.2017. Personal search of the applicant led to the recovery of four gold bangles, one gold chain and 2 pairs of earrings, all totally weighing 253.500 grams and valued at Rs. 6,90,349/- 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.

3. The Original Adjudicating Authority (OAA) viz, Addl. Commissioner of Customs, Preventive Dept., Airport, Visakhapatnam vide Order-In-Original No. O.S No. 14/2017 dated 29.08.2017, ordered for the absolute confiscation of the assorted gold jewellery, totally weighing 253.500 grams and valued at Rs. 6,90,349/- under Section 111 (d) & 111(l) of the Customs Act, 1962. A penalty of Rs. 70,000/- ( Rupees Seventy thousand only ) under Section 112(a) & (b) of the Customs Act, 1962 was also imposed on the applicant.

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 Inida – 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. 70,000/- 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 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, one gold chain and 2 pairs of earrings, totally weighing 253.500 grams. A declaration as required under Section 77 of the Customs Act, 1962 was not submitted and therefore the confiscation of the gold is justified.

8. Government, however notes that a case has not been made out that the applicant had not worn the gold jewellery at the time of arrival and the same had been ingenuously concealed. Government notes that the quantity of gold under import is small and not of commercial quantity. There are no allegations that the Applicant is a habitual offender and 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. 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. Government notes that the applicant is a foreign national and has persistently at this revision stage as well as the preceding stages requested that she be allowed to re-export the gold jewellery.

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 jewellery “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. Government finds that this is a case of non-declaration of gold jewellery. The absolute confiscation of the gold jewellery, leading to dispossession of the Applicant of the gold jewellery in the instant case is therefore harsh and not justified. The applicant has repeatedly and singularly prayed that she be allowed to re-export the gold. Considering the aforesaid facts, Government therefore, sets aside the impugned order of the Appellate authority. The impugned gold jewellery is allowed to be redeemed for re-export on payment of Rs. 1,75,000/- ( Rupees One Lakh Seventy Five Thousand only). The penalty imposed under section 112 (a) & (b) of the Customs Act, 1962 is appropriate.

13. Revision Application is disposed of on above terms.

  
( SHRAWAN KUMAR )

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

ORDER NO. 195/2022-CUS (WZ/SZ)/ASRA/MUMBAI DATED 06.06.2022.

To,

1. Ms. Agustin Rosita Virgin, [address in OIO], Colombo, 57-40, Colombo - 13.
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.