



GOVERNMENT OF INDIA
MINISTRY OF FINANCE
(DEPARTMENT OF REVENUE)

8th Floor, World Trade Centre, Centre - I, Cuffe Parade,
Mumbai-400 005

F.No. 373/50/B/SZ/2019-RA / 20-46 : Date of Issue :

ORDER NO. 196 /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.

(i). F.No. 373/50/B/SZ/2019-RA

Applicant : Smt. Sithy Sawahira

Respondent : Commissioner of Customs, Customs House, Willingdon
Island, Cochin, Kerala - 682 009.

Subject : Revision Application filed, under Section 129DD of the
Customs Act, 1962 against the Orders-in-Appeal No.
No. COC-CUSTM-000-APP-195/2016-17 dated
29.12.2016 [(DOI : 12.01.2017)(C27/159/Air/2016 AU
CUS)(O/S. No. 269/2016 dated 26.08.2016)] passed by
the Commissioner of Customs (Appeals), Custom House,
Cochin - 9.

ORDER

This revision application has been filed by Smt. Sithy Sawahira (hereinafter referred to as the Applicant) against the Order-in-Appeal No. COC-CUSTOM-000-APP-195/2016-17 dated 29.12.2016 [(DOI : 12.01.2017)(C27/159/Air/2016 AU CUS)(O/S. No. 269/2016 dated 26.08.2016)] passed by the Commissioner of Customs (Appeals), Custom House, Cochin - 9.

2(a). Brief facts of the case are that the applicant who is a Sri Lankan national was intercepted by Customs Officers at Cochin International Airport, Nedumbassery, having earlier arrived from Colombo onboard Sri Lankan Airlines Flight no. UL165 / 26.08.2016. The applicant was intercepted at the exit gate on suspicion that she possessed undeclared gold ornaments and it led to the recovery of the undermentioned undeclared goods from her person.

Table No. 1.

Sr.No.	Description of goods	Number	Purity	Weight in gms
1.	Bangles	7	22 carats	129.850
2.	Rings	2	22 carats	32.200
3.	Chain	1	22 carats	39.550
4.	Necklace	1	22 carats	44.250
	Total	11		245.850

2(b). The total weight of the gold jewellery was 245.850 grams, all of 22 carats purity and valued at Rs. 7,32,879/- (I.V) and Rs. 7,17,882/- (M.V) which was seized.

3. The Original Adjudicating Authority (OAA), viz, Addl. Commissioner, Air Customs, Cochin vide Order-In-Original No. O.S. 269 / 2016 dated 26.08.2016 (S.14/24/2016) ordered for the absolute confiscation of the impugned gold jewellery weighing 245.850 grams of 22 Carats purity and valued at Rs. 7,17,882/- (M.V) under Section 111 (d), (i), (l) & (m) of the

Customs Act, 1962 read with Sec. 3(3) of F.T(D&R) Act and Baggage Rules and imposed a penalty of Rs. 20,000/- under Section 112 (a) of the Customs Act, 1962 on the applicant.

4. Aggrieved by the said order, the applicant preferred an appeal before the appellate authority (AA) viz, Commissioner of Customs (Appeals), Custom House, Cochin - 9, vide Order-In-Appeal No. COC-CUSTOM-000-APP-195/2016-17 dated 29.12.2016 [(DOI : 12.01.2017)(C27/159/Air/2016 AU CUS)(O/S. No. 269/2016 dated 26.08.2016)], rejected the appeal.

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

- 5.01. the order of the Commissioner (Appeals) is against law, weight of evidence and circumstances and probabilities of the case;
- 5.02. that they had received the order passed by the appellate authority only after filing an application under RTI.
- 5.03. that the Appellate Authority ought to have allowed the re-export of the impugned gold under Section 80 of the Customs Act, 1962.
- 5.04. that impugned gold belongs to the applicant and she had worn it and it was her personal belonging; that ownership of the gold was not disputed and there was no ingenious concealment; that the gold jewellery worn by the applicant had been purchased out of her own earnings / savings; the case of the respondent too is that she was wearing the jewellery and the same had not been concealed.
- 5.05. that there was no specific allegation that the applicant had passed through green channel and only contention of department was that the applicant had not declared the gold.
- 5.06. that baggage rules would apply only if goods are found in the baggage, since the Applicant was wearing the gold, the violation of baggage rules did not arise;
- 5.07. that the contention of the department of non declaration of the gold as per Section 77 of the Customs Act, 1962 is refuted as not applicable since the gold was worn by the applicant there was no necessity to declare the same since it was her personal belongings.
- 5.08. The appellant further submits 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 is categorically directed that binding precedent should be followed to avoid unnecessary litigation and adverse observations of the Courts should be avoided.

5.09. that the personal penalty of Rs. 20,000/- imposed on applicant was very high and requested for reduction.

5.10. applicant has relied upon the following case laws;

(i). Vigneswaran Sethuraman vs UOI in W.P. 6281 of 2014 (I) dated 12.03.2014.

(ii). 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 this order dated 31.07.2012.

Under the above facts and circumstances of the case, the Applicant has prayed that the Revision Authority be pleased to set aside the impugned order and permit to re-export the gold jewellery on payment of nominal fine and penalty and render justice.

6(a). Personal hearing through the online video conferencing mode was scheduled for 23.03.2022 and 30.03.2022. Smt. Kamalamalar Palanikumar, Advocate for the applicant appeared for physical hearing and submitted a written submission. She submitted that the applicant is a Sri Lankan therefore, requested for re-export on nominal fine and penalty.

6(b). In the written submission dated 30.03.2022 handed over during the personal hearing, Smt. Kamalamalar Palanikumar reiterated the submissions made in the grounds of appeals and relied upon some more case laws viz,

(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, 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.

(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). 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.

6(c). She has reiterated her prayer that the Revisionary Authority may be pleased to set aside the impugned order passed by the AA and permit the applicant to re-export the gold jewellery

7. At the outset, Government notes that the impugned Order-in-Appeal was passed on 29.12.2016 and issued on 12.01.2017. The Revision Application has been filed by the applicant on 11.03.2019. The applicant has claimed that the impugned OIA was received by them on 23.02.2019. A RTI reply bearing F.No. S31/31/2018 Air Cus dated 21.02.2019 issued by the CPIO from the Respondent's and addressed to the Counsel of the applicant has been enclosed in the Revision Application. This RTI reply informs that the OIA was passed vide C27/159/Air/2016 AU CUS dated 29.12.2016 and a copy of the same was enclosed. Respondent has not countered above claims of applicant and has also not attended personal hearing. In absence of any evidence of service of the OIA, this contention of applicant has to be accepted.

8. The Government has gone through the facts of the case and notes that the applicant had failed to declare the goods in her possession as required under Section 77 of the Customs Act, 1962. The applicant had not disclosed that she was carrying dutiable goods and had she not been intercepted would have walked away with the impugned gold jewellery without declaring the same to Customs. By her actions, it was clear that the applicant had no intention to declare the impugned gold to Customs and pay Customs duty on it. The Government finds that the confiscation of the gold jewellery is therefore justified.

9. The Government notes that the quantum of gold jewellery recovered from the applicant is very small. There is no case made out that the concealment was ingenious or that the applicant is a repeat offender. At best this case can be termed as a case of non-declaration of gold jewellery rather than smuggling of gold. The demeanor of the applicant is required to be considered while confiscating the gold and imposing penalty.

10. 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".

11. 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.

12. Section 125 of the Customs Act, 1962 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 even in prohibited goods. 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. The Government finds that this is a case of non-declaration of the gold jewellery. The facts of the case reveals that the gold jewellery was worn by the Applicant and it was not ingeniously concealed. The gold jewellery has been claimed by the Applicant and there is no other claimant. There are no allegations of previous offences registered against the Applicant. Thus, mere non-submission of the declaration cannot be used to deprive the applicant of the gold jewellery, more so because she is a foreign national. Government therefore, is inclined to allow the impugned gold jewellery to be re-exported on payment of a redemption fine as specifically prayed for by the applicant. In view of the same, the Government is inclined to modify the order passed by the appellate authority.

14. The Government finds that the personal penalty of Rs. 20,000/- imposed on the applicant under Section 112(a) of the Customs Act, 1962 is commensurate with the omissions / commissions committed.

15. In view of the above, the Government modifies the order passed by the appellate authority and allows the applicant to redeem the impugned gold jewellery for re-export as prayed for, on payment of a redemption fine of Rs. 1,75,000/- (Rupees One Lakh Seventy Five Thousand only). The penalty amount of Rs. 20,000/- is upheld.

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

Shrawan
28/6/22
(SHRAWAN KUMAR)

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

ORDER NO. 196 /2022-CUS (WZ/SZ)/ASRA/MUMBAI DATED 28.06.2022.

To,

1. Smt. Sithy Sawahira, 84/8B, Amgodiyan Angode, Colombo, Sri Lanka.
2. Commissioner of Customs, Customs House, Willingdon Island, Cochin, Kerala - 682 009.

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.