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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. 373/169 &-168/B/2018-RA / 2022 : Date of Issue 04.07.2022

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ORDER NO. 199-200/2022-CUS (WZ/SZ)/ASRA/MUMBAI DATED 29/06.2022 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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(i). **F.No. 373/169/B/2018-RA**

Applicant No. 1 : Smt. Rajinadevi Dorasamy

(ii). **F.No. 373/168/B/2018-RA**

Applicant No. 1 : Smt. Rajeswari Tharmalingam

Respondent : Pr. Commissioner of Customs, Commissionerate - 1, Chennai Airport and Aircargo Complex, New Custom House, Meenabakkam, Chennai - 600 027.

Subject : Revision Application filed, under Section 129DD of the Customs Act, 1962 against the Order-in-Appeals Airport No. C.Cus.I.No. 74 & 75/2018 dated 09.05.2018 [F.No. C4- 1/50-51/0/2018-AIR] passed by the Commissioner of Customs (Appeals - I), Chennai - 600 001.

**ORDER**

These two revision applications have been filed by (i). Smt. Rajinadevi Dorasamy & (ii). Smt. Rajeswari Tharmalingam (hereinafter referred to as Applicant No. 1 & Applicant No. 2 or alternately as Applicants), both Malaysian nationals, against the common Orders-In-Appeal No.- Airport C.Cus.I. Nos. 74 & 75 / 2018 dated 09.05.2018 [F.No. C4-I/50 - 51/0/2018-AIR] passed by the Commissioner of Customs (Appeals - I), Chennai - 600 001.

**(i). F.No. 373/169/B/2018-RA**

2. Briefly stated the facts of the case are that Applicant No. 1 who is a Malaysian national, arrived at Chennai Airport from Kuala Lumpur onboard Air Asia Flight No. AK13 / 10.11.2017, was intercepted by Customs Officers on 10.11.2017. Personal search of the applicant led to the recovery of one crude gold chain of 24 carat purity, totally weighing 339 grams and valued at Rs. 10,03,779/-(M.V) which had been worn on her neck and concealed with help of her fully covered/ closed neck sleeved dress. The applicant had neither declared the gold nor was she in possession of any valid document / permit / license for the legal import of the impugned gold. Also, the applicant did not possess any foreign currency to pay the Customs duty.

3. The Original Adjudicating Authority (OAA) vide Order-In-Original No. 01 / 2018-19-Airport dated 05.04.2018 [F.No. O.S. 568/2017-AIU (DIN:20171205135313-220)], ordered for the absolute confiscation of the semi-finished crude gold chain weighing 339 grams and valued at Rs. 10,03,779/- (M.V) under Section 111 (d) & (l) of the Customs Act, 1962 read with Sec 3(3) of the Foreign Trade (Development & Regulation Act), 1992 and imposed a penalty of Rs. 1,00,000/- ( Rupees One lakh only ) under

Section 112 of the Customs Act, 1962. A penalty of Rs. 10,000/- ( Rupees Ten thousand ) under Section 114AA of the Customs Act, 1962 was also imposed on the applicant no. 1.

4. Aggrieved by the said order, the applicant no. 1 filed an appeal before the the Appellate Authority (AA) viz, Commissioner of Customs (Appeals - I), Chennai - 600 001, who vide Order-in-Appeal Airport No. C.Cus.I. No. 74 & 75 / 2018 dated 09.05.2018 [F.No. C4-I/50 - 51/0/2018-AIR] except for setting aside the penalty of Rs. 10,000/- imposed on applicant no. 1 under Section 114AA of the Customs Act, 1962 did not find it necessary to interfere in the remaining part of the Original Order passed by OAA.

**(ii). F.No. 373/168/B/2018-RA**

5. Briefly stated the facts of the case are that the Applicant No. 2 who is a Malaysian national, arrived at Chennai Airport from Kuala Lumpur onboard Air Asia Flight No. AK13 / 10.11.2017, was intercepted by Customs Officers on 10.11.2017. Personal search of the applicant led to the recovery of one crude gold chain of 24 carat purity, totally weighing 329 grams and valued at Rs. 9,74,169/- (M.V) which had been worn on her neck and concealed with help of her fully covered/ closed neck sleeved dress. The applicant had neither declared the gold nor was she in possession of any valid document / permit / license for the legal import of the impugned gold. Also, the applicant did not possess any foreign currency to pay the Customs duty.

6. The Original Adjudicating Authority (OAA) vide Order-In-Original No. 02 / 2018-19-Airport dated 11.04.2018 [F.No. O.S. 567/2017-AIU (DIN:20171205134933-123)], ordered for the absolute confiscation of the semi-finished crude gold chain weighing 329 grams and valued at Rs. 9,74,169/- (M.V) under Section 111 (d) & (l) of the Customs Act, 1962 read

with Sec 3(3) of the Foreign Trade (Development & Regulation Act), 1992 and imposed a penalty of Rs. 1,00,000/- ( Rupees One lakh only ) under Section 112 of the Customs Act, 1962. A penalty of Rs. 5,000/- ( Rupees Five thousand ) under Section 114AA of the Customs Act, 1962 was also imposed on the applicant no. 2.

7. Aggrieved by the said order, the applicant no. 2 filed an appeal before the Appellate Authority (AA) viz, Commissioner of Customs (Appeals - I), Chennai – 600 001, who vide Order-in-Appeal No. Airport No. C.Cus.I. No. 74 & 75 / 2018 dated 09.05.2018 [F.No. C4-I/50 - 51/0/2018-AIR] except for setting aside the penalty of Rs. 5,000/- imposed on applicant no. 2 under Section 114AA of the Customs Act, 1962 did not find it necessary to interfere in the remaining part of the Original Order passed by OAA.

8. Aggrieved with the above order, both the Applicants have filed revision applications. The grounds of appeal of both these applicants are similar and they have a common Counsel / Advocate. The grounds of appeal are as under;

8.01. Order of the AA is against law, weight of evidence and circumstances and probabilities of the case; that an order to re-export the seized gold under section 80 of the Customs Act 1962, ought to have been passed; 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.

8.02. that applicants had never attempted or passed through green channel and they both had been intercepted while they were in the hand scan area.

8.03. that they are the owners of the gold and had worn the same; that they had produced the purchase invoices; that baggage rules was not applicable to them as they both were found wearing the gold chain; that no declaration card was provided to them; besides as they had worn the gold chain, provisions of Section 77 of the Customs Act, 1962 were not attracted.

- 8.04. that the both the applicants have 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.
- 8.06. that CBEC vide letter F.No. 495/3/94-Cus VI dated 02.03.1994 had stated that ownership was not a criteria for import of gold; that here the gold receipts are in the name of the applicants.
- 8.07. that the applicants have 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). Revision Authority Order No. 380/57/8/16-RA/1015 dated 31.01.2018 ALIMA ZAMBROSE Sri Lankan national.
- Some cases relied upon have been passed by Commissioner (Appeals) and such orders not being precedent cases for Revisionary Authority, the same have not been mentioned.

Under the circumstances of the case, both the applicants have made a common prayer to set aside the impugned order and permit them to re-export their gold chains respectively and to set aside or reduce the penalty of Rs. 1,00,000/- each and thus, to render justice,

9(a). Personal hearings in both the cases 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 applicants are foreign nationals and were not aware about declaration, gold jewellery was worn by the pax. She requested to allow jewellery on nominal RF and penalty.

9(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. Applicants have 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, 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.

Applicants have prayed that the gold chains may be permitted to be re-exported and have also prayed for reduction of penalty imposed under Section 112 of the Customs Act, 1962.

10. At the outset Government notes that the both the Applicants had brought crude gold chains which were semi-finished, of 24 carats purity and weighing 339 grams and 329 grams respectively. A declaration as required under Section 77 of the Customs Act, 1962 was not submitted by both the applicants and therefore, the confiscation of the gold is justified.

11. Government, however notes that the applicants had worn the gold chains around their necks and the same were not ingeniously concealed. Government notes that the quantity of gold jewellery under import is small and not of commercial quantity. There are no allegations that the Applicants are habitual offenders and were 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 determining quantum of penalty. The applicants have produced invoices claiming ownership of the gold jewellery.

12. 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".

13. 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.*

14. 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.*

15. Government finds that this is a case of non-declaration of gold jewellery. Jewellery was worn by the applicants, quantity is not commercial, applicants are not habitual offenders, there was no ingenious concealment,



absolute confiscation of the gold, leading to dispossession of the Applicants of the gold in the instant case is therefore harsh and not justified. The applicants have persistently prayed that they be allowed to re-export the gold. Government therefore, sets aside the impugned order of the Appellate authority. The impugned gold chains are allowed to be redeemed for re-export on payment of Rs. 2,50,000/- (Rupees Two Lakhs Fifty Thousand Only) and Rs. 2,40,000/- (Rupees Two Lakhs Forty Thousand Only) for applicant no. 1 and applicant no. 2, respectively. The penalty imposed under section 112 of the Customs Act, 1962 on both the applicants is appropriate and commensurate with the omissions and commissions committed.

14. Both the Revision Applications are disposed of on above terms.

*Shrawan*  
*29/6/22*

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

<sup>199-200</sup>  
ORDER NO. /2022-CUS (WZ/SZ)/ASRA/MUMBAI DATED 29.06.2022.

To,

1. Smt. Rajinadevi Dorasamy, D/o. Dorasamy, No. 84, Jalan PJS 10 # 24A, Taman Sri Subang 46150, Petaling Jaya Selangor, Malaysia.
2. Smt. Rajeswari Tharmlingam, 117, Blokatarnan Desaria Jalan PJS 5/9, 46000, Petaling Jaya Selangor, Malaysia.
3. Pr. Commissioner of Customs, Commissionerate - 1, Chennai Airport and Aircargo Complex, New Custom House, Meenabakkam, Chennai - 600 027.

Copy To,

1. Smt. Kamalamalar Palanikumar, Advocate, No. 10, Sunkurama Street, Chennai - 600 001.
2. Sr. P.S. to AS (RA), Mumbai.
3. Guard File.
4. File Copy.
5. Notice Board.