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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. 371/42/B/2017(Mum) / 5327

Date of Issue 12.09.2021

ORDER NO. ²²⁵/2021-CUS (WZ)/ASRA/MUMBAI DATED 09.09.2021 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.

Applicant : Smt. Shabana Abdul Hameed Shaikh

Respondent : Pr. Commissioner of Customs, Mumbai

Subject : Revision Application filed, under Section 129DD of the Customs Act, 1962 against the Order-in-Appeal No. MUM-CUSTOM-PAX-APP-18/17-18 dated 25.04.2017 passed by the Commissioner of Customs (Appeals-I), Mumbai- Zone III.

ORDER

This revision application has been filed by Smt. Shabana Abdul Hameed Shaikh (herein after referred to as the Applicant) against the Order in appeal No. MUM-CUSTOM-PAX-APP-18/17-18 dated 25.04.2017 passed by the Commissioner of Customs (Appeals-I), Mumbai- Zone III.

2. Briefly stated the facts of the case are that the Applicant, Smt. Shabana Abdul Hameed Shaikh arrived from Nairobi on 21.06.2013. She was intercepted after she cleared herself through the Green Channel. The hand held metal detector gave an alarm when passed over her body, indicating that the Applicant was carrying metal. She was asked by the officer on duty whether she had anything to declare to which she replied in negative. The physical search of the passenger resulted in the recovery of 2042.196 gms of gold/gold jewelry valued at Rs. 54,41,610/- (Rupees Fifty Four lakhs Forty one Thousand Six hundred and Ten). The gold/ gold jewelry was concealed in her brassiere and undergarments. Investigations in the case revealed that one, Smt. Saadia Yakub Abdullahi was also actively involved in the smuggling operation.

3. The Original Adjudicating Authority vide Order-In-Original No. ADC/ML/ADJN/42/2014-15 dated 31.07.2014 ordered absolute confiscation of the impugned gold, and imposed penalty of Rs. 5,00,000/- (Rupees Five Lakhs) on the Applicant and Rs. 2,00,000/- (Rupees Two Lakhs) on Smt. Saadia Yakub Abdullahi alias Hoden, under Section 112 (a) & (b) of the Customs Act, 1962.

4. Aggrieved by the said order, the applicant filed appeal before the Commissioner (Appeals) who vide Order-In-Appeal No. MUM-CUSTOM-PAX-APP-18/17-18 dated 25.04.2017 rejected the Appeal.

5. Aggrieved with the above order the Applicant, has filed this revision application after 92 days interalia on the grounds that;

5.1 The Appellant submits that the Appellant in her statement recorded u/s. 108 of the Customs Act, 1962 on 21.06.2013 stated that she resides at Room No. 33, Nasim Chawl, Chimat Pada, Marol Naka, A.K. Road, Andheri (E), Mumbai — 400 059; that she can read, write and understand English, Hindi and Urdu languages and also can understand Marathi; she further stated that she visited Nairobi nine times during the year 2013; that she carried 'Burkas' to Nairobi during the current visit and delivered it to the shop named Mandira at Nairobi for which she got her travel ticket and Rs. 5000/-; that the Burkas were given to her by one Ms. Hoden, a Nigerian National, whom she met through her neighbor Zahida (who has married to a Nigerian); that Ms. Hoden is the owner of Mandira Shop at Nairobi and reside at Mohamed Ali Road, Mumbai; she further stated that on her earlier occasions during her visits to Nairobi, she used to bring loban some times and chocolates some times in her handbag and did not bring any checked in baggage and that she did not bring any gold or gold jewellery earlier while returning to Nairobi. claim on the seized gold.

5.2 The Appellant submits that the Ld. Appellate Authority has seen all the documents which were annexed with the retraction dated 23.06.2013 and thereafter the Ld. Appellate Authority is not accepting the said documents as true and correct. The Ld. Appellate Authority has made out some allegations on the date of entering the Agreement with the company at Nairobi.

5.3 The Ld. Appellate Authority has not disputed that the company at Nairobi is not in existence. The Appellant has annexed sufficient documentary proof to prove their claim on the seized gold. However, the Ld. Appellate Authority merely on assumptions and presumptions is disregarding the said documents.

5.4 The Appellant is relying on some of the orders passed by the same Appellate authority, wherein in similar circumstances, gold bars released to the passengers on redemption fine and penalty on this aspect though Appellate authority has seen the said orders, however, the Appellate

authority has singled out this case from the similar cases where the gold has been released.

5.5 The Appellant submits that under Section 125 of the Customs Act, 1962, which provides redemption fine in lieu of confiscation of goods, the Appellate authority ought to have appreciated that facts that the Appellant is the claimant of the said gold which is under seizure. Section 125 is very much clear that the person who claims to be the owner of goods, the goods can be released on redemption fine. Section 125 in a broader sense can be seen further that even prohibited goods can be released on redemption fine and penalty. The Ld. Appellate Authority vide passing the order has observed on page no. 42 from not releasing the goods on the passing following observations which is as follows:-

(a) Mrs. Shabana Abdul Hameed Shaikh is a part of organized smuggling activity and the release of the gold to her will not only encourage smuggling activity but also adversely affect economy of the country. Hence, I am not inclined to release impugned gold on payment of redemption fine under the provisions of Section 125."

5.6 The Appellant submits that the same Appellate Authority has released gold in number of other cases which are of similar nature. The Appellate Authority cannot ignore this fact the same adjudication orders are very much known to the Appellate authority before passing this Adjudication Order.

5.7 The Appellant submits that the allegations of other passengers has been clubbed with these cases though it has no relevance with the present case.

5.8 The Appellant submits that the Appellate Authority before confiscation of the gold ought to have seen and referred the judgments and orders, wherein in similar cases gold was released.

5.9 The Appellate Authority is merely commenting and relying on retraction dated 23.06.2013 heavily and saying and referring the said retraction was received by the Customs Department on 20.08.2013.

5.10 The Appellant submits that she had posted the retraction on 23.06.2013 and if it is received late due to postal authorities lacunas for which the Appellant is not at all responsible. The fact remains the

retraction is placed on record, wherein all the details and acquisition of gold by the Appellant has been clearly mentioned in the said retraction.

5.11 The Appellant submits that she had arrived by flight no. KQ 202 on 20.06.2013, the said flight arrival time in India was 21 hrs, therefore the said flight had arrived on time whereas the panchanama dated 21.06.2013 wherein panchanama time has been shown as 03.00 hrs, which has not been explained while issuing the said SCN

5.12 It is submitted that panchanama dated 21.06.2013 is false and fabricated document.

5.13 As per the panchanama dated 21.06.2013, the Appellant was not allowed to fill the Customs Gate Pass and no declaration form which is prescribed under the Customs Act has been provided to the Appellant. Therefore, to presume that the appellant has not declared the gold cannot be sustainable.

5.14 The Appellant submits that during drawing the panchanama, however two lady officers and five male officers at the Custom Arrival Hall. It is the case of officers on page no. 2 that officers Smt. Vasantha Sundaram intercepted the appellant and took a personal search in the presence of all other officers mentioned above and from her bra the said gold bars were recovered. If this fact is accepted. then such panchanama is null and void as no personal search has been taken in the presence of male officers.

5.15 The Appellant submits that the copy of panchanama was not given to the Appellant which is evident from the panchanama page no 4 as there is no signature of the appellant receiving the copy of panchanama. This also proves that the panchanama has been drawn by the officers on the computer without calling any panchas.

5.16 The Appellant submit that the pancha witnesses are their own witnesses. They are being called the customs authorities as and when necessary.

5.17 The Appellant submits that even the statement dated 21.06.2013 question no. 110 the officers themselves have mentioned that she was in customs arrival hall and never crossed Exit Gate of Customs, therefore, it cannot be treated that the appellant had passed the green channel. The

statement dated 21.06.2013 is not referring anything that she has crossed the green channel while the alleged panchanama dated 21.6.2013 alleges that Appellant had crossed the green channel.

5.18 The officers recorded allegedly two statements on 21.06.2013. One statement has been recorded by the N. Chandrashekar who is neither a Superintendent nor any gazette officer, therefore the said statement is not admissible. The second statement is recorded on 21.06.2013, wherein no time has been referred in the statement. The said statement says that she had taken the officers at a place where Mrs. Sadia Abdulla alias Hoden a Kenyan national was residing. However the officers have not drawn any panchanama at such place which is referred in the statement dated 21.06.2013, therefore, the said statement can also cannot be relied upon. The seizure panahcnama dated 21.6.2013 wherein the appellant had not given any name of Hoden and the said panchanama was over at 08.00 hrs. There is no reference of any statement made by the Appellant that the said gold was to be handed over to Hoden. The Appellant further submits that during the alleged recording of the statement dated 21.06.2013 the appellant has not given any address where Hoden was residing. Then how the officers have been to the said place is not explained in the statement dated 21.06.2013.

5.19 The Appellant submits that there is no identification panchanama made at the Airport for identifying the Hoden as alleged in the statement.

5.20 The Appellant further submits that as per the statement dated 21.06.2013 there is a reference of a mobile number 09769553540. As per the SCN, and allegations the said mobile belongs to hoden. However, neither said mobile has been seized or taken charge by the officers in the investigations. Neither any mobile printouts has been annexed with the said SCN. Therefore, the entire story of handing over the gold to hoden by the Appellant would not sustain.

5.21 The Appellant submits that in the statement dated 20.11.2013, the questions has been asked on the issue of posting the said retraction. However, with the SCN, the cover / envelope which was posted alongwith

the retraction has not been annexed as a relied upon document. Therefore to believe the retraction received by the customs late cannot be believed.

5.22 The Appellant further submits that Sadia Abdulla Yakub was recorded on 21.06.2013 by the officers of Customs as the Airport itself. While recording the statement it has not been explained how this lady reached to the office of Custom for recording the statement. It is pertinent to note that the office of AIU is a secluded area. No one can enter the said area without any legal authorization. The said lady while recording the statement has denied any receiving of any gold jewellery from the Appellant i.e. that has been replied in questin no 3 of the statement Sadia Abdulla Yakub.

5.23 The Appellant submits that the lady by name Sadia Abdulla Yakub has denied any role in the import of said gold jewellery. She has further stated that she has been dragged in the episode.

5.24 The Appellant submits that the Ld. Appellate Authority has merely endorsed the order of adjudication without going through the details and documents submitted by the Appellant.

5.25 The Appellant submits that alongwith the SCN, the Customs Department has annexed the copy of retraction dated 23.06.2013. However, on the said retraction, it appears a rubber stamp dated 20.08.2013 as receiving date. However, with this there is no such cover which was received by the department on 20.08.2013

5.26 In view of the above mentioned submissions, the Appellant prays that the entire gold which is under seizure be released to the Appellant u/s. 125 of the Customs act, 1962 in judgments relied upon on similar issues.

5.27 The Appellant prays that the Appeal be heard on merits at an earliest as the goods are under seizure.

5.28 The Appellant submits that since the goods are under seizure, the department is fully secured with the penalty amount.

5.29 The Appellant is relying on some of the judgments of CESTAT, wherein it has been observed that once the goods are under seizure, then personal penalty amount can be waived.

5.30 In view of the above, the Appellant prays that the Revision be allowed and the goods may be released to the Appellant or in the alternative the gold may be allowed to be reshipped out of India.

5.31 Ld. Appellate authority without taking into consideration the status of the Appellant has passed a very harsh order of absolutely confiscating the goods and also imposing personal penalty.

6. Personal hearings in the case were scheduled in the case on 10.12.2020, 17.12.2020, 24.12.2020, 05.12.2019 and 12.12.2019. In view of the change in Revisionary authority, another opportunity of personal hearing was extended on 19.03.2021. Nobody attended the hearing on behalf of the department. The Advocate for the Applicant attended the personal hearing. He re-iterated the submissions already made in the revision application and submitted that the gold was brought by the passenger as per agreement for making African style jewelry. He submitted that gold be permitted for re-export.

7. The Government has gone through the facts of the case. The Revision Application has been filed within the condonable limits, as it is within condonable limits and these being reasonable grounds, Government condones the delay and proceeds to decide the case on merits.

8. The facts of the case are that the Applicant was intercepted after the officers detected the presence of metal using a hand held metal scanner. When questioned the Applicant stated that she had nothing to declare. The personal examination of the Applicant resulted in the recovery of assorted gold/gold jewelry weighing 2042.196 gms of gold/gold jewelry valued at Rs. 54,41,610/- (Rupees Fifty Four lakhs Forty one Thousand Six hundred and Ten) concealed in her brassiere wear, and undergarments. As the Applicants did not declare the gold as required under section 77 of the Customs Act, 1962. The confiscation of the gold jewelry is justified and the Applicant has rendered herself liable for penal action.

9. Government observes that the facts of the case reveal that the Applicant is not the owner of the gold. In her initial statements she has stated that the impugned gold was given to her by some persons in Kenya with whom she got

acquainted during her earlier visits, to be delivered to Smt. Saadia Yakub Abdullahi alias Hoden, the person who had sent the Applicant to Kenya. These facts indicate that the Applicant has acted as a carrier. The Applicant is not an eligible passenger to import gold, the quantity of gold being more than 2 kgs is commercial in nature. The Gold was concealed to avoid its detection by the Customs Authorities with clear intention to smuggle it into India, without the payment of customs duties.

10. The Applicant in their revision application has dwelt on the retraction of the statement by the Applicant dated 23.06.2013, but was received in the Customs office on 20.08.2013, and the fact that the impugned gold was brought into India for remaking, as per an agreement between the Applicant and M/s Hothon Osman Farh, Nairobi, Kenya. It is clear that if the gold was brought for remaking and subsequent re-export a proper declaration to that effect at the time of import would have set matters right. Instead the Applicant tried to smuggle the gold into India without declaration. The Original adjudicating authority and the Appellate authority have both pointed out inconsistencies, questioning the genuineness of the agreement and the credibility of the Applicants submissions for bringing the gold. The Revision Application has not addressed these aspects suitably. Government therefore notes that these submissions are an after thought brought out to secure the release of the gold. The submissions do not in any way absolve the Applicant from the offence of trying to smuggle the gold into India. The manner of concealment clearly indicates that there was no intention to declare the gold and therefore the said offence was premeditated and clearly indicates mensrea. Such acts of mis-using the liberalized facilitation process should be meted out with exemplary punishment and the deterrent side of law for which such provisions are made in law needs to be invoked in such cases.

11. 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 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.

12. The Original Adjudicating Authority has confiscated the gold absolutely and the Appellate Authority has upheld the order. The Applicant has pleaded for release of the gold on redemption fine and penalty. The Government, keeping in mind the facts of the case, is not inclined to interfere in the Appellate order on this aspect. The impugned order of the Appellate Authority is liable to be upheld and the Revision Application liable to be dismissed.

13. Revision Application is accordingly dismissed.

Shrawan
9/9/21
(SHRAWAN KUMAR)
Principal Commissioner & ex-officio
Additional Secretary to Government of India

ORDER No. 225/2021-CUS (WZ) /ASRA/

DATED 09-09-2021

To,

1. Smt. Shabana Abdul Hameed Shaikh, c/o Shri N. J. Heera, Advocate, Nulwala Building, 41 Mint Road, Fort, Mumbai 400 001.

Copy to:

2. The Pr. Commissioner of Customs, CSI Airport, Mumbai.
3. Shri N. J. Heera, Advocate, Nulwala Building, 41 Mint Road, Fort, Mumbai 400 001.
4. Sr. P.S. to AS (RA), Mumbai.
5. Guard File. ,
6. Spare Copy.