

REGISTERED
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. 371/365/B/WZ/2019-RA / 1056 : Date of Issue : 12.02.2023

ORDER NO. 239 /2023-CUS (WZ)/ASRA/MUMBAI DATED .02.2023
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.

(i). F.No. 371/365/B/WZ/2019-RA

Applicant : Ms. Shahd Mamdouh Ahmed Seedahmed.

Respondent : Principal Commissioner of Customs, CSMI Airport,
Sahar, Andheri East, Mumbai - 400 099.

Subject : Revision Application filed, under Section 129DD of the
Customs Act, 1962 against the Order-in-Appeal No.
MUM-CUSTM-PAX-APP-135/2019-20 dated 24.05.2019
issued on 12.06.2019 through F.No. S/49-576/2018
passed by the Commissioner of Customs (Appeals),
Mumbai - III, Marol, Mumbai - 400 059.

ORDER

This revision application has been filed by Ms. Shahd Mamdouh Ahmed Seedahmed (hereinafter referred to as the Applicant) against the Order-in-Appeal No. MUM-CUSTM-PAX-APP-135/2019-20 dated 24.05.2019 issued on 12.06.2019 through F.No. S/49-576/2018 passed by the Commissioner of Customs (Appeals), Mumbai – III, Marol, Mumbai – 400 059.

2. Brief facts of the case are that on 10.04.2018, AIU Officers at the CSMI Airport, Mumbai had intercepted the applicant, who is a Sudanese national who had arrived from Addis Ababa onboard Ethiopian Airlines Flight No. ET-640 / 09.04.2018. She had cleared herself through the green channel and was proceeding towards the exit gate at customs arrival hall, CSMI airport. Personal search led to the recovery of one yellow coloured metallic bar which had been kept concealed in her body cavity i.e. rectum, the same purported to be gold. The bar was assayed which confirmed the same was of gold having purity of 22.08KT. The gold bar weighed 225 grams and was valued at Rs. 6,40,575/-.

3. The Original Adjudicating Authority (OAA), viz, Addl. Commissioner of Customs, CSMI Airport, Mumbai vide his Order-In-Original no. ADC/AK/ADJN/141/2018-19 dated 29.06.2018 through Aircus/49/T2/2302/2018-'C' ordered for the absolute confiscation of the 01 gold bar, weighing 225 grams, valued at Rs. 6,40,575/- under Section 111(d), (l) & (m) of the Customs Act, 1962. Personal penalty of Rs. 65,000/- was imposed on the applicant under Section 112(a) and (b) of the Customs Act, 1962.

4. Aggrieved by the said order, the applicant preferred an appeal before the appellate authority (AA) viz, Commissioner of Customs (Appeals), Mumbai – III

who vide Order-In-Appeal No. MUM-CUSTOM-PAX-APP-135/2019-20 dated 24.05.2019 issued on 12.06.2019 through F.No. S/49-576/2018 did not find it necessary to interfere in the impugned OIO and upheld the order passed by OAA.

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

- 5.01. the lower authorities had failed to appreciate that the applicant being a Sudanese national did not know the law of our country i.e. India and did not know English and could not read the boards put up at the Airport as the same were also only in English language.
- 5.02. the lower authorities had failed to appreciate that the gold bar was her personal gold and it did not have any foreign markings or Indian markings. She had brought the gold for making designer jewellery and taking it back to Sudan.
- 5.03. the lower authorities had failed to appreciate that Applicant was also holding foreign currency to pay duty and she was ready and willing to pay the duty.
- 5.04. the lower authorities had failed to appreciate that applicant had informed the Customs Officers that she was carrying a gold bar for making jewellery for herself.
- 5.05. the lower authorities had failed to appreciate that gold bar was not in commercial quantity and the quantity of the gold itself showed that it is meant for personal use.
- 5.06. the lower authorities had failed to appreciate that the gold bar belonged to the applicant and she had purchased it from her own savings.
- 5.07. the Appellate Authority had given the conclusion and findings which were contrary and inconsistent with the findings of Adjudicating Authority.
- 5.08. the lower authorities have decided the case on the basis of presumptions and assumptions only and not on the real and true facts put by the Applicant.
- 5.09. the orders of the lower authorities are illegal and bad in law and the same requires to be quashed and set aside.

5.10. that the applicant was wearing a burkha and the gold bar had been kept in the inner pocket of her innerwear which she was wearing under the burkha but it had been wrongly considered that the said gold piece was in her rectum. The same is false and this has happened as she could not communicate with the officers in English.

The applicant has prayed to the revisionary authority to quash and set aside the order passed by both the lower authorities and to allow the gold bar weighing 225 grams to be re-shipped on nominal reshipment fine and to grant any other reliefs as deemed fit.

6. Personal hearing through the online video conferencing mode was scheduled for 12.08.2022, 25.08.2022, 16.09.2022, 28.09.2022. Smt. Shivangi Kherajani, Advocate for the applicant appeared for personal hearing on 23.09.2022 and submitted that though it is mentioned as rectum concealment, goods were actually kept in the innerwear. She further submitted that quantity is small. She requested to allow re-export on reasonable fine and penalty. None appeared for the respondent.

7. 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, she would have walked away with the impugned gold bar without declaring the same to Customs. The gold bar had been kept concealed in an ingenious manner. By her actions, it was clear that the applicant had no intention to declare the impugned gold bar to Customs and pay duty on it. The Government finds that the confiscation of the gold was therefore, justified.

8. 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”.

9. 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.

10. 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.

11. Government observes that the manner in which the gold was concealed i.e. inside her own body, reveals the intention of the Applicant. It also reveals her criminal bent of mind and a clear intention to evade duty and smuggle the gold into India. Quantity of gold is not important, the method adopted is of relevance. The circumstances of the case especially the ingenious concealment which could be risky to the applicant's life itself, adopted by her, probates that the Applicant had no intention of declaring the gold to the Customs at the airport. The method of concealment indicates and the same was conscious and pre-meditated. All these have been properly considered by the Appellate

Authority and the lower adjudicating authority while absolutely confiscating the gold bar.

12. The main issue in the case is the manner in which the impugned gold was being brought into the Country. The option to allow redemption of seized goods is the discretionary power of the adjudicating authority depending on the facts of each case and after examining the merits. In the present case, the manner of concealment being clever, ingenious and risky with a clear attempt to smuggle gold, it is a fit case for absolute confiscation which would also be a deterrent to such offenders. Thus, taking into account the facts on record and the gravity of the offence, the adjudicating authority had rightly ordered the absolute confiscation of gold. But for the intuition and the diligence of the Customs Officer, the gold would have passed undetected. The redemption of the gold will encourage non-bonafide and unscrupulous elements to resort to concealment and bring gold. 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. The order of the Appellate authority upholding the order of the adjudicating authority is therefore liable to be upheld.

13. In her averments, both in the written submissions and during the personal hearing, the applicant has stated that the gold was kept in her innerware and not in the body cavity and there was some mis-communication. Government notes that this contention was raised by the applicant before the AA who has dealt with the same at length and thereafter had rejected this plea. Government observes that this averment made by the applicant is an afterthought may be at the instance of advice received. Government is not inclined to accept this averment made by the applicant.

14. Government finds that the penalty of Rs. 65,000/- imposed on the applicant under Section 112(a) and (d) of the Customs Act, 1962 is commensurate with the omissions and commissions committed and is not inclined to interfere in the same.

15. Government upholds the order of absolute confiscation of the impugned gold bars passed by the OAA and rightly upheld by the AA. Government does not find it necessary to interfere in the penalty of Rs. 65,000/- imposed on the applicant under Section 112(a) & (b) of the Customs Act, 1962 by the OAA and confirmed by the AA.

16. The Revision Application filed by the applicant is dismissed.

Shrawan
13/2/23
(SHRAWAN KUMAR)

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

ORDER NO. 239 /2023-CUS (WZ)/ASRA/MUMBAI DATED 13.02.2023.

To,

1. Ms. Shahd Mamdouh Ahmed Seedahmed, [Sudanese National, Address not known, Service ; through Notice Board].
2. Pr. Commissioner of Customs, Adjudication Cell, Chhatrapati Shivaji Maharaj International Airport, Sahar, Andheri East, Mumbai – 400 099.

Copy to:

3. Smt. Shivangi Kherajani / Smt. Kiran Kanal, Advocates, Satyam, 2/5, R.C. Marg, Opp. Vijaya Bank, Chembur, Mumbai – 400 071.
4. Sr. P.S. to AS (RA), Mumbai.
5. File Copy.
6. Notice Board.