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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. 371/329,330A & 334/B/WZ/2018-RA / ASK Date of Issue : 22.02.23

ORDER NO. 259-256 /2023-CUS (WZ)/ASRA/MUMBAI DATED 30.02.2023 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. 371/329/B/WZ/2018-RA

Applicant No. 1. : Mrs. Kasturi Paramaselvan,

(ii). F.No. 371/330A/B/WZ/2018-RA

Applicant No. 2. : Mrs. Majula Rengaswamy &

(iii). F.No. 371/334/B/WZ/2018-RA

Applicant No. 3. : Mr. Ashiq Moudooth J. Jafar Mohiyuddin.

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 Orders-in-Appeal No. MUM-CUSTOMS-PAX-APP-546,547 & 548/2018-19 dated 18.09.2018 issued on 24.09.2018 through F.No. S/49-163,166 & 165/2016/AP passed by the Commissioner of Customs (Appeals), Mumbai - III, Marol, Mumbai - 400 059.

ORDER

These 3 revision applications have been filed by (i). Mrs. Kasturi Paramaselvan, (ii). Mrs. Majula Rengaswamy & (iii). Mr. Ashiq Moudooth J. Jafar Mohiyuddin [hereinafter referred to as the Applicants or alternately and more specifically as Applicant no. 1 (A1), Applicant no. 2 (A2), & Applicant no. 3 (A3) resp.] against the Orders-in-Appeal No. MUM-CUSTOM-PAX-APP-546,547 & 548/2018-19 dated 18.09.2018 issued on 24.09.2018 through F.No. S/49-163,166 & 165/2016/AP passed by the Commissioner of Customs (Appeals), Mumbai – III, Marol, Mumbai – 400 059.

2(a). Brief facts of the case are that on 28.11.2015, Customs Officers at the CSMI Airport, Mumbai had intercepted the applicant, who is a Malaysian national and had arrived from Kuala Lumpur by Malindo Air Flight No. OD-215 / 27.11.2015. The applicant had cleared herself through the green channel and had been intercepted near the exit gate of Customs Arrival Hall of Terminal – 2, CSMI Airport. To query, whether she was in possession of any dutiable goods, she had replied in the negative. A personal search led to the recovery of one FM gold bar of 1 kg and a second FM gold bar of 500 gms, which had been kept in the front pockets of the jeans worn by her. Thus, 2 FM gold bars, collectively weighing 1500 gms, valued at Rs. 35,41,770/- were recovered from A1.

2(b). Based on the persistent calls received on the phone of A1 and disclosures made by her that two persons were waiting outside the airport to receive the gold bars, the Customs Officers in immediate follow up action apprehended A2 & A3. A1 had co-operated in identifying A2 and A3.

2(c). A2 and A3 in their statements admitted that they were waiting outside the airport to receive the gold bars from A1. A2 revealed that she was a Malaysian national.

3. The Original Adjudicating Authority (OAA), viz, Addl. Commissioner of Customs, CSMI Airport, Mumbai vide his Order-In-Original no. ADC/RR/ADJN/496/2016-17 dated 31.01.2017 issued through F.No. S/14-5-36/2016-17 (SD/INT/AIU/410/2015 AP'D' ordered for the absolute confiscation of the impugned 2 gold bars, totally weighing 1500 gms and valued at Rs. 35,41,770/- under Section 111(d), (l) and (m) of the Customs Act, 1962. Personal penalty of Rs. 1,50,000/- each were imposed on the A1 & A2, resp. under Section 112(a) and (b) of the Customs Act, 1962 and a personal penalty of Rs. 1,50,000/- was also imposed on the A3 under Section 112(a) of the Customs Act, 1962.

4. Aggrieved by the said order, the applicants preferred appeals before the appellate authority (AA) viz, Commissioner of Customs (Appeals), Mumbai – III who vide Orders-in-Appeal No. MUM-CUSTOM-PAX-APP-546,547 & 548/2018-19 dated 18.09.2018 issued on 24.09.2018 through F.No. S/49-163,166 & 165/2016/AP, observed that the OAA had rightly confiscated the gold absolutely and hence, did not find it necessary to interfere in the impugned OIO and upheld in to-to, the order passed by OAA.

5. Aggrieved with the above order of the appellate authority, the Applicant no. 1 has filed the revision application on the following grounds of revision, that;

5.01. she was a foreign national and did not know to read and write in English; that she understood only her mother tongue; that the gold bars were not concealed and had been found in the pocket of the jeans worn by her; that the applicant had brought such type of goods for the first

- time; that gold was neither restricted nor prohibited item and can be released for re-export under Section 125 of the Customs Act, 1962;
- 5.02. that the AA had come to the conclusion that the acts and omissions on the part of the applicant were to evade Customs duty and that the evasion of customs duty could be done only in respect of dutiable goods and not prohibited goods; that the department therefore, accepted that the goods are dutiable and hence option of redemption of goods should have been given to the applicant under Section 125 of the Customs Act, 1962.
- 5.03. that the applicant has relied upon the following case laws on the subject.
- (a). Collector of Custom vs. Elephanta Oil and Inds. Ltd [2003(152) ELT 02547 Supreme Court]; once imported article is re-exported as directed by the department, there is no question of levying any penalty or redemption fine.
- (b). Kusum Bhai DayaBhai vs. Commr. Of Customs 1995 (79) ELT 292 Tri-Mumbai; If goods are allowed re-export on redemption, fine can be on the lower side and need not relate to margin of profit.
- (c). A.K Jewellers vs. Commissioner of Customs, Mumbai, 2003 (155) ELT 585 Tri-Larger Bench; Re-export of confiscated goods, first to be redeemed on payment of fine and then to be exported. Combination of both these actions in one order is not contrary to law.
- (c). Patel vs. Commr. Of Customs; 2003-153-ELT-226-Tr. ; that when the importer makes a request for re-export, it has been a general practice in Custom House to consider such a request having regard to the bona-fides of such a request. By re-exporting the goods, the importer can avoid payment of duty but not the fine in lieu of confiscation.
- (d). M.V. Marketing and Supplies vs. Commr. of Customs (Import), Chennai, 2004-178-ELT-1034-Tri-Chennai which covers all the citations mentioned at 5.03(a) to (c) above and nearly 31 similar cases.
- 5.04. the applicant has also relied on the undermentioned cases passed by the GOI wherein re-export had been allowed;
- (a). RA Order no. 38/2008 in case of Mrs. Majeeda Mohammed Yonus;
- (b). RA Order no. 178/2008 in case of Mr. Ravinder Sadharam Dular;
- (c). RA Order no. 33/2008 in case of Shri. Deepak Hiralal Parekh;
- (d). RA Order no. 34/2008 in case of Shri. Pradeep Kumar Bhawarlal;
- (e). RA Order no. 392/2002 in case of Shri. Nasir Asgar Mirab. ..

Under the circumstances, the applicant has prayed to the revisionary authority that the gold be released for re-export on nominal fine alongwith reduction in the penalty or to pass any other order as deemed fit.

6. Aggrieved with the above order of the appellate authority, the Applicant no. 2 & 3 have filed the revision applications on the following similar grounds of revision, that;

6.01. that the OIA is bad in law and unjust; that A1 had implicated her on the basis of her statement; A2 has relied upon the Tribunal's order in the case of Vikram Singh Dahiya vs. Commr. Of Customs (Export), New Delhi [2008-223-ELT-619-Tri-Delhi wherein it was held that statement of co-noticee without any corroborative evidence cannot be taken up as an evidence to impose penalty;

6.02. that A2 has cited a host of case laws as mentioned below to buttress her case:-

(a) 2002 (121) E.L.T. 478 (Tri-Delhi): In the case of Jasmine Bhogilal Shah V/s. Commr..

(b) 2008 (223) E.L.T. 619 (Tri. Del.): In the case of Vikram Singh Dahiya V/s. Commr. of Cus. (Export), New Delhi.

(c) 1993 (66) E.L.T. 112 (Tri-Kol.) : In the case of Sadhan Chandra Mallick V/s. Collector of Customs (Prev.),

(d) 2000 (117) E.L.T. 444 (Tri-Mumbai) : In the case of Anant Samant V/s. Commr. of Customs, Mumbai,

(e) 2003 (159) E.L.T. 594 (Tri.-Del) : In the case of Ram Prasad V/s. Commr.of Customs, Amritsar,

(f) 1996 (83) E.L.T. 175 (Tri-Del) : In the case of Jaswinder Singh V/S. Collector Of Customs, New Delhi,

(g) 2014 (305) E.L.T. 350 (HC-Bom.) : In the case of Ashwini Kumar Tandon V/S. Commr. Of Customs (Prev.)

(h) 1991 (53) E.L.T. 12 (Tri-Kol) : In the case of Balbir Singh V/S. Addl. Collector Of Customs (Prev.),

(i) 1993 (66) E.L.T. 105 (Tri-Kol) : In the case of Bhola Singh V/S. Collector Of Customs (Prev.)

6.03. that A2 & A3 are in no way concerned with the seizure of gold made from A1.

Under the circumstances, A2 & A3 have prayed to the revision authority to exonerate them and to set aside the OIA or to pass any order as deemed fit and proper.

7. Personal hearing through was scheduled for 02.08.2022, 20.09.2022. On 20.09.2022, Shri. N.J Heera, Advocate for the applicant appeared in person and sought an adjournment. Thereafter, personal hearing was scheduled for 10.11.2022. Shri. N.J Heera, Advocate appeared for personal hearing on 10.11.2022 and submitted that applicant is a Malaysian national, is a law abiding person and has brought gold for personal purposes. He requested to allow re-export of goods. He also requested to set aside the penalty on co-accused as they had come to receive the applicant.

8. The Government has gone through the facts of the case and notes that the applicant no. 1 had failed to declare the goods in her possession as required under Section 77 of the Customs Act, 1962. The applicant no. 1 had not disclosed that she was carrying dutiable goods and had she not been intercepted, she would have walked away with the impugned 2 nos of gold bars, totally weighing 1500 grams, without declaring the same to Customs. By her actions, it was clear that the applicant no. 1 had no intention to declare the impugned gold to Customs and pay duty on it. The Government finds that the confiscation of the gold was therefore, justified.

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 “prohibited” and therefore liable for confiscation and the ‘applicant’ thus, liable for penalty.

11. 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. The gold was found on the person of the applicant no. 1 who is a foreign national, applicant no. 1 has claimed that she wanted to take back the gold bars, that the gold bars had not been ingeniously concealed. This claim of the applicant no. 1 is contrary to facts and appears to be an afterthought as applicants no 2 & 3 had specifically come to take delivery of gold bars brought by applicant no. 1.

13. In view of the foregoing paras, the Government finds that as the applicant no. 1 had not declared the gold at the time of arrival, applicant 2 & 3 had come to collect the gold, quantity was substantial and in primary form, therefore absolute confiscation of the same was justified. Considering the above facts, Government is not inclined to modify the absolute confiscation upheld by the AA.

14. Government finds that the penalty of Rs. 1,50,000/- imposed on the applicant no. 1 under Section 112(a) and (b) of the Customs Act, 1962 is commensurate with the omissions and commissions committed and is not inclined to interfere in the same.

15. Government finds that penalty of Rs. 1,50,000/- has been imposed on A2 under Section 112(a) & (b) of the Customs Act, 1962 and a penalty of Rs. 1,50,000/- has been imposed on A3 under Section 112(a) & (b) of the Customs Act, 1962. Government finds that the statement of A1 is the primary evidence to implicate A2 and A3. In the absence of any additional material implicating A2 and A3 in the activity conducted by A1, Government finds that penalty imposed on them is harsh and unjust and is inclined to reduce the same.

16. In view of the above, the Government upholds the order of absolute confiscation of gold passed by the appellate authority. The penalty of Rs. 1,50,000/- imposed on the applicant no. 1 under Section 112(a) and (b) of the Customs Act, 1962 by the OAA and upheld by the AA is sustained. As discussed above, the Government reduces the penalty of Rs. 1,50,000/- imposed on A2 Section 112(a) and (b) of the Customs Act, 1962 by OAA and upheld by AA to Rs. 75,000/- (Rupees Seventy five thousand only) and also reduces the penalty of Rs. 1,50,000/- imposed on A3 under Section 112(a) of the Customs Act, 1962 by OAA and upheld by AA to Rs. 75,000/- (Rupees Seventy five thousand only)

17. The 3 Revision Applications are disposed of on the above terms.


(SHRAWAN KUMAR)

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

ORDER NO. 254-256 /2023-CUS (WZ)/ASRA/MUMBAI DATED 20.02.2023.

To,

1. Mrs. Kasturi Paramaselvan, [Malaysian National; Address : 84, Kampung, Prima Cempaka, Serenba – 43000, Malaysia; Service through noticeboard and through her Advocate].

2. Mrs. Majula Rengaswamy, [Malaysian National; Address : L-6, 4E Klang Parade, Kalang - 50200, Malaysia; Service through noticeboard and through her Advocate].
3. Mr. Ashiq Moudooth J. Jafar Mohiyuddin, 99/13, Meah Street, Nagore, Nagapattinam, Tamil Nadu - 611 001.
4. Pr. Commissioner of Customs, Adjudication Cell, Chhatrapati Shivaji Maharaj International Airport, Sahar, Andheri East, Mumbai - 400 099.

Copy to:

5. Shri. N.J Heera, Advocate, Nulwala Bldg, Ground Floor, 41, Mint Road, Opp. G.P.O, Fort, Mumbai - 400 001.
6. Sr P.S. to AS (RA), Mumbai.
7. File Copy.
8. Notice Board.