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SPEED POST



GOVERNMENT OF INDIA  
MINISTRY OF FINANCE  
(DEPARTMENT OF REVENUE)  
8<sup>th</sup> Floor, World Trade Centre, Centre - I, Cuffe Parade,  
Mumbai-400 005

F.No. 371/168/B/2021-RA | 6178

Date of Issue 22/10/21

ORDER NO. <sup>262</sup> /2021-CUS (SZ)/ASRA/MUMBAI DATED 3.10.2021 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. Ayesha Shaffiulla Sayed

Respondent : Pr. Commissioner of Customs, CSI, Sahar, Mumbai.

Subject : Revision Application filed, under Section 129DD of the  
Customs Act, 1962 against the Order-in-Appeal No.  
MUM-CUSTM-PAX-APP-21/2021-22 dated 05.04.2021  
passed by the Commissioner of Customs (Appeals),  
Mumbai - III.

ORDER

This revision application has been filed by Smt. Ayesha Shaffiulla Sayed (herein referred to as Applicant) against the Order in Appeal MUM-CUSTOM-PAX-APP-21/2021-22 dated 05.04.2021 passed by the Commissioner of Customs (Appeals), Mumbai – III.

2. Brief facts of the case are that on 08.12.2019, the officers of Air Intelligence Unit, CSI Airport intercepted the applicant who had arrived from Dubai by Flight No. AI-912/08.12.2019 while she was attempting to clear herself through the green channel. The applicant had not declared any dutiable goods in her possession. The applicant was wearing two bangles on her hand. The personal search of the passenger resulted in recovery of 02 crude Gold Bangles weighing 100 grams and valued at Rs.3,38,832/-.

3. The adjudicating authority vide his OIO no. Air Cus/T2/49/1430/2019 D dated 08.12.2029 had ordered the confiscation of the impugned gold under Section 111 (d), (l) & (m) of Customs Act, 1962 with an option to redeem gold on payment of a fine of Rs. 40,000/ under section 125 (1) of the Customs Act, 1962 and imposed personal penalty of Rs. 20,000/- under Section 112 (a) and (b) ibid of the Customs Act, 1962.

4. Aggrieved, with this Order, the revenue filed an appeal and the appellate authority vide Order-in-Appeal No. MUM-CUSTOM-PAX-APP-21/2021-22 dated 05.04.2021 has ordered for the absolute confiscation of the impugned gold and maintained the personal penalty imposed on the applicant.

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

5.1. the discretionary power of the quasi judicial authority cannot be lightly interfered. Appeal filed by the Revenue was not maintainable and the O-I-A was not sustainable. To sustain and give credence to this contention, the applicant has cited a plethora of case laws where the seized gold had been released on redemption fine.

5.2. that gold was not a prohibited item and that it was a restricted item.

5.3. that the Board's Circular No. 495/5/92-Cus VI dated 10.05.1993 cannot be relied upon for not allowing redemption. Applicant has emphasized that circulars cannot prevail over the statute; that circulars are issued only to clarify the statutory provision and it cannot alter or prevail over the statutory provision.

5.4. that the decisions relied upon by the appellate authority are not applicable to the case of the applicant.

5.5. that the appellate authority had failed to discuss as to how the facts of the cases relied upon fit the factual situation of the applicant.

5.6. that the applicant was the owner of the impugned gold.

Applicant has prayed to the Revisionary Authority for a reasonable order upholding the order of the original authority allowing redemption of the gold jewellery on payment of fine and penalty.

6. Personal hearings in the case was scheduled 24.08.2021 through video conferencing. The applicant alongwith Shri. Prakash Shingrani, Advocate, appeared and reiterated his submissions made earlier. They submitted that the absolute confiscation of the gold jewellery carried in person was unjustified. They requested to restore the order of the original adjudicating authority.

7. The Government notes that the Applicant had opted for the green channel and was intercepted thereafter while attempting to carry the 2 crude gold bangles without declaring the same to Customs. Applicant had admitted that she had not declared the gold bangles. A declaration as required under section 77 of the Customs Act, 1962 was not submitted, therefore, confiscation of the gold is justified. Government however notes that the gold was not ingenuously concealed and was worn by the applicant. The quantity of gold under import is not of commercial in nature. Also, the applicant is not a habitual offender. 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 imposing quantum of penalty.

8. There is no doubt that gold brought by non-eligible person without fulfilling required conditions becomes prohibited. 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 Applicants thus liable for penalty.

10. Even when 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.

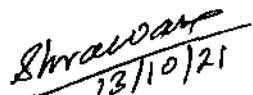
*71. Thus, when it comes to discretion, the exercise thereof has to be guided by law; has to be according to the rules of reason and justice; and has to be based on the relevant considerations. The exercise of discretion is essentially the discernment of what is right and proper; and such discernment 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.*

11. The absolute confiscation of the gold, leading to dispossession of the Applicant of the gold in the instant case is harsh and not justified. Government finds that the lower adjudicating authority had passed a reasonable order and had used his discretionary power quite judiciously to allow to redeem the 2 crude gold bangles on redemption fine. The Government finds that the personal penalty imposed on the applicant by the lower adjudicating authority is reasonable. The Government finds that the Order of the lower adjudicating authority is well balanced and judicious.

12. Government therefore, sets aside the impugned order of the Appellate authority and restores the Order-in-Original passed by the lower adjudicating authority.

13. Revision Application is disposed of on the above terms.

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

ORDER No. <sup>262</sup> //2021-CUS (SZ) /ASRA/

DATED 13.10.2021

To,

1. Shri. Smt. Ayesha Shaffiulla Sayed, D-1501, Imperial Heights, Link Road, Best Colony, Goregaon (West), Mumbai - 400 104.
2. The Pr. Commissioner of Customs, Chhatrapati Shivaji International Airport, Terminal - 2, Mumbai - 400 099.

Copy to:

3. Shri. Prakash Shingrani, Advocate, 12 / 334, Vivek New MIG Colony, Bandra (East), Mumbai - 400 051.
4. Sr. P.S. to AS (RA), Mumbai.
5. Guard File,