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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. 371/330/B/2018-RA /133 : Date of Issue : 02.02.2023

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ORDER NO. 271 /2023-CUS (WZ)/ASRA/MUMBAI DATED 28.02.2023 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.

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Applicants : Ms. Intanbay Disimban Gunting

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

Subject :Revision Application filed, under Section 129DD of the Customs Act, 1962 against the Order-in-Appeal No. MUM-CUSTM-PAX-APP-518/18-19 dated 30.08.2018 [Date of issue: 12.09.2018] [F.No. S/49-858/2015 AP] passed by the Commissioner of Customs (Appeals), Mumbai Zone-III.

ORDER

The Revision Application has been filed by Ms. Intanbay Disimban Gunting (herein referred to as the "Applicant") against the Order-in-Appeal No. MUM-CUSTM-PAX-APP-518/18-19 dated 30.08.2018 [Date of issue: 12.09.2018] [F.No. S/49-858/2015 AP] passed by the Commissioner of Customs (Appeals), Mumbai Zone -III.

2. Brief facts of the case are that on 06.05.2014, the Applicant, a Philippines national, who arrived at the Chhatrapati Shivaji International Airport (CSI), Mumbai from Hongkong, by Cathay Pacific Flight No. CX-685, was intercepted by the officers of Customs, after she had opted for the green channel of customs. The Applicant had left the column No. 9 i.e 'Total value of dutiable goods being imported' of the Customs Declaration Form, blank. On being asked whether she was carrying any contraband/dutiable goods and foreign/Indian currency, the Applicant replied in the negative. During the course of personal search, a hand held metal detector was passed over the body of the Applicant and it gave a positive indication of some metal being concealed on her person. Despite showing reluctance to remove the metal like thing, the Applicant, after persuasion, admitted to having concealed gold in her undergarment and voluntarily took out the gold from her undergarment. The said gold bar weighing 01 kg having foreign marking s as "KALOTI, DUBAI 1KG FINE GOLD 999.9, K.II MELTER ASSAYER KALOTI INTL DNCC-B 18763' valued to Rs. 25,67,870/- was recovered and the said gold bar was seized in the reasonable belief that the same was being smuggled into India in contravention of the provisions of the Customs Act, 1962.

3. Following the due process of law the Original Adjudicating Authority ie, Additional Commissioner of Customs, CSI Airport, Mumbai, vide Order-In-Original (OIO) No. ADC/ML/ADJN/161/2015-16 dated 11.09.2015 [Date of

issue: 14.09.2015] [S/14-5-338/2014-15 Adj. SD/INT/AIU/290/2014 AP 'D'] ordered for the absolute confiscation of the seized 01 gold bar weighing 01 kg and valued at Rs. 25,67,870/-, under Section 111 (d), (l) and (m) of the Customs Act, 1962. A penalty of Rs. 2,50,000/- was imposed on the Applicant under Section 112(a) and (b) of the Customs Act, 1962.

4. Aggrieved with this Order, the Applicant filed an appeal before the Appellate Authority (AA) viz, Commissioner of Customs (Appeals), Mumbai Zone -III, who vide Order-in-Appeal No. MUM-CUSTOM-PAX-APP-518/18-19 dated 30.08.2018 [Date of issue: 12.09.2018] [F.No. S/49-858/2015 AP] upheld the order passed by the OAA.

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

5.01. That the Applicant is a foreign national and does not know to read and write English and understands her mother tongue only;

5.02. That when asked whether she was carrying gold she replied in the affirmative and took out the gold from her person and handed it over;

5.03. That her statement and other papers were prepared in English which was not known to her and her signature was obtained on the papers and a case of non-declaration of gold was made out against her;

5.04. That it was the first time that the Applicant had brought this type of goods and there was no previous case registered against her;

5.05. That the gold was not concealed by her but was found on her person;

5.06. That the Applicant was the owner of gold and ready to pay the customs dues and she was not aware that being a foreign national, she was not supposed to import gold;

5.07. That the gold brought by the Applicant is neither restricted nor prohibited and can be released for Re-export under Section 125 of the Customs Act, 1962;

5.08. that had the Applicant declared the gold and paid customs duty thereon, there would have been no offence and therefore the goods are dutiable goods and not prohibited goods;

5.09. that once it is accepted by the department that the goods are dutiable, the option of redemption of goods as provided under Section 125 of the Customs Act, 1962 will have to be given to the Applicant;

5.10. That in view of the various judgements passed by various authorities, wherein re-export of goods have been granted even when the goods were not declared, in the instant case the re-export of the goods ought to have been considered:

- (i) Collector of Customs vs. Elephanta Oil and Ind Ltd [ 2003 (152) E.L.T. 257 (SC)
- (ii) Kusumbhai Dayabhai Patel vs. Commr. of Customs [1995(79) E.L.T. 292(Tri Mum)
- (iii) A.K.Jewellers vs. CC. Mumbai [2003(155) E.L.T. 585(Tri-LB)]
- (iv) Patel vs. Commr. of Customs [2003(153) E.L.T. 226 Tr]
- (v) Revision Order No 38/2008 in the case of Mrs. Majeeda Mohd. Yunus
- (v) Revision Order No 178/2008 in the case of Ravinder S Dulari
- (vi) Revision Order No 33/2008 in the case of Deepak Hiralal Parekh
- (vii) Revision Order No 34/2008 in the case of Pradeep kumar Bhanwarlal
- (viii) Revision Order No 392/2002 in case of Nasir Asgar Mirab

Under the circumstances the Applicant prayed that the gold be released under Section 125 of the Customs Act, 1962 for re-export on nominal redemption fine and personal penalty may be reduced substantially.

6. Personal hearing in the case was scheduled for 02.08.2022. Shri N.J. Heera, Advocate appeared for the personal hearing on 02.08.2022, on behalf of the Applicant and requested for an adjournment to 25.08.2022. However, no one appeared for the hearing on the said adjourned date or thereafter. Since sufficient opportunities have been granted to the Applicant to attend the personal hearing and no one attended the hearing, the case is being decided on the basis of the available records.

7. The Government has gone through the facts of the case, and observes that the Applicant had failed to declare the goods to the Customs at the first instance as required under Section 77 of the Customs Act, 1962. The Applicant had not disclosed that she was carrying dutiable goods. However, pursuant to personal search, after interception, after she had cleared herself through the Green channel, the gold bar weighing 01 kg was recovered from her person and the method of carrying the gold adopted by the Applicant clearly revealed her intention not to declare the impugned gold and thereby evade payment of Customs Duty.

8.1. The relevant sections of the Customs Act are reproduced below :

**Section 2(33)**

“prohibited goods” means any goods the import or export of which is subject to any prohibition under this Act or any other law for the time being in force but does not include any such goods in respect of which the conditions subject to which the goods are permitted to be imported or exported have been complied with”

**Section 125**

*“Option to pay fine in lieu of confiscation. - (1) Whenever confiscation*

*of any goods is authorised by this Act, the officer adjudging it may, in the case of any goods, the importation or exportation whereof is prohibited under this Act or under any other law for the time being in force, and shall, in the case of any other goods, give to the owner of the goods or, where such owner is not known, the person from whose possession or custody such goods have been seized, an option to pay in lieu of confiscation such fine as the said officer thinks fit :*

*Provided that where the proceedings are deemed to be concluded under the proviso to sub-section (2) of section 28 or under clause (i) of sub-section (6) of that section in respect of the goods which are not prohibited or restricted, the provisions of this section shall not apply :*

*Provided further that, without prejudice to the provisions of the proviso to sub-section (2) of section 115, such fine shall not exceed the market price of the goods confiscated, less in the case of imported goods the duty chargeable thereon.*

*(2) Where any fine in lieu of confiscation of goods is imposed under sub-section (1), the owner of such goods or the person referred to in sub-section (1), shall, in addition, be liable to any duty and charges payable in respect of such goods.*

*(3) Where the fine imposed under sub-section (1) is not paid within a period of one hundred and twenty days from the date of option given thereunder, such option shall become void, unless an appeal against such order is pending.”*

8.2. It is undisputed that as per the Foreign Trade Policy applicable during the period, gold was not freely importable and it could be imported only by the banks authorized by the RBI or by others authorized by DGFT and to some extent by passengers. Therefore, gold which is a restricted item for import but which was imported without fulfilling the conditions for import becomes a prohibited goods in terms of Section 2(33) and hence it liable for confiscation under Section 111(d) of the Customs Act.

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. 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.”*

12. Government finds that this is a case of non-declaration of gold to avoid payment of duty by ingenious concealment. Applicant or authorised person of the Applicant failed to attend the personal hearing. This means that the Applicant did not have anything further to add. 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. Considering the aforesaid facts, Government considers Applicants' request for re-export and granting an option to the Applicant to redeem the gold does not merit acceptance.



13. Applicant has also pleaded for reduction of the penalty imposed on her. The value of the gold in this case is Rs. 25,67,870/-. From the facts of the case as discussed above, Government finds that the penalty of Rs. 2,50,000/- imposed on the Applicant under Section 112(a) & (b) of the Customs Act, 1962 is appropriate and commensurate to the omissions and commissions of the Applicant.

14. The Revision Application is disposed of on the above terms.

  
( SHRAWAN KUMAR )

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

ORDER NO. 271 /2023-CUS (WZ)/ASRA/MUMBAI DATED 28.02.2023

To,

1. Ms. Intanbay Disimban Gunting, 116 C, Palanco Street, Sun Miguen, Manila.  
**Address No. 2:** Ms. Intanbay Disimban Gunting, C/o Advani, Sachwani & Heera Associates, Nulwala Building, Ground Floor, 41, Mint Road, Opp. G.P.O, Fort, Mumbai 400 001
2. The Pr. Commissioner of Customs, C.S.I Airport, Terminal 2, Level-II, Sahar, Andheri (East), Mumbai 400 099.
3. The Commissioner of Customs (Appeals), Mumbai-III, 5<sup>th</sup> Floor, Avas Corporate Point, Makwana Lane, Behind S.M.Centre, Andheri Kurla Road, Andheri (East), Mumbai 400 059.

Copy to:

1. Shri N.J. Heera, Advocate, Nulwala Building, Ground Floor, 41, Mint Road, Opp. G.P.O, Fort, Mumbai 400 001.
2. Sr. P.S. to AS (RA), Mumbai.
3. File Copy.
4. Notice Board.