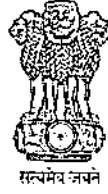


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SPEED POST



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

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**F.No. 371/430/B/WZ/2019-RA/6178** : Date of Issue : 01/11/2022

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ORDER NO. 32/2022-CUS (WZ)/ASRA/MUMBAI DATED 31.10.2022  
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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(i). F.No. **371/430/B/WZ/2019-RA**

Applicant : Mrs. Waheed Banu Osman.

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

Subject : Revision Application filed, under Section 129DD of the  
Customs Act, 1962 against the Orders-in-Appeal No. MUM-  
CUSTM-PAX-APP-340/2019-20 dated 30.07.2019 issued on  
13.08.2019 through F.No. S/49-734/2018 passed by the  
Commissioner of Customs (Appeals), Mumbai – III, Marol,  
Mumbai – 400 059.

**ORDER**

The revision application has been filed by Mrs. Waheed Banu Osman (hereinafter referred to as the Applicant) against the Order-in-Appeal No. MUM-CUSTOM-PAX-APP-340/2019-20 dated 30.07.2019 issued on 13.08.2019 through F.No. S/49-734/2018 passed by the Commissioner of Customs (Appeals), Mumbai – III, Marol, Mumbai – 400 059.

2. Brief facts of the case are that the applicant who is a Sri Lankan national had been intercepted on 09/10.12.2018 by Customs Officers at CSMI airport, Mumbai where she had arrived from Dubai onboard Jet Airways flight no. 9W-0342/09.12.2018 after she had crossed the green channel. Two gold bangles and one gold chain, totally weighing 117 grams and valued at Rs. 3,31,593/- were recovered from her possession.

3. The Original Adjudicating Authority (OAA), viz, Deputy Commissioner of Customs, CSMI Airport, Mumbai vide her Air/Cus/72/49/1171/2018'C' dated 10.12.2018 ordered for the absolute confiscation of the impugned gold jewellery i.e. two gold bangles and one gold chain, totally weighing 117 grams and valued at Rs. 3,31,593/-under Section 111(d) of the Customs Act, 1962. Personal penalty of Rs. 25,000/- was imposed on the applicant under Section 112 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-340/2019-20 dated 30.07.2019 issued on 13.08.2019 through F.No. S/49-734/2018 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;

5.01. that in similar cases both the lower authorities have granted re-shipment.

5.02. that the revision authority too had granted re-shipment on similar cases.

Under the above facts and circumstances of the case, the Applicant has prayed that the Revision Authority be pleased to set aside the impugned OIA and permit to re-export the gold jewellery or any other reliefs as deemed fit.

6. Personal hearing through the online video conferencing mode was scheduled for 10.08.2022 or 24.08.2022. Shri. Prakash Shingrani, Advocate appeared in the office for personal hearing on 10.08.2022. He submitted that applicant is a Sri. Lankan citizen and was wearing one gold chain. He requested to allow the re-export without any fine and penalty.

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 jewellery without declaring the same to Customs. By her actions, it was clear that the applicant had no intention to declare the impugned gold jewellery to Customs and pay duty on it. The Government finds that the confiscation of the gold jewellery 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. The Government notes that the quantity of gold jewellery was small. The applicant has claimed that she was wearing the same at the time of interception. This has not been refuted by the respondent. There are no allegations that the gold jewellery had been concealed. In the OIA, the AA has observed that another passenger had been apprehended on the same flight and similar quantity of gold jewellery was recovered and has concluded that the applicant is part of a syndicate involved in smuggling of gold. Government finds that this conclusion arrived at by the AA without any corroborative evidence is not sustainable.

12. There are no allegations that the Applicant is a habitual offender and was involved in similar offences earlier. The facts of the case indicate that it is a case of non-declaration of gold jewellery 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. Government notes that the applicants who is a foreign national has prayed

that the absolute confiscation be set aside and she be allowed to re-export the gold jewellery.

13. The quantum of gold jewellery is small; that applicant is a foreign national, that gold jewellery was worn / had been found on their person; that gold jewellery had not been concealed, Government notes that as contended by applicants the ratio of the order passed by the Hon'ble Kerala High Court in WP no. 6281 of 2014 in the case of Vigneswaran Sethuraman vs. U.O.I [2014 (308) ELT 394 (Ker.)] is broadly applicable to this case.

14. In a recent judgement passed by the Hon'ble High Court, Madras on 08.06.2022 in WP no. 20249 of 2021 and WMP No. 21510 of 2021 in r/o. Shri. Chandrasegaram Vijayasundarm + 5 others in a similar matter of Sri. Lankans wearing 1594 gms of gold jewellery (i.e. around 300 gms worn by each person) upheld the Order no. 165 - 169/2021-Cus (SZ) ASRA, Mumbai dated 14.07.2021 in F.No. 380/59-63/B/SZ/2018-RA/3716, wherein Revisionary Authority had ordered for restoration of OIO wherein adjudicating authority had ordered for the confiscation of the gold jewellery but had allowed the same to be released for re-export on payment of appropriate redemption fine and penalty.

15. In view of the foregoing paras, the Government finds that as the applicant had not declared the gold jewellery at the time of arrival, the confiscation of the same was justified. However, considering the quantity of gold jewellery, no past history, the same not being concealed in an ingenious manner, applicant being a foreign national, the absolute confiscation of the same was harsh and not justified. In view of the aforesaid facts and considering that the applicant is a foreign national, option to re-export the impugned gold jewellery on payment of redemption fine should have been allowed. Considering the above facts, Government allows the impugned gold jewellery to be re-exported on payment of a redemption fine.

16 Government finds that the penalty of Rs. 25,000/- imposed on the applicant under Section 112 of the Customs Act, 1962 is commensurate with omissions and commissions committed and is not inclined to interfere in the same.

17. In view of the above, the Government sets aside the impugned order of the Appellate Authority in respect of the impugned gold jewellery i.e. two gold bangles and one gold chain, totally weighing 117 grams and valued at Rs. 3,31,593/-. The impugned gold jewellery i.e. two gold bangles and one gold chain, totally weighing 117 grams and valued at Rs. 3,31,593/- are allowed to be re-exported on payment of a redemption fine of Rs. 60,000/- (Rupees Sixty Thousand only). The penalty of Rs. 25,000/- imposed under Section 112 of the Customs Act, 1962 imposed by the OAA and upheld by the AA is appropriate.

18. Revision Application is allowed on the above terms.

  
( SHRAWAN KUMAR )

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

ORDER NO. 32/2022-CUS (WZ)/ASRA/MUMBAI DATED 31.10.2022.

To,

1. Mrs. Waheed Banu Osman, Sri. Lankan National, Passport no. N7757299 / 10.12.2018, Colombo, Sri. Lanka.
2. Pr. Commissioner of Customs, Adjudication Cell, Chhatrapati Shivaji Maharaj International Airport, Sahar, Andheri East, Mumbai - 400 099.

Copy to:

1. Shri. Prakash Shingrani, Advocate, 12/334, New MIG Colony, Bandra East, Mumbai - 400 051.
2. Sr. P.S. to AS (RA), Mumbai.
3. File Copy.
4. Notice Board.