

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. 371/183 & 184/B/WZ/2021-RA / 1368 : Date of Issue : 09.03.2023

ORDER NO. S-346 /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.

F.No. 371/183 & 184/B/WZ/2021-RA

Applicant : Ms. Nassrin Mostafa Mohamed.

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 Nos.
(i). MUM-CUSTM-PAX-APP-1412/2020-21 dated
28.01.2021 issued on 11.02.2021 through F.No. S/49-
755/2019/AP and (ii). MUM-CUSTM-PAX-APP-
1424/2020-21 dated 28.01.2021 issued on 10.02.2021
through F.No. S/49-755/2019/AP passed by the
Commissioner of Customs (Appeals), Mumbai - III,
Marol, Mumbai - 400 059.

ORDER

This revision application has been filed by Ms. Nassrin Mostafa Mohamed (hereinafter referred to as the Applicant) against the Orders-in-Appeal Nos. (i). MUM-CUSTM-PAX-APP-1412/2020-21 dated 28.01.2021 issued on 11.02.2021 through F.No. S/49-755/2019/AP and (ii). MUM-CUSTM-PAX-APP-1424/2020-21 dated 28.01.2021 issued on 10.02.2021 through F.No. S/49-755/2019/AP passed by the Commissioner of Customs (Appeals), Mumbai – III, Marol, Mumbai – 400 059. Since, both these RAs pertain to the same applicant and the Commissionerate being the same, these are taken up simultaneously, for a common order.

(i). F.no. 371/183/B/WZ/2021.

2(a). Brief facts of the case are that on 31.05.2019, Customs Officers at the CSMI Airport, Mumbai had intercepted the applicant, who is a Sudanese national and had arrived at the CSMI Airport from Addis Ababa. Recovery of 4 nos of big and 4 nos of small cut pieces of gold, totally weighing 284 grams and valued at Rs. 8,44,636/- kept concealed in her innerwear was made from the applicant.

(ii). F.no. 371/184/B/WZ/2021.

2(b). Brief facts of the case are that on 28.06.2019, Customs Officers at the CSMI Airport, Mumbai had intercepted the applicant, who is a Sudanese national and had arrived at the CSMI Airport from Addis Ababa. Recovery of two pieces of earrings (30 gms) and necklace (24gms), totally weighing 54 gms and valued at Rs. 1,57,513/- were made from the applicant.

3. The Original Adjudicating Authority (OAA), viz, Dy. Commissioner of Customs, CSMI Airport, Mumbai vide his Orders-In-Original nos.

(i). F.No. Aircus/49/T2/845/2019-'B' dated 31.05.2019, ordered for the absolute confiscation of the impugned gold jewellery i.e. 4 nos of big and 4 nos of small cut pieces of gold, totally weighing 284 grams and valued at Rs. 8,44,636/- under Section 111(d),(l) and (m) of the Customs Act, 1962 read with provisions of the Foreign Trade Development and Regulations Act, 1992. Also, a penalty of Rs. 5,000/- was imposed on the applicant under Section 112(a) and (b) of the Customs Act, 1962 and

(ii). F.No. Aircus/49/T2/919/2019-'B' dated 28.06.2019 ordered for the absolute confiscation of the impugned gold jewellery i.e. two pieces of earrings (30 gms) and necklace (24gms), totally weighing 54 gms and valued at Rs. 1,57,513/- under Section 111(d), (l) and (m) of the Customs Act, 1962 read with provisions of the Foreign Trade Development and Regulations Act, 1992. Also, a penalty of Rs. 5,000/- was imposed on the applicant under Section 112(a) and (b) of the Customs Act, 1962.

4. Aggrieved by the said two orders, the applicant preferred an appeal before the appellate authority (AA) viz, Commissioner of Customs (Appeals), Mumbai – III who vide Orders-in-Appeal Nos. (i). MUM-CUSTM-PAX-APP-1412/2020-21dated 28.01.2021 issued on 11.02.2021 through F.No. S/49-755/2019/AP and (ii). MUM-CUSTM-PAX-APP-1424/2020-21dated 28.01.2021 issued on 10.02.2021 through F.No. S/49-755/2019/AP did not find it necessary to interfere in both the impugned OIOs and upheld the order passed by OAA. In OIA mentioned at 4(ii) above, the AA held the applicant as a habitual offender.

(i). F.no. 371/183/B/WZ/2021.

5. Aggrieved with the above order of the appellate authority mentioned at para 4(i) above, 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 assorted gold bars were her personal gold which was in the form of gold pieces not having any foreign marking or Indian marking on it. She intended to make designer Indian jewellery for herself and then take 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 was not a carrier.
 - 5.05. the lower authorities had failed to appreciate that gold was not in commercial quantity and it was meant for personal use.
 - 5.06. the lower authorities had failed to appreciate that the gold 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. In earlier decisions pertaining to similar quantity, the lower authorities have released the gold.
 - 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.

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 4 nos of big and 4 nos of small cut pieces of gold, totally weighing 284 grams and valued at Rs. 8,44,636/- to be re-shipped on nominal reshipment fine and to grant any other reliefs as deemed fit.

(i). F.no. 371/184/B/WZ/2021.

5. Aggrieved with the above order of the appellate authority mentioned at para 4(ii) above, the Applicant has filed this revision application on the following grounds of revision, that;

- 6.01. 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.
- 6.02. the lower authorities had failed to appreciate that the assorted gold jewellery were her personal gold which was on her person. This was old jewellery.
- 6.03. 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.
- 6.04. the lower authorities had failed to appreciate that applicant was not a carrier.
- 6.05. the lower authorities had failed to appreciate that gold was not in commercial quantity and it was of personal use.
- 6.06. the Appellate Authority had given the conclusion and findings which were contrary and inconsistent with the findings of Adjudicating Authority. In earlier decisions pertaining to similar quantity, the lower authorities have released the gold.
- 6.07. 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.
- 6.08. the orders of the lower authorities are illegal and bad in law and the same requires to be quashed and set aside.

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 two pieces of earrings (30 gms) and necklace (24gms), totally weighing 54 gms and valued at Rs. 1,57,513/- to be re-shipped on nominal reshipment fine and to grant any other reliefs as deemed fit.

7. Applicant's Advocate have filed an application for condonation of delay in both their applications i.e. r/o RA No. 371/183/B/WZ/2021 and RA No. 371/184/B/WZ/2021.

8. Personal hearing was scheduled for 06.12.2022 and 20.12.2022 in respect of both the aforesaid revision applications. Smt. Shivangi Kherajani, Advocate for the applicant appeared for personal hearing on 08.12.2022 and submitted that applicant is foreign national who regularly visited India in relation to her garments business. They submitted that applicant brought small quantity of jewellery for personal use, jewellery was not concealed and was meant to be taken back . They requested to allow re-export of the same.

9(a). On the issue of condonation of delay in r/o RA no. 371/183/B/WZ/2021, Government notes that the revision application has been filed on 24.05.2021. The OIA which is dated 28.01.2021 and was issued on 11.02.2021. Applicant has claimed that the OIA was received on 15.02.2021. Government notes that there is no delay in filing the revision application as this application pertains to the period when general moratorium was granted by the Apex Court for filing of appeals due to the Covid pandemic.

9(b). On the issue of condonation of delay in r/o RA no. 371/184/B/WZ/2021, Government notes that the revision application has been filed on 24.05.2021. The OIA which is dated 28.01.2021 and was issued on 10.02.2021. Applicant has claimed that the OIA was received on 15.02.2021. Government notes that there is no delay in filing the revision application as this application also pertains to the period when moratorium was granted by the Apex Court for filing of appeals due to the Covid pandemic.

10. The Government has gone through the facts of the case and notes that the applicant in both the cases 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 bars and jewellery, without declaring the same to Customs. By her actions, it was clear that the applicant had no intention to declare the impugned gold to Customs and pay duty on it. The Government finds that the confiscation of the gold in both the cases was therefore, justified.

11. 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”.

12. 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.

13. 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.

14(a). The Government notes that in both the cases the quantity of gold / gold jewellery was small. The applicant has claimed ownership of the gold and has desired to take it back on her return trip.

14(b). In the second case i.e F.No. 371/184/B/WZ/2021, the AA has held that the applicant is a habitual offender and was involved in similar offence earlier. Government notes that in this case, the quantity of gold jewellery is very small and the applicant has claimed that she was wearing the gold jewellery and intended to take it back. This has not been refuted by the respondent. Considering the quantity involved which is small, gold was in the form of ornaments / jewellery, Government observes that this was a case of non-declaration of gold jewellery thought to be persona effects rather than smuggling of gold. Since, quantity involved is small and the ambiguity on whether the same was worn by the applicant and covered under the personal effects, Government notes that this cannot be termed as habitual offence.

14(c). The facts of the both the cases, indicates that these are cases of non-declaration of gold rather than a case of smuggling for commercial considerations.

14(d). Under the circumstances, the seriousness of the mis-demeanour 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 applicant who is a foreign national and has prayed that the absolute confiscation be set aside and she be allowed to re-export the gold.

15. 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.

16. In view of the foregoing paras, the Government finds that as the applicant had not declared the gold jewellery at the time of arrival in both the cases, the confiscation of the same was justified. However, considering the quantity of gold, 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 and the case law referred above, Government is inclined to modify the absolute confiscation upheld by the AA in both the cases and allow the impugned gold bars / jewellery to be re-exported on payment of a redemption fine.

17. Government finds that the penalty of Rs. 5,000/- imposed on the applicant under Section 112(a) and (b) of the Customs Act, 1962 in both the cases is commensurate with the omissions and commissions committed by the applicant.

18. In view of the above, the Government modifies both the Appellate Orders passed by the appellate authority as under;

(i). the 4 nos of big and 4 nos of small cut pieces of gold, totally weighing 284 grams and valued at Rs. 8,44,636/- pertaining to RA F.No.

371/183/B/WZ/2021 is allowed to be redeemed for re-export on payment of a fine of Rs. 1,60,000/- (Rupees One Lakh Sixty Thousand only).

(ii). the two pieces of earrings (30 gms) and necklace (24gms), totally weighing 54 gms and valued at Rs. 1,57,513/- pertaining to RA F.No. 371/184/B/WZ/2021 is allowed to be redeemed for re-export on payment of a fine of Rs. 30,000/- (Rupees Thirty Thousand only).

(iii). The penalty of Rs. 5,000/- each imposed in both the RAs viz, 371/183 & 184/B/WZ/2021 under Section 112(a) and (b) of the Customs Act, 1962 by the OAA and upheld by the AA is sustained.

19. Both the Revision Applications are disposed of on the above terms.

Shrawan
28/2/23
(SHRAWAN KUMAR)

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

345-346
ORDER NO. /2023-CUS (WZ)/ASRA/MUMBAI DATED 28.02.2023.

To,

1. Ms. Nassrin Mostafa Mohamed, [Sudanese National; Postal address not available in the records; Service through her Counsel & 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.