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GOVERNMENT OF INDIA
MINISTRY OF FINANCE
(DEPARTMENT OF REVENUE)

8th Floor, World Trade Centre, Centre - I, Cuffe Parade,
Mumbai-400 005

F.No. 371/85/B/WZ/2018-RA | 169 | : Date of Issue : 23.03.2023

ORDER NO. 372/2023-CUS (WZ)/ASRA/MUMBAI DATED 23.03.2023 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.

Applicant : Ms. Jama Halima Dahir

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 Order-in-Appeal No. MUM-CUSTM-PAX-APP-961/2017-18 dated 23.01.2018 [Date of issue 24.01.2018] through F.No. S/49-940/2015/AP passed by the Commissioner of Customs (Appeals), Mumbai Zone - III.

ORDER

This revision application has been filed by Ms. Jama Halima Dahir (hereinafter referred to as the 'Applicant') against the Order-in-Appeal No. MUM-CUSTM-PAX-APP-961/2017-18 dated 23.01.2018 [Date of issue 24.01.2018] through F.No. S/49-940/2015/AP passed by the Commissioner of Customs (Appeals), Mumbai Zone - III.

2. Brief facts of the case are that on .04.04.2014, on suspicion, Customs Officers at the CSMI Airport, Mumbai intercepted the Applicant, who is a holder of a Kenyan passport and had arrived from Kenya by Kenya Airways Flight No. KQ-202. The Applicant had cleared herself through the green channel and was intercepted near the exit gate. The Applicant had left the column No 9 i.e 'total value of dutiable goods being imported' of the Customs Gate pass, blank. The Applicant was asked whether she was carrying any gold or contraband on her person or in her baggage to which she replied in the negative. The hand held metal detector gave a beep sound near her abdomen which indicated that some metal was concealed on her body. The Applicant was once again asked whether she had concealed any gold or any other metal on her body to which she once again replied in the negative. Personal search revealed that she was wearing two leggings and four panties and one heavy bundle wrapped in blue coloured cellophane tape was concealed in the undergarments worn by her. On opening the said bundle, small bundles of assorted jewellery and four bars of yellow metal purportedly to be of gold totally weighing 2130 grams and valued finally at Rs.51,29,086/- was recovered. The gold weighing 2130 grams and valued at Rs. 51,29,086/- were seized under the reasonable belief that the same were attempted to be smuggled into India in contravention of the provisions of the Customs Act, 1962.

3. After following the due process of law, the Original Adjudicating Authority (OAA), viz, Addl. Commissioner of Customs, CSMI Airport, Mumbai vide his Order-In-Original no. ADC/RR/ADJN/130/2015-16 dated 19.08.2015 [Date of issue 20.08.2015] [F.No. S/14-5-284/2014-15 Adj SD/INT/AIU/203/2014 AP 'A'] ordered for the absolute confiscation of the seized the assorted jewellery alongwith the said 04 gold bars totally weighing 2130 grams and valued at Rs. 51,29,086/- under Section 111(d), (l) and (m) of the Customs Act, 1962. Personal penalty of Rs. 5,00,000/- was imposed on the Applicant under Section 112(a) and (b) of the Customs Act, 1962. The seized four panties and two leggings used for concealing the seized gold were also ordered to be confiscated absolutely under Section 119 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 Zone - III who vide Order-In-Appeal No. MUM-CUSTOM-PAX-APP-961/2017-18 dated 23.01.2018 [Date of issue 24.01.2018] through F.No. S/49-940/2015/AP observed that the OIO issued by the OAA was legal and proper and 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, that;

5.01. the Applicant was a foreign national and was not conversant with the English language and the Applicant retracted her statement given earlier to customs authorities and claimed the ownership of the gold brought in by her and no one else has come forward to claim the same

5.02. that in similar type of cases, various authorities have release the gold/allowed its re-export on nominal fine and personal penalty.

Under the circumstances, the Applicant has prayed to the revisionary authority that the gold be released for re-export under Section 125 of the Customs Act on

nominal fine alongwith reduction in the penalty or to pass any other order as deemed fit.

6. Personal hearing through the online video conferencing mode was scheduled for 02.08.2022 and later for 29.09.2022. Shri N.J.Heera, Advocate a for the Applicant appeared in person and sought an adjournment on both the occasions. Personal hearing was then scheduled for 29.12.2022 or 06.01.2023. Shri. N.J Heera, Advocate appeared for personal hearing and submitted that Applicant is a foreign national and the jewellery was kept in garments and Applicant is not a habitual offender. He further submitted that gold and gold jewellery was for personal use and quantity was not large and requested that the goods be allowed to be re-exported.

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 assorted jewellery alongwith the said 04 gold bars totally weighing 2130 grams, 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 was therefore, justified.

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.

9.1. 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”.

9.2. 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 Applicant in her submissions has stated that she was not conversant with English language and expressed her desire to take back the gold bars. Applicant has brought sizeable quantity of golds in primary form by concealing the same in her undergarments. The facts of the case indicate that it is a case of smuggling of gold 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.

12. In view of the foregoing paras, the Government finds that as the Applicant had not declared the gold at the time of arrival, the confiscation of the same was justified. However, considering that the gold bars had been found concealed on the person of the Applicant, the same being in primary form, quantity being sizable, the absolute confiscation of the same was justified. In view of the aforesaid facts, Government is not inclined to modify the absolute confiscation and does

not find merit to allow the impugned gold bars to be re-exported on payment of a redemption fine.

13. Applicant has also pleaded for reduction of the penalty imposed on her. The value of the gold in this case is Rs. 51,29,086/-. From the facts of the case as discussed above, Government finds that the penalty of Rs. 5,00,000/- 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 dismissed.


(SHRAWAN KUMAR)

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

ORDER NO. 372/2023-CUS (WZ)/ASRA/MUMBAI DATED 20.03.2023.

To,

1. Ms. Jama Halima Dahir [Kenyan National; Address : PO Box No. 68674, 7th Street, Eastligh, Nairobi, Kenya ; [Service also through Notice Board].
Address No. 2: Ms. Jama Halima Dahir, c/o Shri. N.J Heera, Advocate, Nulwala Bldg, 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.

Copy to:

1. Shri N.J. Heera, Advocate, Nulwala Building, Ground Floor, 41, Mint Road, Opp G.P.O, Fort, Mumbai 400 001.
2. The Commissioner of Customs (Appeals), Mumbai-III, 5th Floor, Avas Corporate Point, Makwana Lane, Behind S.M.Centre, Andheri Kurla Road, Andheri (East), Mumbai 400 059.
3. Sr. P.S. to AS (RA), Mumbai.
4. File copy.
5. Notice Board.