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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. 371/220/B/WZ/2019-RA/1730 Date of Issue : 28.03.2023

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ORDER NO. 378 /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.

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**(i). F.No. 371/220/B/WZ/2019-RA**

Applicant : Shyama Faza Shamsudeen

Respondent : Pr. Commissioner of Customs, CSMI Airport, Mumbai  
400 099.

Subject : Revision Application filed, under Section 129DD of the  
Customs Act, 1962 against the Order-in-Appeal  
No. MUM-CUSTOMS-PAX-APP-158/19-20 dated 24.05.2019 issued  
on 17.06.2019 through F.No. S/49-200/2018 passed by the  
Commissioner of Customs (Appeals), Mumbai – III.

**ORDER**

This revision application has been filed by Shyama Faza Shamsudeen (hereinafter referred to as the Applicant) against the Order-in-Appeal No. MUM-CUSTM-PAX-APP-158/19-20 dated 24.05.2019 issued on 17.06.2019 through F.No. S/49-200/2018 passed by the Commissioner of Customs (Appeals), Mumbai – III.

2. Brief facts of the case are that on 10.04.2018, the applicant, a Sri Lankan national was intercepted by Customs Officers at the CSMI Airport, Mumbai having earlier arrived from Colombo by Air India Flight No. AI-274 & AI-093 both dated 10.04.2018. The applicant had crossed the green channel and had failed to declare goods i.e. 4 nos of gold bangles, totally weighing 84 grams, valued at Rs. 2,39,138/-. The applicant was a frequent traveller.

3. The Original Adjudicating Authority (OAA), viz, Dy. Commissioner of Customs, CSMI Airport, Mumbai vide Order-In-Original No. Air Cus/49/T2/2299/2018-‘C’ dated 10.04.2018 ordered for the confiscation of the gold jewellery consisting of 4 nos of bangles, totally weighing 84 grams, valued at Rs. 2,39,138/- under Section 111(d) of the Customs Act, 1962 Also, a penalty of Rs. 50,000/- under Section 112 (a) & (b) of the Customs Act, 1962 was imposed on the applicant.

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-CUSTM-PAX-APP-158/19-20 dated 24.05.2019 issued on 17.06.2019 through F.No. S/49-200/2018 rejected the appeal holding that he did not find any reason to interfere in the OIO 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. Order of the AA is against law, weight of evidence and circumstances and probabilities of the case; that the AA had simply glossed over all the judgements and points raised in the appeal and no reason was given while rejecting the appeal; that the applicant had worn the gold jewellery i.e. 4 gold bangles and upon interception, had handed over the same to the Customs; that the ownership of the gold was not in dispute and the bangles of 22 kts and weighing 84 grams;
- 5.02. that the applicant has submitted that as per Circular F. no. 201/01/2014-CX.6 of Government of India, Ministry of Finance, Department of Revenue, CBEC, New Delhi dated 26.06.2016 it has been categorically directed that binding precedent should be followed to avoid unnecessary litigation and adverse observations of the Courts should be avoided.
- 5.03. that the baggage rules would apply only when the goods are found in the baggage; that the jewellery had been worn by the applicant; that the ownership of the gold jewellery was not disputed; that there was no ingenious concealment;
- 5.04. that the authority had come to the conclusion that because the goods had not been declared it was prohibited; that as the gold was worn by the applicant, question of declaring the same does not arise.
- 5.05. that Vigneswaran Sethuraman's case (WP no. 6281 of 2014 dated 12.03.2014) is squarely applicable to them and the department is bound to accept and follow the order of the Hon'ble High Court of Kerala. In this case, it was held that merely because the applicant had not filed a declaration, the same cannot be seized and directed the release of small quantity of gold.
- 5.06. that in the case of Commissioner (Appeals), Cochin, F. NO. C27/243,252 & 255/Air/2013 AU CUS in OS. NO. 370, 349, 364/2013 dated 18.12.2014, Shri. Hamsa Mohideen Mohammed Shajahan Srilanka, Rismila Begam Samsudeen Arip and Hussain Samsudeen Farhan.that that she was the owner of the gold and

she had worn the same; that the same had been purchased at Singapore; that baggage rules was not applicable to her as she was found wearing the gold; besides as she was wearing the gold provisions of Section 77 of the Customs Act, 1962 are not attracted.

- 5.07. Apex Court case in respect of DRI v/s. Pushpa Lekhumal Tolani reported in 2017(353) E.L.T 129 (S.C) where it was held that '*It was immaterial whether jewellery was new or used or meant to be taken out of India – On basis of return ticket, no inference can be drawn that jewellery was meant for import into India*'.
- 5.08. that applicant has relied on O-i-O no. 161 to 164 dated 10.03.2012, Sri Lankan nationals viz (i). Mohamed Ansar, (ii). H.M Naushad, (iii). Seiyed Faizan Mohamed, (iv). Mohamed Rafeek and (v). Imtiyas Mohammed, the Commissioner of Customs (Appeals) had released the gold on payment of redemption fine; that Revision Authority, New Delhi had confirmed these order dated 31.07.2012.
- 5.09. that CESTAT Bangalore has passed an order in C/21257/2018-S.M. dated 01.01.2019- Final Order No. 20020-20021/2019- Smt. Abitha Tahillainathan & Smt. Kirthucase Mary Thawamani v/s. Commissioner of Customs, Cochin, Kerala, allowing to re- export the gold jewellery citing that gold jewellery recovered from person is personal belonging and the same is not covered under the baggage rules.
- 5.10. that penalty of Rs. 50,000/- was very high and unreasonable and hence, same maybe reduced substantially and reasonably.

Under the circumstances of the case, the applicant has prayed to set aside the impugned order and permit her to re-export the 4 nos of gold bangles and to reduce the penalty of Rs. 50,000/- and thus, to render justice.

6. The applicant through the letter dated 28.11.2022 received from her Advocate, viz, Kamalamalar Palanikumar, requested the Revisionary Authority to pass an Order. Accordingly, the case was taken up for a decision.

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 the correct value of the dutiable goods carried / worn by her and had she not been intercepted would have walked away with the impugned 4 nos of gold bangles 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 Customs duty on it. The Government finds that the confiscation of the gold bangle and gold chain 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. 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 the 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 was small. The applicant has claimed ownership of the gold and that the gold bangles had been worn by her. 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 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 applicant who is a foreign national has prayed that the absolute confiscation be set aside and she be allowed to re-export the gold.

12. 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.

13. In view of the foregoing paras, the Government finds that as the applicant had not declared the gold bangles at the time of arrival, the confiscation of the same was justified. However, considering the quantity of gold, 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 on payment of redemption fine should have been allowed. Considering the above facts, Government is inclined to modify the absolute confiscation upheld by the AA and allow the impugned gold jewellery i.e. 4 nos of bangles to be re-exported on payment of a redemption fine.

14. Government finds that the penalty of Rs. 50,000/- imposed on the applicant under Section 112(a) and (b) of the Customs Act, 1962 which is about 21% of the value of the seized gold, is a bit harsh and unreasonable and is inclined to reduce the same.

15. In view of the above, the Government modifies the order passed by the appellate authority and allows the applicant to redeem the impugned gold jewellery i.e. 4 nos of gold bangles, totally weighing 84 grams and valued at Rs. 2,39,138/- for re-export on payment of a redemption fine of Rs. 50,000/- (Rupees Fifty Thousand only). The penalty of Rs. 50,000/- imposed under Section 112(a) and (b) of the Customs Act, 1962 by the OAA and upheld by the AA is reduced to Rs. 25,000/- (Rupees Twenty Five Thousand only).

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

  
( SHRAWAN KUMAR )  
23/3/23

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

**ORDER NO. 378 /2023-CUS (WZ)/ASRA/MUMBAI DATED 23.03.2023.**

To,

1. Shri. Shyama Faza Shamsudeen, 162, Swarna Chaitiya Road, Grardpan, Colombo – 14. {service through her Advocate / display on noticeboard}.
2. Pr. Commissioner of Customs, Chhatrapati Shivaji Maharaj International Airport, Terminal 2, Level – II. Sahar, Mumbai 400 099.

Copy to:

1. S. Palanikumar, S.Kameshwaran & P. Kamala Malar, Advocates, No. 10, Sunk Ram Street, Second Floor, Chènnai – 600 001.
2. Sr. P.S. to AS (RA), Mumbai.
3. File Copy.
4. Notice Board.