

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. 371/48/B/WZ/2018-RA/1796 : Date of Issue : 29.03.2023

ORDER NO. 388 /2023-CUS (WZ)/ASRA/MUMBAI DATED 29.03.2023 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. Egga Zaina 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 Order-in-Appeal No. MUM-CUSTOM-PAX-APP-952/2017-18 dated 17.01.2018 [Date of issue 18.01.2018] through F.No. S/49-829/2015/AP passed by the Commissioner of Customs (Appeals), Mumbai Zone - III.

ORDER

This revision application has been filed by Ms. Egga Zaina Mohamed (hereinafter referred to as the 'Applicant') against the Order-in-Appeal No. MUM-CUSTOM-PAX-APP-952/2017-18 dated 17.01.2018 [Date of issue 18.01.2018] through F.No. S/49-829/2015/AP passed by the Commissioner of Customs (Appeals), Mumbai Zone – III.

2. Brief facts of the case are that on 25.05.2014, Customs Officers at the CSMI Airport, Mumbai had intercepted the applicant, who is a holder of passport of the Republic of Kenya and had arrived from Kenya by Kenya Airways Flight No. KQ-202. The applicant had cleared herself through the green channel and had been intercepted near the exit gate. The Applicant was found to be in possession of Indian Customs Declaration Form duly signed by the Applicant showing the total value of dutiable goods being imported as 'blank'. Personal search led to the recovery of 05 packets of assorted gold jewellery wrapped with off white cellophane which were concealed under the upper garments and 05 packets each having 03 pieces of gold bars wrapped with off white cellophane tape were found concealed in her shoes. The 15 gold bars of 10 tolas each having the markings 'AL ETIHAD DUBAI-UAE 10TOLA 999.0' totally weighing 1749 grams valued at Rs. 44,56,872/- and assorted gold jewellery weighing 182 grams valued at Rs. 4,63,780/- 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.

2.1. The Applicant in her statement admitted that the jewellery and the gold bars did not belong to her and had been given to her by many persons for recycling and making new jewellery and she was to get a monetary consideration of US\$1 per gram of gold bar and gold jewellery, as carrying charges and that she intentionally concealed the gold bars in her shoes and gold jewellery on her person

to avoid detection by Customs and to evade customs duty. The retraction of the statement was suitably rebutted by the department.

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/150/2015-16 dated 18.08.2015, ordered for the absolute confiscation of the impugned 15 gold bars of 10 tolas each totally weighing 1749 grams valued at Rs. 44,56,872/- and assorted gold jewellery weighing 182 grams valued at Rs. 4,63,780/- 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.

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-952/2017-18 dated 17.01.2018 [Date of issue 18.01.2018] through F.No. S/49-829/2015/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 worn or kept in garments and gold bars were kept in garments and shoes and that applicant was not a habitual offender. He further submitted that gold and gold jewellery was for personal use and quantity was not large and goods be allowed to be re-exproted.

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 15 gold bars of 10 tolas each totally weighing 1749 grams and assorted gold jewellery weighing 182 grams, without declaring the same to Customs. The Applicant had cleverly and innovatively concealed the sizable quantity of gold in her shoes and on her person which reveals her mindset to smuggle the goods and evade the duty. The quantum of gold and the manner of attempting to smuggle indicates that the same was for commercial use. The Applicant's admission that the gold was attempted to be smuggled for monetary considerations brings out that the Applicant was a carrier. 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 and the Applicant had rendered herself liable for penalty for his omissions and commissions.

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 Applicant in her submissions has stated that she was not conversant with English language and expressed her desire to take back the gold bars and the assorted gold jewellery. Government observes that the quantum of gold was large, of high purity of commercial quantity and it was cleverly and consciously concealed on her person and her shoes. The circumstances of the case clearly brings out that the Applicant had no intention of declaring the gold to the Customs and indicates 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. The main issue in the case is the manner in which the impugned gold was being brought into the Country. Though the option to allow redemption of the seized goods is the discretionary power of the adjudicating authority depending on the facts of each case and the discretion to release the gold is based on various factors such as methodology of smuggling, manner of concealment, quantity, attempt of smuggling as part of a syndicate etc. and after examining the merits. In the present case, the quantum of the gold bars and gold jewellery and manner of concealment being clever with a clear attempt to smuggle the gold bars weighing 1739 grams and assorted gold jewellery weighing 182 grams, it is a fit case for absolute confiscation which would act as a deterrent to such offenders. Thus, taking into account the facts on record and the serious and grave and novel and bold modus operandi, the Original Adjudicating Authority had rightly ordered and the Appellate Authority has rightly echoed the absolute confiscation of the impugned gold. But for the intuition and the diligence of the Customs Officers, the gold would have passed undetected. The redemption of the gold will encourage such concealment as, if the gold is not detected by the Custom authorities, the passenger gets away with smuggling and if not, he has the option of redeeming the gold. Such acts of misusing the liberalized facilitation process should be meted out with exemplary punishment and the deterrent side of law for which such provisions are made in law needs to be invoked. Government thus concurs with the findings of the lower authorities and holds that the absolute confiscation of the gold is in order. 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 collective value of the gold in this case is Rs. 48,27,985/- 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. 388 /2023-CUS (WZ)/ASRA/MUMBAI DATED 29.03.2023.

To,

1. Ms. Egga Zaina Mohamed [Kenyan National; Address : Plot No. 420, Easleigh 1669, Nairobi; Service also through Notice Board].
Address No. 2: Ms. Egga Zaina Mohamed, 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.