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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. 371/17/B/WZ/2020-RA/4192 : Date of Issue : 23.06.2023

ORDER NO. 180/2023-CUS (WZ)/ASRA/MUMBAI DATED 22.06.2023 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 : Mrs. Afsha Imran Havaladar

Respondent : Pr. Commissioner of Customs, CSI, Mumbai.

Subject : Revision Application filed under Section 129DD of the Customs Act, 1962 against the Order-in-Appeal No. MUM-CUSTM-PAX-APP-807/2019-20 dated 26.12.2019 [Date of issue: 02.01.2020] [F. No. S/49-516/2019] passed by the Commissioner of Customs (Appeals), Mumbai Zone-III.

ORDER

The Revision Application has been filed by Mrs Afsha Imran Havaladar (herein referred to as the 'Applicant') against the Order-in-Appeal No. MUM-CUSTOM-PAX-APP-807/2019-20 dated 26.12.2019 [Date of issue: 02.01.2020] [F. No. S/49-516/2019] passed by the Commissioner of Customs (Appeals), Mumbai Zone-III.

2. Brief facts of the case are that on 08.04.2018, the officers of Air Customs, Chatrapati Shivaji International Airport (CSIA), Mumbai, intercepted the Applicant, holding an Indian passport, who had arrived by Flight No.SG 014 from Dubai, after she had cleared herself through the Customs Green Channel. The personal search of the Applicant resulted in the recovery of two chrome coloured metallic bangles worn by her on both her hands, one chrome coloured metallic ring worn by her in the ring finger of her right hand and golden brown coloured metallic sticky dust purportedly to be gold, kept in two this plastic bags and cleverly concealed in two specially created pockets in her upper under garments. After being assayed by a Government valuer, the two chrome coloured metallic bangles of gold and one chrome coloured metallic ring of gold weighing 79 grams and gold dust weighing 334.106 grams, totally weighing 413.106 grams and finally valued at Rs. 11,53,045/- were seized under the reasonable belief that the same were being smuggled into India and hence were liable for confiscation under the provisions of the Customs Act, 1962.

3. Following the due process of law, the Original Adjudicating Authority i.e The Additional Commissioner of Customs, CSI Airport, Mumbai vide Order-in-Original No ADC/AD/ADJN/452/2018-19 dated 27.02.2019, absolutely confiscated the seized gold totally weighing 413.106 grams, valued at Rs. 11,53,045/- under Section 111 (d), (l) & (m) of the Customs Act, 1962. A

penalty of Rs. 1,50,000/- was imposed on the Applicant under Section 112(a) and (b) of the Customs Act, 1962.

4. Aggrieved, with this Order, the Applicant filed an appeal before the Appellate Authority (AA) viz, Commissioner of Customs (Appeals), Mumbai Zone-III who vide Order-in-Appeal No. MUM-CUSTM-PAX-APP-807/2019-20 dated 26.12.2019 [Date of issue: 02.01.2020] [F. No. S/49-516/2019] upheld the order 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. That in similar cases the option of redemption was granted and prayed to set aside the absolute confiscation and to reduce the penalty and issue any such other reliefs as deemed fit may be granted;

5.02. The Applicant relied upon the decision in the case of CC(Prev), Lucknow vs. Ibrahim Abdullah Rahiman [2018(363)E.L.T 534 (Tri-All) and various other cases where the Appellate Authority or the Adjudicating Authority had allowed redemption of gold on payment of redemption fine.

6. Personal hearing in the case was scheduled for 23.05.2023. Shri Prakash Shingrani, Advocate appeared for the personal hearing on the scheduled date on behalf of the Applicant. He submitted that that Applicant brought small quantity of jewellery which was worn and small quantity of gold for personal use, there was no ingenuous concealment and the Applicant is not a habitual offender. He requested to allow the option to redeem the goods on nominal fine and penalty.

7. The Government has gone through the facts of the case and observes that the Applicant had brought two chrome coloured metallic bangles of gold worn by her on both her hands, one chrome coloured metallic ring of gold worn by her in the ring finger of her right hand and golden brown coloured metallic

sticky dust containing gold dust with the gold totally weighing 413.106 grams and finally valued at Rs. 11,53,045/- and had failed to declare the goods to the Customs at the first instance as required under Section 77 of the Customs Act, 1962. The Applicant had not disclosed that she was carrying dutiable goods. However, after clearing the green channel of Customs and on examination of his baggage after being intercepted, the impugned two chrome coloured metallic bangles worn by her on both her hands, one chrome coloured metallic ring worn by her in the ring finger of her right hand and golden brown coloured metallic sticky dust containing gold dust totally weighing 413.106 grams which was worn by her and concealed in her garment was recovered from the Applicant and the method of carrying the gold adopted by the Applicant clearly revealed her intention not to declare the said gold and thereby evade payment of Customs Duty. The confiscation of the gold was therefore justified and thus, the Applicant had rendered herself liable for penal action.

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, 1962.

9. 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".

10. 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.

11. A plain reading of the section 125 shows that the Adjudicating Authority is bound to give an option of redemption when goods are not subjected to any prohibition. In case of prohibited goods, such as, the gold, the Adjudicating Authority may allow redemption. There is no bar on the Adjudicating Authority allowing redemption of prohibited goods. This exercise of discretion will depend on the nature of the goods and the nature of the prohibition. For instance, spurious drugs, arms, ammunition, hazardous goods, contaminated flora or fauna, food which does not meet the food safety standards, etc. are harmful to the society if allowed to find their way into the domestic market. On the other hand, release of certain goods on redemption fine, even though the same becomes prohibited as conditions of import have not been satisfied, may not be harmful to the society at large.

12. 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.”

13.1. Government further observes that there are a catena of judgements, over a period of time, of the Hon'ble Courts and other forums which have been categorical in the view that grant of the option of redemption under Section 125 of the Customs Act, 1962 can be exercised in the interest of justice. Government places reliance on some of the judgements as under:

- a) In the case of Commissioner of Customs, Aliganj, Lucknow vs. Rajesh Jhamatmal Bhat, [2022(382) E.L.T. 345 (All)], the Lucknow Bench of the Hon'ble High Court of Allahabad, has held at Para 22 that "*Customs Excise & Service Tax Appellate Tribunal Allahabad has not committed any error in upholding the order dated 27.08.2018 passed by the Commissioner (Appeals) holding that Gold is not a prohibited item and, therefore, it should be offered for redemption in terms of Section 125 of the Act.*"
- b) The Hon'ble High Court of Judicature at Madras, in the judgment in the case of Shaik Mastani Bi vs. Principal Commissioner of Customs, Chennai-I [2017(345) E.L.T. 201 (Mad)] upheld the order of the Appellate Authority allowing re-export of gold on payment of redemption fine.
- c) The Hon'ble High Court of Kerala at Ernakulam in the case of R. Mohandas vs. Commissioner of Cochin [2016(336) E.L.T, 399 (Ker.)] has, observed at Para 8 that "*The intention of Section 125 is that, after adjudication, the Customs Authority is bound to release the goods to any such person from whom such custody has been seized...*"
- d) Also, in the case of Union of India vs Dhanak M Ramji [2010(252)E.L.T. A102(S.C)], the Hon'ble Apex Court vide its judgement dated 08.03.2010 upheld the decision of the Hon'ble High Court of Judicature at Bombay [2009(248) E.L.T. 127 (Bom)], and approved redemption of absolutely confiscated goods to the passenger.

13.2. Government, observing the ratios of the above judicial pronouncements, arrives at the conclusion that decision to grant the option of redemption would be appropriate in the facts and circumstances of the instant case.

14. In the instant case, the quantum of gold under import is small and is not of commercial quantity. The impugned gold was worn by the Applicant and was also kept in her garment on her person by the Applicant. Though the gold

was also recovered from her person, Government observes that sometimes passengers resort to such methods to keep their valuables / precious possessions safe. There are no allegations that the Applicant is a habitual offender and was involved in similar offence earlier. Also there is nothing on record to prove that the Applicant was part of an organized smuggling syndicate.

15. Government finds that this is a case of non-declaration of gold. The absolute confiscation of the impugned gold leading to dispossession of the Applicant of the gold in the instant case is therefore harsh and not reasonable. Government considers granting an option to the Applicant to redeem the gold on payment of a suitable redemption fine, as the same would be more reasonable and fair.

16. The Applicant has also pleaded for reduction of the penalty imposed on him. The market value of the gold in this case is Rs. 11,53,045/-. From the facts of the case as discussed above, Government finds that the penalty of Rs. 1,50,000/- imposed on the Applicant under Section 112(a) and (b) of the Customs Act, 1962, is harsh as compared to the omissions and commissions of the Applicant.

17. In view of the above, the Government modifies the impugned order of the Appellate Authority in respect of the gold and gold jewellery seized from the Applicant. The impugned two chrome coloured metallic bangles of gold, one chrome coloured metallic ring of gold and golden brown coloured metallic sticky dust containing gold dust totally weighing 413.106 grams and valued at Rs. 11,53,045/- is allowed to be redeemed on payment of a fine of Rs. 2,00,000/- (Rupees Two Lakhs only). The penalty of Rs. 1,50,000/- imposed

under Section 112(a) and (b) of the Customs Act, 1962 of the Customs Act, 1962 is reduced to Rs. 1,15,000/- (Rupees One Lakh Fifteen Thousand only).

18. The Revision Application is disposed of on above terms.


(SHRAWAN KUMAR)

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

ORDER NO. ~~180~~ /2023-CUS (WZ)/ASRA/MUMBAI DATED 22.06.2023

To,

1. Mrs. Afsha Imran Havaldar, Room No. 307, B/3, Lohiya Nagar, St Francis Road, Vile Parle (West), Mumbai 400 056
2. The Pr. Commissioner of Customs, Terminal-2, Level-II, Chhatrapati Shivaji International Airport, Mumbai 400 099.

Copy to:

1. The Commissioner of Customs (Appeals), Mumbai Zone - III, Awas Corporate Point, 5th Floor, Makwana Lane, Behind S.M.Centre, Andheri-Kurla Road, Marol, Mumbai - 400 059.
2. Shri Prakash K. Shingrani, Advocate, 12/334, Vivek, New MIG Colony, Bandra (East), Mumbai-400 051
3. Sr. P.S. to AS (RA), Mumbai.
4. File copy.
5. Notice Board.