

REGISTERED
SPEED POST



GOVERNMENT OF INDIA
MINISTRY OF FINANCE
(DEPARTMENT OF REVENUE)
8th Floor, World Trade Centre, Centre - 1, Cuffe Parade,
Mumbai-400 005

F.No. 371/99/B/WZ/2020-RA / 4546 : Date of Issue : ~~06.2023~~
06.02.2023

ORDER NO. 520/2023-CUS (WZ)/ASRA/MUMBAI DATED 30.06.2023 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 : Ms. Madina Mohamed Musa Omer

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-CUSTOM-PAX-APP-1173/2019-20 dated 28.01.2020 [Date of issue: 05.02.2020] [F. No. S/49-392/2019] passed by the Commissioner of Customs (Appeals), Mumbai Zone-III.

ORDER

The Revision Application has been filed by Ms. Madina Mohamed Musa Omer (herein referred to as the 'Applicant') against the Order-in-Appeal No. MUM-CUSTM-PAX-APP-1173/2019-20 dated 28.01.2020 [Date of issue: 05.02.2020] [F. No. S/49-392/2019] passed by the Commissioner of Customs (Appeals), Mumbai Zone-III.

2. Brief facts of the case are that on 22.02.2019, on suspicion, the officers of Air Customs, Chatrapati Shivaji International Airport, Mumbai, intercepted the Applicant, a Sudanese national, who had arrived by Flight No. ET-640 from Addis Ababa, Sudan, after she had opted for the Customs green channel and did not declare any gold in her possession. The Applicant had brought Assorted Gold jewellery totally weighing 22 grams and valued at Rs. 59,570/- . The case was adjudicated after waiver of show cause notice and the Original Adjudicating Authority (OAA) i.e. Superintendent, A.C.S, 'A' Batch, CSI Airport, Mumbai, vide Order-in-Original No. Air Cus/T2/49/400/2019 'A' dated 22.02.2019 absolutely confiscated the impugned Assorted Gold jewellery totally weighing 22 grams and valued at Rs. 59,570/- under Section 111 (d) of the Customs Act, 1962. A penalty of Rs. 6,000/- was imposed on the Applicant under Section 112 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-1173/2019-20 dated 28.01.2020 [Date of issue: 05.02.2020] [F. No. S/49-392/2019] 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 the Applicant was a Sudanese national and did not know English language properly nor she knew the law of India and no interpreter was called to understand her language as to what she intended to state before the *Customs*;

5.02. That the AA as well as the OAA failed to appreciate that the said impugned assorted gold jewellery which is meagre amount and is regulary worn by all ladies whether an Indian or a foreigner and was her personal gold jewellery purchased by her hard earned money and savings and was also not *having foreign or Indian markings*;

5.03. That the Applicant went to the officer and showed her that she had gold jewellery which she was wearing and whether the same was required to be declared but ITC case was put on her;

5.04. That the said gold jewellery which she was wearing was being worn *regularly in Sudan and came to India and this was being worn day in and out* and belonged to her;

5.05. That the Applicant was also holding foreign currency to pay if she was asked to pay duty on it and was ready and willing to pay duty;

5.06. That the AA and the OAA failed to appreciate that the Applicant had *informed in Sudanese and broken English that the jewellery was to be taken* back to Sudan and that the Applicant had a good financial status as she was a business woman;

5.07. That it was wrongly considered that the Applicant was involved in smuggling activities;

5.08. That the Applicant was not acting as a *carrier for anybody and was a* business woman holding a business visa and used to come to India regularly to purchase garments from India to sell in Sudan;

5.09. That there were not foreign markings on the gold jewellery but on assumption and presumption the goods were considered to be of smuggled nature;

5.10. That if the gold was on the person of the Applicant it cannot be considered nor does it amount to concealment;

5.11. That the gold jeweler was not in commercial quantity and the quantity itself shows that it was meant for personal use and she was not acting as a carrier for anybody;

5.12. That the gold jewellery was not in primary form;

5.13. That the AA has given the conclusions and findings which is contrary and inconsistent to the findings of the OAA;

5.14. That the AA and the OAA have passed orders which are contrary in nature to the earlier decisions taken by them wherein such quantity of gold jewellery used to be released on payment of reshipment fine and personal penalty;

5.15. That the Appellate Authority has discriminated between Indian national and foreign nationals, whereas as per the constitution of India, a person is governed by law of the land whether she is a foreign national or Indian national and under this circumstances, justice cannot be denied to foreign national;

5.16. That the AA and the OAA have gone on the basis of presumptions and assumptions only;

5.17. That the AA has confirmed the penalty without clinching and cogent evidence and has passed an illegal order which needs to be set aside;

Under the circumstances, the Applicant prayed that the Order-in-Appeal and Order-in-Original be set aside and the seized gold be allowed to be reshipped on payment of nominal redemption fine and penalty be waived absolutely or any other order as deemed fit may be issued.

6. The Respondent-department, vide letter dated 15.10.2020 filed their written submissions to the revision application. The Respondent-department prayed that the appeal filed by the Applicant be rejected and the OIA passed by the Appellate Authority be upheld, on the following grounds:

6.01. That the Applicant did not declare the gold on his own and the gold was detected only after she was intercepted by the officers of Customs and personal search of the Applicant resulted in the recovery of gold;

6.02. That had the Applicant had not filed any declaration and had she not been intercepted, she would have made good with the gold;

6.03. That the offence was committed in a premeditated manner which clearly indicates mensrea and the Applicant had deliberately not declared the gold to Customs in order to evade customs duty;

6.04. That the Applicant admitted to possession, non-declaration, carriage and recovery of seized gold and was attempted to be cleared without having been declared before customs, and when offending goods are seized along with inculpatory statement, the statement has to be relied upon as decided in Surjeet Singh Chhabra vs. UOI [1997(89) ELT 646(SC)] and K.I.Pavunny vs. Asstt. Collector (HQ), C.Ex, Cochin [1997(90) ELT 241 SC]

6.05. The Respondent-department relied upon the following case laws and circulars in support of their contention:

- (i) Abdul Razak vs UOI [2012(275) E.L.T 300(Ker) (DB)]
- (ii) Decision of the Hon'ble Madras High Court in the case of CC (Air) vs. P Sinnasamy.
- (iii) Om Prakash Bhatia vs. CC, Delhi [(2003)6 SC 161]
- (iv) Baburaya Narayan Nayak vs. CC, Bangalore [2018(364) E.L.T 811 (Tri-Bang)]
- (v) Board's Circular No 495/5/92-Cus.VI dated 10.05.1993

7. Personal hearing in the case was scheduled for 13.06.2023. Mrs Shivangi Kherajani, Advocate appeared for the personal hearing on the scheduled date on behalf of the Applicant and Shri Sanjay Kumar, Superintendent appeared on behalf of the Respondent-department. The Advocate for the Applicant submitted that the Applicant is a foreign national and was wearing small quantity of gold jewellery and is not a habitual offender.

She requested to allow the application. The representative of the department reiterated earlier submissions and requested to maintain the Commissioner (Appeals) order.

8.1. At the outset, the Government notes that the Applicant has filed for condonation of delay. The Revision Application was filed on 25.06.2020. The date of issue of the Order of the Appellate Authority is 05.02.2020, which by the Applicant admission was received by them on 10.02.2020. Based on the date of issue of the said Order of the Appellate Authority, the Applicant was required to file the Revision Application by 04.05.2020 (i.e. taking the first 3 months into consideration) and by 04.08.2020 (i.e. taking into consideration a further extension period of 3 months). The Applicant has accepted that there was a delay from the date of receipt of the order. Thus it is seen that the Revision Application has been filed within the date, after considering the extended period.

8.2. The Applicant in his application for condonation of delay has stated that the revision application could not be filed due to the lockdown in India and requested that the delay be condoned.

8.3. For understanding the relevant legal provisions, the relevant section is reproduced below :

SECTION 129DD. Revision by Central Government.-

(1) The Central Government may, on the application of any person aggrieved by any order passed under section 128A, where the order is of the nature referred to in the first proviso to sub-section (1) of section 129A, annul or modify such order.

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(2) An application under sub-section (1) shall be made within three months from the date of the communication to the Applicant of the order against which the application is being made :

Provided that the Central Government may, if it is satisfied that the Applicant was prevented by sufficient cause from presenting the application within the aforesaid period of three months, allow it to be presented within a further period of three months.

.....

8.4. From above, it is clear that the Applicant was required to file the Revision Application within 3 months from the communication of the Appellate Order. The delay thereafter, upto 3 months can be condoned. Since, the Revision Application is filed within the condonation period of three months, and the reason also being genuine, Government condones the delay on the part of the Applicant in filing the application and proceeds to examine the case on merits.

9. The Government has gone through the facts of the case and observes that the Applicant had brought Assorted Gold jewellery totally weighing 22 grams and valued at Rs. 59,570/-, 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 opting to clear through the green channel of Customs and on personal search after being intercepted, the impugned Assorted Gold jewellery totally weighing 22 grams and valued at Rs. 59,570/-, 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.

10.1. 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."

10.2. 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.

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. 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.

14. 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."

15.1. 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.
- e) 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 Vijayasundaram + 5 others in a matter of Sri Lankans wearing 1594 gms of gold jewellery 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 the 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.

15.2. 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.

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, the confiscation of the same was justified. However, Applicant is a foreign national and the quantum of gold under import is small and is not of commercial quantity. The impugned gold recovered from the Applicant was not concealed in an ingenious manner. There are no allegations that the Applicant is a habitual offender and was involved in similar offence earlier or there is nothing on record to prove that the Applicant was part of an organized smuggling syndicate.

17. Government finds that this is a case of non-declaration of gold jewellery. The absolute confiscation of the impugned gold jewellery leading to dispossession of the Applicant of the same in the instant case is therefore harsh and not reasonable. In view of the aforesaid facts and considering that the Applicant is a foreign national, option to re-export the impugned gold jewellery on payment of redemption fine should have been allowed. Considering the above facts, Government is inclined to modify the absolute confiscation and allow the impugned gold jewellery to be re-exported on payment of a redemption fine.

18. Applicant has also pleaded for reduction of the penalty imposed on her. The market value of the gold in this case is Rs. 59,570/-. From the facts of the case as discussed above, Government finds that the penalty of Rs. 6,000/- imposed on the Applicant under Section 112 of the Customs Act, 1962 is commensurate to the omissions and commissions of the Applicant.

19. In view of the above, the Government modifies the Order-in-Appeal No. MUM-CUSTM-PAX-APP-1173/2019-20 dated 28.01.2020 [Date of issue: 05.02.2020] [F. No. S/49-392/2019] order passed by the Appellate Authority and allows the Applicant to redeem the impugned Assorted Gold jewellery totally weighing 22 grams and valued at Rs. 59,570/- for re-export, on payment of a redemption fine of Rs. 10,000/- (Rupees Ten Thousand only). The penalty of Rs. 6,000/- imposed on the Applicant under Section 112 of the Customs Act, 1962 by the OAA and upheld by the AA is sustained.

20. The Revision Application is disposed of on the above terms.

Shrawan Kumar
8.06/23
(SHRAWAN KUMAR)

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

ORDER NO. 520/2023-CUS (WZ)/ASRA/MUMBAI DATED 30.06.2023

To,

1. Ms. Madina Mohamed Musa Omer, C/o Mrs Shivangi Kherajani, 501, Savitri Navbahar CHS Ltd, 19th Road, Khar (West), Mumbai 400 052.
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. Mrs Shivangi Kherajani, Advocate, 501, Savitri Navbahar CHS Ltd, 19th Road, Khar (West), Mumbai 400 052.
2. Sr. P.S. to AS (RA), Mumbai.
4. File copy.
5. Notice Board.