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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. 371/102/B/WZ/2020-RA/9873 Date of Issue : 31/07/23

ORDER NO. 538/2023-CUS (WZ)/ASRA/MUMBAI DATED 26.07.2023
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.

(i). F.No. 371/102/B/WZ/2020-RA

Applicant : Ms. Aisha Shrif Ardia Abdelshafi.

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-790/2019-20 dated
26.12.2019 issued on 02.01.2020 through F.No. S/49-
278/2019 passed by the Commissioner of Customs
(Appeals), Mumbai - III, Marol, Mumbai - 400 059.

ORDER

This revision application has been filed by Ms. Aisha Shrif Ardia Abdelshafi (hereinafter referred to as the Applicant) against the Order-in-Appeal No. MUM-CUSTOM-PAX-APP-790/2019-20 dated 26.12.2019 issued on 02.01.2020 through F.No. S/49-278/2019 passed by the Commissioner of Customs (Appeals), Mumbai – III, Marol, Mumbai – 400 059.

2. Brief facts of the case are that on 11.03.2019, Customs Officers at the CSMI Airport, Mumbai had intercepted the applicant, who is a Sudanese national and had arrived from Addis Ababa onboard Ethiopian Airlines Flight No. 640. The applicant had walked through the green channel. Personal search of the applicant led to the recovery of assorted gold jewellery weighing 155 grams, valued at Rs. 4,68,813/- which was found on her person and she had failed to declare to Customs.
3. The Original Adjudicating Authority (OAA), viz, Dy. Commissioner of Customs, CSMI Airport, Mumbai who vide his Order-In-Original no. AirCus/T2/49/505/2019-C dated 11.03.2019 ordered for the absolute confiscation of the assorted gold jewellery, totally weighing 155 grams, valued at Rs. 4,68,813/- under Section 111(d) of the Customs Act, 1962. Personal penalty of Rs. 50,000/- was imposed on the applicant under Section 112 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 – III who vide Order-In-Appeal No. MUM-CUSTOM-PAX-APP-790/2019-20 dated 26.12.2019 issued on 02.01.2020 through F.No. S/49-278/2019 did

not find any reason 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 lower authorities had failed to appreciate that the applicant being a Sudanese national did not know the law of our country i.e. India and did not know English and hence, she could state her intentions to Customs.
- 5.02. the lower authorities had failed to appreciate that the assorted gold jewellery, weighing 155 grams, valued at Rs. 4,68,813/- was of 22KT which she was wearing was for personal use, had been purchased from her hard-earned money and savings and it did not have any foreign markings or Indian markings. She had worn the jewellery and intended to take it back to Sudan.
- 5.03. the lower authorities had failed to appreciate that Applicant was also holding foreign currency to pay duty and she was ready and willing to pay the duty.
- 5.04. the lower authorities had failed to appreciate that applicant had informed the Customs Officers that she was wearing the gold jewellery which was for personal use and she had not been understood.
- 5.05. the lower authorities had failed to appreciate that gold was not in commercial quantity and the quantity of the gold itself showed that it is meant for personal use; that the gold was not in primary form.
- 5.06. the Appellate Authority had given the conclusion and findings which were contrary and inconsistent with the findings of Adjudicating Authority.
- 5.08. the lower authorities have decided the case on the basis of presumptions and assumptions only and not on the real and true facts put by the Applicant.
- 5.09. the orders of the lower authorities are illegal and bad in law and the same requires to be quashed and set aside.

The applicant has prayed to the revisionary authority to quash and set aside the order passed by both the lower authorities and to allow the assorted gold jewellery, totally weighing 155 grams to be re-shipped on nominal reshipment fine and to grant any other reliefs as deemed fit.

6. The respondent vide their written submission bearing F.No. Aircus/Review-310/2020-21 dated 09.10.2020 have stated; that applicant had not declared the goods; that the assorted gold jewellery was of 22 KT and weighed 155 grams; that in the instant case, the offence had been committed in a premeditated and clever manner which indicated mensrea; that had the applicant not been intercepted, she would have gone away without payment of duty; that the applicant had deliberately not declared the gold to Customs in order to evade Customs duty; that applicant had admitted to possession, non-declaration, carriage and recovery of the seized gold, that Section 123 of the Customs Act, 1962 cast a burden on the applicant to prove that the gold was not smuggled; that they rely on the following case laws;

(i). Surjeet Singh Chhabra vs. UOI - 1997-89-ELT-646-SC, wherein the Apex Court had held that *'the confession, though retracted, is an admission and binds the petitioner'*.

(ii). Apex Court's Order in the case of K.I Pavunny vs. Asstt. Collector (HQ), C.Ex, Cochin [1997-90-ELT-241-SC] on the issue that confessional statement made to Customs officials is admissible evidence

(iii). Abdul Razak vs. UOI - 2012(275)ELT 300(Ker)(DB) passed by the Division Bench of the Hon'ble High Court, Kerala, on the issue that appellant did not have right to get the confiscated gold ;

(iv). Commissioner of Customs (Air) vs. P. Sinnasamy, passed by Hon'ble Madras High Court, it is held that non-fulfilment of conditions tantamount to prohibition.;

(v). Om Prakash Bhatia vs. Commissioner of Customs, Delhi – 2003(6) SC 161 of the Apex Court, it is held that non-fulfilment of conditions tantamount to prohibition.;

(vi). CESTAT Order in respect of Baburaya Narayan Nayak vs. Commissioner of Customs, Bangalore – 2018(364) ELT 811 (Tri-Bang), upheld absolute confiscation as evidence of licit purchase had not been provided;

(vii). Board's Circular no. 495/5/92-Cus.VI dated 10.05.1993 which specifies that in r/o gold seized for non-declaration, no option to redeem the same on redemption fine under Section 125 of the Customs Act, 1962, should be given, except in very trivial cases where the adjudicating authority was satisfied that there was no concealment of the gold in question.

Therefore, under the circumstance of the case, the respondent has prayed to the Revision Authority to reject the revision application filed by the applicant and to uphold the OIA passed by the AA.

7. The applicant has filed an application for condonation of delay of 52 days. This delay has been attributed by the applicant was due to Covid condition and the prevalent lockdown in India.

8. Personal hearing was scheduled for 06.07.2023. Smt. Shivangi Kherajani, Advocate for the applicant appeared for personal hearing on 06.07.2023. Smt. Shivangi Kherajani, Advocate submitted that applicant brought small quantity of jewellery for personal use. She further submitted that jewellery

was not concealed and applicant is not a habitual offender. She requested to allow re-export on nominal fine and penalty.

9. On the issue of condonation of delay, Government notes that the OIA dated 26.12.2019 was issued on 02.01.2020. The applicant in the FORM CA-8 has claimed that the OIA dated 26.12.2019 was received by her 10.01.2020. Government notes that during the appealable period of 3 months, the restrictions due to Covid condition had been imposed in the country. Due to the prevalent Covid conditions, Government observes that the Apex Court had granted a moratorium for filing appeals etc from 15.03.2020 to 28.02.2022 [Misc. Appln. No. 21/2022]. The applicant has filed the Revision Application on 25.06.2020. Considering the said moratorium period granted by the Apex Court, it is seen that the applicant had filed the revision application within time.

10. 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 gold jewellery 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.

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. 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.

14. The Government notes that the quantity of gold was small. From the time of interception, the applicant has claimed ownership of the gold, that she was wearing it and now desires to take it back on her return trip. 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 misdemeanor 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.

15. 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.

16. In view of the foregoing paras, the Government finds that as the applicant had not declared the assorted gold jewellery at the time of arrival, the confiscation of the same was justified. However, considering the quantity of gold, no past history, the same having been worn as claimed by her and not being concealed in an ingenious manner, applicant being a foreign national, the jewellery admittedly being of 22KT; 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 assorted gold jewellery to be re-exported on payment of a redemption fine.

17. Government finds that the penalty of Rs. 50,000/- imposed on the applicant under Section 112 of the Customs Act, 1962 is commensurate with the omissions and commissions committed and is not inclined to interfere in the same.

18. In view of the above, the Government modifies the order passed by the appellate authority and allows the applicant to redeem the impugned assorted gold jewellery, collectively weighing 155 grams and valued at Rs. 4,68,813/- for re-export on payment of a redemption fine of Rs. 90,000/- (Rupees Ninety Thousand only). The penalty of Rs. 50,000/- imposed on applicant under Section 112 of the Customs Act, 1962 by the OAA and upheld by the AA is sustained.

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


(SHRAWAN KUMAR)

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

ORDER NO. 538 /2023-CUS (WZ)/ASRA/MUMBAI DATED 26.07.2023.

To,

1. Ms. Aisha Shrif Ardia Abdelshafi, Sudan. Address not available on the records (Service through noticeboard and Advocate on record).
2. Pr. Commissioner of Customs, Adjudication Cell, Chhatrapati Shivaji Maharaj International Airport, Sahar, Andheri East, Mumbai - 400 099.

Copy to:

3. Smt. Shivangi Kherajani, Advocates, 501, Savitri Navbahar CHS, 19th Road, Khar West, Mumbai - 400 052.
4. Sr. P.S. to AS (RA), Mumbai.
5. File Copy.
6. Notice Board.