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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. 371/99/B/2021-RA / 2021 :

Date of Issue: 26.09.2023

ORDER NO. 684 /2023-CUS (WZ)/ASRA/MUMBAI DATED 26.09.2023
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.

Applicants : Ms Forough Maleki

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

Subject : Revision Application filed, under Section 129DD of the
Customs Act, 1962 against the Order-in-Appeal No.
MUM-CUSTM-PAX-APP-872/2019-20 dated 21.01.2021
[F.No. S/49-1131/2019] [Date of issue: 29.01.2021]
passed by the Commissioner of Customs (Appeals),
Mumbai-III.

ORDER

This Revision Application has been filed by Ms Forough Maleki (herein referred to as the "Applicant") against the Order-in-Appeal No. MUM-CUSTOM-PAX-APP-872/2019-20 dated 21.01.2021 [F.No. S/49-1131/2019] [Date of issue: 29.01.2021] passed by the Commissioner of Customs (Appeals), Mumbai-III.

2. Brief facts of the case are that on 16.12.2018, the AIU Officers at CSI Airport, Mumbai, intercepted Ms Forough Maleki, the applicant, holding Passport No. T32735922 of Islamic Republic of Iran, who had arrived from Muscat by Oman Air Flight No. WY203, at the exit gate, after she had cleared herself through Green Channel. The personal search of the Applicant in the presence of independent punches resulted in recovery of (i) 06 Silver coated Bangles, (2) 01 Silver coated kada, (3) 01 Silver coated Bracelet and (4) 01 Silver coated chain, all made of 24 KT gold totally weighing 807 grams and collectively valued at Rs.23,16,090/-. The same were seized by the officers in the reasonable belief that the same was smuggled into India in a clandestine manner in contravention of the provisions of the Customs act, 1962. After completion of the investigation Show cause notice was issued on 13.06.2019.

3. The Original Adjudicating Authority (OAA) viz the Additional Commissioner of Customs, C.S.I. Airport, Mumbai, vide his OIO no. ADC/AK/ADJN/189/2019-20 dated 21-11-2019 ordered for absolute confiscation of the recovered assorted gold jewellery totally weighing 807 grams of 24 KT and collectively valued at Rs. 23,16,090/- under Section 111 (d), (l) and (m) of Customs Act, 1962. A personal penalty of Rs 2,35,000/- under section 112(a) & (b) of the Customs Act, 1962 was also imposed on the applicant.

4. Aggrieved, with this Order, the Applicant filed an appeal before the Appellate Authority (AA) viz, Commissioner of Customs (Appeals), Mumbai-III, who vide Order-in-Appeal No. MUM-CUSTOM-PAX-APP-872/2019-20 dated 21.01.2021 [F.No. S/49-1131/ 2019] [Date of issue: 29.01.2021] upheld the order passed by the OAA.

5. Aggrieved with the above order, the Applicants have made an exhaustive submission of case laws and have submitted copies including their submissions made before the lower authorities etc. They have filed these revision applications on the following main points:

5.01. That the gold jewellery seized from the applicant were not for sale; that the jewellery carried to India was for safety purpose and for use during her stay in India;

5.02. That the applicant as a Tourist was eligible to import personal jewellery/accessory;

5.03. That the petitioner was not involved in any smuggling activity;

5.04. That the Gold jewellery imported by the noticee was not dutiable;

5.05. That Gold is not prohibited item for import and the gold imported by them was not liable for absolute confiscation;

5.06. That the decisions relied upon by the Commissioner of Customs (Appeals) are not applicable in their case;

5.07. That the Petitioner claimed ownership of the goods and redemption of the gold under absolute confiscation for re-export;

5.08. The applicant concluded by submitting that in absence of a statutory prescription in terms to the effect that a foreign tourist entering India should not bring /wear gold jewellery, the impugned OIA cannot be sustained.

Under the above circumstances of the case, the applicants prayed for unconditional release of the assorted jewellery for re-export and drop further proceedings against her.

6. Personal hearing in the case was scheduled on 02.08.2023. Shri. Prakash Shingrani, Advocate for the applicant appeared for personal hearing and submitted that the applicant is a foreign national and while coming to India had brought some personal jewellery. He further stated that applicant has not concealed jewellery and was not fully aware about declaration process. He requested to allow re-export of jewellery to the applicant on reasonable fine and penalty.

7. The Government has gone through the facts of the case and notes that the applicant had not declared the gold while availing the green channel facility. Thereafter, on interception she had been asked whether she was carrying any dutiable items to which she had replied in the negative. The impugned gold was recovered only during the personal search of the applicant. The assorted gold jewellery had been ingeniously coated with silver which shows the intention of the applicant of hoodwinking the Customs and evading payment of Customs duty. The quantity of gold was quite substantial and the gold was of very high purity i.e 24KT, indicates that the same was for commercial use. The applicant clearly had failed to declare the goods to the Customs at the first instance as required under Section 77 of the Customs Act, 1962. The ingenuity used reveals the mindset of the applicant to not only evade duty but smuggle the gold. It also

reveals that the act committed by the applicant was conscious and pre-meditated. The applicant had been given an opportunity to declare the dutiable goods in her possession but having confidence in the nature of her concealment, she denied carrying any gold. Had she not been intercepted, the applicant would have gotten away with the gold concealed ingeniously. Therefore, the confiscation of the gold was 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 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. Government observes that besides the substantial quantum of gold which indicates that it was for commercial use, the manner in which it was attempted to be brought into the country is vital. The impugned gold was cleverly, consciously and ingeniously coated with silver which reveals the intention of the applicant. The aforesaid circumstances of the case and ingenious method used to coat the gold with silver, probates that the applicant had no intention of declaring the gold to the Customs at the airport. All these have been properly considered by the Original Adjudicating Authority while ordering the absolute confiscation of the gold and appellate authority had upheld the same.

12. The option to allow redemption of seized goods is the discretionary power of the adjudicating authority depending on the facts of each case and after examining the merits. In the present case, the manner of concealment being clever, conscious and ingenious, quantity and type of gold being for commercial use, this being a clear attempt to brazenly smuggle the impugned gold, is a fit case for absolute confiscation as a deterrent to such offenders. Thus, taking into account the facts on record and the gravity of offence, the adjudicating authority had rightly ordered the absolute confiscation of the impugned gold. But for the intuition and the diligence of the Customs Officer, the gold would have passed undetected. Such acts of mis-using 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 is in agreement with the order of the OAA absolutely confiscating the impugned gold and not allowing the same to be re-exported. The absolute confiscation of the gold would act as a deterrent against such persons who indulge in such acts with impunity.

13. The Government, keeping in mind the facts of the case is in agreement with the observations of the Appellate authority and finds that absolute confiscation is proper, legal and judicious. The penalty of Rs.2,35,000/- imposed under Section 112 (a) and (b) of the Customs Act 1962 on the seized gold jewellery valued at Rs 23,16,090/- is appropriate and commensurate with the omission and commission committed by the applicant. In view of the above Government does not find it necessary to interfere in the impugned OIA passed by the Appellate Authority.

14. Accordingly, the Revision Application filed by the applicant is disposed.

Shrawan
26/9/23
(SHRAWAN KUMAR)

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

ORDER NO. 684/2023-CUS (WZ)/ASRA/MUMBAI DATED 26.09.2023

To,

1. Ms Forough Maleki, 26, Jalebi Road, Street Abol Fazal, Gharib, Tehran.
2. Ms Forough Maleki C/o Advocate Prakash K. Shingarani, 12/334, Vivek, New MIG Colony, Bandra East, Mumbai-400051
3. The Pr. Commissioner of Customs, C.S.I Airport, Terminal 2, Level-II, Sahar, Andheri (East), Mumbai 400 099.
4. 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.

Copy to:

1. Prakash K. Shingarani (Advocate), 12/334, Vivek, New MIG Colony, Bandra East, Mumbai-400051
2. Sr. P.S. to AS (RA), Mumbai.
3. File Copy.
4. Notice Board.