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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. 371/04/B/WZ/2020-RA

7109 : Date of Issue : 28.09.23

ORDER NO. 688/2023-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.

(i). F.No. 371/04/B/WZ/2020-RA

Applicant : Ms. Fathima Farzana Mohideen Pichai.

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-CUSTM-PAX-APP-332/2019-20 dated 29.07.2019
issued on 13.08.2019 through F.No. S/49-495/2016
passed by the Commissioner of Customs (Appeals),
Mumbai - III, Marol, Mumbai - 400 059.

ORDER

This revision application has been filed by Ms. Fathima Farzana Mohideen Pichai (hereinafter referred to as the Applicant) against the Order-in-Appeal No. MUM-CUSTOM-PAX-APP-332/2019-20 dated 29.07.2019 issued on 13.08.2019 through F.No. S/49-495/2016 passed by the Commissioner of Customs (Appeals), Mumbai - III, Marol, Mumbai - 400 059.

2. Brief facts of the case are that on 18.06.2016, Customs Officers at the CSMI Airport, Mumbai had intercepted the applicant, who is a Sri Lankan national and had arrived at the CSMI Airport from Colombo onboard Sri Lankan Flight No. UL-0141. The applicant had cleared herself through the green channel. Personal search of the applicant and search of her baggage resulted in the recovery of 04 (four) gold bangles, 01 (one) gold chain with pendant and 01 (one) gold ring, all these weighing 204 grams and valued at Rs. 5,80,278/-. The Government Approved Valuer certified that all the aforesaid gold ornaments were of 22 karats and valued at Rs. 5,44,560/-.

3. The Original Adjudicating Authority (OAA), viz, Addl. Commissioner of Customs, CSMI Airport, Mumbai vide his Order-In-Original no. ADC/RR/ADJN/321/2016-17 dated 28.09.2016 ordered for the confiscation of the impugned gold jewellery i.e. 04 (four) gold bangles, 01 (one) gold chain with pendant and 01 (one) gold ring, weighing 204 grams and valued at Rs. 5,44,560/-, under Section 111(d), (l) and (m) of the Customs Act, 1962. Personal penalty of Rs. 50,000/- 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 - III who vide Order-In-Appeal No. MUM-CUSTOM-PAX-APP-332/2019-20 dated 29.07.2019 issued on 13.08.2019 through F.No. S/49-495/2016 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. that the orders of the AA was against the law, weight of evidence and probabilities of the case; that the applicant was wearing the gold jewellery; that she had brought the jewellery for a personal use; that the lower authorities ought to have ordered for the release of the gold jewellery without imposing any penalty; that lower authorities ought to have seen that applicant was not a carrier; that the gold jewellery were of 22K; that the OIO was unjust, unreasonable and arbitrary; that the lower authorities had erred in confiscating the gold jewellery; that the lower authorities ought to have seen that the gold was not for commercial and ought to have released the same; that applicant did not have an intention to evade Customs duty; that the gold jewellery be allowed to be re-exported; the lower authorities had found that the gold had not been ingeniously concealed; that applicant had not crossed the green channel; that the seizure mahazar had not been drawn and prepared before the witnesses;; that the lower authorities had erred in not applying Section 125 of the Customs Act, 1962 and the jewellery ought to have been released on payment of redemption fine; that the jewellery was of 22Karats and was for personal use; that the AA ought to have ordered for the re-export of the gold jewellery as prayed for by them since she had worn it; that she had retracted her statement; that this statement should have been held as admissible; that CCTV footage had not been provided to them; that discretion under section 125 of the Customs Act, 1962 should have been applied;
- 5.02. that she relies on the case law of DRI vs. Pushpa Lekhaumal Tolani [2017-355-ELT-129(SC)] wherein it was held that whenever a passenger was wearing jewellery and even cross the green channel there was no infraction of the provisions of the Customs Act.
- 5.03. that in the case of Vigneswaran [2014-314-ELT-394(Ker)], it was held that a foreign tourist need not declare if they were wearing the jewellery;

- 5.04. that the release of the gold jewellery on payment of redemption fine had been allowed in the following case laws;
- (a). Sapna Sanjiv Kohli vs. Commr. Of Customs, Airport, Mumbai [2008-230-ELT-305
 - (b). UOI vs. Dhanak M. Ramji [2009-248-ELT-127(Bom)];
- 5.05. that in many of the undermentioned cases, the Jt. Sec.(Rev. Appl) had allowed the release of the confiscated gold on payment of fine;
- (a). Order no. 159/2013 dated 01.07.2013 passed under Section 129DD of the Customs Act, 1962;
 - (b). Order no. 66-70/2013 dated 19.02.2013 passed under Section 129DD of the Customs Act, 1962;
 - (c). Order no. 201/2005 dated 30.06.2005 passed under Section 129DD of the Customs Act, 1962;
 - (d). Order no. 437-438/2003 dated 25.11.2003 passed under Section 129DD of the Customs Act, 1962;
- 5.06. that re-export of the gold have been permitted in the following cases;
- (a). 2008-230-ELT-305(Tri-Mum);
 - (b). 2009-240-ELT-207(Bom);
 - (c). 2010-253-ELT-A52(SC);
 - (d). 2011-266-ELT-167(Mad);
 - (e). 2011-269-ELT-72(Mad);
 - (f). 2014-314-ELT-349(GOI)
- 5.07. that she had been apprehended not after passing through the green channel but immediately after entering the Custom hall after she had passed the immigration facilities and had collected her checked-in baggage;
- 5.08. that she had retracted their statements and the lower authorities ought not to have relied upon the same;
- 5.09. that cross-examination of the witnesses had not been allowed and she had been deprived of natural justice; on this issue she has relied upon the following;
- (a). Apex Court judgement in the case of A Tajudeen vs. UOI reported in 2015-4SCC-Pg.435
 - (b). Hon'ble Gujarat High Court in Vulcan Industrial Engineering Company Ltd vs. UOI, [2013-297-ELT-190(Guj)];
- 5.10. that the gold jewellery had been worn by A1 / A2 which was not a violation; Here she has cited the case of Vigneswaran passed by Hon'ble Kerala High Court and reported in 2014-314-ELT-394(Ker)

Under the circumstances; A1/A2 have prayed to the Revision Authority to set aside the impugned OIA and to release the gold gold jewellery on payment of a fine and to set aside the penalty of Rs. 50,000/- imposed on her.

6. Applicant through her Advocate has filed an application for condonation of delay stating that there was a delay of 45 days which had occurred due to the loss of her father which she suffered and had to attend to the religious ceremonies.

7. Personal hearing was scheduled for 12.05.2023, 19.05.2023, 07.07.2023 and 14.07.2023. No one turned up on behalf of the Applicant / Respondent for the personal hearing. Sufficient opportunities have been given to the applicant / respondent. Therefore, the case is being taken up for a decision, on the basis of evidence available on the records.

8. On the issue of condonation of delay, Government notes that the revision application has been filed on 06.01.2020. The OIA which is dated 29.07.2019 was issued on 13.08.2019. Applicant has claimed that the OIA was received on 20.08.2019. This has not been refuted by the respondent. Accordingly, the applicant was required to file the revision application within 3 months i.e. by 11.11.2019. Government notes that an extension period of 3 months was available to the applicant which would have expired on 09.02.2020. Government notes that the revision application was filed on 06.01.2020 which is well within the extension / condonable period i.e. 3 months + 3 months. Therefore, prayer for condonation of delay is accepted and Government condones the delay.

9. 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 gold jewellery i.e. 04 gold bangles, 01 gold chain with pendant and a gold ring, 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.

10. 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".

11. 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.

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. The Government notes that the quantity of gold jewellery was small. The applicant has claimed ownership of the gold and her desire 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 mis-demeanour 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.

14. 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.

15(a). 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, considering the quantity of gold, the same not being concealed in an ingenious manner, applicant being a foreign national, the gold jewellery being of 22 karats, the absolute confiscation of the same was harsh and not justified.

15(b). Government notes that the applicant has prayed for the release of the gold jewellery on payment of a redemption fine. However, in the grounds of revision, applicant has requested that she be allowed to re-export the gold jewellery.

15(c). 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 gold jewellery to be re-exported on payment of a redemption fine.

16. Government finds that the penalty of Rs. 50,000/- imposed on the applicant under Section 112(a) and (b) of the Customs Act, 1962 is commensurate with the omissions and commissions committed by the applicant and is not inclined to reduce the same.

17. In view of the above, the Government modifies the order passed by the appellate authority and allows the applicant to redeem the impugned gold jewellery i.e. 04 (four) gold bangles, 01 (one) gold chain with pendant and 01 (one) gold ring, weighing 204 and valued at Rs. 5,44,560/- for re-export on payment of a redemption fine of Rs. 1,05,000/- (Rupees One Lakh Five Thousand only). The penalty of Rs. 50,000/- imposed on the applicant under Section 112(a) and (b) of the Customs Act, 1962 by the OAA and upheld by the AA is sustained.

18. Revision Application is decided / disposed of on the above terms.


(SHRAWAN KUMAR)

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

ORDER NO. 688/2023-CUS (WZ)/ASRA/MUMBAI DATED 26.09.2023.

To,

1. Ms. Fathima Farzana Mohideen Pichai, No. 105/8, Awwal Zaviya Road, Grand Pass, Colombo - 14 [Sri Lankan National; Service through Counsel & Notice Board].

2. Pr. Commissioner of Customs, Adjudication Cell, Chhatrapati Shivaji Maharaj International Airport, Sahar, Andheri East, Mumbai – 400 099.

Copy to:

3. M. Abdul Nazeer, Advocate, No. 65, Barach Road, Varadamma Garden, 3rd Street, Kilpauk, Chennai – 600 010.
4. Sr. P.S. to AS (RA), Mumbai.
5. File Copy.
6. Notice Board.