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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. 371/368/B/2021-RA / 605 : **Date of Issue 29.01.2024**

ORDER NO. 71/2024-CUS (WZ)/ASRA/MUMBAI DATED 24.01.2024 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. Malti Khanchandani

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-616/2019-20 dated 31.10.2019] [F. No. S/49-01/2021] passed by the Commissioner of Customs (Appeals), Mumbai Zone-III.

ORDER

The Revision Application has been filed by Mrs. Malti Khanchandani (herein referred to as the 'Applicant') against the Order-in-Appeal No. MUM-CUSTOM-PAX-APP-616/2019-20 dated 31.10.2019] [F. No. S/49-01/2021] passed by the Commissioner of Customs (Appeals), Mumbai Zone-III.

2. Brief facts of the case are that on 10.07.2017, the officers of Air Customs, Chattrapati Shivaji International (CSI) Airport, Mumbai, intercepted the Applicant, an Indian passport holder, who arrived from Dubai by Indigo Flight No. 6E 64 after she had cleared customs through the green channel. On being asked whether she was carrying any dutiable goods, contraband or gold in her baggage or on her person she replied in the negative. Not being satisfied with her reply, she was asked to pass through the metal detector door frame which indicated a positive beep sound. Subsequently personal search of the Applicant resulted in the recovery of one diamond studded chain purportedly to be of white gold and one diamond studded necklace purportedly to be of rose gold and white gold which were cleverly concealed by putting it beneath the white jacket worn by her.

2.1. Pursuant to being assayed, the one diamond studded chain was ascertained as " studded gold necklace in white rhodium plated RDS Diamond purity 750% Gold-18KT Gold" weighing 48 grams and the diamond studded necklace was ascertained as " studded necklace with Diamond in Rose and white coloured Rhodium with purity 750% Gold RDS diamonds-18KT Gold Bougets Diamonds" weighing 164 grams, collectively valued at Rs. 16,85,159/-, 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.

2.2. The Applicant in her statements admitted the possession, non-declaration and recovery of the jewellery; that the seized jewellery was owned by her husband; that she was supposed to hand over the jewellery to Shreyansh Begani (another notice) outside the CSI Airport for minor repairing; that she was to return back on the same day; that she knew that import of gold without declaration and payment of duty was an offence punishable under the Customs Act, 1962.

2.3. Though the Applicant retracted her earlier statement, in the following statement, the Applicant reiterated her earlier statement she stated that she did not have any proof of purchase of the jewellery; that the statement of Shreyansh Begani that in the past he had collected jewellery from her at least 07 to 08 times, was untrue.

3. After following the due process of law, the Original Adjudicating Authority (OAA) i.e. Additional Commissioner of Customs, CSI Airport, Mumbai, vide Order-in-Original No. ADC/AK/ADJN/229/2018-19 dated 02.09.2018 ordered the confiscation of the one studded gold necklace in white rhodium plated RDS diamond and one studded necklace with diamond in rose and white coloured diamond, totally weighing 212 gramd and valued at Rs. 16,85,159/-. However, the Applicant was given an option to redeem the seized gold for re-export on payment of fine of Rs. 3,20,000/, in lieu of confiscation, under Section 125(1) of the Customs Act, 1962 and payment of applicable charges as per Section 125(2) of the Customs Act, 1962. Personal penalty of Rs. 2,10,000/- was imposed on the Applicant under Section 112(a) and (b) of the Customs Act, 1962. Personal penalties were also imposed on the other noticees i.e Mr. Shreyansh Begani and Mr. Siddharth Bothra, 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-CUSTOM-PAX-APP-616/2019-20 dated 31.10.2019] [F. No. S/49-01/2021] 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 AA erred in rejecting the Appeal and failed to appreciate that import of gold jewellery was neither prohibited nor banned;

5.02. That the OAA erred in upholding heavy fines and penalty imposed for re-export of the jewellery and failed to appreciate that the jewellery was imported into India for repairing;

5.03. That the OAA erred in ignoring the case law cited by the Applicant in support of her case;

5.04. That the OAA erred in holding that the Applicant had imported gold on 07 to 08 occasions in the past and if this was true then suitable actions would have been taken by the Respondent for past imports and it is apparent that the Respondent does not believe in confessional statements;

5.05. That the OAA erred in ignoring and overlooking most of the submissions of the Applicant as well as during the personal hearing.

Under the circumstances, the Applicant prayed that the Order-in-Appeal be set aside and the revision application be allowed with consequential reliefs.

6. The Applicant has also filed an application for condonation delay in filing of the Revision Application. The Applicant has stated that the Order-in-Appeal was received by her on 14.11.2019 and the statutory period of 3 months expired on 14.02.2020. The Revision Application, having been filed on 31.12.2021, there was a delay of 22 months in filing the Revision

Application. The delay occurred due to the covid lockdown and the Applicant was not in a position to instruct her advocate for filing the Revision Application.

7. Personal hearing in the case was scheduled for 09.08.2023 or 23.08.2023. Shri Anil Balani, Advocate, appeared online for the personal hearing on 23.08.2023 on behalf of the Applicant. He reiterated the earlier submissions and submitted that the Applicant was a Non Resident Indian and she was wearing a necklace when she came to India. He further submitted that the same was allowed to be redeemed on payment of redemption fine and penalty. He requested to reduce the redemption fine and penalty as the jewellery was personal and used. No one appeared for the personal hearing on behalf of the Respondent.

8. The Applicant has prayed for condonation of delay on the grounds of not being in a position to file the revision application due to outbreak of covid pandemic. The Applicant, by her admission has received the Order-in-Appeal on 14.11.2019 and has filed the Revision Application on 31.12.2021 i.e after 22 months. The statutory period of 3 month expired on 14.02.2020 and considering the extended period as prescribed in Section 129DD (2) of the Customs Act, 1962, the last date for filing of the Revision Application was 14.05.2020. However, in view of the order of the Hon'ble Supreme Court dated 23.09.2021 in M.A No 665 of 2021 in Suo Mot Writ Petition (C) No. 3 of 2020, whereby the Apex Court directed "*that the period from 15.03.202 till 28.02.2022 shall stand excluded for the purpose of limitation as may be prescribed under any general or special laws in respect of all judicial or quasi-judicial proceedings*", Government notes that the Revision Application has been filed within the extended period of 6 months (i.e. 3 months + 3 months) as prescribed in Section 129DD (2) of the Customs Act, 1962. Accordingly,

Government condones the delay and proceeds to examine the revision application on the merits of the case.

9. The Government has gone through the facts of the case and observes that the Applicant had brought one 'studded gold necklace in white rhodium plated RDS diamond' and one 'studded necklace with diamond in rose and white coloured diamond', totally weighing 212 grams and valued at Rs. 16,85,159/- 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 being intercepted, the impugned one 'studded gold necklace in white rhodium plated RDS diamond' and one 'studded necklace with diamond in rose and white coloured diamond', totally weighing 212 grams was recovered from the Applicant. The non declaration of the impugned jewellery revealed her intention not to declare the impugned jewellery and thereby evade payment of Customs Duty. The confiscation of the said jewellery 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:

- (i) 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.”

- (ii) 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.
- (iii) 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...”*
- (iv) 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.
- (v) Judgement dated 17.02.2022 passed by the Hon'ble High Court, Rajasthan (Jaipur Bench) in D.B. Civil Writ Petition no. 12001 / 2020, in the case of Manoj Kumar Sharma vs. UOI and others.

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. Government observes that the aspect of allowing redemption of the impugned jewellery has been discussed in detail by the Original Adjudicating

Authority and concurred by the Appellate Authority and a reasoned, legal and judicious order has been passed in this regard. The Appellate Authority, has at Para 5, 6 and 7 of the impugned Order-in-Appeal, stated as under:

"5. I have gone through the facts of the case and submission made by the appellants. I find that the Appellant No. 1 was found in possession of 1 studded gold necklace in white Rhodium plated RDS Diamond purity 750% Gold-18KT Gold and 1 studded necklace with diamond in Rose & White coloured Rhodium with purity 750% Gold and RDS diamonds-8KT Gold Bougets totally valued at Rs. 16,85,159/-. The impugned goods were not declared to Customs on arrival as per requirement of section 77 of Customs Act, 1962 read with Baggage Rules, 1988 and relevant Policy provisions which render the goods liable for confiscation and the passenger liable for penalty. I find that the Jewellery was confiscated by the adjudicating authority. However an option was given to appellant No.1 to redeem the seized gold for re-export on payment of fine of Rs. 3,20,000/-, in lieu of confiscation, under Section 125 of the Customs Act, 1962 and personal penalty of Rs. 2,10,000/- on the appellant No. 1, Rs. 1,00,000/- on Appellant No. 2 and Rs. 85,000/- on Appellant No. 3 under section 112(a) & (b) of the Customs Act, 1962 was also imposed. I find that the limited argument raised by the Appellant is setting aside the impugned order and appeal be allowed with consequential relief to the Appellants.

6. I observe from the confessional statements of the appellants recorded under section 108 of the Customs act, 1962 that the appellant No. 1 admittedly carried the impugned jewelery on instruction of her Husband; that the impugned jewelry was purchased by her husband in Dubai and she was supposed to hand over the same to appellant No. 3 (Shri Shreyesh Begani), who is working for Mr. Siddharth Bothra (appellant No. 2) outside the CSI Airport. I find that the appellant No. 1 is a frequent traveller and appellant No. 3 had confessed in his statements that he had received the gold from the appellant No. 1 on previous 7-8 occasions and also from his husband on instruction of his employer Mr. Siddharth Bothra. Call records of the all the appellants also suggest that all the three appellants were in regular conversation during the period of arrival of the appellant No. 1 at CSI Airport Mumbai. I find that the investigation in the matter call records of all the appellants and statements of the appellants suggests that all the appellants by doing their act were involved in the activities of bringing impugned gold jewelry into India without paying the Customs duty. I find that the adjudicating authority has taken a lenient view and already allowed redemption by the way of re-export of the impugned assorted diamond studded gold jewellery and the fine imposed by the lower authority is roughly 18% of the total value of impugned goods which is not harsh/ excessive by any standards and penalty imposed under section 112(a) & (b) is also in commensurate with the offence committed by the appellants.

7. Under the circumstances, I uphold the decision of adjudicating authority and penalty imposed is also in commensurate with the offence committed by the appellants."

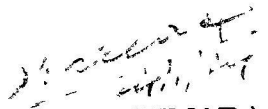
17. In the instant case, though the quantum of gold under import is not small, the gold has not been concealed ingeniously by the Applicant, and, there are no allegations that the Applicant is a habitual offender and was involved in similar offence earlier. Also as discussed by the OAA and AA, there is nothing on record to prove that the Applicant was part of an organized smuggling syndicate. Government notes that at times, passengers adopt innovative methods to bring valuables and attempt to evade payment of duty, thus making the goods liable to confiscation. 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 would therefore be harsh and not reasonable and the Order of the Appellate Authority concurring with the OAA, in granting an option to the Applicant to redeem the gold on payment of suitable redemption fine is reasonable and fair.

18. The OAA has also observed that the Applicant was carrying the impugned gold jewellery which was owned by her husband from his own resources. Concealment was not ingenious, past record of the Applicant does not indicate anything adverse. In the circumstances, Government finds that the OAA had used his discretion in allowing the impugned gold jewellery to be redeemed on payment of a fine of Rs. 3,20,000/-, and the order of the OAA having been concurred by the AA, is legal and proper.

19. The Applicant has prayed for reduction of the penalty imposed on her. The market value of the jewellery is Rs. 16,85,189/-. Government finds that the personal penalty of Rs. 2,10,000/- imposed by the Original Adjudicating Authority on the Applicant under Section 112 (a) and (b) of the Customs Act, 1962 is excessive and not commensurate with the omissions and commissions committed and needs to be reduced.

20. In view of the above discussion, Government modifies the Order-in-Appeal No. MUM-CUSTOM-PAX-APP-616/2019-20 dated 31.10.2019] [F. No. S/49-01/2021], passed by the Commissioner of Customs (Appeals), Mumbai Zone-III, to the extent of upholding the quantum of redemption fine on the impugned jewellery. The penalty of Rs. 2,10,000/- imposed on the Applicant under section 112(a) (i) of the Customs Act, 1962 is reduced to Rs. 1,50,000/- (Rupees One Lakh Fifty Thousand only)

21. The Revision Application is disposed in terms of the above.


(SHRAWAN KUMAR)

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

ORDER NO. 7//2024-CUS (WZ)/ASRA/MUMBAI DATED 24.01.2024

To,

1. Mrs. Malti Khanchandani, 55, Usha Colony, Malviya Nagar, Jaipur 320 217.
2. The Pr. Commissioner of Customs, C.S.I Airport, Terminal 2, Level-II, Sahar, Andheri (East), Mumbai - 400 099.

Copy to:

1. 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.
2. Shri Anil Balani, Advocate, 717, Raheja Chambers, 213, Free Press Journal Marg, Nariman Point, Mumbai.
3. Sr. P.S. to AS (RA), Mumbai.
4. File copy.
5. Notice Board.

