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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. 371/109-A/B/2020-RA / 7411 : Date of Issue: 17.10.2023

ORDER NO. 720/2023-CUS (WZ)/ASRA/MUMBAI DATED 09.10.2023
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 Nawal Alteyeb Handan Salih.

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-772/2019-20 dated 23.12.2019
[F.No. S/49-233/2019] passed by the Commissioner of
Customs (Appeals), Mumbai-III.

ORDER

This Revision Application has been filed by Ms Nawal Alteyeb Handan Salih (herein referred to as the "Applicant") against the Order-in-Appeal No. MUM-CUSTM-PAX-APP-772/2019-20 dated 23.12.2019 [F.No. S/49-233/2019] passed by the Commissioner of Customs (Appeals), Mumbai-III.

2. Brief facts of the case are that on 22-02-2019, the Officers of CSMI Airport Mumbai, intercepted one passenger Ms Nawal Alteyeb Handan Salih, the applicant, holding Sudanese Passport No. P 05016014 who had arrived from Sudan by Flight No. ET 640, after she had opted for green channel of Customs. Personal search of the applicant resulted in recovery of 03 gold bangles weighing 28 grams of 22 KT, valued at Rs.85,075/- which was not declared. 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.

3. The case was adjudicated by the Original Adjudicating Authority (OAA) viz the Superintendent of Customs, C.S.I. Airport, Mumbai, who vide his OIO No. AirCus/49/ T2/398/2019 'A' dated 22-02-2019 ordered absolute confiscation of the recovered 03 gold bangles weighing 28 grams of 22 KT, valued at Rs.85,075/- under Section 111 (d), (l) and (m) of Customs Act, 1962. A personal penalty of Rs 15,000/- 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-CUSTM-PAX-APP-772/2019-20 dated 23-12-2020 [F.No. S/49-233/ 2019] upheld the order passed by the OAA.

5. Aggrieved by this Order, the applicant has filed this revision application on the undermentioned grounds:

5.1 That the applicant was a Sudanese national and had come to India for the first time, did not know the law of the land and had informed the officer who intercepted her that she is wearing the gold bangles from the day of her marriage and the same was her regular wear and also did not have any foreign marking on it;

5.2 That the applicant was holding foreign currency to pay if she was asked to pay duty on it and she was willing to pay the same, even though the bangles were old;

5.3 That the applicant had also informed that the Gold jewellery was to be taken back to Sudan; that the applicant was not a carrier for anybody; that the applicant was a business woman and holding business visa; that she comes to India to purchase garments and would sell the same in Sudan and this was her flourishing business.

5.4 That the applicant was wearing the gold jewellery; it was not concealed; that the quantity of gold jewellery shows that the same is not in commercial quantity; that the jewellery was not in a primary form.

5.5 That the Orders passed by the lower authorities are contrary in nature with the earlier decisions which allowed the gold to be re-exported or released on payment of fine, duty and personal penalty;

5.6 *Therefore, in view of above submission the applicant requested to quash and set aside the impugned order.*

6. Personal hearing in the matter was scheduled for 07-08-2023. Ms Shivangi Kherajani, Advocate, appeared for the hearing on behalf of the Applicant. The Advocate submitted that the applicant is a foreign national and has brought small quantity of personal gold jewellery which was worn by her. She requested to allow release of goods unconditionally.

7.1 Government observes that the applicant has filed an appeal for condonation of delay in filing the impugned revision application. Applicant has submitted that the OIA was received by him on 06.01.2020 and that there was delay of 84 days in filing the application due to the disruption caused by COVID. Government observes that the applicant was required to file the revision application within 3 months i.e. by 05.04.2020. Considering, the further extension of 3 months which can be condoned, the applicant was required to file the revision application by 05.07.2020. The applicant had filed the revision application on 25.06.2020 which is within the extendable period. Government therefore condones the delay and goes into the merits of the case.

7.2 The Government has gone through the facts of the case, and observes that the applicant had failed to declare the impugned gold carried by her 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 the dutiable goods. By not declaring the gold carried by her, the applicant clearly revealed her intention *not to declare the gold and pay Customs duty on it*. The Government finds that the confiscation of the impugned gold was therefore justified.

8.1 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.**

8.2 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.

9. 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" in terms of Section 2(33) and hence it is liable for confiscation under Section 111(d) of the Customs Act, 1962.

10. 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.

11.1 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 pretense. 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."

11.2 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. Thus, Adjudicating authority can allow

redemption under Section 125 of any goods which are prohibited either under the Customs Act or any other law on payment of fine.

12. In the instant case, the quantum of gold involved is small i.e. only 28 grams and in the form of bangles which indicates that the same was not for commercial purpose; moreover the impugned gold were not ingeniously concealed, in fact, it was worn by the applicant. Government, notes that the applicant has claimed ownership of the gold and has stated that she would be taking it back to Sudan as this is her regular wear. Government, notes that there were no allegations that the Applicant is a habitual offender or that it was ingeniously concealed or that it was involved in similar offences earlier. Considering the quantity of gold, the same not being concealed in an ingenious manner, applicant being a Sudanese national, a business woman, the absolute confiscation of the same was harsh and not justified. Government observes that the applicant had made request of re-export in their appeal filed with Commissioner Appeal.

13.1 Government observes that the applicant has requested to allow the option of redemption and to re-export the seized gold jewellery. In view of the above facts, Government is inclined to modify the absolute confiscation upheld by the AA and allow the impugned 03 gold bangles weighing 28 grams of 22 KT, valued at Rs.85,075/- to be re-exported on payment of redemption fine.

13.2 Government finds that the penalty of Rs.15,000/- imposed on the Applicant under Section 112(a) & (b) of the Customs Act, 1962 is appropriate and commensurate to the omissions and commissions of the Applicant.

14.1 In view of the above, the Government modifies the impugned order passed by the Appellate authority and allows the applicant to redeem the impugned 03 gold bangles weighing 28 grams of 22 KT, valued at Rs.85,075/-

for re-export on payment of redemption fine of Rs. 17,000/- (Rupees Seventeen Thousand Only).

14.2 The penalty of Rs. 15,000/- imposed under Section 112(a) and (b) of the Customs Act, 1962 being appropriate and commensurate with the omissions and commissions of the Applicant, Government does not feel it necessary to interfere with the imposition of the same and is sustained.

15. Accordingly the Revision Application is disposed of on the above terms.

Shrawan
21/9/23
(SHRAWAN KUMAR)

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

ORDER NO. 720/2023-CUS (WZ)/ASRA/MUMBAI DATED 09.10.2023

To,

1. Ms Nawal Alteyeb Handan Salih, C/o Kiran Kanal, Advocate, Satyam, 2/5, R. C. Marg, Opp Vijaya bank, Chembur, Mumbai-400071.
2. The Pr. Commissioner of Customs, C.S.I Airport, Terminal 2, Level-II, Sahar, Andheri (East), Mumbai 400 099.
3. 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. Mrs. Shivangi Kherajani, Advocate, 501, Savtri Navbahar CHS Ltd. ,19th Road, Khar West, Mumbai-400052.
2. Sr. P.S. to AS (RA), Mumbai.
3. File Copy.
4. Notice Board.

