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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. 371/247/B/2021-RA / 7503 Date of issue: 18.10.2023

ORDER NO. 723 /2023-CUS (WZ)/ASRA/MUMBAI DATED 16.10.2023
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.

Applicant : Mrs. Hanan Hamza Ahmed Elzain

Respondent : Pr. Commissioner of Customs, CSMI, Mumbai

Subject : Revision Application filed under Section 129DD of the
Customs Act, 1962 against the Order-in-Appeal No. MUM-
CUSTM-PAX-APP-06/2021-22 dated 09.04.2021 passed by
the Commissioner of Customs (Appeals), Mumbai Zone-III.

ORDER

This Revision Application is filed by Mrs. Hanan Hamza Ahmed Elzain (here-in-after referred to as the 'Applicant') against the Order-in-Appeal (OIA) No. MUM-CUSTOM-PAX-APP-06/2021-22 dated 09.04.2021 passed by the Commissioner of Customs (Appeals), Mumbai Zone-III.

2. Brief facts of the case are that on 07.06.2018, the officers of AIU of Mumbai Customs, Chhatrapati Shivaji Maharaj International Airport, Mumbai, intercepted the Applicant, a Sudanese national, who had arrived by Air Arabia Flight No. G9-0401 from Sharjah, near exit gate. A detailed examination of the white coloured polythene bag that the Applicant was carrying resulted in recovery of eight gold bars totally weighing 865 grams and valued at Rs.24,59,121/-.

3. The case was adjudicated after issuance of show cause notice dated 20.07.2018 and the Original Adjudicating Authority (OAA) i.e., Additional Commissioner of Customs, CSMI Airport, Mumbai vide Order-in-Original (OIO) No. ADC/AK/ADJN/188/2019-20 dated 18.10.2019 ordered absolute confiscation of the impugned gold bars totally weighing 865 grams and valued at Rs.24,59,121/- under Section 111 (d) of the Customs Act, 1962. A penalty of Rs.2,50,000/- was imposed on the Applicant under Section 112 of the Customs Act, 1962.

4. Aggrieved, the Applicant filed an appeal before the Appellate Authority (AA) who vide impugned OIA upheld the order of the OAA and rejected the appeal.

5. Hence, the Applicant has filed the instant revision application on the following grounds:

- i. that the Appeal Authority failed to consider that the Applicant had no knowledge as to procedure of declaration because she never carried gold

on her previous visits. She is an Arabic national and cannot communicate without interpreter because she knows no other language. In her first statement itself she had stated that she is illiterate.

- ii. The panchnama itself is defective and same cannot be used against the accused. She was not intercepted after crossing exit hall but at the screening machine. There is no non-declaration as the baggage screening machine is kept after barricades of green channel and before every passenger exits the arrival hall their entire luggage is screened in the Baggage Screening machine in arrival hall. At that time itself the gold was detected. It is pertinent to note that she was confronted before Panchas who appeared late and were informed by the officers that she was intercepted near exit gate. Panchas has not witnessed her interception. In this situation from the Panchnama itself it is clear that she has not crossed green channel but since the goods were in the hand bag it was detected at the Screening Machine when all the passengers were in queue for the purpose of checking their bags. Her contention is that she was standing near screening machine when some words were spoken to her which she did not understood as she did not understand English or Hindi and false story just to make a case that she was intercepted after profiling is brought before. Her signature was procured on Panchnama but there is no signature of interpreter on the Panchnama. She wanted to pay the duty as this gold was for her medical treatment and to cover other expenses during her stay in India. However, she was not aware of the procedure. This was brought to the notice of Adjudicating Authority but the plea remained unheard even by the Appeal Authority which is not just.
- iii. The compliance of Sec 102 mandatory provision was followed in defective manner where the Pax who is not versed with English or Hindi Language and where the Interpreter was absent how she was conveyed and confronted with the Provisions. If we see the Panchnama it was typed on 8/06/2018 and the Passenger arrived at 22.30 hrs that is around 10.30 the statement was typed with signature of interpreter on

8/06/2018 at 1.30 am. This itself indicates that the Interpreter was not present at the early hours of seizure and was only called to sign the statement the next day. Hence based on false and defective Panchnama to Punish the Pax for Non-declaration would be bad in law. Even if we assume that the clearance took 2 hours how is that the statement was typed and completed at 1.30 am. The retraction could not be made in the case as there after she did not come to India until the date of summons that were served by the investigating authorities to appear before them.

- iv. There are no antecedents against the Applicant. The goods were for personal use that is to avail medical treatment. The documents were all submitted at the time of investigation along with bank details to prove that the goods are not smuggled goods under sec 123 of the customs Act,1962. She is the owner of the goods under Foreign Trade (Regulation and Development) Act 1992.The central government can form notification to regulate import and export of goods. However, under same act the owner must be given an opportunity for redemption under sec 17 of the Foreign Trade (Regulation and Development) Act 1992. It means that the opportunity of redemption is available even under foreign trade regulation Act 1992.
- v. On humanitarian ground this is the first offence which is out of ignorance of customs law and procedure. She is illiterate. There are no antecedents against her. She is only earning member in the family. She borrowed money for her treatment expenses from family members and have submitted the bank account details of his brother. Whatever money is invested in gold is her savings and borrowed money which she bought to avail medical treatment from his brother. At the time goods were seized she was having a fracture in her one hand. Absolute confiscation will put her in great financial difficulty. She must be given one opportunity. The purpose of Law and legal provision is not only Punitive and Preventive but also reformative. She is ready to pay applicable government dues hence under sec 28 of customs act 1962

an opportunity be given and redemption be granted under sec 125 of the customs act 1962. As Foreign Trade (Development and Regulation Act, 1992 as amended sec 18 Any order passed in good faith cannot be challenged in any court law hence it is fit case wherein a redemption can be granted in favour of the Pax who came for medical treatment.

- vi. That the notification 50/2017 states that in the public interest, Central Government have exempted certain category from IGST and criteria for concession of Duty it nowhere states that a Passenger is completely banned from carrying gold.
- vii. Penalty imposed under sec 112 (a) and (b) is not applicable since the goods are not prohibited goods but dutiable as per customs Act 1962. The penalty imposed can only be the duty evaded and absolute confiscation will be bad in law. The confiscation under sec 111 (d)(l) and (m) cannot be made as the goods seized are neither under any prohibition nor it is a case of misdeclaration under sec 77 hence under sec 112 (a) and (b)
- viii. Order of Absolute Confiscation not Sustainable: Gold is not a prohibited item. It is only restricted item as is held in Section 125 does not provides for absolute confiscation of goods which are contraband and since gold is not a contraband item the Applicant is entitled to have the goods released on payment of redemption fine and duty. Section 125 of the Act empowers the adjudicating authority to release the goods to its rightful owner or the person from whose possession the goods has been seized, on payment of redemption fine in lieu of confiscation.
- ix. The Applicants are relying upon following case laws:
 - Vigneswaran Sethuram Vs Union of India Oct 2006 Kerala High Court
 - K.Kuttiyandi Vs C.C. Chennai (Appeal No. C/29/2009) CESTAT
 - Michael John Holyoake Vs. Commissioner of Customs, Goa
 - Surjit kaur kalra Vs. Commissioner of Customs, Appeals, Calcutta, 2000(115) ELT 867

On the above grounds, the Applicant prayed to set aside the impugned OIO & OIA and allow redemption of gold on payment of reasonable fine.

6. Personal hearing in the case was scheduled for 03.08.2023. Ms. Shabana Pathan, Advocate appeared for the personal hearing on the scheduled date on behalf of the applicant. She submitted that the applicant is a foreign national and has brought some quantity of gold for her use. She further submitted that there was no concealment and the applicant is not a habitual offender. She requested to allow redemption of gold on reasonable redemption fine and penalty for re-export. No one appeared for the personal hearing on behalf of the Respondent.

7. The Government has gone through the facts of the case and observes that the Applicant had brought impugned eight gold bars totally weighing 865 grams and valued at Rs. 24,59,121/- 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. On being intercepted, impugned gold bars totally weighing 865 grams and valued at Rs.24,59,121/- were recovered from the Applicant. The confiscation of the gold bars was therefore justified and thus the Applicant had rendered herself liable for penal action.

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 prohibited goods in terms of Section 2(33) and hence it became liable for confiscation under Section 111(d) of the Customs Act, 1962.

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”.

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. 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."

12. The Government finds that the Applicant is a Sudanese national and was caught with gold bars. It is noted that there have been several instances where Sudanese nationals were found indulging in carrying undeclared gold. As the Applicant had not declared impugned eight gold bars totally weighing 865 grams and valued at Rs. 24,59,121/- at the time of arrival, the confiscation of the same was justified. Government agrees with the findings of OAA that being a Sudanese national, the applicant is not an 'eligible passenger' in terms of Notification No. 50/2017-Cus dated 30.06.2017 and that the quantity of impugned gold cannot be treated as bonafide baggage of passenger in terms of said Notification.

13. In view of the foregoing paras, the Government finds that as the applicant had not declared the gold at the time of arrival, quantity was substantial and in primary form, therefore absolute confiscation of the same was justified. Considering the above facts, Government is not inclined to modify the absolute confiscation upheld by the AA.

14. Applicant has also pleaded for setting aside the penalty imposed on her. The market value of the gold in this case is Rs.24,59,121/-. From the facts of the case as discussed above, Government finds that the penalty of Rs.2,50,000/- imposed on the Applicant under Section 112 of the Customs Act, 1962 is commensurate to the omissions and commissions of the Applicant and is not inclined to interfere in the same.

15. In view of the above findings, the Government upholds the impugned OIA and rejects the instant Revision application.


(SHRAWAN KUMAR)
Principal Commissioner & ex-officio
Additional Secretary to Government of India

ORDER NO. 723/2023-CUS (WZ)/ASRA/MUMBAI DATED 16.10.23

To,

1. Mrs. Hanan Hamza Ahmed Elzain,
c/o. Adv. Ms. Shabana Pathan, Ekta Niwas,
Room No.9, Gala Nagar, Achole Road,
Nalasopara East - 401 209.
2. The Pr. Commissioner of Customs,
Terminal-2, Level-II,
Chhatrapati Shivaji Maharaj International Airport,
Mumbai - 400 099.

Copy to:

1. Adv. Ms. Shabana Pathan,
Ekta Niwas, Room No.9,
Gala Nagar, Achole Road,
Nalasopara East - 401 209.
2. Sr. P.S. to AS (RA), Mumbai.
3. Guard file.