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GOVERNMENT OF INDIA
MINISTRY OF FINANCE
(DEPARTMENT OF REVENUE)
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Mumbai - 400 005

F.No. 371/280/B/2021-RA / 7793 Date of issue: 02.11.23

ORDER NO. 807 /2023-CUS (WZ)/ASRA/MUMBAI DATED 30.10.2023
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 : Ms. Aaliya Usman Sheikh
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-1778/2020-21 dated 25.02.2021 [Date of
issue: 08.03.2021] [F. No. S/49-1107/2019] passed by the
Commissioner of Customs (Appeals), Mumbai Zone-III.

ORDER

This Revision Application is filed by Ms. Aaliya Usman Sheikh (herein referred to as the 'Applicant') against the Order-in-Appeal (OIA) No. MUM-CUSTM-PAX-APP-1778/2020-21 dated 25.02.2021 passed by the Commissioner of Customs (Appeals), Mumbai Zone-III.

2. Brief facts of the case are that on 19.10.2019, the officers of Customs, Chhatrapati Shivaji Maharaj International Airport, Mumbai, intercepted the Applicant, who had arrived by Gulf Air Flight No. GF-64 from Bahrain, while attempting to clear herself from through Green Channel. A personal search of the Applicant resulted in recovery of two crude gold bangles of 24 carat totally weighing 200 grams and valued at Rs.6,94,080/-.

3. The case was adjudicated after waiver of show cause notice and the Original Adjudicating Authority (OAA) i.e., Assistant Commissioner of Customs 'A' Batch, CSMI Airport, Mumbai, vide Order-in-Original (OIO) dated 19.10.2019 ordered confiscation of the impugned two crude gold bangles totally weighing 200 grams and valued at Rs.6,94,080/- under Section 111(d), (l) & (m) of the Customs Act, 1962 with an option to redeem it on payment of fine of Rs. 70,000/- under Section 125(1) of the Customs Act, 1962. The OAA also imposed a penalty of Rs.30,000/- under Section 112 ibid.

4. Aggrieved by the impugned OIO, the Department filed an appeal for absolute confiscation of the impugned gold which was allowed by the Appellate Authority (AA), vide impugned OIA.

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

- i. that the Applicant had informed the Dy. Commissioner at the time of hearing that the said Gold Bangles is her personal Gold being regularly worn by her and on appreciating her submissions the said Gold Bangles were allowed to be redeemed.

- ii. that the Appellate Authority did not consider the view of Adjudicating Authority and failed to appreciate that, the said Gold Bangles belonged to her and any Indian woman always wears some items in Gold like Gold Bangles, Mangalsutra, etc. and the Applicant was only wearing the said 2 Gold Bangles which was of her regular use.
- iii. that the Appellate Authority as well as Adjudicating Authority failed to appreciate that, the Applicant was also holding foreign currency to pay if she was asked to pay duty on it and was ready and willing to pay the same and even if she had less money for payment of duty, she could have arranged and called from her family members.
- iv. that the Applicant had also informed to the Custom Officers that the Gold Bangles which she was wearing was Indian made Gold. The said fact was also mentioned by her. Further the Applicant had also good financial status. The Applicant was not aware of the Customs rule with regard to Gold Bangles, even if she had worn Gold on her hands and was supposed to declare it. Thus, it has been wrongly considered that the Applicant was involved into smuggling activities and hence tried to evade customs duty.
- v. that there is no foreign marking on the Gold Bangles, but on assumption and presumption OAA & AA considered that the goods were of smuggled nature.
- vi. that the Gold Bangles is not in commercial quantity and the quantity of the Gold itself shows that it is meant for personal use.

6. Personal hearing in the case was held on 29.08.2023. Ms. Shivangi Kherajani, Advocate appeared for the personal hearing on behalf of the applicant and submitted that the applicant had brought two gold bangles for personal use. She requested to allow redemption of same on nominal redemption fine and penalty by restoring the original order. No one appeared for the personal hearing on behalf of the Respondent.

7. Government has gone through the facts of the case and observes that the Applicant had brought two crude gold bangles but 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 about carrying dutiable goods. However, after getting cleared through the green channel of Customs and on being intercepted, two crude gold bangles totally weighing 200 grams and valued at Rs.6,94,080/-, were recovered from the Applicant and revealed her intention of not to declare the said gold and thereby evade payment of applicable Customs Duty. The confiscation of the gold was therefore justified and the Applicant had thus 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 a 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. 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.

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."

13.1. Government further observes that there is 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:

- a) 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."
- b) 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.
- c) 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..."
- d) 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.

- e) 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.
- f) 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 Vijayasundaram + 5 others in a matter of Sri Lankans wearing 1594 gms of gold jewellery 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 the 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.

13.2. 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.

14. In view of the foregoing paras, the Government finds that as the Applicant had not declared two crude gold bangles totally weighing 200 grams and valued at Rs.6,94,080/- at the time of arrival, the confiscation of the same was justified. However, the quantum of gold under import is small and is not of commercial quantity. The impugned gold bangles recovered from the Applicant were not concealed in an ingenious manner. There are no allegations that the Applicant is a habitual offender and was involved in similar offence earlier. Further, there is nothing on record to prove that the Applicant was part of an organized smuggling syndicate.

15. 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 same in the instant case is therefore harsh and not reasonable. Considering these facts, Government finds the OIO passed by the

OAA, allowing redemption of impugned gold on payment of fine amounting to Rs.70,000/-, to be fair, legal and proper and is inclined to uphold the same. Government finds the penalty of Rs.30,000/- imposed on the applicant under Section 112(a) and (b) of the Customs Act, 1962 by the OAA and upheld by the AA commensurate with the omissions and commissions committed.

16. Accordingly, in view of the above, Government sets aside the OIA passed by the AA and restores the OIO passed by the OAA.

17. Revision Application filed by the applicant is disposed of on above terms.

Shrawan
30/10/23
(SHRAWAN KUMAR)
Principal Commissioner & ex-officio
Additional Secretary to Government of India

ORDER NO. 801 /2023-CUS (WZ)/ASRA/MUMBAI DATED 30.10.23

To,

1. Mrs. Aaliya Usman Sheikh,
Kailash Marg, Jhabua,
Madhya Pradesh - 457 661.
2. The Pr. Commissioner of Customs,
Terminal-2, Level-II,
Chhatrapati Shivaji Maharaj International Airport,
Mumbai - 400 099.

Copy to:

1. Adv. Mrs. Kiran Kanal,
Satyam, 2/5, R.C.Marg,
Opp. Vijaya Bank, Chembur,
Mumbai - 400 071.
2. Sr. P.S. to AS (RA), Mumbai.
3. Guard file.

