

REGISTERED
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. 371/199/B/WZ/2022-RA/751 : **Date of Issue : 10.10.2023**

ORDER NO. 807/2023-CUS (WZ)/ASRA/MUMBAI DATED 31.10.2023 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. Alemtshay Meles Abay

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-CUSTOM-PAX-APP-1914/2021-22 dated 15.03.2022 [Date of issue: 15.03.2022] [F. No. S/49-1104/2021] passed by the Commissioner of Customs (Appeals), Mumbai Zone-III.

ORDER

The Revision Application has been filed by Ms. Alemtshay Meles Abay (herein referred to as the 'Applicant') against the Order-in-Appeal No. MUM-CUSTOM-PAX-APP-1914/2021-22 dated 15.03.2022 [Date of issue: 15.03.2022] [F. No. S/49-1104/2021] passed by the Commissioner of Customs (Appeals), Mumbai Zone-III.

2. Brief facts of the case are that on 17.01.2019, on the basis of observation and profiling, the officers of Air Customs, Chhatrapati Shivaji International Airport, Mumbai, intercepted the Applicant, holding a Eritrean passport, who had arrived by Jet Airways Flight No. 9W-543 from Dubai, after she had cleared herself through the Customs green channel. On being asked whether she was carrying any contraband or gold on her person or baggage, the Applicant replied in the negative. Not satisfied with the reply of the Applicant, personal search and the baggage of the Applicant was examined. The personal search led to the recovery of eight crude bangles of yellow metal purported to be gold which were worn on both her hands

3. Pursuant to being assayed, the eight gold bangles of 24KT gold, collectively weighing 582 grams and valued at Rs. 17,25,048/- were seized under the provision of the Customs Act, 1962 under the reasonable belief that the gold was being smuggled into India hand hence liable for confiscation under the Customs Act 1962.

4. The Applicant in her statement dated 17.01.2019 which was later retracted on 29.01.2019 and rebutted by the department vide letter dated 26.02.2019, submitted that she worked in a boutique in Eritrea and earned around USD75 per month and that she did not purchase the seized gold bangles and the same were handed over to her by one lady named Mrs Asmert Miket who instructed the Applicant to carry the bangles to India and handover

the same to a person who would contact her in India; that she did not have any invoice and did not declare the gold to evade payment of customs duty. She also admitted that she knew that import of gold in any form without declaration was an offence punishable under the Customs law and admitted the possession, ownership, knowledge, carriage, non-declaration, carriage, concealment and recovery of the seized bangles.

4.1. The Applicant, in her further statement, said she had an invoice for the purchase of 8 gold bangles and that she brought the bangles for personal use as it was not safe to leave the gold at her Dubai residence which was shared with others and that she worked in a coffee shop as a partner and the gold was purchased from her savings; that she visited India to meet the doctor for her sons heart treatment.

4.2. The Applicant was summoned to appear and produce documents regarding business/job, bank statement etc. but she neither appeared nor submitted the documents.

5. 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/SKR/ADJN/106/2020-21 dated 20.03.2020 [Date of issue: 01.07.2020] ordered the absolute confiscation of the impugned eight gold bangles of 24KT gold, collectively weighing 582 grams valued at Rs. 17,25,048/-, under Section 111 (d), (l) and (m) of the Customs Act, 1962. A penalty of Rs. 2,59,000/- was imposed on the Applicant under Section 112 (a) (i) of the Customs Act, 1962.

6. 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-1914/2021-22 dated 15.03.2022 [Date of issue: 15.03.2022] [F. No. S/49-1104/2021] upheld

the order passed by the OAA with regard to the absolute confiscation of the gold. The Appellate Authority reduced the penalty amount to Rs. 1,70,000/-.

7. Aggrieved with the above order of the Appellate Authority, the Applicant has filed this revision application on the following grounds:

7.01. That the Applicant was an Ethiopian national and being a foreign national, knew English language properly and she put the true facts before the officer

7.02. That the AA as well as the OAA failed to appreciate that the said impugned gold was her personal gold and was her regular wear gold and while coming from Dubai she was wearing the same as she could not leave the same in Ethiopia since she was staying alone without any family members and the gold was purchased by her from her own and her husbands savings;

7.03. That the OAA as well as the AA failed to appreciate that the gold bangles were her regular uses gold and not for sale in India and would have been taken back by her to Ethiopia but this was misunderstood and it was concluded that she was carrying the gold for monetary gain;

7.04. That the seizure and confiscation made by OAA is illegal and some irrelevant part mentioned in the statement has been retracted by the Applicant but the retraction was not appreciated by the authorities;

7.05. That the OAA and AA failed to appreciate that the goods under seizure were gold bangles which were worn by her and thus not being ingeniously concealed;

7.06. That the gold under seizure was for her personal use and were not meant for sale in India and being a foreigner she did not have the knowledge that even personal gold worn or brought need to be declared;

7.07. That on her interception, she was not told or warned that being a foreign tourist, entering India wearing of carrying gold was not allowed but the gold was just seized despite informing that she was willing to pay the applicable

duty and if not the same may be retained and handed over on her return from India but the authorities failed to listen to her;

7.08. That the OAA and AA failed to appreciate and arrived at a purported finding that are totally arbitrary, perverse and unjust;

7.09 That the OAA and AA failed to appreciate that Section 125 of the CA, 1962 provides for situations where the goods which have been seized can be released on payment of redemption fine;

7.10. That mere foreign origin of the goods does not indicate that the goods are smuggled and the entire case is based on mere suspicion, assumption and presumption and on surmise and conjunctions;

7.11. 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 duty;

7.12. That the Applicant informed the officers that the said gold bangles which she was carrying were to be taken back to Ethiopia;

7.13. That the Applicant had a good financial status and was earning a handsome amount being the business partner in Al-Lail Alhadi Coffee shop *and she had produced the documents and thus it has been wrongly considered that the Applicant was involved in smuggling activities;*

7.14. That on the day of her interception she had mentioned that the gold bangles belonged to her and also in her further statement and this was her second visit to India with regard to meeting with a doctor for appointment;

7.15. That the Applicant was not acting as a carrier for anybody and was a business partner;

7.16. That the gold bangles belonged to her but on assumption and presumption the AA and OAA considered the gold to be of smuggled nature;

7.17. That the OAA and AA failed to appreciate that the gold bangles were meant for personal use and she was wearing the same at the time of interceptions and it cannot be considered that it was concealed;

7.18. That the gold bangles were not of commercial quantity and the quantity of gold shows that it was for personal use;

7.19. That the AA has given findings which are contrary and inconsistent with the findings of the Adjudicating Authority;

7.20. That the AA and the OAA have passed orders which are contrary in nature to the earlier decisions taken by them wherein such quantity of gold used to be released for re-export on payment of reshipment fine and personal penalty;

7.21. That the Appellate Authority has discriminated between Indian national and foreign nationals, whereas as per the constitution of India, a person is governed by law of the land whether he/she is a foreign national or Indian national and under these circumstances, justice cannot be denied to foreign national;

7.22. That the AA and the OAA have gone on the basis of presumptions and assumptions only and on the basis of surmises and presumption and without ascertaining the true facts of the case being totally perverse and unjust and have been made erroneously with total non-application of mind;

7.23. That the AA has confirmed the penalty without clinching and cogent evidence and has passed an illegal order which needs to be set aside;

7.24. That the OAA and the AA have passed the order which is otherwise illegal and bad in law.

Under the circumstances, the Applicant prayed that the Order-in-Appeal and Order-in-Original be set aside and the seized gold bangles be allowed to be reshipped on payment of nominal redemption fine and penalty be waived absolutely or any other order as deemed fit may be issued.

8. Personal hearing in the case was scheduled for 01.08.2023. Mrs Shivangi Kherajani, Advocate appeared for the personal hearing on the scheduled date on behalf of the Applicant. The Advocate for the Applicant

submitted that the Applicant is a foreign national and had brought some gold for personal purpose. She requested to allow redemption of the goods on reasonable fine and penalty, for re-export. No one appeared for the personal hearing on behalf of the Respondent.

9. The Government has gone through the facts of the case and observes that the Applicant had brought the eight gold bangles of 24KT gold, collectively weighing 582 grams valued at Rs. 17,25,048/-, 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 opting to clear through the green channel of Customs and after being intercepted, the impugned eight gold bangles of 24KT gold, collectively weighing 582 grams valued to Rs. 17,25,048/- was recovered from the Applicant. The gold bangles were worn by the Applicant and revealed her intention not to declare the said gold and thereby evade payment of Customs Duty. The confiscation of the gold bangles 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:

- a) In the case of Commissioner of Customs, Aligarj, 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.

15.2. Further, The Hon'ble High Court, Madras, in a judgement passed on 08.06.2022 in WP No. 20249 of 2021 and WMP No. 21510 of 2021 in respect of Shri. Chandrasegaram Vijayasundaram and 5 others in a matter of Sri Lankans collectively 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.

15.3. 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. In view of the foregoing paras, the Government finds that as the Applicant had not declared the impugned eight gold bangles of 24KT gold, collectively weighing 582 grams valued at Rs. 17,25,048/-, at the time of arrival, the confiscation of the same was justified. However, Applicant is a foreign national and the quantum of gold under import is not substantial or of commercial quantity. The impugned gold bangles were worn by the Applicant which suggests that the impugned gold was not concealed in an ingenious manner. The Applicant is not a frequent flyer, there are no allegations that the Applicant is a habitual offender and was involved in similar offence earlier or there is nothing on record to prove that the Applicant was part of an organized smuggling syndicate.

17. Government finds that this is a case of non-declaration of gold in the form of bangles. The absolute confiscation of the impugned gold bangles leading to dispossession of the Applicant of the gold in the instant case is therefore harsh and not reasonable. In view of the aforesaid facts and considering that the Applicant is a foreign national, option to re-export the impugned gold bangles on payment of redemption fine should have been allowed. Considering the above facts, Government is inclined to modify the absolute confiscation and allow the impugned gold bangles to be re-exported on payment of a redemption fine.

18. Applicant has also pleaded for waiver of the penalty imposed on her. The market value of the gold in this case is Rs. 17,25,048/-. From the facts of the case as discussed above, Government finds that the reduced penalty of Rs. 1,70,000/-, by the Appellate Authority under Section 112 (a) (i) of the Customs Act, 1962, is commensurate to the omissions and commissions of the Applicant.

19. In view of the above, the Government modifies the Order-in-Appeal No. MUM-CUSTOM-PAX-APP 1914/2021-22 dated 15.03.2022 (Date of issue: 15.03.2022) [F. No. S/49-1104/2021] passed by the Commissioner of Customs (Appeals), Mumbai Zone-III and allows the Applicant to redeem the impugned eight gold bangles of 24KT gold, collectively weighing 582 grams valued at Rs. 17,25,048/-, for re-export, on payment of a redemption fine of Rs. 3,50,000/- (Rupees Three Lakh Fifty Thousand only). The penalty of Rs. 1,70,000/- imposed by the Appellate Authority is sustained.

20. The Revision Application is disposed of on the above terms.

(SHRAWAN KUMAR)

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

ORDER NO. 807/2023-CUS (WZ)/ASRA/MUMBAI DATED 31.10.2023

To,

1. Ms. Alemtshay Meles Abay. Edag, Asmara, Massawa, Eritrea
2. Address No.2: Ms. Alemtshay Meles Abay C/o Mrs Kiran Kanai/ Mrs Shivangi Kherajani, Advocates, 501, Savitri Navbahar CHS Ltd, 19th Road, Khar (West), Mumbai 400 052.
3. The Pr. Commissioner of Customs, Terminal-2, Level-II, Chhatrapati Shivaji International Airport, Mumbai 400 099.

Copy to:

1. The Commissioner of Customs (Appeals), Mumbai Zone - III, Awas Corporate Point, 5th Floor, Makwana Lane, Behind S.M. Centre, Andheri-Kurla Road, Marol, Mumbai - 400 059.
2. Mrs Kiran Kana/Mrs Shivang Kherajani, Advocates, 501, Savitri Navbahar CHS Ltd, 19th Road, Khar (West), Mumbai 400 052.
3. Sr. P.S. to AS (RA), Mumbai.
4. File copy.
5. Notice Board.