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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. 371/407/B/WZ/2022-RA / 2985 : Date of Issue : 21.11.2023

ORDER NO. 839 /2023-CUS (WZ)/ASRA/MUMBAI DATED 20.11.2023 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. Varsha Ankit Maheshchandra Mandalia

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-675/2022-23 dated 18.07.2022 [Date of issue: 19.07.2022] [F. No. S/49-2328/2021] passed by the Commissioner of Customs (Appeals), Mumbai Zone-III.

ORDER

The Revision Application has been filed by Mrs. Varsha Ankit Maheshchandra Mandalia (herein referred to as the 'Applicant') against the Order-in-Appeal No. MUM-CUSTOM-PAX-APP-675/2022-23 dated 18.07.2022 [Date of issue: 19.07.2022] [F. No. S/49-2328/2021] passed by the Commissioner of Customs (Appeals), Mumbai Zone-III.

2. Brief facts of the case are that on 02.02.2020, the officers of Air Customs, Chatrapati Shivaji International Airport, Mumbai, intercepted the Applicant, who had arrived by Ethiopian Airlines Flight No. ET 640 from Addis Ababa, after she had cleared herself through the Customs green channel. Personal search of the Applicant resulted in the recovery of 21 gold bangles worn by the Applicant on her body and concealed by the clothes worn by her, 05 finger rings and 06 gold earrings concealed in the pockets of the jacket worn by the Applicant. Pursuant to being assayed, the recovered gold viz 21 gold bangles, 05 finger rings and 06 gold earrings having 24K purity and collectively weighing 560 grams and valued at Rs. 19,94,163/-, were seized under the provisions of the Customs Act, 1962 under the reasonable belief that the same were smuggled into India in contravention of the provisions of the Customs Act, 1962 and hence liable to confiscation under the Customs Act, 1962.

3. The Applicant in her statement informed that she stays in Sudan and that she neither has a bank account in India or Sudan and does not have a PAN card or Aadhar card and that she works as a beautician and earns 5000 Sudanese pounds per month. She further denied the ownership of the gold and the seized gold was handed over to her by a Sudani passenger and was carried by her for a monetary consideration and that she did not have any invoice of the purchase of the gold. She admitted possession, knowledge, carriage, concealment, non-declaration and recovery of the gold and that she

was aware that import of gold in any form without declaration and payment of duty was an offence under the Customs Act, 1962. Investigations also revealed that she had made several short duration visits to India and the last two and a half years.

4. 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/VDJ/ADJN/157/2021-22 dated 10.08.2021 [Date of issue: 12.08.2021] ordered the absolute confiscation of the seized 21 gold bangles, 05 finger rings and 06 gold earrings having 24K purity and collectively weighing 560 grams and valued at Rs. 19,94,163/-, under Section 111(d), (l) and (m) of the Customs Act, 1962. Personal penalty of Rs. 1,75,000/- was imposed on the Applicant under Section 112 (a) and 112(b) of the Customs Act, 1962.

5. 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-CUSTM-PAX-APP-675/2022-23 dated 18.07.2022 [Date of issue: 19.07.2022] [F. No. S/49-2328/2021] upheld the order passed by the OAA.

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

6.01. That the Applicant was an Indian national and being a Gujarati, she was not well versed with English language and went to declare the gold and asked the officer that the gold which she was wearing needs to be declared but she was diverted as if she had not declared;

6.02. That the AA as well as the OAA failed to appreciate that the Applicant submitted that the impugned gold belonged to her and were her personal gold and was her regular gold wear and was wearing the same at home and was

old and that the gold was purchased during her marriage in India and did not have foreign markings;

6.03. That the OAA and the AA failed to appreciate that the gold jewellery were her regular use and the same would be taken back by her to Sudan but the fact was misunderstood and it came to be concluded that the said gold jewellery which she was wearing was for monetary gain;

6.04. That the seizure and confiscation made by both the Authorities is illegal and the Applicant has stated all the facts in the statement itself;

6.05. That the AA and OAA failed to appreciate that the gold under seizure were for his personal use and being an Indian national she did not have the knowledge that even personal gold worn or brought need to be declared;

6.06. That the Applicant told the officers that she was ready and willing to pay the applicable duty if required and if not then the same may be retained by them and on her return from India the same may be handed over to her but the officer failed to listen and/or pay heed to her say;

6.07. That the purported findings are totally arbitrary, perverse and unjust and have been erroneously made with total non-application of mind;

6.08. That the OAA and AA failed to appreciate that under Section 125 of the Customs Act, 1962, whenever confiscation of any goods is authorized by the Act, the goods can be released by the OAA on payment of redemption fine;

6.09. That mere foreign origin of the goods does not indicate that the goods are smuggled and though in this case the gold jewellery was not of foreign origin, the entire case is based on assumption and presumption and on surmise and conjunctions;

6.10. 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;

6.11. That she had informed that the impugned gold which she was wearing were to be taken back by her to Sudan and that the Applicant had a good financial status as she and her husband were staying together in Sudan and

were running a beauty parlour and she could not leave the gold jewellery in the houses and she regularly wears the same and had produced the documents and that it was wrongly considered that the Applicant was involved in smuggling activities;

6.12. That the OAA and AA failed to appreciate that the goods belonged to her and the same was mentioned in her statements;

6.13. That the Applicant was not acting as a carrier for anybody nor did she state that she wanted to sell the same in the local market and the Sudanese passenger mentioned in the statement was not caught to prove that the said jewellery belonged to that lady and the retraction was filed at the first available opportunity;

6.14. That the AA and the OAA have gone on the basis of presumptions and assumptions only;

6.15. That the seized gold were worn by her and was seen on her hands and it cannot be considered to be ingeniously concealed and the fact of concealment was false;

6.16. That the gold jewellery was not in commercial quantity and the quantity itself shows that it was meant for personal use;

6.17. That the AA has given the conclusions and findings which is contrary and inconsistent to the findings of the OAA;

6.18. 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 goods used to be released for re-export on payment of reshipment fine and personal penalty;

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

national and furthermore the constitution of India supersedes the Customs law and states that all persons are equal before the law;

6.20. That in the instant case the Applicant is an Indian and has come to India after many years and she has stayed for more than six months abroad;

6.21. That the OAA and AA have gone on the basis of presumptions and assumptions only and not on the real facts put by the Applicant;

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

6.23. 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 21 gold bangles, 05 finger rings and 06 gold earrings having 24K purity and collectively weighing 560 grams and valued at Rs. 19,94,163/- be allowed to be re-shipped on payment of nominal reshipment fine and penalty be waived absolutely or any other order as deemed fit may be issued.

7. 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 brought some gold jewellery and that gold is not a prohibited item. She requested to allow redemption of goods on reasonable fine and penalty. 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 21 gold bangles, 05 finger rings and 06 gold earrings having 24K purity and collectively weighing 560 grams and valued at Rs. 19,94,163/- 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, on being intercepted, 21 gold bangles, 05 finger rings and 06 gold earrings having 24K purity and collectively weighing 560 grams and valued at Rs. 19,94,163/- were recovered from the Applicant and it revealed her intention not to declare the said gold and thereby evade payment of Customs Duty. The confiscation of the gold 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 a prohibited goods in terms of Section 2(33) and hence it 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 are 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.

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 21 gold bangles, 05 finger rings and 06 gold earrings having 24K purity and collectively weighing 560 grams and valued at Rs. 19,94,163/- at the time of arrival, the confiscation of the same was justified. However, the quantum of gold under import is not substantial or of commercial quantity. The impugned gold bangles recovered from the Applicant were worn by the Applicant and the gold rings and earrings were kept in the pockets of the jacket worn by the Applicant and thus was not concealed in an ingenious manner. Though the Applicant has to India several time, 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.

15. Government finds that this is a case of non-declaration of gold jewellery. The absolute confiscation of the impugned 21 gold bangles, 05 finger rings and 06 gold earrings having 24K purity and collectively weighing 560 grams, leading to dispossession of the Applicant of the same in the instant case is therefore harsh and not reasonable. In view of the aforesaid facts and the release of the impugned gold jewellery in the form of bangles, rings and earrings, 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 21 gold bangles, 05 finger rings and 06 gold earrings having 24K purity and collectively weighing 560 grams and valued at Rs. 19,94,163/- to be released on payment of a redemption fine.

16. Applicant has also pleaded for setting aside the penalty imposed on her. The market value of the impugned 21 gold bangles, 05 finger rings and 06 gold earrings in this case is Rs. 19,94,163/-. From the facts of the case as discussed above, Government finds that the penalty of Rs. 1,75,000/- imposed on the Applicant under Section 112(a) of the Customs Act, 1962 is commensurate to the omissions and commissions of the Applicant and needs no interference.

17. In view of the above, the Government modifies the Order-in-Appeal No. MUM-CUSTOM-PAX-APP-675/2022-23 dated 18.07.2022 [Date of issue: 19.07.2022] [F. No. S/49-2328/2021] passed by the Commissioner of Customs (Appeals), Mumbai Zone-III and allows the Applicant to redeem the impugned 21 gold bangles, 05 finger rings and 06 gold earrings having 24K purity and collectively weighing 560 grams and valued at Rs. 19,94,163/-, on payment of a redemption fine of Rs. 4,00,000/- (Rupees Four Lakhs only). The penalty

of Rs. 1,75,000/- imposed by the OAA and upheld by the Appellate Authority is sustained.

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

Shrawan
20/11/23
(SHRAWAN KUMAR)

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

ORDER NO. 839/2023-CUS (WZ)/ASRA/MUMBAI DATED 20.11.2023

To,

1. Mrs. Varsha Ankit Maheshchandra Mandalia, R/o Ganesh Valli, Ratanbhai Masjid, Jain House, Jamnagar, Gujarat

Address No.2: Mrs. Varsha Ankit Maheshchandra Mandalia, C/o Mrs Kiran Kanal/ Mrs Shivangi Kherajani, Advocates, 501, Savitir Navbahar CHS Ltd, 19th Road, Khar (West), Mumbai 400 052.

2. 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 Kanal/Mrs Shivangi 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.

