

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. 371/234/B/WZ/2021-RA / 2981 : Date of Issue : 22.11.2023

ORDER NO. 840/2023-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 Harm Eltayeb Ahmed Khogali

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-1434/2020-21 dated 28.01.2021 [Date of issue: 10.02.2021] [F. No. S/49-817/2019] passed by the Commissioner of Customs (Appeals) Mumbai Zone-III.

ORDER

The Revision Application has been filed by Mrs Harm Eltayeb Ahmed Khogali (herein referred to as the 'Applicant') against the Order-in-Appeal No. MUM-CUSTM-PAX-APP-1434/2020-21 dated 28.01.2021 [Date of issue: 10.02.2021] [F. No. S/49-817/2019] passed by the Commissioner of Customs (Appeals), Mumbai Zone-III.

2. Brief facts of the case are that on 27.02.2018, the officers of Air Customs, Chatrapati Shivaji International Airport, Mumbai, intercepted the Applicant, holding a Sudanese passport, who had arrived by Flight No. SV 772 from Jeddah, after she had cleared herself through the Customs Green channel. Pursuant to personal search of the Applicant, resulted in the recovery of 07 gold bangles which were worn on her wrist and 01 gold necklace which were concealed under the long sleeved dress worn by her. The examination of her checked in baggage resulted in the recovery of 04 pieces of yellow coloured metal and examination of her hand bag resulted in the recovery of 02 pieces of yellow coloured metal. Pursuant to be being assayed, the gold jewellery having 21K purity and weighing 156 grams and the 06 pieces of gold bars of 24K purity, collectively weighing 896 grams and valued at Rs. 22,44,164/- 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 admitted to ownership, possession, carriage, non-declaration, concealment and recovery of the seized gold and that she had brought the gold from her own savings and had come to India for her daughters treatment. She also stated that she had brought the gold in the

illegal manner for the first time and did so to earn monetary benefit by selling the gold.

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/AK/ADJN/60/2019-20 dated 14.06.2019 ordered the absolute confiscation of the seized gold jewellery and melted gold pieces weighing 896 grams and valued at Rs. 24,44,164/-, under Section 111(d), (l) and (m) of the Customs Act, 1962. Personal penalty of Rs. 2,50,000/- was imposed on the Applicant under Section 112 (a) and (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-CUSTOM-PAX-APP-1434/2020-21 dated 28.01.2021 [Date of issue: 10.02.2021] [F. No. S/49-817/2019] 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:

7.01. That the Applicant was a Sudanese national and did not know English language properly nor she knew the law of India and no interpreter was called to understand her language as to what she intended to state before the Customs;

7.02. That the AA as well as the OAA failed to appreciate that the said impugned assorted gold was for her personal use and were given by her mother during her marriage and the gold jewellery was for regular use and the cut pieces of gold were brought for making additional designer jewellery in India and were not meant for sale;

7.03. 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;

7.04. That the AA and the OAA failed to appreciate that the impugned gold was for personal use and belonged to her;

7.05. That the OAA and the AA failed to appreciate that the assorted gold belonged to her and were old being gifted to her by her mother during her marriage;

7.06. That the Applicant was not acting as a carrier for anybody and was a business woman holding a business visa and used to come to India regularly to purchase garments from India to sell in Sudan;

7.08. That there were not foreign markings on the assorted gold but on assumption and presumption the goods were considered to be of smuggled nature;

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

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

7.11. 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 jewellery and gold bars used to be released on payment of reshipment fine and personal penalty;

7.12. 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 this circumstances, justice cannot be denied to foreign national;

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

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

7.15. 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 assorted jewellery i.e 7 gold bangles, 01 gold necklace and 06 cut pieces of gold 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.

The Applicant also filed an application for condonation of delay.

8. Personal hearing in the case was scheduled for 22.08.2023. 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 who brought some gold jewellery with her for business purposes. She submitted that the Applicant is not a habitual offender. She requested to allow redemption of gold on suitable fine and penalty for re-export. No one appeared for the personal hearing on behalf of the Respondent.

9.1 At the outset, the Government notes that the Applicant has filed for condonation of delay. The Revision Application was filed on 15.07.2021. The date of issue of the Order of the Appellate Authority is 10.02.2021. Based on the date of issue of the said Order of the Appellate Authority, the Applicant was required to file the Revision Application by 09.05.2021 (i.e. taking the first 3 months into consideration) and by 09.08.2021 (i.e. taking into consideration a further extension period of 3 months). The Applicant has accepted that there was a delay in filing the application from the date of receipt of the order. However, it is seen that the Revision Application has been filed within the date, after considering the extended period.

9.2. The Applicant in her application for condonation of delay has stated that the revision application could not be filed due to the lockdown in India due to the covid situation and requested that the delay be condoned.

9.3. For understanding the relevant legal provisions, the relevant section is reproduced below :

SECTION 129DD. Revision by Central Government.-

(1) The Central Government may, on the application of any person aggrieved by any order passed under section 128A, where the order is of the nature referred to in the first proviso to sub-section (1) of section 129A, annul or modify such order.

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(2) An application under sub-section (1) shall be made within three months from the date of the communication to the Applicant of the order against which the application is being made :

Provided that the Central Government may, if it is satisfied that the Applicant was prevented by sufficient cause from presenting the application within the aforesaid period of three months, allow it to be presented within a further period of three months.

.....

9.4. From above, it is clear that the Applicant was required to file the Revision Application within 3 months from the communication of the Appellate Order. The delay thereafter, upto 3 months can be condoned. Since, the Revision Application is filed within the condonation period of three months, and the reason also being genuine, Government condones the delay on the part of the Applicant in filing the application and proceeds to examine the case on merits.

10. The Government has gone through the facts of the case and observes that the Applicant had brought the gold jewellery i.e 07 bangles and 01 gold necklace having 21K purity and weighing 156 grams and the 06 pieces of gold bars of 24K purity, collectively weighing 896 grams and valued at Rs. 24,44,164/- 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 07 bangles, 01 gold necklace and 06 pieces of gold bars were recovered from the Applicant. The gold jewellery were worn by the Applicant and concealed under the long sleeved dress worn by her and the 06 pieces of gold bars were wrapped with black coloured adhesive tape and were recovered from her checked-in and hand baggage and the manner in which it was brought revealed her intention not to declare the said gold and thereby evade payment of Customs Duty. The gold bars were of high purity and were in primary form, indicates that the same was for commercial use. The manner in which the gold was attempted to be got into India, reveals the mindset of the Applicant to not only evade duty but smuggle the gold. It also reveals that the act committed by the Applicant was conscious and pre-meditated. The Applicant was given an opportunity to declare the dutiable goods in her possession but having confidence in the nature of his concealment, she cleared herself from the Green channel denied carrying any gold. Had she not been intercepted, the Applicant would have gotten away with the impugned gold jewellery and gold bars, weighing 896 grams. The confiscation of the gold was therefore justified and thus, the Applicant had rendered herself liable for penal action.

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 ‘respondent’ thus, liable for penalty.

13. 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 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 observes that the quantum of gold was substantial and the jewellery was concealed under the long sleeved dress and the gold bars were wrapped in black coloured adhesive tapes and kept in the checked in and hand bag with the express intent for evading payment of customs duty and for selling the same and earn a monetary benefit. Government observes that the purity and quantum of the gold indicates that the same was for commercial use and the manner in which it was attempted to be brought into the country is important. During personal search the jewellery was recovered having been worn by the Applicant and concealed under her dress and the bars were wrapped in black coloured adhesive tapes which reveals the intention of the Applicant. It also revealed her criminal bent of mind to conceal the gold and not declare the same and a clear and premeditated intention to evade duty and smuggle the gold into India. Government notes from no invoice or source of funds were provided by the Applicant suggests that the Applicant was a carrier for a syndicate, entrusted with smuggling of the gold. The Appellate Authority has rightly concurred with the findings of the OAA on all counts and has discussed the issue in detail.

13.2. The Appellate Authority, at para 6 and 7 of the Order-in-Appeal has observed as under :

“6. Regarding the request for redemption for re-export by the appellant. I find that in terms of Rule of Baggage Rules, 1998 (Appendix-E) tourist of foreign origin are allowed to bring only use personal effects. I find that only eligible passenger of more than 6 months of stay abroad and having Indian Passport are allowed to bring gold. In this way foreign nationals are not allowed to bring gold in primary form in any circumstances except personal jewellery. I find that in the instance, the gold was attempted to be cleared without having being declared before Customs which amounts to smuggling. Her purpose and intention cannot be other than avoidance of payment of duty and legal obligations laid down for import of gold in India under Customs Act, 1962 and any other law for the time being in force. I further find that Mrs Harm Eltayeh Ahmed Khogali in her statement recorded under Section 108 of the Customs Act 1962 admitted that she had concealed gold to evade detection by Customs officers and intended to sell that in the market. I find that in case of Aiyakannu Vs CC (AIR), Chennai-1 2009 (247) ELT 21 (Madras) held that:

Smuggling Gold Foreign passport holder bringing gold into India concealing it inside bag covered with coloured adhesive tapes and not declaring it to Customs on arrival- HELD Foreign National is not entitled to import gold in terms of Foreign Trade (Exemption from Application of Rules in Certain Cases) Order, 1993 which applies only to passenger of Indian origin or a passenger holding a valid passport issued under Passport Act 1967-Redemption fine was not permissible and impugned gold was liable to absolute confiscation as there was attempt to smuggle by green channel-Sections 111, 123 and 125 of Customs Act 1962 [paras 8,9)

7. Under these circumstances, I find that the adjudicating authority has rightly confiscated the seized gold absolutely and redemption in such circumstances cannot be claimed as a right.”

13.3. The aforesaid circumstances of the case and manner of concealment of 07 gold bangles, 01 gold necklace and 06 pieces of gold bars, which by her own admission had been brought for a monetary consideration probates that the Applicant had no intention of declaring the gold to the Customs at the airport. All these have been properly considered by the Original Adjudicating Authority while ordering the absolute confiscation of the gold and has been rightly vetted by the Appellate Authority.

14. The main issue in the case is the quantum and manner in which the impugned gold was being brought into the country. The option to allow

redemption of seized goods is the discretionary power of the Adjudicating Authority depending on the facts of each case and after examining the merits. In the present case, the quantum of gold and the manner of attempting to clear the gold without declaring the same and lack of documentary evidence of the licit purchase of the gold suggests that the Applicant was a merely a carrier and this being a clear attempt to brazenly smuggle the impugned gold by the Applicant who could not provide any proof of the ownership or purchase of the gold, is a fit case for absolute confiscation as a deterrent to such offenders. Thus, taking into account the facts on record and the gravity of offence, the adjudicating authority had rightly ordered the absolute confiscation of the impugned gold. But for the intuition and the diligence of the Customs Officer, the gold would have passed undetected. The redemption of the gold bars will encourage non bonafide and unscrupulous elements to resort to concealment and bring gold. Such acts of mis-using the liberalized facilitation process should be meted out with exemplary punishment and the deterrent side of law for which such provisions are made in law needs to be invoked. Government is in agreement with the order of the OAA absolutely confiscating the impugned gold bars. The absolute confiscation of the gold jewellery and gold bars would act as a deterrent against such persons who indulge in such acts with impunity and Government concurs with the same.

15. Government finds that the penalty of Rs. 2,50,000/- imposed on the Applicant by the OAA under Section 112(a) and (b) of the Customs Act, 1962 is commensurate with the omissions and commissions committed by the Applicant.

16. For the aforesaid reasons, the Government is inclined not to interfere with the Order-in-Appeal No. MUM-CUSTM-PAX-APP-1434/2020-21 dated

28.01.2021 [Date of issue: 10.02.2021] [F. No. S/49-817/2019] passed by the Commissioner of Customs (Appeals), Mumbai Zone-III and upholds the same.

17. The Revision Application is dismissed as being devoid of merit.


(SHRAWAN KUMAR)

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

ORDER NO. 840/2023-CUS (WZ)/ASRA/MUMBAI DATED 20.11.2023

To,

1. Mrs Harm Eltayeb Ahmed Khogali, House No. 6, road No. 6K, Khartoum, North Sudan

Address No.2: Mrs Harm Eltayeb Ahmed Khogali, C/o Mrs Kiran Kanal/ Mrs Shivangi Kherajani, Advocates, 501, Savitri 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.