

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. 371/200/B/2022-RA | २११६ Date of issue: २१.११.२०२३

ORDER NO. ४१/२०२३-CUS (WZ)/ASRA/MUMBAI DATED २०.११.२०२३
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. Yasmin Salahedin Magzoub Mohamed
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-680/2021-22 dated 30.08.2021 passed
by Commissioner of Customs (Appeals), Mumbai Zone-III.

ORDER

This Revision Application is filed by Ms. Yasmin Salahedin Magzoub Mohamed (herein referred to as the 'Applicant') against the Order-in-Appeal (OIA) No. Order-in-Appeal No. MUM-CUSTOM-PAX-APP-680/2021-22 dated 30.08.2021 passed by the Commissioner of Customs (Appeals), Mumbai Zone-III.

2. Brief facts of the case are that on 19.06.2018, the officers of AIU, Chhatrapati Shivaji Maharaj International Airport, Mumbai, intercepted the Applicant, a Sudanese national, who had arrived by Emirates Flight No. EK-500 from Dubai, after she had cleared herself through the Customs Green Channel. A personal search of the Applicant resulted in recovery of 02 gold kadas worn on her left wrist and 06 gold bars concealed in her underwear totally weighing 892 grams and valued at Rs.24,77,899/-. After due investigation, a Show Cause cum Demand Notice dated 12.12.2018 was issued to the applicant

3. The case was adjudicated and the Original Adjudicating Authority (OAA) i.e. Additional Commissioner of Customs, CSMI Airport, Mumbai vide Order-in-Original (OIO) No. ADC/AK/ADJN/116/2019-20 dated 06.08.2019 ordered absolute confiscation of the seized assorted gold totally weighing 892 grams valued at Rs. 24,77,899/- and the plastic used for concealment under Section 111 (d), (l) & (m) of the Customs Act, 1962. A penalty of Rs.2,50,000/- was imposed on the Applicant under Section 112(a) & (b) 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 said Gold i.e. 2 Kadas of Gold weighing 193 grams of 22 kt. valued at Rs.5,00,187/- & 6 Gold Bars weighing 699 grams of 24 kt. valued at Rs.19,77,712/- was her personal Gold and was brought by

her from Dubai to India for the purpose of making Gold Jewellery matching to her Gold Kadas which she was wearing, the same were to be worn by her at the time of her marriage and the invoice were also with her, which she shown the officer, but the said fact was not considered. The said Gold Bars were purchased by her and the money for the same was given by her brother for the purpose of her marriage.

- ii. that the goods under seizure were Gold Kadas which were worn by her and the Gold Bars which were in her inner pocket of her innerwear and thus not being ingeniously concealed.
- iii. that the Customs Officer who had intercepted her did not tell her or warn her that as she was a foreign tourist entering into India with Gold ornaments wearing or carrying them was not allowed, but just seized the Gold and arrested her. Though the Applicant told the officers that she was ready and willing to pay the applicable duty and if not the same may be retained by them and on her return from India the same be handed back to her, but the officer failed to listen and/or paid heed to her say.
- iv. that under Section 125 of the Customs Act, whenever confiscation of any Goods is authorized by the Act, the officer adjudicating it may in the case of any goods, the importation or exportation whereof is in force prohibited under this Act or under any other law for the time being and shall be in case of any other goods, due to the owner of the goods or their such owner is not known, the person from whose possession or custody the goods have been seized can be released on payment of redemption fine.
- v. that mere foreign origin of the goods does not indicate that the goods are smuggled. The entire case is based on mere suspicion, assumption and presumption and on surmise and conjunctions. It is settled law that suspicious however grave is not a substitute for proof.
- vi. 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, which is also not against the policy of Act.

vii. that Applicant was not acting as carrier for anybody and was a businesswoman holding Business Visa.

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 is a foreign national who had brought small quantity of gold. She further submitted that applicant was unaware about the policy She also submitted that gold is a restricted item and is not prohibited. 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. Government has gone through the facts of the case and observes that the Applicant had brought 02 gold kadas worn on her left wrist and 06 gold bars concealed in her underwear 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 that she was carrying dutiable goods. However, after clearing herself through the green channel of Customs and on being intercepted, 02 gold kadas worn on her left wrist and 06 gold bars concealed in her underwear totally weighing 892 grams and valued at Rs.24,77,899/- were recovered from the Applicant and revealed her intention of 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. 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”.

9. 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 Applicants thus liable for penalty.

10. Once goods are held to be prohibited, Section 125 *ibid* 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.*


11. Government notes that the quantity of gold brought by the applicant is quite substantial. Further, the OAA has observed that *'Xerox copy of purchase bill produced by the passenger is a fabricated one as the description mentioned in the same is not tallied with the goods seized. Hence it shows that she is not the owner of the seized gold. I also find that the seized 06 gold bars were ingeniously concealed in her underwear.* Government observes that had it not been alertness and diligence of the officers manning the exit gate, the applicant would have gotten away with the impugned gold without discharging the duty.

12. The Applicant has pleaded for setting aside the Order passed by the OAA which has been upheld by the Appellate Authority. On considering quantum, form, manner of concealment and clear attempt to smuggle gold, plea of the applicant does not deserve consideration. The Government, keeping in mind the facts of the case is in agreement with the observations of the Appellate authority and finds that absolute confiscation is proper and judicious. This also would act as a deterrent for attempting to smuggle the gold.

13. On the issue of penalty under Section 112(a) & (b) of the Customs Act, the Government finds that the quantum of the penalty is commensurate with the omission and commissions committed by the applicant.

14. On the issue of re-export, the fact that absolute confiscation has been ordered, this plea of the applicant has become infructuous as goods absolutely confiscated cannot be allowed to be redeemed.

15. In view of the above findings, the Government finds no reason to annul or modify the impugned OIA and rejects the instant Revision Application.


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

ORDER NO. 84/2023-CUS (WZ)/ASRA/MUMBAI DATED 20.11.23

To,

1. Ms. Yasmin Salahedin Magzoub Mohamed,
c/o. Adv. Mrs. Kiran Kanal,
Satyam, 2/5, R.C.Marg,
Opp. Vijaya Bank, Chembur,
Mumbai - 400 071.
2. The Pr. Commissioner of Customs,
Terminal-2, Level-II,
Chhatrapati Shivaji Maharaj International Airport,
Sahar, 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

