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SPEED POST



GOVERNMENT OF INDIA  
MINISTRY OF FINANCE  
(DEPARTMENT OF REVENUE)  
8<sup>th</sup> Floor, World Trade Centre, Centre – I, Cuffe Parade,  
Mumbai - 400 005

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F.No. 371/252-253/B/2022-RA / *ka* Date of issue: *07-12-23*

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ORDER NO. *887-888*/2023-CUS (WZ)/ASRA/MUMBAI DATED *07-12-2023*  
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.

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Applicant : 1. Ms. Marsa Maheer Besada Boktor  
2. Ms. Mariana Butros Anwar Mansour  
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-146/2022-23 dated 06.05.2022 [F. No.  
S/49-1273/2021] passed by the Commissioner of Customs  
(Appeals), Mumbai Zone-III.

ORDER

These Revision Applications are filed by Ms. Marsa Maheer Besada Boktor and Ms. Mariana Butros Anwar Mansour (herein referred to as the 'Applicant-I' & Applicant-II' respectively) against the Order-in-Appeal (OIA) No. MUM-CUSTOM-PAX-APP-146/2022-23 dated 06.05.2022 passed by the Commissioner of Customs (Appeals), Mumbai - III.

2. Brief facts of the case are that on 17.04.2018, the officers of AIU, Mumbai Customs, Chhatrapati Shivaji Maharaj International Airport, Mumbai, intercepted the Applicant-I & Applicant-II, both holding Sudanese passport, who had arrived by Kenya Airways Flight No. KQ-210 from Nairobi, after they had cleared through the Customs Green Channel. A personal search of the Applicant-I led to the recovery of 08 crude gold bangles and 01 gold chain and personal search of the Applicant-II led to the recovery of 06 crude gold bangles and 01 gold chain. Thus, 14 crude gold bangles and 02 gold chains totally weighing 596 grams and valued at Rs.17,72,996/- were seized.

3. The case was adjudicated after issuance of show cause notice dated 27.09.2018 and the Original Adjudicating Authority (OAA), i.e. Additional Commissioner of Customs, CSMI Airport, Mumbai vide Order-in-Original (OIO) No. ADC/SKR/ADJN/84/2020-21 dated 06.08.2020 ordered absolute confiscation of the seized gold totally valued at Rs. 17,72,996/- under Section 111 (d) of the Customs Act, 1962 and imposed a penalty of Rs.2,00,000/- each on both the Applicants under Section 112 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 Applicants have filed the instant revision applications mainly on the following grounds:

- i. that the said Gold jewellery namely 14 Gold Bangles & 2 Gold Chains totally weighing 596 gms totally valued at Rs.17,72,996/- were their

personal Gold and were their regular wear Gold and while coming from Nairobi to India they were wearing the same as they could not leave the same in Nairobi since they had no other family members staying with them at that relevant time. The Applicants submit that, the said Gold was purchased by their husbands respectively from their personal savings.

- ii. that both the authorities have failed to appreciate that the goods under seizure were Gold Jewellery which were worn by them on both their hands and neck respectively and thus not being ingeniously concealed. The said fact that they were wearing on their hands and neck is clearly mentioned in the Show Cause Notice as well as in their statements.
- iii. that the goods under seizure were Gold Jewellery which were worn by them on both their hands and neck respectively and thus not being ingeniously concealed. The said fact that they were wearing on their hands and neck is clearly mentioned in the Show Cause Notice as well as in their statements.
- iv. that both the authorities failed to appreciate that, the Custom Officer who had intercepted them did not tell them or warn them that as they were foreign tourists entering into India with Gold ornaments wearing or carrying them was not allowed, but just seized the Gold. Though the Applicants told the officers that they were ready and willing to pay the applicable duty and if not the same may be retained by them and on their return from India the same be handed back to them, but the officer failed to listen and/or paid heed to their say.
- v. 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.

- vi. that the Applicants had also informed to the Custom Officers that the said Gold Jewellery which they were wearing were to be taken back to Nairobi. The said fact was also mentioned by them at the time of recording their statements. Further the Applicants had also good financial status and they were earning a handsome amount. Thus, it has been wrongly considered that the Applicants were involved into smuggling activities.
- vii. that Applicants were not acting as carriers for anybody.
- viii. the Appellate Authority confirmed the Order of Adjudicating Authority imposing the penalty of Rs.2,00,000/- each, without any clinching and cogent evidence and has passed the illegal order, which requires to be quashed and set aside.

6. Personal hearing in the case was scheduled for 29.08.2023. Ms. Shivangi Kherajani, Advocate appeared for the personal hearing on the scheduled date on behalf of the applicant. She submitted that the applicants had brought small quantity of gold. She further submitted that the applicants do not have any past history of offence. 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 Applicants had brought impugned gold jewellery totally weighing 596 grams 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 Applicants had not disclosed that they were carrying dutiable goods. However, after clearing through the green channel of Customs and on being intercepted, impugned gold jewellery totally weighing 596 grams valued at Rs.17,72,996/- worn by them, were recovered and it revealed their 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 Applicants had rendered themselves 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. 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.”*

12. The Government finds that the Applicants are Sudanese nationals and were caught with gold jewellery. It is noted that there have been several instances where Sudanese nationals were found indulging in carrying undeclared gold. As the Applicants had not declared impugned gold jewellery totally weighing 596 grams valued at Rs.17,72,996/- worn by them at the time of arrival, the confiscation of the same was justified. Government agrees with the findings of OAA that being Sudanese nationals, the applicants are not 'eligible passengers' in terms of Notification No. 50/2017-Cus dated 30.06.2017 and that the quantity of impugned gold cannot be treated as bonafide baggage of passenger in terms of said Notification.

13. Government also observes that the applicants were frequent flyers and had made several visits for short period and were therefore well conversant with the law of land. Therefore, Government finds that as the applicants had not declared the gold at the time of arrival, therefore absolute confiscation of the same was justified. Considering the above facts, Government is not inclined to modify the absolute confiscation upheld by the AA.

14. Applicants have also pleaded for setting aside the penalty imposed on them. The market value of the gold in this case is Rs. 17,72,996/-. From the facts of the case as discussed above, Government finds that the penalty of

Rs.2,00,000/- each on both the applicants under Section 112 of the Customs Act, 1962 is commensurate to the omissions and commissions of the Applicant and is not inclined to interfere in the same.

15. In view of the above, the Government upholds the order of absolute confiscation of gold passed by the appellate authority. The penalty of Rs.2,00,000/- each on both the applicants imposed under Section 112 of the Customs Act, 1962 by the OAA and upheld by the AA is sustained.

16. The Revision Applications are disposed of on the above terms.

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

ORDER NO ~~887-888~~/2023-CUS (WZ)/ASRA/MUMBAI DATED 07-12-23

To,

1. Ms. Marsa Maheer Besada Boktor and  
Ms. Mariana Butros Anwar Mansour,  
c/o. Adv. Mrs. Kiran Kanai/Adv. Shivangi Kherajani,  
501, Savitri Navbahar CHS Ltd.,  
19<sup>th</sup> Road, Khar (West)  
Mumbai - 400 052.
2. The Pr. Commissioner of Customs,  
Terminal-2, Level-II,  
Chhatrapati Shivaji Maharaj International Airport,  
Mumbai - 400 099.

Copy to:

1. Sr. P.S. to AS (RA), Mumbai.
2. Guard file.