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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. 371/255/B/2022-RA / 8264 Date of issue: 08.12.23

ORDER NO. 889/2023-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.

Applicant : Ms. Adhanet Megharsa Negha
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-109/2022-23 dated 29.04.2022 passed
by Commissioner of Customs (Appeals), Mumbai Zone-III.

ORDER

This Revision Application is filed by Ms. Adhanet Megharsa Negha (herein referred to as the 'Applicant') against the Order-in-Appeal (OIA) No. Order-in-Appeal No. MUM-CUSTOM-PAX-APP-109/2022-23 dated 29.04.2022 passed by the Commissioner of Customs (Appeals), Mumbai Zone-III.

2. Brief facts of the case are that on 20.10.2018, the officers of Customs, Chhatrapati Shivaji Maharaj International Airport, Mumbai, intercepted the Applicant, an Eritrean 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 and her hand bag resulted in recovery of assorted gold jewellery - 02 kadas, 01 pendant, 02 anklets, 01 chain and 01 silver coated gold bar totally weighing 1000 grams and valued at Rs.29,19,990/-. After due investigation, a Show Cause cum Demand Notice dated 19.03.2019 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/SKR/ADJN/06/2020-21 dated 20.05.2020 ordered absolute confiscation of the seized assorted gold jewellery totally weighing 1000 grams valued at Rs. 29,19,990/- under Section 111 (d), (l) & (m) of the Customs Act, 1962. A penalty of Rs.3,00,000/- 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 Assorted Gold Jewellery namely 2 yellow Metal Kadas weighing 226 gms, one Yellow Metal Pendant weighing 100 gms, 2 Yellow Metal Anklets weighing 212 gms, one Gold Chain weighing 350

- gms and one Silver coated Metal Bar weighing 112 gms, thus totally weighing 1000 gms totally valued at Rs.29,19,990/- was her personal Gold and was brought by her from Dubai to India for the purpose of making Gold Necklace matching to her Gold Jewellery which she was wearing, the same were for her own personal use and informed the officer that she could produce the invoice for the same, but the said fact was not considered and the same was produced at the time of further statement, the said fact is also mentioned in the Show Cause Notice.
- ii. that the said Gold were brought by her for taking it back to Dubai after making good designer Gold Necklace for herself. She informed that, this was her own Gold and the same is regularly worn by her, but the said fact also was misunderstood and it came to be concluded that the said Gold which she was carrying was for monetary gain.
 - iii. that the goods under seizure were Gold Jewellery which were worn by her and a Gold Bar which was in her handbag and thus not being ingeniously concealed.
 - iv. that that both the authorities failed to appreciate that, the said Gold under the seizure were for her personal use and were not meant for sale in India. Furthermore, being a foreigner, she did not have the knowledge that even personal Gold worn or brought need to be declared, as even in Dubai she was not required to declare the same.
 - 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 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.

- vii. 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.
- viii. that she had stated that the said Gold belonged to her, on the first day itself i.e. the day of her interception by the officers and even the fact was mentioned in her further statement that she brought the seized Gold Bar for making Gold Jewellery to be used for her personal use and the Gold Jewellery was her regular personal Gold, she also is a Businesswoman and sells clothes which she purchased from India. Thus, she is earning a handsome amount from her business. The Applicant also produced the copy of Bill/Invoice for the purchase of the said Gold and the said fact is mentioned in her further statement. The said fact is also mentioned in the Show Cause Notice issued to the Applicant.
- ix. 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 brought some quantity of assorted jewellery. 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 assorted gold jewellery consisting of 02 kadas, 01 pendant, 02 anklets, 01 chain and 01 silver coated gold bar totally weighing 1000 grams 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, assorted gold jewellery - 02 kadas, 01 pendant, 02 anklets, 01 chain and 01 silver coated gold bar totally weighing 1000 grams totally valued at Rs.29,19,990/- 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 Applicant is 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 AA has observed that:

9. *It is submitted by the advocate of the appellant in the grounds of appeal that if at all she has to pay duty as she had the foreign currency with her and if the officer would have told her about the said procedure of customs she would have followed the same.*

9.1 *In this regard, I find that the appellant had not approached at the appropriate Red channel of Customs to declare the subject impugned gold but attempted to clear herself through Green channel without payment of Customs duty. Moreover, the appellant had visited India 07 times earlier within a period of five months therefore she would have knowledge about the payment of customs duty where and when, and also she admitted evasion of Customs duty in her statement recorded under section 108 of the Customs Act, 1962 therefore I do not find merit in this submission of the appellant.*

Government observes that the applicant has not countered the above observations of AA and thus it appears that but for 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. On considering quantum, form, manner of concealment and clear attempt to smuggle gold, Government, is in agreement with the observations of the AA and finds that absolute confiscation is proper and judicious. This also would also 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
7/12/23
(SHRAWAN KUMAR)

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

ORDER NO. **889** /2023-CUS (WZ)/ASRA/MUMBAI DATED **07-12-23**

To,

1. Ms. Adhanet Megharsa Negha,
c/o. Adv. Mrs. Kiran Kanal/Adv. Shivangi Kherajani,
501, Savitri Navbahar CHS Ltd.,
19th Road, Khar (West)
Mumbai - 400 052.
2. The Pr. Commissioner of Customs,
Terminal-2, Level-II,
Chhatrapati Shivaji Maharaj International Airport,
Sahar, Mumbai - 400 099.

Copy to:

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