

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. 371/269/B/WZ/2021-RA | 8383 : Date of Issue : 13.12.23

ORDER NO. 304/2023-CUS (WZ)/ASRA/MUMBAI DATED 12.12.2023
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. Eman Mohammed Ahmed Khaled.

Respondent: Principal Commissioner of Customs, CSMI Airport,
Sahar, Andheri East, Mumbai - 400 099.

Subject : Revision Application filed, under Section 129DD of the
Customs Act, 1962 against the Order-in-Appeal No.
MUM-CUSTM-PAX-APP-1784/2020-21 dated
25.02.2021 issued on 08.03.2021 through F.No. S/49-
746/2019 passed by the Commissioner of Customs
(Appeals), Mumbai - III, Marol, Mumbai - 400 059.

ORDER

This revision application has been filed by Ms. Eman Mohammed Ahmed Khaled (hereinafter referred to as the Applicant) against the Order-in-Appeal No. MUM-CUSTM-PAX-APP-1784/2020-21 dated 25.02.2021 through F.No.

S/49-746/2019 passed by the Commissioner of Customs (Appeals), Mumbai - III, Marol, Mumbai - 400 059.

2. Brief facts of the case are that on 28.06.2019, Customs Officers at the CSMI Airport, Mumbai had intercepted the applicant, who is a Sudanese national and had arrived from abroad onboard Eithopian Flight no. ET-640. The applicant had opted for the green channel. Applicant was found in possession of five gold bangles, totally weighing 43 grams and valued at ₹ 1,19,725/- which she had failed to declare to Customs.

3. The Original Adjudicating Authority (OAA), viz, Dy. Commissioner of Customs, CSMI Airport, Mumbai who vide his Order-In-Original no. F.No. AirCus/49/T2/920/2019-20 dated 28.06.2019, ordered for the absolute confiscation of the assorted gold jewellery i.e. five gold bangles, totally weighing 43 grams and valued at ₹ 1,19,725/- under Section 111(d), (l) and (m) of the Customs Act, 1962. Personal penalty of ₹ 5,000/- was imposed on the applicant under Section 112 (a) (b) of the Customs Act, 1962.

4. Aggrieved by the said order, the applicant preferred an appeal before the appellate authority (AA) viz, Commissioner of Customs (Appeals), Mumbai - III who vide Order-In-Appeal No. MUM-CUSTM-PAX-APP-1784/2020-21 dated 25.02.2021 through F.No. S/49-746/2019 did not find any reason to interfere in the impugned OIO and upheld the order passed by OAA.

5. Aggrieved with the above order of the appellate authority, the Applicant has filed this revision application on the following grounds of revision, that;

5.01. the lower authorities had failed to appreciate that the applicant being a Sudanese national did not know the law of the country i.e. India and did not know English and hence, she could not state her intentions to Customs.

5.02. the lower authorities had failed to appreciate that the two crude gold bangles, totally weighing 43 grams and valued at ₹ 1,19,725/-

which she was wearing were old and was her regular jewellery; it did not have any foreign markings. She had worn the jewellery and intended to take it back to Sudan.

- 5.03. the lower authorities had failed to appreciate that Applicant was also holding foreign currency to pay duty and she was ready and willing to pay the duty.
- 5.04. the lower authorities had failed to appreciate that gold was not in commercial quantity and the quantity of the gold itself showed that it is meant for personal use; that the gold was not in primary form.
- 5.06. the Appellate Authority had given the conclusion and findings which were contrary and inconsistent with the findings of Adjudicating Authority.
- 5.08. the lower authorities have decided the case on the basis of presumptions and assumptions only and not on the real and true facts put by the Applicant.
- 5.09. the orders of the lower authorities are illegal and bad in law and the same requires to be quashed and set aside.

The applicant has prayed to the revisionary authority to quash and set aside the order passed by both the lower authorities and to allow the two crude gold bangles, totally weighing 43 grams and valued at ₹ 1,19,725/-, to be re-shipped on nominal reshipment fine and to grant any other reliefs as deemed fit.

6. The applicant has filed an application for condonation of delay of 73 days. This delay has been attributed by the applicant was due to Covid condition and the prevalent lockdown in India.

7. Personal hearing was scheduled for 22.08.2023. Smt. Shivangi Kherajani, Advocate for the applicant appeared for personal hearing on the appointed day i.e. 22.08.2023. Smt. Shivangi Kherajani, Advocate submitted that applicant has brought five gold bangles for personal use. She requested to allow redemption of gold on nominal fine and penalty for re-export.

8. At the outset, the Government notes that the Applicant has filed for condonation of delay. The Revision Application was filed on 16.08.2021. The

date of issue of the Order of the Appellate Authority is 25.02.2021. Based on the date of issue of the said Order of the Appellate Authority, the Applicant was required to file the Revision Application by 24.05.2021 (i.e. taking the first 3 months into consideration) and by 24.08.2021 (i.e. taking into consideration a further extension period of 3 months). The Applicant has accepted that there was a delay in filing the Revision Application from the date of receipt of the order. Thus it is seen that the Revision Application has been filed within the date, after considering the extended period.

8.2. 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.

8.3. 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.

.....

8.4. 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.

9. The Government has gone through the facts of the case and notes that the applicant had failed to declare the goods in her possession as required under Section 77 of the Customs Act, 1962. The applicant had not disclosed that she was carrying dutiable goods and had she not been intercepted, she would have walked away with the impugned five gold bangles together weighing 43 grams and valued at ₹ 1,19,725/-, without declaring the same to Customs. By her actions, it was clear that the applicant had no intention to declare the impugned gold to Customs and pay duty on it. The Government finds that the confiscation of the gold was therefore, justified.

10. 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".

11. 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.

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. The Government notes that the quantity of gold was small; the applicant has claimed ownership of the gold, that she was wearing it and now desires to take it back on her return trip. There are no allegations that the Applicant is a habitual offender and was involved in similar offences earlier. The facts of the case indicate that it is a case of non-declaration of gold rather than a case of smuggling for commercial considerations. Under

the circumstances, the seriousness of the misdemeanor is required to be kept in mind when using discretion under Section 125 of Customs Act, 1962 and while imposing quantum of penalty. Government notes that the applicant who is a foreign national has prayed that the absolute confiscation be set aside and she be allowed to re-export the gold.

14. Government further observes that there are a 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.

14.2 In a recent judgement passed by the Hon'ble High Court, Madras on 08.06.2022 in WP no. 20249 of 2021 and WMP No. 21510 of 2021 in r/o. Shri. Chandrasegaram Vijayasundarm + 5 others in a similar matter of Sri. Lankans wearing 1594 gms of gold jewellery (i.e. around 300 gms worn by each person) upheld the Order no. 165 - 169/2021-Cus (SZ) ASRA, Mumbai dated 14.07.2021 in F.No. 380/59-63/B/SZ/2018-RA/3716, wherein Revisionary Authority had ordered for restoration of OIO wherein adjudicating authority had ordered for the confiscation of the gold jewellery but had allowed the same to be released for re-export on payment of appropriate redemption fine and penalty.

14.3. 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.

15. In view of the foregoing paras, the Government finds that as the applicant had not declared the two crude gold bangles, totally weighing 37 grams and valued at ₹ 1,19,725/-, at the time of arrival, the confiscation of the same was justified. However, considering the quantity of gold jewellery, no past history, the same having been worn as claimed by her and not being concealed in an ingenious manner, applicant being a foreign national, the absolute confiscation of the same was harsh and not justified. In view of the aforesaid facts and considering that the applicant is a foreign national, option to re-export the impugned gold on payment of redemption fine should have been allowed. Considering the above facts, Government is inclined to modify the absolute confiscation upheld by the AA and allow the impugned

five gold bangles, totally weighing 43 grams and valued at ₹ 1,19,725/- to be re-exported on payment of a redemption fine.

16. Government finds that the penalty of ₹ 5,000/- imposed on the applicant under Section 112 of the Customs Act, 1962 is commensurate with the omissions and commissions committed and is not inclined to interfere in the same.

17. In view of the above, the Government modifies the order passed by the appellate authority and allows the applicant to redeem the impugned two crude gold bangles, totally weighing 43 grams and valued at ₹ 1,19,725/- for re-export on payment of a redemption fine of ₹ 20,000/- (Rupees Twenty Thousand only). The penalty of ₹ 5,000/- imposed on applicant under Section 112 of the Customs Act, 1962 by the OAA and upheld by the AA is sustained.

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

Shrawan
12/12/23
(SHRAWAN KUMAR)
Principal Commissioner & ex-officio
Additional Secretary to Government of India

ORDER NO. 904/2023-CUS (WZ)/ASRA/MUMBAI DATED 12.12.2023.

To,

1. Ms. Eman Mohammed Ahmed Khaled, Sudan. Address not available on the records (Service through noticeboard and Advocate on record).
2. Pr. Commissioner of Customs, Adjudication Cell, Chhatrapati Shivaji Maharaj International Airport, Sahar, Andheri East, Mumbai - 400 099.

Copy to:

3. Smt. Shivangi Kherajani, Advocate, 501, Savitri Navbahar CHS, 19th Road, Khar West, Mumbai - 400 052.
4. Smt. Kiran Kanal, Advocate, Satyam 2/5, R.C Marg, Opp. Vijaya Bank, Chembur, Mumbai - 400 071.
5. Sr. P.S. to AS (RA), Mumbai.
6. File Copy.
7. Notice Board.

