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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. 371/279/B/WZ/2021-RA/8133 Date of Issue **19.12.2023**

ORDER NO. **934/2023-CUS (WZ)/ASRA/MUMBAI DATED 18.12.2023**
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.

F.No. 371/279/B/WZ/2021-RA

Applicant : Ms. Salma Ibdargul Pathan

Respondent : Pr. Commissioner of Customs, Chhatrapati Shivaji
Maharaj International 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-81/2020-21 dated 05.04.2021
issued on 26.04.2021 through F.No. S/49-1103/2019
passed by the Commissioner of Customs (Appeals),
Mumbai - III.

ORDER

This revision application has been filed by Ms. Salma Ibdargul Pathan (herein referred to as Applicant) against the Order-in-Appeal No. MUM-CUSTOM-PAX-APP-81/2020-21 dated 05.04.2021 issued on 26.04.2021 through F.No. S/49-1103/2019 passed by the Commissioner of Customs (Appeals), Mumbai - III.

2(a). Brief facts of the case are that on 19.10.2019, the Officers of Customs at CSMI Airport, Mumbai intercepted the applicant after she had crossed the green channel. Two crude gold bangles together weighing 200 grams and valued at Rs. 6,94,080/- were recovered from the applicant. Earlier, the applicant an Indian national had arrived from Bahrain onboard Gulf Air Flight No. GF-64 after a stay of 26 days.

3. The applicant had waived of the issuance of the show cause notice. Therefore, the Original Adjudicating Authority i.e. the Asstt. Commissioner of Customs, CSMI Airport, Mumbai vide Order-In-Original No. Air Cus/T2/49/1253/2018/UNI-A dated 19.10.2019 ordered for the confiscation of the two crude gold bangles, totally weighing 200 grams and valued at Rs. 6,94,080/- under under Section 111 (d), (1) and (m) of the Customs Act, 1962. However, an option to redeem the said two gold bangles was granted to the applicant on payment of a fine of Rs. 70,000/- under Section 125(1) of the Customs Act, 1962. Further, a penalty of Rs. 30,000/- was imposed on the applicant under Section 112 (a) and (b) of the Customs Act, 1962.

4. Aggrieved by this Order, the Respondent preferred an appeal before the appellate authority (AA) i.e. Commissioner of Customs (Appeals), Mumbai - III

who vide Order-in-Appeal No. MUM-CUSTOM-PAX-APP-81/2020-21 dated 05.04.2021 issued on 26.04.2021 through F.No. S/49-1103/2019 set aside the OIO dated 19.10.2019 passed by the OAA and ordered for the absolute confiscation the said two crude gold bangles. The penalty of Rs. 30,000/- imposed on the applicant by the OAA was sustained.

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. that the AA had failed to appreciate that the applicant had informed the OAA that the gold belonged to her and she had worn the same.; that the gold bangles were made in India and had no foreign markings; that the gold bangles had been purchased from her hard earned money; the OAA too instead of just releasing the same had imposed redemption fine and personal penalty on the applicant;
- 5.02. that the gold was her regular ornaments which she was wearing; that she was willing to pay the duty; the even if she had less money she would have arranged for the shortfall, if any; that the AA had not considered the fact that she was the owner of the gold; that she was not a carrier acting for somebody else; that as the gold had been worn by her the same cannot be considered as not declared or concealed; that the gold bangles was not in commercial quantity; that the lower authorities had passed orders on presumptions and assumptions
- 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 that the lower authorities failed to appreciate that she was not a carrier for anybody;
- 5.05. that the lower authorities had failed to appreciate that there were no foreign markings on the gold;
- 5.06. the Appellate Authority had given the conclusion and findings which were contrary and inconsistent with the findings of Adjudicating Authority.
- 5.07. 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.

5.08. that the gold was not in commercial quantity.

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 AA and to allow the two crude gold bangles of 24kts valued at Rs. 6,94,080/- to be released without payment of any fine and duty instead of absolute confiscation and penalty to be waived absolutely or pass any other order or to grant any other relief as deemed fit.

6. The applicant has filed an application for condonation of delay of 29 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 29.08.2023. Smt. Shivangi Kherajani, Advocate for the applicant appeared for personal hearing on appointed date i.e. 29.08.2023. Smt. Shivangi Kherajani, Advocate submitted that applicant is brought small quantity of jewellery for personal use. She requested to allow redemption of the same on payment of nominal fine and penalty.

8. On the issue of condonation of delay, Government notes that the OIA dated 05.04.2021 was issued on 26.04.2021. The applicant in the FORM CA-8 has claimed that the OIA dated 05.04.2021 was received by her on or about 06.05.2021. Government notes that during this period, due to the Covid pandemic, the Apex Court had granted a moratorium for filing appeals etc. This moratorium was from 15.03.2020 to 28.02.2022 [Misc. Appln. No. 21/2022]. The applicant has filed the Revision Application on 03.09.2021. Considering the said moratorium period granted by the Apex Court, it is seen that the applicant had filed the revision application within time.

9. The Government has gone through the facts of the case and notes that the applicant who was an Indian national had not declared the gold while availing the green channel facility. The applicant harboured no intention to pay Customs duty and hence, opted not to declare the gold to Customs. The applicant clearly had failed to declare the goods to the Customs at the first instance as required under Section 77 of the Customs Act, 1962. It reveals that the act of not declaring the impugned gold bangles committed by the applicant was conscious and pre-meditated. Had she not been intercepted; the applicant would have gotten away with the gold bangles without paying the duty. Therefore, the confiscation of the gold was 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. 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. The Government notes that the quantity of gold was small; the applicant has claimed ownership of the gold, that she was wearing it; she had expressed her desire to pay the duty. 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 OIO passed by the OAA had considered all these issues while allowing the impugned gold bangles to be redeemed on payment of a fine of Rs. 70,000/-. Government finds that the OIO passed by the OAA is legal and judicious and is inclined to restore the same.

14. In view of the foregoing paras, the Government finds that as the applicant had not declared the two crude gold bangles, totally weighing 200 grams and valued at ₹ 6,94,080/-, 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, 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 which had been allowed by the OAA should have been upheld by the AA. Considering the above facts, Government is inclined to restore the OIO passed by the OAA and set aside the OIA passed by the AA.

15. Government finds that the penalty of ₹ 30,000/- 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.

16. In view of the above, the Government sets aside the Order-in-Appeal No. MUM-CUSTM-PAX-APP-81/2020-21 dated 05.04.2021 issued on 26.04.2021 through F.No. S/49-1103/2019 and restores in toto, the Order-In-Original No. Air Cus/T2/49/1253/2018/UNI-A dated 19.10.2019 passed by the OAA.

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


(SHRAWAN KUMAR)

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

ORDER No. 934/2023-CUS (WZ)/ASRA/MUMBAI DATED 18.12.2023

To,

1. Ms. Salma Ibdargul Pathan, R/o. 603, Rahmani Heights, Kazi Street, Khariwad, Nani Daman – 396 210.
2. Pr. Commissioner of Customs, Adjudication Cell, Level – 2, Terminal – 2, Chhatrapati Shivaji Maharaj International Airport, Sahar, Andheri East, Mumbai – 400 099.

Copy to:

3. Smt. Shivangi Kherajani, Advocates, 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.