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GOVERNMENT OF INDIA
MINISTRY OF FINANCE
(DEPARTMENT OF REVENUE)

8th Floor, World Trade Centre, Centre – I, Cuffe Parade,
Mumbai-400 005

F.No. 371/368/B/2022-RA / 224 :

Date of Issue: 31.01/2024

ORDER NO. 95 /2024-CUS (WZ)/ASRA/MUMBAI DATED 30.01.2024 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.

Applicants : Mrs. Sharmin Imran Loday

Respondent : Pr. Commissioner of Customs, Pune

Subject : Revision Application filed, under Section 129DD of the
Customs Act, 1962 against the Order-in-Appeal No.
PUN-CT-APPII-(VNT)-000-215/2021-22 dated 25.03.2022
passed by the Commissioner (Appeals-II), Central Tax
Pune.

ORDER

This Revision Application has been filed by Mrs. Sharmın Imran Loday (herein referred to as the "Applicant") against the Order-in-Appeal No. PUN-CT-APPII-(VNT)-000-215/2021-22 dated 25.03.2022 passed by the Commissioner (Appeals-II), Central Tax, Pune.

2. Brief facts of the case are that Applicant, holder of Passport No M0981243, on arrival from Dubai by Air India Flight No. IX-212 on 22-05-2019 at 11.30 hours was on the basis of suspicion, intercepted by Customs Officer at the Pune International Airport while attempting to pass through the green channel without filing a customs declaration. On being questioned whether she was carrying any dutiable/restricted/prohibited items, she replied in the negative. Personal search of the applicant was carried out under a panchanama which led to retrieval of one cream colored waist belt which was worn by the applicant. Upon retrieval and examination thereof, a polythene strip containing yellowish colour paste was found concealed therein. As per the valuer's certificate/report, the yellowish coloured paste having weight of 1978 grams was reported to contain gold of 1701.08 grams valued at Rs. 55,28,510/- The material was seized under the reasonable belief the same was attempted to be smuggled into India in contravention of the provisions of the Customs Act, 1962. A statement of the applicant was recorded on 22-05-2019 under Section 108 of the Customs Act, 1962 Thereafter, further statements were recorded on 12-07-2019 and 11-11-2019 under Section 108 of the Customs Act, 1962 and upon conclusion of investigations, a show cause notice was issued to the applicant.

3. The Adjudicating Authority vide Order-in-Original No. PUN-CUSTOMS-000-JC-10/2020-21/2011 dated 29.10.2020 confiscated the impugned gold absolutely under Section 111(i)(1) of Customs Act, 1962 and imposed personal

penalty of Rs.5,00,000/- on the Applicant under Section 112 (a) and (b) of Customs Act, 1962.

4. Aggrieved, with this Order, the Applicant filed an appeal before the Appellate Authority (AA) viz, Commissioner (Appeals-II) Central Tax,Pune, who vide impugned Order-in-Appeal upheld the order passed by the OAA.

5. Aggrieved with the above order, the Applicant has made an exhaustive submission of case laws and have submitted copies including their submissions made before the lower authorities etc. They have filed these revision applications on the following main points:

5.1 the impugned OIA is not passed by the appropriate Appellate Authority, notified under the Customs Act, 1962 viz. the Commissioner of Customs and Central Excise (Appeals-I), Pune, but by the Commissioner (Appeals-II) of Central Tax, Pune, who is not the appropriate Authority, notified as per the provisions of the Customs Act, 1962.

5.2 the Commissioner (Appeals-II) of Central Tax, Pune does not have any jurisdiction to decide the Customs Appeals under section 128 of the Customs Act, 1962, pertaining to orders passed in the Pune Customs Commissionerate.

5.3 the Commissioner (Appeals-II), Central Tax, Pune, has jurisdiction to decide the appeals pertaining to the orders passed under the GST Acts, the Central Excise Act, 1944 and the Finance Act, 1994, only, but does not have any jurisdiction to decide the Customs Appeals, under section 128 of the Customs Act, 1962.

5.4 the gold brought by her does not fall under the category of prohibited goods and hence bringing the gold into India with an honest intention of payment of Customs Duty is not an offence and hence the action of the

Adjudicating Authority in confiscating the gold and imposing penalty and rejecting my appeal by the Appellate Authority, is bad in law and has caused gross injustice to the Applicant.

- 5.5 she had brought the gold with an intention to declare the same and clear it on payment of applicable Customs Duty. However, the Customs Officers at Pune International Airport, prevented her from declaring the Gold and pay the Customs Duty and instead made a false case against her.
- 5.6 The applicant has reproduced relevant text of para 19.4 of the impugned contend that the respondent's conclusion is based on assumption and presumption and without any evidence on record; that in its attempt to prove the applicant guilty, the respondent has overlooked vital facts recorded under panchanama dated 22-05-2019 wherein the panchas/witnesses are said to have been informed by Ankit Singh, Inspector that the applicant who arrived from Dubai by Air India Flight No. IX-212 was intercepted by Smt. Superintendent (ATU), while she was trying to pass through green channel.
- 5.7 That based on the above reference to the panchanama, the applicant contends she had not entered the green channel at all but in fact been inquiring with someone about declaration of gold at the counter, that is clearly established that the applicant had neither entered the green channel nor had crossed the green channel; that there was no attempt to smuggle the goods and charges of smuggling are not established with concrete evidences but are based on assumption and presumptions, without any iota of proof.

5.8 The applicant has reproduced para 19 5 of the impugned OIO to draw attention to definition of baggage ("baggage" includes unaccompanied baggage but does not include motor vehicles) to state that barring motor vehicles, all other goods brought by a passenger from a foreign country is covered as baggage and therefore gold brought in by the applicant is baggage item and could be cleared on payment of Customs duty under notification no. 26/2016-Customs dated 31-03-2016.

5.9 the department had no scope to bring in the aspect of bonafide baggage into picture and to disallow the, clearance of gold on payment of customs duty; that the department's stand that gold brought in by a passenger is not bonafide baggage is not correct and is bad in law; that the term bonafide baggage comes into picture only for the purpose of claiming free allowance (As per baggage Rules, 2016) and not for the purpose of treating the goods imported as baggage or otherwise; that the definition of baggage is required to be read only from Section 2(3) of the Customs Act, 1962 and not from any other sources.

5 10 Applicant has placed reliance on various case laws.

5.11 in view of their submissions, it is clearly established that the applicant has not committed any offence, and hence gold brought by her is liable to be released on payment of appropriate customs duty; that the department has not been able to prove with concrete evidences that applicant had attempted its smuggling; That the applicant states that gold is not falling the category of prohibited goods and hence it is allowed to be imported into India as baggage and allowed to be cleared on payment of applicable customs duty; that the law does not forbid bringing gold into India, but on the contrary, allows its import on payment of appropriate customs duty.

Under the above circumstances of the case, the applicant prayed to Revision Authority:

- i To set aside the impugned Order in Appeal No. PUN-CT-APPII- (VNT)-215-2021-22 dated 25.03 2022, on the grounds that the same is not passed by the appropriate Appellate Authority, viz. the Commissioner of Customs and Central Excise (Appeals-I), Pune, but by the Commissioner (Appeals-II), Central Tax, Pune and hence is passed without Authority of Law;
- ii. To set aside the Order of confiscation of Gold and allow clearance of gold on payment of applicable Customs Duty or allow re-export under Section 80 of the Customs Act, 1962.
- iii. To Set aside the penalty of 5,00,000/- imposed

6. Personal hearing in the case was scheduled on 12.09.2023. Mr. K.A. Sayed, Advocate and Mrs. Sharmin Imran Loday, applicant appeared for personal hearing and submitted that there are procedural flows in the panchanama, and statement was retracted. They also submitted copies of few judgments. They reiterated earlier submissions They requested to decide the matter on merits.

7. The applicant argued that the impugned order was not issued by the appropriate authority. According to the applicant, Pune Appeals-II lacks jurisdiction in this particular case, and the order should have been issued by Pune Appeals-I In response, it has been pointed out that, in accordance with notification No. 2/2017-CT dated 19 06 2017, a trade notice (No. 03/2017) was issued by the Chief Commissioner of Pune Zone on 21.06.2017, outlining the jurisdictions. As per this notice, Pune Appeals-II is deemed the proper authority with jurisdiction over Pune Customs Commissionerate. Consequently, the Applicant's argument that the impugned order was not passed by the proper

authority is deemed incorrect. Therefore, the Government proceeds to decide the matter on its merits.

8. Government has gone through the facts of the case and notes that the applicant had not declared the gold while attempting to pass through the green channel facility. Thereafter, on interception she had been asked whether she was carrying any dutiable items to which she had replied in the negative. The impugned gold was recovered only during the personal search of the applicant. The quantity of gold was quite substantial and was in the form of paste. 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 committed by the applicant was conscious and pre-meditated. Had she not been intercepted; the applicant would have gotten away with the gold. Therefore, the confiscation of the gold was justified.

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 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.”*

12. Applicant argued that she had intended to declare and clear the gold in paste form, subject to payment of duty. However, she was prevented from declaring it, and a false case was fabricated against her. In this regard, it is pertinent to reproduce para 8.8 of the impugned OIA:

“8.8 Without prejudice to the findings of the impugned OIO which has clearly brought out the attempt to smuggle gold in paste form by the appellant, even if one is to proceed on the presumption that the appellant intended to declare the gold in paste form, observe that it would have been possible to do so only on the basis of credible documentary evidence showing its licit procurement/purchase in the form in which it was recovered during the personal search of the appellant from the waist-belt worn by her. In this regard, I wish too record the observation that even after substantial passage of time since the impugned seizure of goods on 22-05-2019, the appellant has not been able to prove legitimate ownership of the gold through credible documentary evidences. It is also on record in the impugned OIO that the letter dated 22-04-2019 from M / s Rizan jewellers based on which the claim for legitimate ownership/procurement of gold was first advanced during adjudication, itself stood disproved in the said adjudication proceedings as per findings recorded at para 18 of the impugned OIO. Therefore

to concede that the appellant was to declare the gold in paste form on the date of her arrival would not only be illogical but far-fetched considering the fact that there were no credible documentary evidence to substantiate its legitimate procurement/possession. Owing to this observation also, I find that the contention advanced by the appellant that she wanted to declare the gold on arrival but was prevented from doing so is no more than a bald statement and is contrary to facts on record and clear findings rendered by the respondent. The admission of the appellant in her statement dated 11-11-2019 that the intention of converting gold into waste form was to smuggle gold and thereby evade payment of legitimate duties demolishes the sum and substance of grounds of the appellant.”

From the above following point emerges:

- a. Despite the passage of time since the seizure, the applicant has not been able to provide credible documentary evidence proving the legitimate ownership of the gold.
- b. The letter dated 22-04-2019 from M/s Rizan Jewellers, which was initially presented as evidence of legitimate ownership, was disproven during the adjudication proceedings
- c. The applicant had admitted in her statement dated 11-11-2019 that the intention behind converting gold into paste form was to smuggle gold and evade legitimate duties

Government finds that even at this stage, Applicant has not produced any documentary evidences that can establish and prove the ownership of Applicant on the impugned Gold. Regarding retraction of the statement on 22.05.2019 by the Applicant, the Appellate Authority has thoroughly examined it in paragraphs 8.4 and 8.5 before coming to the conclusion that retraction was an afterthought. Consequently, the claim that the applicant

intended to declare the gold in paste form upon arrival is found improbable. The lack of credible documentary evidence to substantiate the legitimate procurement of the gold further weakens the argument.

13. Government notes that the quantity of gold is quite substantial. Had it not been due to the alertness and diligence of the officers manning the exit gate, the applicant would have gotten away with the impugned gold without discharging the duty. The Applicant has pleaded for setting aside the Order passed by the Lower Adjudicating Authority which has been upheld by the Appellate Authority. On considering quantum, form, nature 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. The aforesaid circumstances of the case probates that the applicant had no intention of declaring the gold to the Customs at the airport. All these have been properly considered by the Original Adjudicating Authority while ordering the absolute confiscation of the gold and appellate authority had upheld the same.

14. The option to allow redemption of seized goods is the discretionary power of the adjudicating authority depending on the facts of each case and after examining the merits. In the present case, the manner of concealment being clever, conscious and pre-meditated, quantity and type of gold being for commercial use, this being a clear attempt to brazenly smuggle the impugned gold, is a fit case for absolute confiscation as a deterrent to such offenders. Thus, taking into account the facts on record and the gravity of offence, the adjudicating authority had rightly ordered the absolute confiscation of the impugned gold. But for the intuition and the diligence of the Customs Officer,

the gold would have passed undetected. Such acts of mis-using the liberalized facilitation process should be meted out with exemplary punishment and the deterrent side of law for which such provisions are made in law needs to be invoked. Government is in agreement with the order of the OAA absolutely confiscating the impugned gold. The absolute confiscation of the gold would act as a deterrent against such persons who indulge in such acts with impunity.

15. 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, legal and judicious. Government does not find it necessary to interfere with the same.

16. Government finds that the penalty of Rs. 5,00,000/- imposed under Section 112 (a) and (b) of the Customs Act 1962 is appropriate and commensurate with the omissions and commissions of the Applicant.

17. Accordingly, the Revision Application filed by the applicant is disposed of as above

(SHRAWAN KUMAR)

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

ORDER NO. 95 /2024-CUS (WZ)/ASRA/MUMBAI DATED 30.01.2024

To,

1. Mrs. Sharmin Imran Loday, 74/301 B Wing, BhusarMohalla, Behind KhatoonbiKazi Hospital,Bhiwandi-421302.
2. The Pr. Commissioner of Customs, GST Bhavan, 41/A, Sassoon Road, Pune-411001.
3. The Commissioner (Appeals-II). Central Tax, 2nd Floor, F Wing, GST Bhavan, 41/A, Sassoon Road, Pune-411001

Copy to:

- 1 Sr. P.S. to AS (RA), Mumbai.
- 2 Mr. K.A Sayed (Advocate)
- 3 File Copy.
- 4 Notice Board.

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