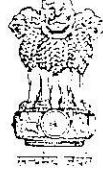


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GOVERNMENT OF INDIA
MINISTRY OF FINANCE
(DEPARTMENT OF REVENUE)

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

F.No. 371/55/B/WZ/2021-RA / 250 : Date of Issue : 09.01.2024

ORDER NO. 969 /2023-CUS (WZ)/ASRA/MUMBAI DATED 29.12.2023 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. Amal Abdi Mohamed

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-695/2020-21 dated 07.01.2021 issued on 22.01.2021 through F.No. S/49-752/2019 passed by the Commissioner of Customs (Appeals), Mumbai - III, Marol, Mumbai - 400 059.

ORDER

This revision application has been filed by Ms. Amal Abdi Mohamed (hereinafter referred to as the Applicant) against the Order-in-Appeal No. MUM-CUSTOM-PAX-APP-695/2020-21 dated 07.01.2021 issued on 22.01.2021 passed by the Commissioner of Customs (Appeals), Mumbai – III, Marol. Mumbai – 400 059.

2. Brief facts of the case are that on 22.06.2019, Customs Officers at the CSMI Airport, Mumbai had intercepted the applicant, who is a Kenyan national and had arrived from Addis Abbaba. A personal search led to the recovery of assorted crude gold jewellery totally weighing 162 gms of 2 pieces of crude gold bar, totally valued at Rs. 4,69,210/- concealed inside the body. The applicant admitted to knowledge, possession, carriage, concealment, non-declaration and recovery of the seized gold from her possession.

3. The Original Adjudicating Authority (OAA), viz, Dy/Asst. Commissioner of Customs, CSMI Airport, Mumbai vide Order-in-Original no. AirCus/T2/49/903/2019 UNI'D' dated 22.06.2019 ordered for the absolute confiscation of the impugned 162 gms of 2 pieces of crude gold bar, totally valued at Rs. 4,69,210/- under Section 111(d), (l) and (m) of the Customs Act, 1962. Personal penalty of Rs. 45,000/- was imposed on the applicant under Section 112(a) and (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-CUSTOM-PAX-APP-695/2020-21 dated 07.01.2021 issued on 22.01.2021 did not find it necessary 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 Kenyan national did not know the law of our country i.e. India and did not know English and could not read the boards put up at the Airport as the same were also only in English language.

- 5.02. the lower authorities had failed to appreciate that Applicant was she was ready and willing to pay the duty.
- 5.04. the lower authorities had failed to appreciate that applicant was not a carrier.
- 5.05. the lower authorities had failed to appreciate that gold was not restricted or prohibited and can be released for re-export.
- 5.06 The applicant placed his reliance on following case laws:
1. Collector of Customs vs. Elephanta Oil and Inds.; 2003-(152)-ELT-0257-Supreme Court.
 2. Kusum Bhai DayaBhaiPatel Vs. Commissioner of Customs 1995979; ELT 292 Tri Mumbai
 3. A.K. Jewellers vs. Commissioner of Customs Mumbai; 2003(155) E.L.T. 585 (Tri-Larger Bench).
 4. Patel vs. Commissioner of Customs Citation: 2003(153) ELT 226 Tr
 5. M.V. Marketing and Supplies vs. Commissioner of Customs (Import), Chennai; 2004(178) E.L.T. 1034 (Tri-Chennai).
 - 6 Revision order No 38/2008 passed in the case of Mrs Majeeda Mohammed Yunus; 178/2008 passed in the case Mr Ravinder Sadharam Dulari, 33/2008 Mr Deepak Hiralal Parekh, 34/2008 Mr Pradeep Kumar Bhanwarlal, 392/2002 Mr Nasir Asgar Mirab passed by RA, New Delhi.

5.1 The respondent Department in their reply placed reliance on decision of the Hon'ble CESTAT passed in the case of Baburaya Narayan Nayak v/s Commissioner of Customs Bagalore reported in 2018 (364) ELT 811 (Tri Bang). They prayed that the OIA may be upheld.

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 gold jewellery weighing 162 grams to be re-exported on nominal fine and to grant any other reliefs as deemed fit.

6. Shri N J Heera Advocate appeared before me and submitted that the applicant brought small quantity of gold for personal use. He requested to allow the redemption of goods on nominal fine for re-export as the applicant is a foreign national.

7. The Government has gone through the facts of the case and observes that the Applicant had brought the assorted crude gold jewellery i.e assorted gold jewellery weighing 162 grams valued at Rs. 4,69,210/- 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 Applicant had not disclosed that she was carrying dutiable goods. However, after being intercepted, the impugned assorted crude gold jewellery of weighing 162 grams valued at Rs. 4,69,210/- was recovered from the Applicant admittedly concealed inside her body. The manner, in which it was brought, revealed her intention not to declare the said gold and thereby evade payment of Customs Duty. The assorted crude gold jewellery was in primary form, indicating that the same was for commercial use. The manner, in which the gold was attempted to be brought into India, reveals the mindset of the Applicant to not only evade duty but also smuggle the gold. It also reveals that the act committed by the Applicant was conscious and pre-meditated. The Applicant was given an opportunity to declare the dutiable goods in her possession but having confidence in the nature of her concealment, she cleared herself from the Green channel denied carrying any gold. Had she not been intercepted, the Applicant would have gotten away with the impugned assorted crude gold jewellery of weighing 162 grams. 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' thus, is liable for penalty.

10. 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.

11. Government observes the quantum of gold was not substantial that the manner in which the gold was concealed i.e. inside her own body, reveals the intention of the Applicant. It also reveals her criminal bent of mind and a clear intention to evade duty and smuggle the gold into India. Quantity of gold was not substantial and it was in primary form which indicates that the same was for commercial use. Government notes that applicant was a frequent traveller and was well versed with the law and procedure. The circumstances of the case especially the ingenious concealment method adopted, probates that the Applicant had no intention of declaring the gold to the Customs at the airport. The method of concealment indicates and the same was conscious and pre-meditated. Government notes that the Applicant was a carrier for a syndicate, entrusted with smuggling of the gold. The Appellate Authority has rightly concurred with the findings of the OAA on all counts and has discussed the issue in detail.

11.2. The Appellate Authority, at para 6 of the Order-in-Appeal has observed as under:

"9. I find that in case of Aiyakannu Vs CC (AIR), Chennai-1 2009 (247) ELT 21 (Madras) held that;

'Smuggling-Gold-Foreign passport holder bringing gold into India concealing it inside bag covered with coloured adhesive tapes and not declaring it to Customs on arrival - HELD: Foreign National is not entitled to import gold in terms of Foreign Trade (Exemption from Application of Rules in Certain Cases) Order, 1993 which applies only to passenger of Indian origin or a passenger holding a valid passport issued under Passport Act, 1967. Redemption fine was not permissible and impugned gold was liable to absolute confiscation as there was attempt to smuggle by green channel - Sections 111, 123 and 125 of Customs Act, 1962. [paras 8, 9]'

12. The main issue in the case is the manner in which the impugned gold was being brought into the country. 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 and ingenious with a clear attempt to smuggle gold, it is a fit case for absolute confiscation which would also be a deterrent to such offenders. Thus, taking into account the facts on record and the gravity of the offence, the adjudicating authority had rightly ordered the absolute confiscation of gold. But for the intuition and the diligence of the Customs Officer, the gold would have passed undetected. The redemption of the gold will encourage non bonafide and unscrupulous elements to resort to concealment and bring gold. 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. The order of the Appellate authority upholding the order of the adjudicating authority is therefore liable to be upheld.

13. The seized gold jewellery and crude round pieces of gold are valued at Rs 4,69,210/- The Government finds that the penalty of Rs. 45,000/- imposed on the applicant under Section 112(a) & (b) of the Customs Act, 1962 is appropriate and commensurate with the omission and commission committed by the applicant.

14. Government upholds the order of absolute confiscation of the impugned gold bars passed by the AA. Government does not find it necessary to interfere in the penalty of Rs. 45,000/- imposed on the applicant under Section 112(a) & (b) of the Customs Act, 1962 by the OAA and confirmed by the AA.

15. The Revision Application is disposed of on the above terms.


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

ORDER NO.
.12.2023.

969/2023-CUS (WZ)/ASRA/MUMBAI DATED 29.12.23

To

1. Ms Amal Abdi Mohamed, C/o Shri. N J Heera, Advocate, Nulwala Building, Ground Floor, 41, Mint Road, Opp GPO, Fort, Mumbai 400001.
2. Pr. Commissioner of Customs, Adjudication Cell, Chhatrapati Shivaji Maharaj International Airport, Sahar, Andheri East, Mumbai – 400 099.

Copy to:

1. Shri. N J Heera, Advocate, Nulwala Building, Ground Floor, 41, Mint Road, Opp GPO, Fort, Mumbai 400001.
2. Sr. P.S. to AS (RA), Mumbai.
3. File Copy.
4. Notice Board.