



GOVERNMENT OF INDIA
MINISTRY OF FINANCE
(DEPARTMENT OF REVENUE)

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

F.No. 371/260/B/WZ/2022-RA / 248 : Date of Issue: 01-02-2024

ORDER NO. 98 /2024-CUS (WZ)/ASRA/MUMBAI DATED 29-01-2024
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.

Applicant : Smt. Subashini Thangaraja

Respondent: Principal Commissioner of Customs CSMI Airport, Mumbai

Subject . Revision Application filed, under Section 129DD of the Customs
Act, 1962 against the Order-in-Appeal No. MUM-CUSTM-PAX-
APP-699/2021-22 dated 22-09-2021 issued on 30-09-2021
through F.No. S/49-458/2020 passed by the Commissioner of
Customs (Appeals), Mumbai - III.

ORDER

This Revision application has been filed by Smt. Subashini Thangaraja (hereinafter referred to as the Applicant) against the Order-in-Appeal No MUM-CUSTOM-PAX-APP-699/2021-22 dated 22-09-2021 issued on 30-09-2021 through F.No. S/49-458/2020 passed by the Commissioner of Customs (Appeals), Mumbai - III.

2 Brief facts of the case are that on 03-03-2020, on the basis of suspicion the officers of AIU, Mumbai intercepted the applicant who is a Sri Lankan national, holding Sri Lankan Passport No. N 8390539 and had arrived from Colombo by Flight No. AI-276 The applicant was intercepted after she cleared herself through Customs Green Channel. The AIU officers recovered (i) 02 gold bracelet of 22Kt weighing 112 grams; (ii) 05 gold bangles of 22Kt weighing 68 grams and (iii) 03 gold rings of 23 Kt weighing 44 grams, totally weighing 224 grams and totally valued at Rs.8,00,716/-. The impugned gold jewellery were concealed by the applicant. The impugned gold ornaments were seized under the provisions of the Customs Act, 1962 as the same was being attempted to be smuggled into the country without declaring the same to Customs.

3 The Original Adjudicating Authority (OAA), viz, Assitant Commissioner, CSI Airport, Mumbai vide Order-In-Original No. AirCus/T2/49/1650/2020 dated 03-03-2020 ordered for the absolute confiscation of the impugned gold jewellery weighing 224 grams and totally valued at Rs.8,00,716/- under Section 111 (d), (l) & (m) of the Customs Act, 1962 and imposed a penalty of Rs. 15,000/- under Section 112 (a) (i) of the Customs Act, 1962 on the applicant

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-699/2021-22 dated

22.09.2021 [F.No. S/49-458/2020] [Date of issue: 30.09.2021] upheld the order passed by the OAA.

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

- 5.01 That the order of the Commissioner (Appeals) is against law, weight of evidence and circumstances and probabilities of the case; that gold is not prohibited item and can be released on payment of redemption fine;
- 5.02 That impugned gold belongs to the applicant and she had worn it and it was her personal belonging; that ownership of the gold was not disputed and there was no ingenious concealment; that the gold jewellery worn by the applicant had been purchased out of her own earnings / savings; that she is claiming the gold and willing to pay appropriate duty;
- 5.03 That she had requested for re-export of the impugned gold after paying customs duty under Section 80 of the Customs Act, 1962, which the officers did not heed to,
- 5.04 That as per section 77 of the Customs Act 1962, the owner of any baggage shall, for the purpose of clearing it, make declaration of its contents to the proper officer. Since the passenger is being the owner of the baggage, in that circumstances the passenger is only liable for make declaration under the said act not any other person. The applicant further submitted that the authority one way stated that the passenger has not declared the contents of the baggage as per section 77 of the said act, other it is stated that he is not the owner of the goods. If authority had taken the stand that the passenger had not declared, then he cannot take the stand that he is not the owner of the baggage or goods;
- 5.05 That there is no provision for absolute confiscation of goods. The option of redemption should be given under section 125 of the Customs act Further there are several judgments by Revisional authority and Cestat

and Hon'ble Supreme Court and High Court which states that the authority should excise the power under Section 125 of the act because the same is mandatory;

Under the above circumstances of the case, the Applicant has prayed to the Revision Authority, to set aside the impugned order and permit to re-export the gold jewellery and also to reduce the personal penalty of Rs.15,000/-.

6. Personal hearing was scheduled on 05-09-2023, 12-09-2023, 10-10-2023 & 17-10-2023 However, no one appeared before the Revisionary Authority for personal hearing on any of the appointed dates for hearing. Since sufficient opportunity for personal hearing has been given in the matter, the case is taken up for decision on the basis of the available records.

7.1 Government observes that the applicant has filed an appeal for condonation of delay in filing the impugned revision application. Applicant has submitted that the OIA was received by him on 05.10.2021 and the revision application was filed on 01-06-2022 that there was delay of in filing the application due to the disruption caused by COVID. In view of Hon'ble S.C vide Order dated 10-01-2022 in respect of Misc Application No.21/2022, Government condones the delay in filing the application and goes into the merits of the case.

7.2. 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 would have walked away with the impugned gold jewellery 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 Customs duty on it The Government finds that the confiscation of the gold jewellery is therefore justified

8.1 The relevant sections of the Customs Act are reproduced below:

Section 2(33)

“prohibited goods” means any goods the import or export of which is subject to any prohibition under this Act or any other law for the time being in force but does not include any such goods in respect of which the conditions subject to which the goods are permitted to be imported or exported have been complied with”

Section 125

“Option to pay fine in lieu of confiscation. - (1) Whenever confiscation of any goods is authorised by this Act, the officer adjudging it may, in the case of any goods, the importation or exportation whereof is prohibited under this Act or under any other law for the time being in force, and shall, in the case of any other goods, give to the owner of the goods or, where such owner is not known, the person from whose possession or custody such goods have been seized, an option to pay in lieu of confiscation such fine as the said officer thinks fit :

Provided that where the proceedings are deemed to be concluded under the proviso to sub-section (2) of section 28 or under clause (i) of sub-section (6) of that section in respect of the goods which are not prohibited or restricted, the provisions of this section shall not apply:

Provided further that, without prejudice to the provisions of the proviso to sub-section (2) of section 115, such fine shall not exceed the market price of the goods confiscated, less in the case of imported goods the duty chargeable thereon.

(2) Where any fine in lieu of confiscation of goods is imposed under sub-section (1), the owner of such goods or the person referred to in sub-section (1), shall, in addition, be liable to any duty and charges payable in respect of such goods.

(3) Where the fine imposed under sub-section (1) is not paid within a period of one hundred and twenty days from the date of option given thereunder, such option shall become void, unless an appeal against such order is pending.”

8.2 It is undisputed that as per the Foreign Trade Policy applicable during the period, gold was not freely importable and it could be imported only by the banks authorized by the RBI or by others authorized by DGFT and to some

extent by passengers. Therefore, gold which is a restricted item for import but which was imported without fulfilling the conditions for import becomes a prohibited goods in terms of Section 2(33) and hence it liable for confiscation under Section 111(d) of the Customs Act.

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" in terms of Section 2(33) and hence it is liable for confiscation under Section 111(d) of the Customs Act, 1962.

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.

11.1 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 pretense. 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 ”

11.2 A plain reading of the section 125 shows that the Adjudicating Authority is bound to give an option of redemption when goods are not subjected to any prohibition. In case of prohibited goods, such as, the gold, the Adjudicating Authority may allow redemption. There is no bar on the Adjudicating Authority allowing redemption of prohibited goods. This exercise of discretion will depend on the nature of the goods and the nature of the prohibition. For instance, spurious drugs, arms, ammunition, hazardous goods, contaminated flora or fauna, food which does not meet the food safety standards, etc. are harmful to the society if allowed to find their way into the domestic market. On the other hand, release of certain goods on redemption fine, even though the same

becomes prohibited as conditions of import have not been satisfied, may not be harmful to the society at large. Thus, Adjudicating authority can allow redemption under Section 125 of any goods which are prohibited either under the Customs Act or any other law on payment of fine.

12 In the instant case, the quantum of gold involved is small and is not of commercial quantity. The quantum of the same does not suggest the act to be one of organized smuggling by a syndicate. Government, notes that the impugned gold were not ingeniously concealed, in fact the applicant had worn the gold jewellery. The applicant has claimed ownership of the gold and her desire to take it back. Government, notes that there were 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 the 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.

13. 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 respect of Shri Chandrasegaram Vijayasundaram and 5 others in similar matter of Shri Lankans wearing 1594 grams of gold jewellery (i.e. around 300 grams 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. In view of the foregoing paras, the Government finds that as the applicant had not declared the gold at the time of arrival, the confiscation of the same was justified. However, considering the quantity of gold, the same not being concealed in an ingenious manner, applicant being a foreign national and wishing to take the gold jewellery back, the absolute confiscation of the same was not justified. Considering the above facts, Government is inclined to modify the absolute confiscation upheld by the AA and allow the impugned gold jewellery weighing 224 grams and totally valued at Rs.8,00,716/- to be re-exported on payment of redemption fine.

15. Government finds the value of the gold in this case is Rs. 8,00,716/- and quantum of the penalty imposed of Rs. 15,000/- under Section 112(a) and (b) of the Customs Act, 1962 is appropriate and commensurate with the omission and commission committed and does not find it necessary to interfere in the same.

16. In view of the above, the Government modifies the order passed by the appellate authority and allows the applicant to redeem the impugned gold jewellery totally weighing 224 grams and totally valued at Rs.8,00,716/-for re-export as prayed for, on payment of a redemption fine of Rs. 1,60,000/- (Rupees One Lakh Sixty Thousand only). The penalty amount of Rs. 15,000/- is upheld

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


(SHRAWAN KUMAR)

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

ORDER NO. 98 /2024-CUS (WZ)/ASRA/MUMBAI DATED 29.01.2024.

To,

1. Smt. Subashini Thangaraja, C/o Smt. Kamalamalar Palanikumar, Adv., No. 10, Sunkurama Street, Second Floor, Chennai – 600 001.

- 2 The Pr. Commissioner of Customs, C.S.I Airport, Terminal 2, Level-II, Sahar, Andheri (East), Mumbai 400 099.
3. The Commissioner of Customs (Appeals), Mumbai-III, 5th Floor, Avas Corporate Point, Makwana Lane, Behind S. M. Centre, Andheri Kurla Road, Andheri (East), Mumbai 400 059.

Copy to.

1. Smt. Kamalamalar Palanikumar, Advocate, No 10, Sunkurama Street, Second floor, Chennai - 600 001.
2. Sr. P.S. to AS (RA), Mumbai.
- 3 File Copy.
- 4 Notice Board.