

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. 373/32-33/B/16-RA / 818

Date of Issue 29.01.2021

ORDER NO. 67/202/CUS (SZ)/ASRA/MUMBAI DATED 12.01.2021 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 : Shri Ravinderkumar Rishabchand
Smt. Chandrakala Ravinderkumar Rishabchand

Respondent : Commissioner of Customs, Chennai.

Subject : Revision Application filed, under Section 129DD of the Customs Act, 1962 against the Order-in-Appeal No. C.CUS-1 No 697-698/2015 dated 30.10.2015 passed by the Commissioner of Customs (Appeals-I), CHENNAI.



ORDER

This revision application has been filed by the Ravinderkumar Rishabchand and Smt. Chandrakala Ravinderkumar Rishabchand (herein referred to as Applicants) against the order C.CUS-I No.697-698/2015 dated 30.10.2015 passed by the Commissioner of Customs (Appeals), Chennai.

2. Briefly stated facts of the case are that the officers of the Air intelligence unit opened and examined the checked in baggage of Shri Ravinderkumar Rishabchand and Smt. Chandrakala Ravinderkumar Rishabchand. In the course of the examination the officers recovered a plastic container which was unusually heavy. The plastic container contained betel nut flakes alongwith three gold bars and two gold bits totally weighing 3052 grams valued at Rs. 92,78,080/- (Rupees Ninety two lacs Seventy eight thousand and Eighty).

3. After due process of the law vide Order-In-Original No. 66/31.01.2015, the Original Adjudicating Authority ordered absolute confiscation of the gold and imposed penalty of Rs. 10,00,000/- (Rupees Ten lacs) each on both the Applicants under Section 112 (a) of the Customs Act,1962.

4. Aggrieved by this order the Applicant filed an appeal with the Commissioner of Customs (Appeals), The Commissioner (Appeals) vide his order C. CUS-I No. 233 & 234/2015 dated 29.05.2015 dismissed the appeal for non-compliance of the mandatory provisions as laid down under section 129E of the Customs Act,1962. Aggrieved with the order, the Applicants filed a Writ of Mandamus nos 19455 & 19456 of 2015 in the High Court of Madras, seeking quashing of the Order in Appeal and to direct the respondent to hear the Appeals without insisting for pre-deposit as mandated under section 129E of the Customs Act,1962. The Hon'ble High Court of Madras set aside the Appellate order and directed the Respondent to consider the Appeals afresh without insisting upon the predeposit of 7.5% of the penalty amount. The Commissioner (Appeals) decided the appeals afresh as directed by the Hon'ble High Court of Madras, and rejected the Appeal on merits.

5. Aggrieved with the above order the Applicant has filed this revision application interalia on the grounds that;

5.1 The order of the Appellate authority is unjust unfair, arbitrary, contrary to law and against the principles of natural justice. The order by



not considering the submissions in the proper perspective renders it as unsustainable in law

5.2 The applicants was carrying gold bars in an open and transparent manner, without the same being concealed in any manner, along with sufficient documents (invoice) for the licit purchase of the same without adopting any dubious or illegal means or methods.

5.3. The applicants had only brought the gold bars with the sole intention converting it into jewellery as per choice of their daughter who was to visit them for the delivery of the baby and sending it back along with her, abroad.

5.4 The appellate authority ought to have considered that the applicants are not eligible passengers to bring gold into India for only concessional rate of duty, that they are debarred from bringing gold and clearing the same on payment of merit rate/tariff rate, i.e., other than the concessional rate as provided under the said notification, is totally unfounded and baseless, ultimately it is inbuilt that other passengers would be permitted clearance on merit rate of duty..

5.6 The absolute confiscation of the gold for the mere reason that the gold in question were of 24 carat purity is totally bad in law.

5.7 The applicants were not allowed to declare the gold brought by them which was licitly purchased by them accompanied by valid documents, the same cannot become restricted or prohibited goods in terms of the provisions of the Customs Act or any other law for the time being in force and therefore there is no justification on the part of the adjudicating authority to have absolutely confiscated the impugned gold.

5.8 The finding of the adjudicating authority that the applicants had not declared the gold or its value in the Customs Declaration card is not correct, as the applicants were made to write against each of the column of the declaration card with the words "NO" or "NIL" as the case may be, with a threat that refusal to do so will lead to absolute confiscation of the gold. The applicants did not attempt to go through the green channel and were not given any opportunity to make the declaration before the search of their baggages.

5.9 The charge of exporting currency as has been recorded in their statements without any verification or corroboration.



5.10 The Appellate authority further failed to see that the applicant; had given all their plausible reasons to establish that the impugned gold brought by them were not attempted to be smuggled, whereas on the other hand the revenue has not provided any cogent/tangible and other corroborative evidence to prove that the goods was attempted to be smuggled into India.

5.11 The order of absolute confiscation of the gold under Sec. 111 (d) & (f) is also not legally sustainable as the prohibition brought out for non-declaration of the gold being contrary to the true fact and hence unavailable to the department and not legally sustainable

5.12 The imposition of the penalty on them u/s.112 (a) of the said Act on the applicants is not justified or reasonable since they did not willfully nor deliberately with a mala fide intention to evade customs duty, the notice issued to them also does not allege any criminal intent or defiance of law against them.

5.13 In any case, the learned lower appellate authority ought to have exercised his power u/s.125 of the Customs Act by giving an option to redeem the gold bars in the facts and circumstances of the case, since the applicants had not made any attempt to smuggle the goods.

5.14 In view of the above the Revision Application pleaded that the impugned order in appeal is not legally sustainable and hence liable to be set aside.

6. Keeping principles of natural justice in mind, personal hearings in the case were scheduled, Shri N. Vishwanathan, Advocate attended the hearing online on 22.12.2020 behalf of the Applicants. He requested to allow re-export of the gold.

6.1 In his written submissions he has submitted that, the Applicants for safety purpose packed the gold in a plastic container alongwith betel nut flakes and carried the same in their unaccompanied baggage in a most transparent manner with no concealment.

6.2 The applicants only upon getting the copies of the documents only during May 2014, they sent their retraction letter dated 21.05.2014 for which they did not receive any objection from the concerned authority.

6.3 The applicants submit that they stoutly defended their case whereas the adjudicating authority mainly relying upon the judgments of the Honble Supreme Court held the gold imported by them as prohibited and



absolutely confiscated the gold and imposed the penalty of Rs. 10 lakhs each on the applicants under Sec. 112 of the Customs Act, 1962.

6.3 The import of gold not having been prohibited either under the customs Act or under any other law for the time being in force and have not also been shown to be so either by the original or the appellate authority and also none of the provisions relied upon by the original authority to hold the gold in question as an item prohibited for import, are legally tenable.

6.4 The applicants submit that the citations relied upon by the original authority to hold the import of gold as prohibited were delivered under the erstwhile Import Trade (Control) Order and not under the liberalised Foreign Trade (Development & Regulations) Act or the Foreign Trade Policy.

6.5 The applicants further submit that the Hon'ble Supreme Court in the case of Asian Food Industries as well as in the case of Atul Automation P. Ltd., and the Punjab & Haryana High Court in the case of Horizon Foods have drawn the distinction between prohibit, restrict or otherwise regulate as appearing in the FTDR Act and the customs Act and have held that the mere restriction of the goods under the Foreign Trade provision would not be prohibition under the Customs Act. Therefore, the interpretation placed by the original authority under Sec. 2 (33) of the customs Act by relying upon the judgment of the Supreme Court under the old Import control order has no application whatsoever.

6.6 The reliance placed on the fact that the applicants are not passengers eligible to import cannot result in the gold brought by them being held to be prohibited goods as the said term has been used for the only purpose of extending the concessional rate of duty to such passengers.

6.7 The findings recorded by the lower appellate authority that they had indigenously concealed the gold and that they had pre-planned the smuggling of gold is totally bereft of any truth and incorrect as the facts on record itself had shown that they kept it only in a plastic container along with betelnut flakes for safety and not with any intention of smuggling the gold.

6.8 The stay of one day at Dubai relied upon by the lower appellate authority to hold the applicants guilty of the act of pre-planning the alleged smuggling is totally unreasonable and unsupported in the light of the clear explanation. In any case and without prejudice the reasons recorded by the learned appellate authority for approving the absolute confiscation of the



gold -without allowing its redemption under Sec. 125 of the Act is not legally sustainable.

7. The Government has gone through the case records. The Commissioner (Appeals) in his order in appeal C, Cus-I No. 697-698/2015 dated 30.10.2015 has summarized facts of the case under para 6. It is observed that no declaration was filed informing the Customs about the quantity of gold being brought by them. The officers have recovered gold totally weighing 3052 grams valued at Rs. 92,78,080/- (Rupees Ninety two lacs Seventy eight thousand and Eighty) from a plastic container containing betel nut flakes.

8. The Revision Applicants have contended that their submissions have not been considered in a proper perspective. Their submissions made in the revision application and their written submissions made at the time of hearing can be broadly summarised as under,

8.1 That the gold bars were packed in a plastic container along with betel nut flakes for safety purpose and carried the same in their unaccompanied baggage in a most transparent manner with no concealment.

8.2 They were not allowed to declare the gold, and they did not attempt to use the green channel. That the charge of pre-planned smuggling of gold is totally bereft of any truth and is incorrect.

8.3 None of the provisions relied upon by the original authority to hold the gold in question as an item prohibited for import, are legally tenable.

8.4 The judgements relied upon holding that the import of gold as prohibited were delivered under the erstwhile Import Trade (Control) Order and not under the liberalised Foreign Trade (Development & Regulations) Act or the Foreign Trade Policy. The only purpose of the eligibility criteria was to extend the concessional rate of duty to such passengers.

8.5 The order of absolute confiscation of the gold is not legally sustainable, and the learned lower appellate authority ought to have



exercised his power u/s.125 of the Customs Act,1962 by giving an option to redeem the gold bars.

9. The Government proceeds to address the submissions of applicants.

9.1 The Original Adjudicating Authority has recorded the facts of the case under para 22.1 in his Order in original dated 31.01.2015 " On 16.03.2014, Officers of Air Intelligence unit intercepted Shri Ravinderkumar and Smt. Chandrakala Ravinderkumar who arrived from Dubai, while they were passing through green channel on reasonable belief that they might be carrying gold or any other contraband either in their baggage or on their person, that when questioned as to whether they were in possession of gold or any other contraband goods either in their baggage or in their person they replied in the negative, That not satisfied with their reply and also as they were found nervous, the officer brought them alongwith their three hand baggage and two checked-in baggage to AIU room for detailed examination of their baggage and search of their person in the presence of witnesses. The search of their person in the presence of witnesses was done by the officers separately and nothing incriminating was recovered. Then their three hand baggage were examined and it was found to contain their personal effects only. Then their two checked in baggage were examined and apart from their personal effects, one plastic container was found to be unusually heavy and on opening the same it was found to contain betal nut flakes along with brown colour adhesive tape and on cut opening of the same three nos of yellow colour metal bars and two nos. of yellow colour metal bits were recovered and totally weighing 3052 grams, " .

9.2 Thus it is undisputed that both the appellants were walking through the green channel with three hand bags and two checked-in luggage, no wheelchair assistance was found availed at the time of interception. They declared the value of the goods carried by them as "NIL" in Customs Declaration Card. The gold was discovered only on examination of their baggage and concealed inside a plastic container containing betal nut flakes. Their contention of carrying the gold in such a manner for safety could have been sustained if they had declared the gold. The facts reveal that inspite of carrying 3 kgs of gold, the Applicants



preferred not to declare the same. The Applicants were intercepted after they had cleared themselves at the green channel and at the exit. This clearly indicates that the Applicants had no intentions of declaring the gold. Thus contentions of the Applicants that the packing of gold was only for safety and they were not allowed to declare the gold are contrary to the facts on record.

10.1 The Applicants have contended that gold is not a prohibited item. The Hon'ble High Court Of Madras, in the case of Commissioner Of Customs (Air), Chennai-1 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".

10.2 Farther, *"In the case of literal interpretation of the words, "prohibited goods" and the contention that gold is not notified and therefore, to be released, would cut down the wide ambit of the inbuilt prohibitions and restrictions in the Customs Act, 1962 and any other law for the time being in force."* It is well-settled that a statute must be read as a whole and one provision of the Act should be construed with reference to other provisions in the same Act, so as to make a consistent enactment of the whole statute. Such a construction has the merit of avoiding any inconsistency or repugnancy either within the statute or between a Section or other parts of the statute. In para 47 of the spid 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 Applicants thus liable for penalty.

10.3 The Honble Apex Court in the case of Sheikh Mohd. Omer V/s Collector of Customs, Calcutta and others, reported in 1983 (13) ELT 1439 (S.C.) has also held that, " any goods which are imported or attempted to be imported contrary to "any prohibition imposed by any law for the time being in force in this country" is liable to be confiscated. "Any prohibition" referred to in that section applies to every type of "prohibition". That prohibition may be complete or partial. Any restriction on import or export is to an extent a prohibition. The expression "any prohibition" in Section 111(d) of the Customs Act, 1962 includes restrictions."

11.1 In addressing the issue of eligibility for gold import the Government notes that, "As per Clause 3 of Foreign Trade (Exemption from application of rules in certain cases) Order, 1993, issued under Foreign Trade (Development and Regulation) Act, 1992, read with Customs Notification No. 171/94, dated 30-9-94 (as amended) the import of gold in any form including ornaments (but excluding ornaments studded with stones or pearls) will be allowed as part of baggage by a passenger of Indian origin or a passenger holding a valid passport issued under the Passports Act, 1967, subject, inter alia, to the condition that the passenger importing the gold is coming to India after period of not less than six months of stay abroad and the import duty on the gold shall be paid in convertible foreign currency." In this case, the Applicant, stayed abroad for a day. Thus they are not eligible passengers for the import of gold as they did not satisfy the conditions.

11.2 It may also be seen from the above that the Applicants were held ineligible passengers for import of gold as per the Foreign Trade (Development & Regulations) Act, 1992 as they did not satisfy the conditions prescribed for



the import of gold under the Foreign Trade Policy read with Customs Notification No. 171/94, dated 30-9-94 (as amended) and not as per the Gold (Control) Act, 1968, which was repealed in the year 1990. The contentions of the Appellants that the eligibility criteria was only to extend concessional rate of duty is therefore flawed and erroneous. Judgements mentioned under para 10 above are not delivered under erstwhile Import Trade Control order, but under relevant laws as applicable. Therefore this contention of the applicants is also not based on correct appreciation of laws held by the Apex court and High Courts.

12. The facts of the case further bring out that the Applicants have carried foreign currency abroad illegally for purchase of the gold. Their duration of stay abroad of one day clearly bring out that at least one of the purposes of their visit abroad was to bring/smuggle gold. Their statements were retracted after 7 months in a routine manner as an after thought. If the Applicants were not intercepted they would have smuggled the gold without payment of Customs duty and without any accountal of the same.

13. The Applicants were well aware that gold is not only a dutiable item and needs to suffer customs duty for its import into India, but gold is also subjected to certain restriction with conditions and eligible agencies / persons can only bring the same into India. The manner of concealment and opting for the green channel, and making their way to the exit, clearly indicates that they were planning to escape the payment of customs duty and smuggle the gold into India. The impugned gold was discovered only after the Applicants were intercepted and subjected to a search. The Applicants have pleaded for setting aside the Appellate order and have requested for redemption of the gold and re-export of the gold. The impugned gold has been absolutely confiscated. After recording a categorical finding of attempted smuggling of 3052 grams of gold, by concealment and without declaration to the customs, the adjudicating authority has exercised his discretion to order absolute confiscation of gold. The Government, keeping in mind the above facts, notes that under Section 125 of the Customs Act, 1962 a discretion has been conferred on the officer to give the option to pay fine in lieu of confiscation in cases of goods, the importation or exportation whereof is prohibited under the Act or under any other law for the time being in force. In the present case, the Original adjudicating authority



has considered it appropriate to direct absolute confiscation of the goods, which indicates that he did not consider it a fit case for exercise of his discretion to give an option to pay the redemption fine under Section 125 of the Act. The Appellate authority has also not considered in allowing redemption against absolute confiscation of the gold. The Hon'ble Madras High Court in the case of *Commr. of Customs (Air), Chennai-I V/s P. Sinnasamy*, 2016 (344) E.L.T. 1154 (Mad.) referred supra has held that the adjudicating authority is within his discretion to confiscate the goods absolutely and that redemption cannot be allowed as a matter of right. The Government also does not find any reason to take a different view. As the impugned gold is not allowed for redemption, the question of giving option of re-export does not arise. The revision application is therefore liable to be dismissed.

14. Revision application is accordingly dismissed.

Shrawan Kumar
12/01/2021
(SHRAWAN KUMAR)
Principal Commissioner & ex-officio
Additional Secretary to Government of India

ORDER No. ⁰⁶⁻⁰⁷ /2021-CUS (SZ) /ASRA/

DATED 2-01.2021

To,

1. Shri. Ravinderkumar Rishabchand
Smt. Chandrakala Ravinderkumar Rishabchand, Old no. 11, New no. 30, Govindu street, T. Nagar, Chennai 600 017.
2. The Commissioner of Customs, Chennai -I Commissionerate, New Custom House, Meenambakam, Chennai-600 027.

Copy to:

1. Shri N. Vishwanathan, Advocate, Flat 8A, RAMS, Door No. 26, South Mada Street, Shri Nagar Colony, Saidapet, Chennai- 600015.
2. Sr. P.S. to AS (RA), Mumbai.
3. Guard File.
4. Spare Copy.

