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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. 380/59-63/B/SZ/2018-RA

3721

Date of Issue

20.07.2021

ORDER NO. ^{165-169/2021} CUS (SZ)/ASRA/MUMBAI DATED 14.07.2021 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 : Commissioner of Customs, Chennai.

Respondent: Shri Chandrasegaram Vijayasundaram
Shri Vijayasundaram Mahalakhshmi
Shri Somasundaram Chandrasegaram
Smt. Chandrasegaram Rajalakhshmi
Smt. Ravindhram Shanthadevi

Subject : Revision Application filed, under Section 129DD of the
Customs Act, 1962 against the Order-in-Appeal C. Cus-I No. 69-
73/2018 dated 27.04.2018 passed by the Commissioner of Customs
(Appeals-I), Chennai.

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ORDER

This revision application has been filed by Commissioner of Customs, Chennai. (herein referred to as Applicant department) against the order C. Cus-I No. 69-73/2018 dated 27.04.2018 passed by the Commissioner of Customs (Appeals-I), Chennai.

2. On 06.05.2017 the officers of Customs intercepted the respondent, a Sri Lankan citizen and his family as they were attempting to walk out of the green channel without declaring anything to the Customs. The examination of their baggage and person resulted in the recovery of 112 liquor bottles and 1584 gms of gold jewelery valued at Rs. 42,27,854/- (Rupees Forty two lakhs Twenty Seven thousand Eight hundred and fifty four), as detailed below.

Sr. No.	Name of Pasenger	No. of Liquor bottles recovered	Value in Rs.	Gold Jewelry Recovered IN Grams	Value in Rs.
1.	Shri Chandrasegaram Vijayasundaram	24	36,000/-	371	9,90,236/-
2.	Shri Vijayasundaram Mahalakhshmi	18	27,000/-	263.5	7,83,381/-
3.	Shri Somasundaram Chandrasegaram	25	37,500/-	322	8,59,450/-
4.	Smt. Chandrasegaram Rajalakhshmi	20	30,000/-	293.5	7,83,381/-
5.	Smt. Ravindhram Shanthadevi	25	37,500/-	304	8,11,406/-
	TOTAL	112		1584	42,27,854/-

In his statements recorded immediately after seizure the informed the officers that the he was a textile trader and the 112 liquor bottles were brought for sale in Chennai and the gold jewelry was their personal jewelry. They had come to India to visit Tirupati temple.

3. After due process of the law vide Order-In-Original No. 207/2017-18-Airport dated 27.01.2018 the Original Adjudicating Authority ordered confiscation of the gold, but allowed redemption for re-export on payment of redemption fine and penalties as detailed below.

S r. No.	Name of Passenger	Liquor bottles confiscated absolutely	Gold Jewellery Recovered in Grams	Value in Rs.	Redemption fine imposed	Penalty imposed under section 112 (a)	Penalty imposed under section 114AA
1	Shri Chandrasegaram Vijayasundaram	24	371	9,90,236/-	4,00,000/-	1,00,000/-	10,000/-
2	Shri Vijayasundaram Mahalakhshmi	12	263.5	7,83,381/-	3,00,000/-	80,000/-	10,000/-
3	Shri Somasundaram Chandrasegaram	25	322	8,59,450/-	3,30,000/-	85,000/-	10,000/-
4	Smt. Chandrasegaram Rajalakhshmi	20	293.5	7,83,381/-	3,00,000/-	80,000/-	10,000/-
5	Smt. Ravindhram Shanthadevi	25	304	8,11,406/-	3,00,000/-	80,000/-	10,000/-
	TOTAL	112	1584	42,27,854/-			

The Respondents opted for redemption and paid the redemption fine and penalty and re-exported the gold jewelry.

4. Aggrieved by this order the respondents filed appeals with the Commissioner of Customs (Appeals) contesting the resultant fine and penalty of the gold jewelry offered for re-export. The absolute confiscation of the liquor bottles were not contested. Commissioner (Appeals) vide his order C. Cus-I No. 69-73/2018 dated 27.04.2018 observed that the facts of the case fail miserably in pointing out any attempt made by the Appellants to smuggle gold jewelry and therefore, confiscation of the same, albeit with an option for redemption on payment of redemption fine and penalty is not in order and set aside the confiscation and penalties with consequential relief.

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

5.1 It appears that the order passed by the Commissioner of Customs (Appeals-I) is neither legal nor proper.

5.2 The passengers had attempted to smuggle the gold by way of non-declaration to Customs knowing well that they were not the eligible passengers to import gold;

5.3 The passengers did not declare to the Customs officer about the possession of gold totally weighing 1584 gms (totally valued at Rs. 42,27,854/-) as required under Section 77 of the Customs Act, 1962;

5.4 Considering the facts of the case, the Adjudicating Authority vide his O-in-O No. 207/2017-18 dated 27.01.2018, has passed order for confiscation of the said gold jewellery and imposed separate penalties u/s 112(a) and 114AA of the Customs Act, 1962 on each. But the Appellate Authority has set aside confiscation of the impugned gold and also set aside the penalties imposed under sections 112(a) and 114AA of the Customs Act, 1962. Moreover, the Commissioner of Customs(Appeal) has not specified whether the impugned gold is allowed to be cleared on payment of duty for home consumption or allowed for re-export

5.5 The Commissioner (Appeals-1) in his Order-in Appeal has acknowledged the fact, that passengers have not declared the gold brought by them and that passengers were not eligible to bring gold into India. But the Commissioner (Appeals) has inexplicably proceeded to set aside penalties levied on the passengers and also allowed the gold to be released on mere payment of applicable duty without levying any redemption fine.

5.6 As per the Section 77 of the Customs Act, 1962 the owner of any baggage shall, for the purpose of clearing it, make a declaration of its contents to the proper officer. However, the passengers in this case failed to declare the gold under seizure, when questioned in the presence of witnesses. The passengers have thus violated the provisions of Section 77 of the Customs Act, 1962, and rendered the goods prohibited as per Section 2(33) of the Customs Act, 1962. The Hon'ble Apex Court in the case of Om Prakash Bhatia Vs Commissioner of Customs [as reported in 2003 (155) 423 (SC) = 2003 (6) SCC 1611 has also held that any goods which can be imported subject to certain conditions and if the condition is not fulfilled, it has to be treated as prohibited.

5.7 Once violation of the provisions of the Customs Act is confirmed, the offending goods which become liable for confiscation under section 111 of the Customs Act, 1962 and can't be released without levying appropriate redemption fine vide Section 125 of the Customs Act, 1962. Moreover the person violating the provisions, can't be acquitted without levy of appropriate personal penalties under section 112 & 114AA of the Customs Act, 1962.

5.8 While acknowledging the violations of the provisions of the Customs Act by the passengers which rendered the goods liable for confiscation and rendered the passengers liable for penal action, Commissioner (Appeals) proceeded to drop the charges against the passengers without offering any justification.

5.9 The Appellate authority has failed to consider the fact that the passengers had also brought liquor bottles in trade quantity and tried to clear the same without declaring to Customs, a fact which was acknowledged by them and which was not even disputed by them in their appeal filed before Appellate authority. Setting aside the penalties levied on the passengers in spite of their acknowledgment of the offense committed by them is not correct in Law.

5.10 In view of the above, the Appellate Authority's order, does not appear to be legally correct. It is prayed that the Order of the Appellate Authority may be set aside or such an order be passed as deemed fit.

6. In view of the Appellate order the Respondents filed a Writ Petition Nos. 51,55,56,58 &60 of 2020 before Hon'ble High Court of Madras for issuance of a writ of mandamus directing the respondent (Applicant department) to refund the redemption fine and penalty as per the orders of the Appellate authority's order 69-73/2018 dated 27.04.2018. The Applicant department informed the Hon'ble High Court of Madras that a Revision Application has been filed before the revision authority in this regard and thus till such time the Revision Applications are disposed, the Applicant department would not be inclined to consider the request for refund and requested for a speedy disposal of the Revision Application. The Hon'ble High Court of Madras vide their order dated

22.04.2021 has directed that the Revision Applications within twelve weeks of the date of the order after hearing petitioners in accordance with the law.

7. Accordingly a show cause notice was issued to the respondent by the Revisionary Authority under Section 129 DD of the Customs Act, 1962 to enable the respondent to file their counter reply. The respondent vide their reply submitted that,

The Commissioner (Appeals) vide the impugned order came to the conclusion that (a) the respondents /noticees are foreign nationals and were wearing the gold jewellery on their person and did not declare the gold jewellery brought by them.

(b) There was no ingenious concealment of the gold jewellery in question and the ownership of the same was also not disputed and therefore the adjudicating authority should not have confiscated the gold and allowed re-export on payment of fine and penalty.

(c) The said authority further found that the gold jewellery belonged to the respondents / notices.

(d) The said authority found that gold jewellery brought by the passenger as bonafide baggage may be restricted for import or otherwise as per Heading No. 98.03 of ITC(HS). The said Heading of the FTP deals with dutiable articles imported by the passenger in his baggage. As per this entry, the imports are restricted and allowed if permitted under the customs baggage rules by saving clause 3(1)(h) of Foreign Trade (Exemption from application of Rules in certain cases) Order 1993. As per this saving clause, the passengers baggage is allowed to the extent admissible under the Customs Baggage Rules. In addition as per the proviso to saving clause, import of gold in any form including ornaments is allowed as part of baggage by passengers of Indian origin or Indian Passport holder subject to the condition that the passenger bringing the gold is coming to India after a period of not less than six months of his stay abroad, quantity of gold imported shall not exceed 5 kilograms and import duty of such gold shall be paid in convertible foreign currency.

7.2 The appellate authority comes to a categorical conclusion that the respondents / noticees are not covered in the proviso to the saving clause however in view of the fact that the gold jewellery belong to them and is in quantities which can be for personal use, the same is not restricted for import in their bonafide baggage. (emphasis supplied). The appellate

authority also noted of the judgment of the Hon'ble Kerala High Court in the case of Vigneswaran Sethuraman Vs. Union of India reported in 2014 (308) ELT 394 (Ker.) which dealt with a similar situation and in which it has been categorically held that gold jewellery brought by a Srilankan national which was worn cannot be seized or confiscated on the ground that the same requires to be declared at the time of arrival.

7.3 The Appellate authority further found that the respondents / noticees belong to the same family and were wearing the jewellery and had come for a pilgrimage to India and there was no dispute regarding the ownership and therefore applying the ratio of the Kerala High Court, The Appellate authority has rubbished the case of the department of attempting to smuggle in gold jewelry in question. Therefore, the authority rightly has vacated the order of confiscation, redemption fine and penalty.

7.4 It is not a case of import of gold jewellery as baggage or on the touchstone of eligibility of the appellants to import the gold jewellery. In fact, there is no import at all is explicit by the fact that the passengers and the minors were wearing the gold jewellery in question. The concurrent findings that there is no ingenious concealment and the further fact that the passengers were wearing rings and ear studs which were not seized fortifies their contention that the gold jewellery in question were worn by them.

7.5 Inasmuch as there is no import and that too as an eligible passenger, there is no question of any commerce or sale with respect to the gold jewellery in question. Redemption fine is normally, in terms of section 125, has to take into account the market value of the goods less the duty payable and other factors like margin of profit etc. in its fixation. As there is no commerce or margin of profit as also no duty payable, there cannot be any imposition of redemption fine for re-export.

7.6 It is submitted that the revisionist is in error in placing reliance on the case of Samynathan Murugesan as also the case law of the Hon'ble Supreme Court in the case of Om Prakash Bhatia Vs. Commissioner of Customs reported in 2003 (155) ELT 423 (SC). In the first case, there is a case of concealment of gold by the passenger in a television set and he had raised a plea that being eligible passenger, he was entitled to redemption which allowed by the Tribunal. The Hon'ble High Court set aside the same

on the ground that the gold in question became prohibited such concealment and attempted smuggling and therefore option of redemption could not be extended which was affirmed by the Hon'ble Supreme Court.

7.7 Further, the revisionist has also not assailed the finding of the appellate authority on the application of the ratio of the Hon'ble Kerala High Court in the case of Vigneswaran Sethuraman placed at Annexure A inasmuch as the said order has attained finality and has been accepted by the department themselves at a later date completely seals the issue in favour of the respondent. This case was cited but conveniently ignored by the revisionist. Likewise, the judgment of the Hon'ble Supreme Court in the case of Pushpa Lakhmal Tulani reported in 2017 (353) ELT 129 (SC) is also relevant inasmuch as the said judgment of the Hon'ble Supreme Court in categorical terms laid down the ratio on the same lines as indicated above.

7.8 In light of the above submissions, it is submitted that the revisions deserve to be dismissed and the respondents be entitled to get refund of the fines and penalties deposited by them for which they respectfully pray.

8. In compliance of Hon'ble High Court's Order, personal hearing was held in this case on 06.07.2021. Shri Satish Sundar, Advocate for the Respondent appeared for the hearing and reiterated his submissions dated 29.06.2021. He submitted that the passengers were on pilgrimage to India and were wearing the same (gold jewelry) on their person. He requested that the application of the department be rejected. In his written submissions dated 29.06.2021 the respondents in addition to their above submissions to the SCN stated that;

8.1 The respondents and the undersigned as their counsel also rely upon the following provisions to fortify their contention that personal jewellery worn by a tourist or foreigner coming into India cannot be brought within the ambit of the relevant Baggage Rules and there is no need for any declaration to be made of such in terms of section 77 of the Customs Act, 1962. The further contention is that under CTH ITC (HS) 9803, all dutiable articles imported by a passenger are free subject to the customs and Baggage Rules and saving clause of Rule 3(1)(h) of the Foreign Trade (Exemption from Application of Rules in Certain Cases) Order, 1993.

8.2 In the Baggage Rules, 2016 restriction or prohibition is on duty-free clearance of gold or silver in any form other than ornament and not on the import as such. It is not stipulated in the Baggage Rules, 2016 that a foreign tourist coming to India by air cannot wear gold jewellery on his person that too of normal quantity. In the absence of any express provision in the Baggage Rules, 2016, prohibiting a foreign tourist entering India from wearing gold jewellery, it has to be held that the case of the applicant / revisionist cannot be upheld and the revision rejected at the hands of this respected authority. Further, the saving clause under Rule 3(1)(h) of the Foreign Trade (exemption from Application of Rules in Certain Cases) Order, 1993 cannot also have application as there is no import in the present case and that too by a person of Indian origin or a passenger holding a valid passport issued under Passports Act, 1967 and therefore not covered by any notification much less the one cited by the lower authority namely 12/2012 dated 17.3.2012 as amended. The aforesaid relevant provisions have been take note of the appellate authority in the impugned decision and the said appellate authority is therefore justified in vacating the confiscation and penalty holding that the present case of worn gold jewellery by the respondents cannot amount to any interaction of the Customs Act, 1962.

8.3 In fact, even the Customs Declaration Form which is given to incoming passengers (other than foreigners) to make a declaration of gold jewellery subject to a duty-free allowances of Rs.50,000/- for gentlemen and Rs.1,00,000/- for a lady which means that any foreign tourist or passenger arriving from outside India is not required by the customs to declare personal gold jewellery of daily / normal use worn on them as they qualify for personal effects. The copy of the Customs Declaration Form is appended along with this submissions.

8.4 The respondents say and submit that dehors the statutory provisions and the case laws of the Hon'ble Kerala High Court in the case of Vigneswaran Sethuraman and that of the Hon'ble Supreme Court in the case of Pushpa Lokumal Thulani, line of decisions of the Tribunal namely the CEGAT / CESTAT from 1987 under the extant Baggage Rules and on interpretation in section 77 seems to be that personal jewellery worn and brought by a tourist into India without declaration cannot

tantamount to misdeclaration or interaction of the Baggage Rules and Section 77 of the Customs Act, 1962. The following orders of Tribunal are being filed along with the present submissions which may be taken into account by this respected authority in deciding the revisions.

8.5 In addition to the above the Respondents submitted other case laws in support of their case, and reiterated that they seek rejection / dismissal of the revision applications filed by the Applicant department.

9. The Government has gone through the facts of the case, and notes that it is an uncontested fact that the goods were not declared to the customs under Section 77 of the Act and the passenger passed through the green channel. As detailed above each of the member of the Respondents family was wearing approximately around 300 gms of gold jewelry each, as detailed in the table above, totally 1.584 kgs of gold was carried by the Respondents. In addition to the above the entire family was carrying a total of 112 bottles of one litre liquor bottles in their baggage. The respondents did not inform that they were carrying dutiable goods and if they were not intercepted they would have walked away with the impugned goods without declaring the same to Customs. The confiscation of the gold and liquor is therefore justified. Once violation of the provisions of the Customs Act is confirmed, the offending goods which become liable for confiscation under section 111 of the Customs Act, 1962 can't be released without levying appropriate redemption fine vide Section 125 of the Customs Act, 1962. The order of the Appellate authority in this regard is therefore in error.

10. The main contentions of the Respondents is they had come to India as tourists on a pilgrimage and that they were wearing the gold jewelry and there was no concealment. The gold jewelry worn by the individual respondents could be taken as personal jewelry as the same was in reasonable quantity. Further, the respondents contended that personal jewellery worn by a tourist or foreigner coming into India cannot be brought within the ambit of the relevant Baggage Rules and there is no need for any declaration to be made of such in terms of section 77 of the Customs Act, 1962. Their further contention is that under CTH ITC (HS) 9803, all dutiable articles imported by a passenger are free subject to the customs and Baggage Rules and saving clause of Rule 3(1)(h) of the Foreign Trade (Exemption from Application of Rules in Certain Cases) Order, 1993.

11. In addressing these issues Government notes that the Respondents were carrying 1.5 kgs of gold jewelry and were also carrying 112 liquor bottles, and hence their contention that they were on pilgrimage raises serious doubt. Further in his statements to the investigating officers Shri Chandrasegaram Vijayasundaram has categorically stated that he had brought the liquor bottles to be sold at a profit and therefore it was more of a business venture. The visit to Tirupati temple may have been on the itinerary of the tourists but it was not the sole reason for the visit to India. Further, though the gold jewellery carried by individual members of the family was in the range of approx. 300gms the total quantity carried by the family was 1584 grams of gold jewelry valued at Rs. 42,27,854/-. Such huge quantities merited declaration especially when they were specifically asked by the Customs authorities whether they were carrying any dutiable items.

12. The respondents as well as the Appellate authority have taken recourse to the saving clause of Rule 3(1)(h) of the Foreign Trade (Exemption from Application of Rules in Certain Cases) Order, 1993 and have contended that personal jewellery worn by a tourist or foreigner coming into India cannot be brought within the ambit of the relevant Baggage Rules and there is no need for any declaration to be made of such in terms of section 77 of the Customs Act, 1962. In this regard Rule 3(1)(h) of the Foreign Trade (Exemption from Application of Rules in Certain Cases) Order, 1993 is reproduced as below,

“ 3. Exemption from the application of rules:-

(1) Nothing contained in the rules shall apply to the import of any goods,

(h) By the person as passenger baggage to the extent admissible under the Baggage Rules for time being in force:

Provided that in case of imports by a tourist, articles of high value whose re-export is obligatory under Baggage Rules, 2016, shall be re-exported on his leaving India, failing which such goods shall be deemed to be goods the imports of which has been prohibited under the Customs Act, 1962, (52 of 1962) .

It is clear from the above that re-export of high value goods brought by a tourist is obligatory under Baggage Rules, 2016. However, this can be facilitated only when a proper declaration has been made by the tourist concerned. Re-export of dutiable goods is governed by Section 80 of the Customs Act, 1962, it is reproduced below.

“ 80. Temporary detention of baggage.—Where the baggage of a passenger contains any article which is dutiable or the import of which is prohibited and in respect of which a true declaration has been made under section 77, the proper officer may, at the request of the passenger, detain such article for the purpose of being returned to him on his leaving India [and if for any reason, the passenger is not able to collect the article at the time of his leaving India, the article may be returned to him through any other passenger authorised by him and leaving India or as cargo consigned in his name].”

Had the tourists informed the Customs authorities and made a true declaration that they were carrying dutiable goods, their gold jewelry could have been detained and allowed re-export on their departure from India. As the gold carried by the Respondents was large it should have been mandatorily declared as per section 77 of the Customs Act, 1962. Government opines every tourist has to comply with the laws prevailing in the country visited. If a tourist is caught circumventing the law, he must face the consequences.

13. The Respondents as well as the Appellate authority have taken recourse to the judgement of the Hon'ble Kerala High Court in the case of Vigneswaran Sethuraman in support of their case, in the said case the foreign tourist was wearing a gold chain of a mere 84 grams. The respondents family in the present case were collectively carrying 1584 grams of gold jewelry valued at Rs. 42,27,854/-. Facts in the instant case of 1.584 kgs of gold jewelry and 112 bottles of liquor clearly reveal commercial nature of the goods as distinguished to a gold chain of 84 gms worn by a tourist in the case decided by the Hon'ble High Court. The facts of the case of the Hon'ble Supreme Court in the case of Pushpa Lokumal Tolani also are dissimilar and the Hon'ble Apex court has further, made it clear that the conclusion arrived at by the Apex Court is confined only to the disposal of the impugned Appeal. In view of the above case laws stand distinguished from the facts of the impugned case.

13. In conclusion the Government opines that the tourist may have had pilgrimage on their itinerary on their visit to India, however the huge quantities of liquor brought by them along with the gold jewelry indicates that pilgrimage was not the only purpose of their visit. The goods brought by them should have been properly declared to the Customs officers when enquired. The non-

declaration during enquiries indicates that the intentions of the Respondents were not bonafide, the confiscation of the gold is therefore justified. Once violation of the provisions of the Customs Act is confirmed, the offending goods can't be released without levying appropriate redemption fine and penalty vide Section 125 of the Customs Act, 1962. The impugned Order-in-Appeal setting aside the confiscation and allowing redemption of the gold jewelry without payment of redemption fine and penalty is therefore unlawful and has the effect of making smuggling an attractive proposition and is therefore liable to be set aside. The Order of the original adjudicating authority has rightly allowed the impugned gold jewelry for re-export on payment of suitable redemption fine and penalty. The Order of the original adjudicating authority is therefore liable to be upheld.

14. The impugned order in Appeal is therefore set aside. The order of the original adjudicating authority is upheld. However Government observes that once penalty has been imposed under section 112(a) there is no necessity of imposing penalty under section 114AA. The penalties imposed under section 114AA of the Customs Act, 1962 on each of the Respondents, in the order in original is set aside.

15. Revision application is disposed of as above.

Shrawan
16/07/21
(SHRAWAN KUMAR)

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

165-169

ORDER No. /2021-CUS (WZ) /ASRA/

DATED 14.07.2021

To,

1. Commissioner of Customs, New Customs House, Meenambakkam, Chennai -27.
2. Shri Chandrasegaram Vijayasundaram
3. Shri Vijayasundaram Mahalakhshmi
4. Shri Somasundaram Chandrasegaram
5. Smt. Chandrasegaram Rajalakhshmi
6. Smt. Ravindhram Shanthadevi
No. 15-1/8, Umbichy Place, Wolfedhal Street, Colombo-30, Sri Lanka.

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7. Shri Satish Sundar, Advocate, M/s Aum Associates, Suite No. 25, 1st Floor, RR Complex, No. 1 Rattan Bazaar, Chennai-600 003.
8. Sr. P.S. to AS (RA), Mumbai.
9. Guard File.
10. Spare Copy.