

F.No. 373/212/B/2018-RA
F.No. 373/213/B/2018-RA
F.No. 380/31-32/B/SZ/2018-RA

REGISTERED
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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. 373/212/B/2018-RA : Date of Issue : 25/08/2022
F.No. 373/213/B/2018-RA /3099
F.No. 380/31-32/B/SZ/2018-RA

215-218
ORDER NO. /2022-CUS (WZ/SZ)/ASRA/MUMBAI DATED 19.07.2022
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.

(i). F.No. 373/212/B/2018-RA

Applicant - 1 : Shri. Moorthy Rasu

(ii). F.No. 373/213/B/2018-RA

Applicant - 2 : Shri. Sanjeewarkanth Sathiyaseelan

Respondent-Dept : Pr. Commissioner of Customs, Commissionerate - 1,
Meenabakkam, Chennai - 600 027.

(iii). F.No. 380/31/B/2018-RA

(iv). F.No. 380/32/B/2018-RA

Applicant (Dept) : Pr. Commissioner of Customs, Commissionerate - 1,
Meenambakkam, Chennai - 600 027.

Respondents-Applicant : Shri. Moorthy Rasu and
Shri. Sanjeewarkanth Sathiyaseelan

Subject : Order-in-Appeals Airport No. C.Cus.I.No. 05 & 06/2018
dated 30.01.2018 [F.No. C4- I/178-179/O/2017-AIR]
passed by the Commissioner of Customs (Appeals - II),
Chennai - 600 001.

ORDER

These revision applications have been filed by (i). Shri. Moorthy Rasu and (ii). Sanjeewarkanth Sathiyaseelan (hereinafter referred to as the Applicants or alternately as the Applicant No. 1 or Applicant No. 2 resp or Respondent-Applicant.) and (iii). Pr. Commissioner of Customs, Commissionerate - I, Meenambakkam, Chennai (hereinafter referred to as the Applicant-department or Respondent-dept.) against the common Orders in Appeal No. C.Cus.I.No. 05 & 06/2018 dated 30.01.2018 [F.No. C4- I/178-179/O/2017-AIR] passed by the Commissioner of Customs (Appeals - II), Chennai - 600 001.

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2(a). Briefly facts of the case are that the applicant no. 1 who is a Sri Lankan National who had arrived at the Chennai Airport on 12.01.2017 from Colombo onboard Sri Lankan Airlines Flight No. UL 125/12.01.2017 was intercepted by Customs Officers as he was walking out of the exit gate of the arrival hall after clearing Customs green channel. To query put forth to him for possession of any dutiable items, he had replied in the negative. During the search of the applicant no. 1, he was found to be wearing 10 copper coloured metal chains with wooden beads around his neck. Out of these 5 copper coloured metal chains were found to be unusually heavy. A part of the chain was scraped / scratched and it revealed that the same was made of gold. During the examination process, the 5 gold chains got cut into 6 nos of broken end chains and 34 nos of small pieces of gold. All the gold were of 24 carat purity, totally weighing 589.500 grams and valued at Rs. 17,17,803/-(M.V). The applicant no. 1 did not possess any valid permit, licence for the legal import of the said gold not did he have any foreign currency in his possession. The gold items were seized.

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2(b). Briefly facts of the case are that the applicant no. 2 who is a Sri Lankan National who had arrived at the Chennai Airport on 11.01.2017 from Colombo onboard Air India Flight No. AI274/11.01.2017 was intercepted by Customs Officers as he was walking out of the exit gate of the arrival hall after clearing Customs green channel. To query put forth to him for possession of any dutiable items, he had replied in the negative. During the search of the applicant no. 2, he was found to be wearing 4 copper coloured metal chains with wooden beads around his neck. These 4 copper coloured metal chains were found to be unusually heavy and one chain had a pendant. A part of the chain was scraped and it revealed that the same was made of gold. During the examination, the 3 gold chains remained intact, however one gold chain got cut into 16 nos of small pieces of gold. All the gold were of 24 carat purity, totally weighing 552.500 grams and valued at Rs. 16,09,985/-(M.V). The applicant no. 2 did not possess any valid permit, licence for the legal import of the said gold not did he have any foreign currency in his possession. The gold items were seized.

3(a). The Original Adjudicating Authority viz, Joint Commissioner of Customs (Adjudication-AIR), Chennai in respect of applicant no. 1, vide Order-In-Original No. 071/2017-18 – Airport dated 15.07.2017 [F.No. O.S No. 22/2017-AIR] ordered the absolute confiscation of the 6 crude gold chains and 34 small crude gold pieces, totally weighing 589.500 grams and valued at Rs. 17,17,803/- under Section 111(d) and (l) of the Customs Act, 1962 read with Section 3(3) of the Foreign Trade (Development and Regulation) Act, 1992. Penalties of (i). Rs. 1,75,000/- under Section 112(a) of the Customs Act, 1962 and (ii). Rs. 1,00,000/- under Section 114AA of the Customs Act, 1962 were also imposed on the applicant no. 1.

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3(b). The Original Adjudicating Authority viz, Joint Commissioner of Customs (Adjudication-AIR), Chennai in respect of applicant no. 2, vide Order-In-Original No. 072/2017-18 – Airport dated 15.07.2017 [F.No. O.S No. 20/2017-AIR] ordered the absolute confiscation of the 4 crude gold chains, one crude gold pendent and 16 small pieces of crude gold, totally weighing 552.500 grams and valued at Rs. 16,09,965/- under Section 111(d) and (l) of the Customs Act, 1962 read with Section 3(3) of the Foreign Trade (Development and Regulation) Act, 1992. Penalties of (i). Rs. 1,60,000/- under Section 112(a) of the Customs Act, 1962 and (ii). Rs. 1,00,000/- under Section 114AA of the Customs Act, 1962 were also imposed on the applicant no. 2.

4. Aggrieved by the said orders, the applicant no. 1 and 2 both filed appeals before the Appellate Authority (AA) i.e. Commissioner of Customs (Appeals - II), Chennai – 600 001, who vide a common Order-in-Appeal No. C.Cus.I.No. 66/2018 dated 27.04.2018 [F.No. C4-I/48/0/2018-AIR] except for setting aside the penalties imposed on both the applicants under Section 114AA of the Customs Act, 1962, did not find it necessary to interfere in the remaining part of the order.

5. Aggrieved with the above common order, the Applicants have filed these revision application on the following grounds;

5.01. that the order of the lower authority is contrary to law, weight of evidence and violates the principles of natural justice.

5.02. that the applicants were wearing the gold and had proceeded towards the red channel and were not allowed to declare the goods under Section 77 of the Customs Act, 1962.

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5.03. that there are lots of case laws which have held that Section 125 of the Customs Act, 1962 does not prohibit re-shipment or export under Section 74 of the Customs Act, 1962.

5.04. that there is a practice to rodhium coat the gold to give it a prominent look and applicants had not concealed the gold. The gold was visible to the naked eye.

5.05. The applicants have relied upon the following case laws;

(i). Uma Balasaraswathi v/s. Collector of Customs, 1988 (37) ELT 106 (Tribunal) ; That non-declaration should be conscious and intentional. Ornaments worn on the person which are not at all concealed but are visible to the naked eye.

(ii). K.R Ahmed Shah V/s. Addl. Collector of Customs, Madras 1981 ELT 153 (Mad). Importation can only be said to have taken place when the goods have crossed the Customs barrier. In these cases the applicants have stated that they had been intercepted before the exit gate.

(iii). Vigneshwaran Case of High Court of Kerala, Customs law or baggage rules does not stipulate that a foreign tourist entering India cannot wear gold ornaments on his person.

(iv). GOI RA no. 373/22/B/2000-RA; that gold falls under restricted list and not prohibited item.

(v). GOI RA no. 373/209/B/09-RA; redemption fine was reduced.

(vi). GOI RA no. 373/48/B/2005-RA dated 16.04.2008 where re-export had been permitted.

(vii). Madras High Court in WP no. 16819 to 16824 of 1990 dated 31.10.1990 where re-export of gold had been allowed.

(viii). Escorts Herion Ltd v/s. Commr. Of Customs, 1999 (107) ELT 599 on issue of redemption for re-export.

(ix). A.K Jewellers v/s. Commissioner of Custom.

(x). GOI Order in RA no. 373/75/B/2002-RA dated 21.10.2002.

Applicant has prayed for setting aside the order of absolute confiscation, penalty and permit the gold to be re-exported on payment of minimum redemption fine and to render justice.

6. Aggrieved with the above order passed by the AA, the Applicant-Department has filed these two revision applications i.e. F.No. 380/31-32/B/SZ/2018-RA on the following limited grounds;

6.01. that the order passed by the appellate authority with reference to setting aside the penalty levied u/s 114AA was neither legal nor proper.

Applicant has prayed that the Order-In-Appeal passed by the appellate authority was not legal and proper to the extent of penalty under Section 114AA was concerned and hence, the same is required to be set aside.

7. Personal hearings in the case was scheduled through the online video conferencing mode was scheduled for 03.12.2021 / 09.12.2021, 05.01.2022 / 19.01.2022, 23.02.2022 / 02.03.202, 23.03.2022 / 30.03.2022. Shr. A Ganesh, Advocate appeared for physical hearing on 24.03.2022 for both the revision applications. He reiterated the earlier submissions and submitted that passengers are Sri. Lankans, they were wearing the jewellery which was visible to the naked eye, quantity is small. Therefore, he requested to allow release of the goods on nominal RF and penalty and goods be allowed to be re-exported. No one appeared for the applicant-department.

8. Government notes that in both the CA-8 Forms filed before the revisionary authority, the applicants have indicated that the application for condonation of delay has been attached. However, the same is not available in the records. The Government notes that the applicants have indicated that they had received the appellate order on 06.02.2018 and have filed the Revision Application on 06.08.2018. Government notes that when the calendar month is considered, the last date for filing the Revision Application after considering the extension period of 3 months over the statutory 3 months i.e. 3 months + 3 months, then the last date for filing the revision application is 05.08.2018. However, Government notes that 05.08.2018 was a Sunday and the next working day falls on 06.08.2018. Therefore, the Government notes that the revision application has been filed within the specified time. Therefore, Government condones the delay.

9. The Government has gone through the facts of the case, and notes that the applicants had passed through the green channel 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 applicants had not disclosed that they were carrying dutiable goods and had they not been intercepted would have walked away with the impugned goods without declaring the same to Customs. Also, the gold chains were silver / copper coated to escape detection and consequently, evade Customs duty. The silver / copper coating clearly reveals intention of the applicants to ingeniously conceal the gold and it is evident that the applicant had not intended to declare the same to Customs. The Government finds that the confiscation of the gold is therefore justified.

10. 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”.

11. 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 Applicants thus liable for penalty.

12. 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.

13. Government notes that the quantity of gold is quite substantial and was in crude form. The gold chains had been ingeniously coated to avoid detection. 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. Government notes that the applicant had worn the chains however, the same had been coated, it was a deliberate act to hoodwink the Customs and avoid payment of duty. The crude form of the gold and its purity of 24 carats coupled with the coating, indicates that the same was for commercial purpose and not for personal use. The Applicants have pleaded for setting aside the absolute confiscation order passed by the Original Adjudicating Authority which has been upheld by the Appellate Authority. On considering quantum, form, manner 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 those attempting to smuggle the gold in similar manner. For the aforesaid reasons, the two revision applications filed by the applicants fails.

14. With regard to the penalty of Rs. 1,75,000/- and Rs. 1,60,000/- imposed under Section 112(a) of the Customs Act, 1962 on applicant no. 1 & 2 respectively, the Government finds that the same is commensurate with the omissions and commissions committed and is not inclined to interfere in the same.

15. Government notes that once penalty has been imposed under section 112(a) of the Customs Act, 1962 there is no necessity of imposing penalty under Section 114AA of the Customs Act, 1962. Therefore, the penalty of Rs.

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1,00,000/- each imposed under Section 114AA of the Customs Act, 1962 on the applicants have been correctly set aside by the appellate authority. For this reason, the Revision Application filed by Applicant-Department fails.

16. The two Revision Applications filed by the applicant-department on the limited grounds to set aside the appellate order wherein the penalty imposed under Section 114AA of the Customs Act, 1962 was set aside, fails. Thus, the two Revision Applications viz, F.No. 380/30 & 31/B/SZ/2018-RA are dismissed.

17. For the aforesaid reasons, the two revision applications i.e. F.No. 373/212/B/2018-RA and F.No. 373/213/B/2018-RA filed by the applicants, also fail and are dismissed.

Shrawan
19/7/22
(SHRAWAN KUMAR)

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

ORDER No. 2\5-2\8/2022-CUS (WZ/SZ) /ASRA/

DATED 07.07.2022

To,

1. Shri. Moorthy Rasu, S/o. Shri. Raju, No. 32, Lidd Estate, A. Ragala, Noverliya Dt., Sri Lanka.
2. Shri. Sanjeevakanth Sathiyaseelan, S/o. Shri. Sathiyaseelan, No. 62, Main Street, Ragala Bazher, Halgrnoya, Sri Lanka.
3. Pr. Commissioner of Customs, Commissionerate - 1, Chennai Airport and Aircargo Complex, New Custom House, Meenabakkam, Chennai - 600 027.

Copy To,

1. Shr. A Ganesh, Advocate, F. Block 179, IV Street, Annanagar, Chennai - 600 102.
2. Sr. P.S. to AS (RA), Mumbai.
3. File Copy.
4. Notice Board.