

SPEED POST



F. No. 373/55/B/2016-RA
GOVERNMENT OF INDIA
MINISTRY OF FINANCE
(DEPARTMENT OF REVENUE)

14, HUDCO VISHALA BLDG., B WING
6th FLOOR, BHIKAJI CAMA PLACE,
NEW DELHI-110 066

Date of Issue..12/01/2023.

Order No. 04 /23-Cus dated 12-01-2023 of the Government of India passed by Sh. Sandeep Prakash, Additional Secretary to the Government of India, under Section 129DD of the Custom Act, 1962.

Subject : Revision Application filed, under Section 129 DD of the Customs Act 1962, against the Order-in-Appeal C.Cus-I No. 581/2015 dated 29.09.2015 passed by the Commissioner of Customs (Appeals-I), Chennai.

Applicant : Sh. Shaik Chand Basha, Kadapha

Respondent : Pr. Commissioner of Customs, Airport, Chennai

ORDER

A Revision Application, bearing No. 373/55/B/SZ/2016-RA dated 13.04.2016, has been filed by Sh. Shaik Chand Basha, Kadapha (hereinafter referred to as the Applicant), against the Order-in-Appeal No. C.Cus-I No. 581/2015 dated 29.09.2015, passed by the Commissioner of Customs (Appeals-I), Chennai. The Commissioner (Appeals) has upheld the order of the Joint Commissioner of Customs, Anna International Airport, Chennai, bearing No. 90 dated 28.05.2015, vide which 06 gold pieces brought by the Applicant herein, weighing 666 grams of 24 Carat purity and valued at Rs. 20,09,322/-, had been absolutely confiscated under Sections 111(d) and 111(l) of the Customs Act, 1962. Besides, penalty of Rs. 2,00,000/- was also imposed on the Applicant, under Section 112(a) of the Act, *ibid*.

2. Brief facts of the case are that the Applicant arrived from Riyadh at Anna International Airport, Chennai, on 11.02.2014, and was intercepted by the Customs officers while passing through the Green Channel. Upon being questioned whether he was carrying gold/contraband either in his baggage or on his person, he replied in negative. He had filled up the value of dutiable goods brought by him as Rs. 10,000/- in his Customs Declaration Card. Upon examination of one of his checked in baggage 06 gold bars were found concealed in Kit Kat brand chocolate bar wrappers. The Government of India approved gold appraiser certified them to be gold bars of 24 carat purity, totally weighing 666 gms and appraised the total value to be Rs. 20,09,322/-. Thereafter the Applicant was asked whether he was in possession of any valid permit/licence for the legal import of the aforesaid 06 nos of gold bars recovered from his baggage to which he replied in negative. The Applicant, in his statement recorded immediately after seizure, under Section 108 of the Customs Act, 1962, *inter-alia*, stated that he was working as a car driver in Riyadh; that as he had no money for ticket, he asked his friend one Sh. Shukoor for a way who asked him to carry gold; that he accepted and brought the gold to India; and that he attempted to pass through the Green Channel without declaring the gold with an intent to evade duty.

3. The revision application has been filed, mainly, on the grounds that he was an eligible passenger; that the adjudicating authority had erred in not affording an opportunity of hearing by sending notice to the proper address; that he was forced to sign the statement on threat of arrest, force and coercion; that gold is not a prohibited item; and that redemption is mandatory in case of goods which is not prohibited; that it is not a case of ingenious concealment.

4. Personal hearing was fixed on 18.08.2021, 27.10.2021, 08.12.2021, 23.11.2022, 22.12.2022, 09.01.2023. In the hearing held, in virtual mode, on 09.01.2023, Sh. T. Chezhiyan, Advocate appeared for the Applicant and requested that written submissions emailed on 09.01.2023 may be taken on record. He reiterated the contents of the RA and Written Submissions dated 09.01.2023. In his submission, wrapping the gold in chocolate wrapper doesn't amount to concealment. No one appeared for the Respondent department nor any request for adjournment has been received. Hence, it is presumed that the Respondent department has nothing to add in the matter.

5. The instant revision application has been filed with a delay of 89 days. The delay is attributed to the Applicant being a resident in Riyadh at the relevant time and, therefore, it took him time to meet his counsel and give him the papers for filing his application. The delay is condoned.

6.1 The Government has carefully examined the matter. It is observed that the Applicant was intercepted while he was trying to pass through the Green Channel. The Applicant had declared the value of dutiable goods as Rs. 10,000/- in his Customs Declaration Card. He himself had admitted to the recovery of gold bars concealed in chocolate wrappers from him. However, it is contended that wrapping of gold bars in chocolate wrappers is not concealment. This contention, to say the least, is disingenuous. To any normal and prudent person, chocolates wrapped in chocolate wrappers would not be a case of concealment but gold bars wrapped in chocolate wrappers would be not only a case of concealment but also a case of ingenious concealment.

6.2 It is further contended that the Applicant had retracted his statement and, hence, it should not be relied upon against him without corroborative evidence. The Government, however, observes that the Hon'ble Supreme Court has, in the case of Surjeet Singh Chhabra vs. UOI {1997 (89) ELT 646 (SC)}, held that a confession statement made before Customs officers, though retracted within six days, is an admission and binding. The Government further observes that several of the facts admitted by the Applicant in his statement are corroborated from the panchanama/mahazar proceedings. The fact that the Applicant had concealed gold in chocolate wrappers; that he had crossed Green Channel without declaration; and that he failed to declare the gold even upon being orally asked to do so are recorded in the presence of independent witnesses. Further, non-declaration of gold in the declaration made in writing as well as orally and the manner of concealment make the intention to smuggle manifest, which intention has been admitted in the statement. The Government also observes that the Applicant herein was a person of poor means, being a car driver and, therefore, his contention of being the bonafide owner of gold worth more than Rs. 20 lakhs is not believable. No documents evidencing ownership have also been produced. Therefore, even in this respect the admission made in the statement that the Applicant was merely a carrier is believable. Therefore, the Government finds that the statement made by the Applicant was voluntary disclosure/admission and the subsequent retraction is nothing but an afterthought.

7.1 The Applicant has contended that the gold is not a 'prohibited item'. On the other hand, the authorities below have relied upon the orders of Hon'ble Supreme Court in the cases of Sheikh Mohd. Omer {1983 (13) ELT 1439 (SC)} and Om Prakash Bhatia {2003 (155) ELT 423 (SC)} and that of the Hon'ble Madras High Court in the case of Swaminathan Murugesan {2009 (247) ELT 21(Mad.)} to hold that the subject goods are 'prohibited goods'.

7.2 The Government observes that the gold is not allowed to be imported freely in baggage and it is permitted to be imported only subject to fulfilment of certain conditions. In the present case, it is contended that the Applicant was an eligible passenger as he had been staying abroad for 07 years. However, no evidence has been produced to substantiate this claim. Further, in terms of notification no. 12/2012-Cus dated

17.03.2012, the eligible passenger is allowed to import gold upto 01 Kg, at concessional rate of duty, if he had made a declaration in this regard and subject to payment of applicable duty in foreign currency. In the present case, neither a declaration was made nor the Applicant was carrying any foreign currency to pay duty. The Applicant has also cited certain provisions relating to gold under ITC HS 71 and the Foreign Trade (Exemption from Application of Rules in Certain Cases) Order, 1993 to contend that gold is not a prohibited item. However, this contention of the Applicant is misconceived as the import in baggage is covered under ITC HS 9803 and not under Ch. 71. Therefore, it is evident that the Applicant did not comply with the conditions subject to which he could have imported gold in his baggage. As correctly pointed out by the authorities below, the Hon'ble Supreme Court has held that if the conditions prescribed for import or export of any goods are not complied with, such goods would be considered to be prohibited goods. It is further observed that in the case of UOI & Ors. vs. M/s Raj Grow Impex LLP & Ors (2021-TIOL-187-SC-CUS-LB), the Hon'ble Supreme Court has followed the judgments in Sheikh Mohd. Omer (supra) and Om Prakash Bhatia (supra) to hold that *"any restriction on import or export is to an extent a prohibition; and the expression "any prohibition" in Section 111(d) of the Customs Act includes restriction."*

7.3 In the case of Malabar Diamond Gallery P. Ltd. vs ADG, DRI, Chennai [2016(341) ELT 65 (Mad.)], a Division Bench of the Hon'ble Madras High Court (i.e. the jurisdictional High Court) has summarized the position on the issue, specifically in respect of gold, as under:

"Dictum of the Hon'ble Supreme Court and High Courts makes it clear that gold, may not be one of the enumerated goods, as prohibited goods, still if the condition for such import are not complied with, then import of gold would squarely fall under the definition "prohibited goods", in Section 2 (33) of the Customs Act, 1962----."

The judgment in Malabar Diamond Gallery (supra) has been followed by another Division Bench of the Hon'ble Madras High Court in the case of P. Sinnasamy {2016 (344) ELT 1154 (Mad.)}.

7.4 The Applicant has cited a judgment dated 06.07.2022 of the Hon'ble Allahabad High Court in the case of Rajesh Jhamatmal Bhat and another (Customs Appeal No. 7 of 2019) to contend otherwise. The relevant extracts of the aforesaid judgment of the Hon'ble Allahabad High Court are as under:

"20. Moreover, we find that in the order dated 27.08.2018, the Commissioner (Appeals) has held that the import of gold was not prohibited under the Foreign Trade Policy or any other law for the time being in force and, therefore, there is no sufficient ground for absolute confiscation of the gold. This finding has not been reversed by the Tribunal as the Tribunal has affirmed the order passed by Commissioner (Appeals). Nothing has been placed before this Court to establish that this finding of the Commissioner (Appeals) is wrong or erroneous and that gold falls within the category of 'prohibited goods'. Therefore, we proceed to decide the appeal on the factual premise that Gold does not fall within the category of 'prohibited goods'."

It is thus apparent that in the case before the Hon'ble Allahabad High Court, there was no challenge to the findings of the authorities below that the gold was not a 'prohibited item' and, therefore, the Hon'ble High Court decided the appeal before it on the premise that gold does not fall within the category of prohibited goods. In other words, there is no finding of the Hon'ble High Court itself in the matter. As such, the said judgment of Hon'ble Allahabad High Court is of no assistance to the case of the Applicant herein. In any case, the judgments in the cases of Swaminathan Murugesan (surpra), P. Sinnasamy (supra) and Malabar Diamond Gallery (supra) are the judgments of the jurisdictional High Court i.e., the Hon'ble Madras High Court.

7.5 In view of the above, the Government holds that the seized goods are 'prohibited goods'.

8.1 The authorities below have denied the release of seized goods on redemption fine under Section 125 of the Customs Act, 1962. In terms of Section 125, the option to release 'prohibited goods', on redemption fine, is discretionary, as held by the Hon'ble Supreme Court in the case of Garg Woollen Mills (P) Ltd. vs. Additional Collector of

Customs, New Delhi [1998 (104) E.L.T. 306 (S.C.)]. The Applicant has, however, relied upon the judgment dated 22.02.2022 of the Hon'ble Rajasthan High Court in the case of Mehboob (CWP No. 5640/2019) to seek redemption of the goods.

8.2 The Government observes that, in the case of Mehboob (supra), the Hon'ble Rajasthan High Court has followed its earlier judgment dated 17.02.2022 in the case of Manoj Kumar Sharma vs. UOI and Ors. (CWP No. 12001/2020). The Government finds that in Manoj Kumar Sharma's case, the Hon'ble High Court has agreed with the judgment of Hon'ble Gujarat High Court, in the case of Bhargavraj Rameshkumar Mehta Vs. UOI [2018 (361) ELT 260 (Guj)], wherein it is held that for the purpose of Section 111 "---- goods, import of which is conditional, would fall within the definition of prohibited goods if such conditions are not complied with." The Hon'ble Rajasthan High Court has, however, subsequently in its judgment distinguished between the interpretation of 'prohibited goods' in respect of Section 125 and that in respect of Section 112 read with Section 111 in the following terms:

"This view may seem incongruent with the view expressed by Gujarat High Court in case of Bhargavraj Rameshkumar Mehta (supra) which we have also followed in this judgment but flavours of Section 112 and 125 of the Customs Act are entirely different. Section 125 on the other hand pertains to option to pay fine in lieu of confiscation. As noted, sub-section (1) of Section 125 comes in two parts. Whenever confiscation of goods authorised under the Act, as per sub-section (1) of Section 125 the adjudicating officer has a discretion to offer redemption fine in lieu of confiscation in case of goods importation or exportation whereof is prohibited. In all other cases, there is a statutory mandate on the adjudicating officer to offer such redemption fine. If the interpretation of Section 112 and 125(1) is not reconciled as above, this latter portion of sub-section (1) of Section 125 which covers all cases except where the importation or exportation of the goods is prohibited, would become otiose."

Thus, Hon'ble Rajasthan High Court has, in effect, held that while the goods, import/export of which is conditional, have to be considered as 'prohibited goods' for the purposes of imposition of penalty under Section 112/114, however, for the purposes of Section 125,

such goods cannot be considered to be so. The Government respectfully observes that this distinction drawn by the Hon'ble Rajasthan High Court is at variance with the judgment of Hon'ble Supreme Court in the case of Raj Grow Impex (surpa). The Apex Court has, in Raj Grow Impex, held that the goods which were imported beyond permissible quantity and without licence (i.e., in contravention of the conditions) were 'prohibited goods' and thereafter proceeded to hold such goods liable to absolute confiscation, i.e., without affording the option of redemption under Section 125. Thus, the Hon'ble Supreme Court has not made any distinction between the meaning of 'prohibited goods' for the purpose of Section 112 read with Section 111 and that for the purpose of Section 125. The judgment in Raj grow Impex (supra) case has not been considered by the Hon'ble Rajasthan High Court in the case of Manoj Kumar Sharma and Mehboob. It would also be pertinent to notice here that the 'prohibited goods' are defined in clause (33) of Section 2 of the Customs Act, 1962. This provision does not make any distinction in the meaning of 'prohibited goods' for the purposes of Section 112 & 114, on one hand, and for the purposes of Section 125, on the other hand. As such, the Government respectfully follows the dictum of Hon'ble Supreme Court in the matter and holds that the subject goods are 'prohibited goods'. The option to redeem such goods in lieu of confiscation is discretionary.

8.3 In the case of Raj Grow Impex (supra), the Hon'ble Supreme Court has held "*that 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; has to be based on relevant considerations*". Further, in the case of P. Sinnasammy (supra), the Hon'ble Madras High Court has held that "*when discretion is exercised under Section 125 of the Customs Act, 1962, the twin test to be satisfied is 'relevance and reasons'*". Hon'ble Delhi High Court has, in the case of Raju Sharma Vs. UOI {2020 (372) ELT 249 (Del.)}, held that "*Exercise of discretion by judicial, or quasi-judicial authorities, merits interference only where the exercise is perverse, or tainted by patent illegality, or is tainted by oblique motives.*" In holding so, the Hon'ble High Court has relied upon the judgment of Apex Court in the case of Mangalam Organics Ltd. {2017 (349) ELT 369 (SC)}. Thus, the Commissioner (Appeals) could have interfered with the discretion exercised by the original authority only if it would have been tainted by any of vices highlighted by the Hon'ble Courts. In the present case, the original authority has for the reasons recorded in para 14 denied the option of redemption. Hence, the Commissioner

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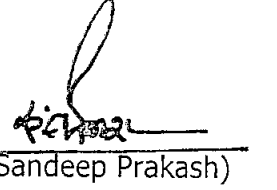
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(Appeals) has correctly refused to interfere with discretion exercised by the original authority.

9. The penalty imposed is just and fair, in the facts and circumstances of the case.

10. The revision application is rejected for the reasons aforesaid.


(Sandeep Prakash)

Additional Secretary to the Government of India


Sh. Shaik Chand Basha
14/473 Dhasthagiri Pet, Kadapha-516360
Andhra Pradesh

Order No. 04/23-Cus dated 12-01-2023

Copy to:

1. The Commissioner of Customs (Appeals-I), 60, Rajaji Salai, Custom House, Chennai-600001.
2. Pr. Commissioner of Customs, Chennai-I(Airport), New Custom House, Meenambakkam, Chennai-600027.
3. Sh. T. Chezhiyan, Advocate, No. 8, Eldams Road, Alwarpet, Chennai-600018.
4. PS to AS(RA)
5. Guard File
6. Spare Copy
7. Notice Board

ATTESTED


12.01.2023

(लक्ष्मी राघवन)
(Lakshmi Raghavan)
अनुभाग अधिकारी / Section Officer
वित्त मंत्रालय (सजरख विभाग)
Ministry of Finance (Deptt. of Rev.)
भारत सरकार / Govt. of India
नई दिल्ली / New Delhi