

SPEED POST



F. No. 373/146/B/2018-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. 29/03/23

Order No. 128/23-Cus dated 29-03-2023 of the Government of India passed by Sh. Sandeep Prakash, Additional Secretary to the Government of India, under Section 129DD of the Customs Act, 1962.

Subject : Revision Application, filed under Section 129 DD of the Customs Act 1962 against the Order-in-Appeal 1005/2017 dated 13.12.2017 passed by the Commissioner of Customs (Appeals), Bengaluru.

Applicant : Sh. K.V. Jagannatha, Bengaluru

Respondent : Pr. Commissioner of Customs, Airport & Air Cargo Complex, Bengaluru

ORDER

A Revision Application, bearing No. 373/146/B/2018-RA dated 19.03.2018, has been filed by Sh. K.V. Jagannatha, Bengaluru (hereinafter referred to as the Applicant), against the Order-in-Appeal 1005/2017 dated 13.12.2017, passed by the Commissioner of Customs (Appeals), Bengaluru, whereby the Commissioner (Appeals) has upheld the Order-in-Original passed by the Additional Commissioner of Customs, Kempegowda International Airport, Bengaluru, bearing no. 14/2017-18 (AP-ADM) dated 24.06.2017. Vide the aforementioned Order-in-Original, 09 nos of gold biscuits of 24 carat/999.9% purity, totally weighing 900 grams and valued at Rs. 28,48,500/-, recovered from the Applicant, had been absolutely confiscated under Section 111(d),(i),(l) & (m) of the Customs Act, 1962 and 60 nos of Axe Brand Universal Oil & 48 nos of Tiger Balm, totally valued at Rs. 6,500/-, recovered from the Applicant, had been confiscated under Section 111(k), (l) & (m) of the Act *ibid*. However, the Applicant was allowed to redeem the same on payment of redemption fine of Rs. 3,000/-. Besides, penalties of Rs. 8,00,000/- & Rs. 6,00,000/- were also imposed on the Applicant, under Section 112(a) & 114AA, respectively, of the Act, *ibid*.

2. Brief facts of the case are that the Applicant, who had arrived at Bengaluru airport from Singapore, on 16.09.2016, was intercepted by the Customs officers at Customs Arrival Hall while exiting through Green Channel. On examination of his bag, 60 nos of Axe Brand Universal Oil and 48 nos of Tiger Balm were found along with personal effects. Upon the search of his person, 09 gold biscuits, weighing 100 grams each, neatly wrapped in black carbon paper, kept in small red pouch were found concealed in his cream colour coat. The Applicant admitted that he was carrying gold biscuits in his bag and he transferred the gold biscuits from the said bag to his cream colour coat in the duty free shop. The approved gold appraiser certified the said 09 nos of gold biscuits to be of 24 carat/999.9% purity, totally weighing 900 grams and valued at Rs. 28,48,500/-. Further, the value of 60 nos of Axe Brand Universal Oil and 48 nos of Tiger Balm were totally valued at Rs. 6,500/-. The Applicant, in his statement dated 16.09.2016, recorded under Section 108 of the Customs Act, 1962, *inter-alia*, stated that he is into readymade garments trading business; that he purchases readymade garments from Mumbai and sells the same at Bengaluru and Singapore; that in return he brings readymade shirts, Axe

Oil, Tiger Balm and Chocolates for a profit of about Rs. 35,000/- per month; that from his friends he came to know that he can make profit of Rs. 3,500/- to Rs. 4,000/-, if he can bring gold biscuits from Singapore and sell the same in Bengaluru; that since his earnings were not sufficient to meet his day-to-day expenses, he decided to purchase the Gold at Singapore by taking loan from Bank; that he applied for loan in Punjab National Bank, Rajajinagar, Bangalore for business purpose and was sanctioned Rs. 40,00,000/-; that he purchased 09 nos of gold biscuits by investing Rs. 26,50,000/- out of Rs. 40,00,000/-, from a shop at Sarguan Road, Singapore; that he wrapped the said gold in his bag and boarded the flight at Singapore International Airport and reached Bengaluru where he was intercepted by the Customs officers. The original authority absolutely confiscated the gold biscuits and confiscated the other items and gave option to redeem the other items along with imposing penalties as mentioned above. Aggrieved, the Applicant filed an appeal before the Commissioner (Appeals) who rejected his appeal.

3. The revision application has been filed, mainly, on the grounds that the gold seized was not mis-declared and was brought by the Applicant for clearance on payment of duty; that he is an un-educated person and was not aware of Customs formalities; that the gold was for his bonafide use and he had no intention of selling the same for profit; and that he was not given the option to re-export, which was permissible.

4. In the hearing held on 28.03.2023, in virtual mode, Sh. K.S. Rajan, Advocate appeared for the Applicant and reiterated the contents of the RA. He submitted that in the facts and circumstances of the case, re-export may be allowed and only nominal penalty may be imposed. No one appeared for the department nor any request for adjournment has been received. As such, it is presumed that the department has nothing to add in the matter.

5. The Government has carefully examined the matter. It is observed that the Applicant was intercepted while going through Green Channel. The Applicant admitted the recovery of gold biscuits and offending goods from him and that he intended to clear the gold by way of concealment for monetary benefit. Moreover, entire proceedings have been recorded under Mahazar dated 16.09.2016 in the presence of two independent witnesses

which also corroborate the sequence of events. Hence the contention of the Applicant that gold seized was not mis-declared and was brought by him for clearance on payment of duty is not tenable. Further, the contention that the Applicant is an un-educated person and was not aware of Customs formalities is not acceptable as ignorance of law cannot be accepted as an excuse for breaking a law.

6. As per Section 123 of Customs Act 1962, in respect of the gold and manufactures thereof, the burden of proof that such goods are not smuggled is on the person, from whom goods are recovered. No documents evidencing ownership and licit purchase have also been placed on record. The gold biscuits were admittedly brought for trading to earn monetary benefit. The Applicant has, thus, failed to discharge the burden placed on him, in terms of Section 123, *ibid*. Keeping in view the facts of the case and as the Applicant has failed to discharge the onus placed on him in terms of Section 123, the Government holds that the lower authorities have correctly held the goods to be liable to confiscation under Section 111 of the Act, *ibid*.

7.1 The Government observes that gold can be imported in baggage subject to certain conditions. These conditions have not been fulfilled in the present case. In the case of Sheikh Mohd. Omer vs Collector of Customs, Calcutta & Ors {1971 AIR 293}, the Apex Court has held that for the purpose of Section 111(d) of the Customs Act, 1962, the term *"Any prohibition" means every prohibition. In other words, all types of prohibition. Restriction is one type of prohibition*". In another case of M/s Om Prakash Bhatia Vs. Commissioner of Customs, Delhi {2003(155) ELT423(SC)}, the Hon'ble Supreme Court has held that *"if the conditions prescribed for import or export of goods are not complied with, it would be considered to be prohibited goods"*. Further, 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 restrictions."*

7.2 In the case of Malabar Diamond Gallery P. Ltd. Vs ADG, DRI, Chennai [2016(341) ELT65(Mad.)], the Hon'ble Madras High Court has summarized the position on the issue, specifically in respect of import of gold in baggage, as under:

"64. 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 conditions 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 Commissioner (Appeals) has also correctly brought out that Hon'ble Madras High Court has taken a similar view in the cases of P. Sinnasamy {2016-TIOL-2544-HC-MAD-CUS} and Samyanathan Murugesan {2009 (247) ELT 21(Mad.)}.

7.3 As such, it has to be held that the offending goods are 'prohibited goods'.

8. The original authority has denied the release of gold biscuits on redemption fine under Section 125 of Customs Act, 1962. The Government observes that, in terms of Section 125 of the Customs Act, 1962, the option to release 'prohibited goods', on redemption fine, is discretionary. This position has been affirmed 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.)]. 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. Sinnasamy (supra), the Hon'ble Madras High Court has held that *"non-consideration or non-application of mind to the relevant factors, renders exercise of discretion manifestly erroneous and it causes for judicial interference."* Further, *"when discretion is exercised under Section 125 of the Customs Act, 1962, ----- the twin test to be satisfied is "relevance and reason"."* Hon'ble Delhi High Court has, in the case of Raju Sharma [2020 (372) ELT 249 (Del)], relying upon the judgment of Apex Court in Mangalam Organics Ltd. [2017 (349) ELT 369 (SC)], 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 motive.*" Such a case is not made out. Hence, the order of absolute confiscation could not have been interfered with.

9.1 As regards the prayer for permitting re-export of the offending goods, the Government observes that a specific provision regarding re-export of articles imported in baggage is made in Chapter-XI of the Customs Act, 1962, by way of Section 80. The said Section 80 reads as follows:

"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"

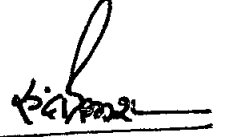
9.2 On a plain reading of Section 80, it is apparent that a declaration under Section 77 is a pre-requisite for allowing re-export. Hon'ble Allahabad High Court has, in the case of Deepak Bajaj vs Commissioner of Customs (P), Lucknow {2019(365) ELT 695(All.)}, held that a declaration under Section 77 is a *sine qua non* for allowing re-export under Section 80 of the Act, *ibid*. In this case, the Applicant had not made a true declaration under Section 77. It is also to be observed that the Hon'ble Delhi High Court has, in the case of Jasvir Kaur vs. UOI {2009 (241) ELT 621 (Del.)}, held that re-export is not permissible when article is recovered from the passenger while attempting to smuggle it.

9.3 Hence, the question of allowing re-export, in the present case, does not arise.

10. In the facts and circumstances of the case, the quantum of penalties imposed is on a higher side. Hence, the penalties imposed are reduced from Rs. 8,00,000/- to Rs.

6,00,000/- (under Section 112) and from Rs. 6,00,000/- to Rs. 4,50,000/- (under Section 114AA).

11. In view of the above, the revision application is partly allowed to the extent of reduction of penalties, as per para 10 above.



(Sandeep Prakash)

Additional Secretary to the Government of India

Sh. K.V. Jagannatha
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Order No. 128/23-Cus dated 29-03-2023

Copy to:

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2. The Pr. Commissioner of Customs, Airport & Air Cargo Complex, Air India SATS, Air Freight Terminal, Kempegowda, Bengaluru-560300.
3. Sh. K. S. Rajan, Advocate, No. 209, 16th Cross, Wilson Garden, Bengaluru-560030.
4. PPS to AS(RA).
5. Guard File.
6. Spare Copy.
7. Notice Board.

ATTESTED



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