

SPEED POST



F. No. 373/40/B/2018-RA
F. No. 373/42/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..18/01/23

Order No. 17-18/23-Cus dated 18-01-2023 of the Government of India passed by Shri Sandeep Prakash, Additional Secretary to the Government of India, under section 129DD of the Custom Act, 1962.

Subject : Revision Applications, filed under Section 129 DD of the Customs Act 1962, against the Orders-in-Appeal Nos. 68/2017-TRY (CUS) & 67/2017-TRY(CUS) both dated 30.10.2017, passed by the Commissioner of CGST & Central Excise (Appeals), Tiruchirapalli.

Applicant : 1. Smt. Kumari Sarala, Trichy.
2. Smt. Vigneswari Thayaparan, Colombo.

Respondent : The Commissioner of Customs, Tiruchirapalli.

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ORDER

Two Revision Applications, bearing Nos. 373/40/B/2018-RA & 373/42/B/2018-RA both dated 28.12.2017, have been filed by Smt. Kumari Sarala, Trichy and Smt. Vigneswari Thayaparan, Colombo (hereinafter referred to as the Applicant-1 & Applicant-2, respectively), against the Orders-in-Appeal Nos.68/2017-TRY (CUS) & 67/2017-TRY (CUS) both dated 30.10.2017, respectively, passed by the Commissioner of CGST & Central Excise (Appeals), Tiruchirapalli. The Commissioner (Appeals) has, vide the impugned Orders-in-Appeal, upheld the Order-in-Original No. TCP-CUS-PRV-JTC-097-16 dated 23.11.2016, passed by the Joint Commissioner of Customs, Trichy and rejected the appeals filed by the Applicants herein, except to the extent of reducing the penalties imposed on the Applicants by the original authority.

2. Brief facts of the case are that the Applicant-1 and 2 arrived at Tiruchirapalli from Colombo, on 26.01.2016, and were intercepted by the Customs Officers while they were crossing through the Green Channel. Verification of their Customs Declaration Form indicated that they had mentioned nothing against the column "Total value of dutiable goods being imported (SI No. 9)" and had ticked 'No' against all the sub-headings under the column "Are you bringing the following items into India including Gold Bullion" (SI No. 10). On being asked whether they had brought any Gold in any form with them either on their person or in their hand baggage, they replied in negative. On repeated enquiries by the officers, the Applicants persisted that they were not wearing any gold items. However, upon their personal search, six gold bangles, one rope chain with two Raja and two Rani coins and one gundu chains, totally weighing 386.50 gms. valued at Rs. 10,30,022/-, and four bangles and one chain, totally weighing 230 gms. valued at Rs. 6,12,950/-, were recovered from Applicant-2 and Applicant-1, respectively. The gold items were found to be of 24 carat purity and were in crude form. The Applicant-1 in her statement dated 26.01.2016, recorded under Section 108 of the Customs Act, 1962, stated that she was working as a teacher in a primary school at a monthly salary of Rs. 6,000/-; that she went to Sri Lanka on 22.01.2016 with Applicant-2 who is her distance relative to attend her relative's marriage; that Applicant booked air tickets for both of them; that after the marriage function an unknown person came to Applicant-2 and handed over some gold chains and bangles and requested to carry the same to Trichy by concealment and further told that one of his accomplices would collect the same from her residence at Trichy; that the Applicant-2 had handed over one chain and four bangles to her and asked her to conceal the same with her full sleeve shirt and thupatta and told her that she would receive back the same when she came out of the Trichy Airport and also instructed her not to declare the gold to Customs; that she followed the instructions of Applicant-2 and did not have any permit/license or document for legal import of gold into India. The Applicant-2 in her statement dated 26.01.2016, recorded under Section 108 ibid, stated that her daughters were studying in Trichy and she was staying with them; that for past

two months she was working as a teacher in a primary school for monthly salary of Rs. 4,000/-; that her husband booked air tickets for her and the Applicant-1 for travel to Colombo to attend her relative's marriage; that after attending her relative's marriage one Sh. Rajesh came to her house and handed over gold items to her and asked to carry them to India; that Sh. Rajesh convinced her to wear the gold and to conceal the same with her clothing and also not to declare the gold in her Indian Customs Officer; that one of his accomplices would collect the said gold items from her house; that as Sh. Rajesh is her husband's friend she accepted to do so; that out of gold items given by Sh. Rajesh, she gave 04 bangles and one chain to Applicant-1 to wear and conceal; that the gold items under seizure were not purchased by her and did not belong to her. The original authority, vide Order-in-Original dated 23.11.2016, ordered for absolute confiscation of seized gold items, totally weighing 616.50 gms. collectively valued at Rs. 16,42,972/-, under Sections 111(d), 111(i), 111(l) and 111(m) of the Customs Act, 1962. Penalties of Rs. 75,000/- and Rs. 2,00,000/- were also imposed on the Applicants 1 & 2, respectively, under Section 112(a) of the Customs Act, 1962. Appeals filed by the Applicants herein have been rejected, except that the Commissioner (Appeals) has reduced the penalty imposed on Applicant-1 to Rs. 50,000/- and that on Applicant-2 to Rs. 1,00,000/-

3.1 The revision application has been filed by Applicant-1, mainly, on the grounds that the seized gold ornaments were personal jewellery owned by her which was not dutiable; that the statement dated 26.01.2016 has been retracted, vide letter dated 12.02.2016; that the gold ornaments were worn around her neck and wrist and there was no concealment; that the subject goods are not prohibited goods and not liable for absolute confiscation; and that, accordingly, the impugned gold ornaments may be permitted to be redeemed on payment of redemption fine and penalty may be waived.

3.2 The Applicant-2 has filed the revision Application, mainly, on the grounds that the statement recorded on 26.01.2016 has been retracted and should not be relied upon; that the impugned goods are not prohibited goods; that wearing of gold ornaments by foreign tourists is not prohibited by the Baggage Rules, 1998; that Hon'ble Kerala High Court has, in the case Vigneswaran Sethuraman {2014 (308) ELT 394 (Ker.)}, held accordingly; and that, therefore, the impugned orders may be set aside and the Applicant may be permitted to re-export impugned gold ornaments back to Sri Lanka.

4. The personal hearing in RA No. 373/40/B/SZ/2018-RA and RA No. 373/42/B/2018-RA was held, in virtual mode, on 11.01.2023 and on 13.01.2023, respectively. Sh. N. Krishnamurthy, Advocate appeared for the Applicants and reiterated the contents of the respective RAs. In respect of Applicant-1, he submitted that the Applicant is a poor person and there was no concealment. Hence, a lenient view may be taken. In respect of Applicant-2, Sh. N. Krishnamurthy highlighted that she is a foreign national and prayed that the goods may be allowed to be re-exported waiving fine and penalty. No one

appeared for the Respondent department nor any request for adjournment has been received. Therefore, 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 Applicants did not declare the gold items brought by them and filed a Nil declaration in the Indian Customs Declaration Form. They also failed to declare the gold ornaments, even when asked to do so orally. The Applicants have admitted the recovery of gold ornament from them and other facts of the case in their respective statements tendered on 26.01.2016. However, it is contended that the statements were not voluntarily and have been retracted. The Government, however, observes that the Hon'ble Supreme Court has in the case of Surjeet Singh Chhabra vs. U.O.I {1997 (89) ELT 646 (SC)}, held that a confession statement made before the Customs Officer, though retracted within six days, is an admission and binding. The Government further observes that the Commissioner (Appeals) has clearly recorded that subject "gold items are roughly finished, in crude form and cannot be worn as ornaments." This finding of Commissioner (Appeals) remains uncontroverted. Further, the fact of non-declaration and concealment below garments also substantiate that the Applicants herein intended to smuggle the gold items. Therefore, the admissions made in the statement are corroborated from other evidence on record. Hence, the subject contention of the Applicants cannot be accepted. In this light, the reliance placed by the Applicants on the judgment of Hon'ble Madras High Court in the case of Sainul Abideen Neelam {2014 (300) ELT, 342 (Mad.)}, is also of no assistance to their case. As such, it is held that the gold jewellery seized from the Applicants herein did not belong to them and it was being smuggled by them as carriers.

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. The Applicants did not declare the gold items as stipulated under Section 77 of the Act, *ibid*. No documents evidencing ownership and licit purchase have been produced. The gold items are of 24 carat and are in rough & crude form. Hence, the intention to smuggle is manifest. The Applicants have, thus, failed to discharge the burden placed on them, in terms of Section 123, *ibid*. Keeping in view the facts of the case and as the Applicants have failed to discharge the onus placed on them in terms of Section 123, the Government agrees with the lower authorities that the seized goods were liable to confiscation under Section 111 *ibid* and the penalty was imposable on the Applicants.

7.1 The Applicant-2 has, however, contended that being a foreign national she was not required to declare the jewellery worn on her person and has relied upon the judgment of the Hon'ble Kerala High Court in the case of Vigneswaran Sethuraman (*supra*) in this regard.

7.2 The Government is not persuaded by this contention of the Applicant, as evident from the Baggage Rules, 1998 themselves. Rule 3 of the Rules ibid prescribed the entitlement for duty free clearance in bonafide baggage, in respect of passengers arriving from countries other than Nepal, Bhutan or Myanmar. The rule reads as under:

"Rule 3. Passenger arriving from countries other than Nepal, Bhutan or Myanmar - An Indian resident or a foreigner residing in India, returning from any country other than Nepal, Bhutan or Myanmar, shall be allowed clearance free of duty articles in his bona fide baggage to the extent mentioned in column (2) of Appendix A.

Provide that such Indian resident or such foreigners returning from Pakistan, by land route , shall be allowed clearance free duty articles in his bona-fide baggage to the extent mentioned in column(2) of Appendix B

Appendix A

(See rule 3)

1	2 Article allowed free of duty
(a) All passengers of and above 12 years of age and returning after stay abroad of more than three days.	(i) Used personal effects, excluding jewellery, required for satisfying daily necessities of life. (ii) Article up to a value of Rs. 12,000 if these are carried on the person or in the accompanied baggage of the passenger.
(b) All passengers of and above 12 years of age and returning after stay abroad of three days or less.	(i) Used personal effects, excluding jewellery, required for satisfying daily necessities of life. (ii) Article up to a value of Rs. 6,000 if these are carried on the person or in the accompanied baggage of the passengers.
(c) All passengers up to 12 years of age and returning after stay abroad of more than three days.	(i) Used personal effects, excluding jewellery, required for satisfying daily necessities of life. (ii) Article up to a value of Rs. 3,000 if these are carried on the person or in the accompanied baggage of the passenger.
(d) All passengers up to 12 years of age and returning after stay abroad of three days or less.	(i) Used personal effects, excluding jewellery, required for satisfying daily necessities of life. (ii) Articles up to a value of Rs. 1,500 If these are carried on the person or in the

accompanied baggage of the passenger.

Explanation- *The free allowance under this rule shall not be allowed to be pooled with the free allowance of any other passenger.*

Thus, it is clear that, as per Baggage Rules, 1998, articles "carried on the person or in the accompanied baggage of the passenger" both are part of 'baggage'. Further, these Rules are also applicable to the 'foreigners residing in India', as is the case of Applicant-2 who had been admittedly staying in India since 2007 itself. Therefore, the facts of this case are different from those obtaining in Vigneswaran Sethuraman (supra), which related to a 'foreign tourist' and not to a 'foreigner residing in India' in the present case. *L as to*

7.3 In view of the above, it is clear that, being a foreigner residing in India, the Applicant-2 was required to make requisite declaration in terms of Section 77 ibid read with the Baggage Rules, 1998.

8. The Government observes that import of gold and articles thereof in baggage is allowed subject to fulfillment of certain conditions. In the present case, it is not even contended that these conditions were fulfilled by the Applicants herein. It is settled by a catena of judgments of Hon'ble Supreme Court that goods, in respect of which conditions subject to which their import/export is allowed are not fulfilled, are to be treated as 'prohibited goods'. [Ref: Sheikh Mohd. Omer {1983 (13) ELT 1439 (SC), Om Prakash Bhatia {2003 (155) ELT 423 (SC)} & Raj Grow Impex LLP {2021 (377) ELT 145 (SC)}]. Further, the Hon'ble Madras High Court (i.e. the Hon'ble jurisdictional High Court) has, in the cases of Malabar Diamond Gallery P. Ltd. {2016 (341) ELT 465 (Mad.)} and P. Sinnasamy {2016 (344) ELT 1154 (Mad.)}, taken this view specifically in respect import of gold in baggage. Hence, there is no doubt that the goods seized in the present case are to be held to be 'prohibited goods'.

9. 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, 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.)]. 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), it has been held that "*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.*" Thus, the discretion exercised by the original authority could have

been interfered with only if it suffered from any of these vices. In the present case, the original authority has for relevant and reasonable considerations recorded in paras 53 to 58 of the OIO refused to grant redemption. Thus, the Commissioner (Appeals) has correctly refused to interfere in the matter.

10.1 It has been prayed by the Applicant-2 to permit re-export of gold ornaments seized from her. The Government observes that a specific provision regarding re-export of baggage articles has been made under Section 80 of the Customs Act, 1962, which 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 authorized by him and leaving India or as cargo consigned in his name.”

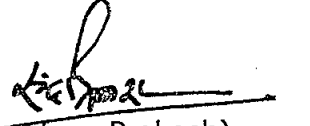
10.2 On a plain reading of Section 80 it is apparent that a declaration under Section 77 is a pre-requisite for allowing re-export. Hon'ble Allahabad High Court has, in the case of Deepak Bajaj {2019 (365) ELT 695 (All.)}, held that a declaration under Section 77 is a *sine qua non* for allowing re-export under Section 80 of the Act, *ibid*. In this case, as already held, the Applicant had made no declaration in respect of the subject goods. Further, the Hon'ble Delhi High Court has, in the case of Jasvir Kaur vs. UOI {2019 (241) ELT 521 (Del.)}, held that re-export “cannot be asked for as of right-----”. The passenger cannot be given a chance to try his luck and smuggle Gold into the country and if caught he should be given permission to re-export.”

10.3 Hence, the request for re-export of gold items recovered from Applicant-2 does not merit consideration.

11. The decisions relied upon by the Applicants, in support of their various contentions, are of no assistance to their case in view of the dictum of Hon'ble Supreme Court and Hon'ble High Courts, as above.

12. The Commissioner (Appeals) has already reduced the penalty imposed from Rs. 75,000/- to Rs. 50,000/- and from Rs. 20,00,000/- to Rs. 1,00,000/-, in respect of Applicant -1 & 2, respectively. In the facts and circumstances of the case, no further relief is merited.

13. In view of the above, the revision applications are rejected.



(Sandeep Prakash)

Additional Secretary to the Government of India

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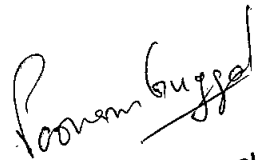
Smt. Vigneswari Thayapran
W/o Thayaparan
No. 248-38, Wolfendhal Street,
Colombo-13. Sri Lanka.

Order No. 17-18 /23-Cus dated 18-01- 2023

Copy to:

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2. The Commissioner of CGST & Central Excise (Appeals), No. 1 Williams Road, Cantonment, Trichirapalli-620001.
3. Sh. N. Krishnamurthy, Advocate, No. 11, 2nd Cross, Vinayaga Nagar, Karumandapam, Tiruchirapalli-620001.
4. PS to AS(RA).
5. Guard file.
6. Spare Copy.
7. Notice Board.

ATTESTED



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