

SPEED POST



F. No. 373/252/B/SZ/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 24/5/23

Order No. 200/23-Cus dated 24-05-2023 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 No. 155/2018-TRY(CUS) dated 08.08.2018, passed by the Commissioner of Customs & Central Excise (Appeals), Tiruchirappalli.

Applicant : Sh. Sridharan, Madurai

Respondent : The Commissioner of Customs (P), Tiruchirappalli

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ORDER

A Revision Application, bearing No. 373/252/B/SZ/2018-RA dated 26.09.2018, has been filed by Sh. Sridharan, Madurai (hereinafter referred to as the Applicant), against the Order-in-Appeal No. 155/2018-TRY (CUS) dated 08.08.2018, passed by the Commissioner of Customs & Central Excise (Appeals), Tiruchirappalli, whereby the Commissioner (Appeals) has upheld the Order-in-Original No. 32/2018 dated 10.02.2018, passed by the Assistant Commissioner of Customs (Airport), Tiruchirappalli. Vide the aforementioned Order-in-Original, 01 no. of gold chain and 02 nos. of gold bangles of 22 carat purity, totally weighing 141.000 grams and collectively valued at Rs. 3,89,865/-, recovered from the Applicant, had been absolutely confiscated under Section 111(d), 111(i), 111(l) & 111(m) of the Customs Act, 1962. Besides, penalty of Rs. 39,000/- was also imposed on the Applicant, under Section 112(a) & 112 (b) of the Act, *ibid*.

2. Brief facts of the case are that the Customs Officers intercepted the Applicant upon his arrival at Tiruchirappalli Airport, from Kuala Lumpur, on 22.06.2017. On verification, it was found that he had not filed the Custom Declaration Form. Further, ^{on} being asked whether he had brought gold in any form with him either in person or in his baggage, he replied in negative. However, upon the search of his person, 01 no. of gold chain and 02 nos. of gold bangles were found, which were hidden under his shirt in a concealed manner. The Government approved Gold Assayer assayed the aforementioned gold items and certified them to be of 22 carat purity, totally weighing 141.000 grams and collectively valued at Rs. 3,89,865/-. Upon being further asked as to why he did not declare the gold items in Customs Declaration Slip and as to why he did not go through the Red Channel for paying customs duty on the gold items, the Applicant replied that since he wanted to clear the gold items without payment of Customs duty, he did not file Customs Declaration Slip to Customs Baggage officers. The Applicant, in his statement dated 22.06.2017, recorded under Section 108 of the Customs Act, 1962, *inter-alia*, stated that he was working as a goldsmith at Madurai; that some of his friends suggested that if he brings gold from Malaysia without payment of customs duty he would get profit; that, accordingly, he along with his family went to Malaysia on 16.06.2017 for sightseeing and while returning he brought gold from an unknown person at Malaysia on 22.06.2017; that

he brought the gold wearing in his neck and hand concealed under his shirt; and that he had not declared the gold to the customs officers and did not have any money to pay the customs duty. The matter was adjudicated by the original authority, vide aforesaid Order-in-Original dated 10.02.2018. Aggrieved, the Applicant filed an appeal before the Commissioner (Appeals), which has been rejected.

3. The revision application has been filed, mainly, on the grounds that the statement of the Applicant was taken under duress; that gold ornaments are not prohibited for import; that the gold items were worn by the Applicant's daughter on her person and were not concealed; that he had retracted his statement vide letter dated 03.07.2017; that the Applicant and his family had orally declared to the Customs officers that his daughter was wearing the gold jewellery; and that the order of Commissioner (Appeals) be set aside, the gold be released on payment of appropriate duty, fine and reduced penalty or re-exported on payment of fine under Section 80 of the Customs Act, 1962.

4. Personal hearing in the matter was fixed on 17.05.2023 & 24.05.2023. In the hearing held on 24.05.2023, Sh. A. Selvaraj, Consultant appeared for the Applicant physically and filed a Written Submission, which was taken on record. He reiterated the contents of the RA and the Written Submissions. Sh. Arvind Kumar, Superintendent, who appeared for the department in virtual mode, supported the Orders of the lower authorities.

5. The Government has carefully examined the matter. It is observed that the Applicant was intercepted while crossing Customs Green Channel without making any declaration in respect of gold carried by him. He declined the possession of gold even when inquired orally. In his statement also, the Applicant had admitted the recovery of 01 no. of gold chain and 02 nos. of gold bangles and that he intended to clear these goods without payment of Customs duty. Further, the entire proceedings have been covered under Mahazar dated 22.06.2017, in the presence of two independent witnesses. Mahazar proceedings have not been disputed with any evidence nor did the Applicant seek cross examination of Mahazar witnesses to repudiate the proceedings. Hence, the contentions of the Applicant that the gold items were worn by his daughter on her person and were not

concealed, or that he had declared orally that his daughter was wearing gold jewellery appear to be nothing but an afterthought and, hence, cannot be sustained. Further, the admission made by the Applicant in his statement are largely corroborated by the Mahazar proceedings. Therefore, there is no doubt that the statement made is voluntary and the retraction filed is also an afterthought.

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 Applicant did not declare the gold items, as stipulated under Section 77 of the Act, *ibid*. No documents evidencing ownership and licit purchase were produced at the time of interception. The Applicant has, thus, failed to discharge the burden placed on him, in terms of Section 123, *ibid*. Keeping in view the facts and circumstances of the case and as the Applicant has failed to discharge the onus placed on him in terms of Section 123, the Government agrees with the lower authorities that the seized gold items were liable to confiscation under Section 111 *ibid* and the penalty was imposable on the Applicant.

7. The Government observes that import of gold and articles thereof in baggage is allowed subject to fulfillment of certain conditions. In the present case, these conditions have not been fulfilled by the Applicant 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 of 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' and the contentions of the Applicant to the contrary cannot be accepted.

8. The Government observes that the original authority had denied the release of seized gold items on payment of redemption fine under Section 125 of Customs Act, 1962.

It is settled by the judgment of 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.)], that option to release 'prohibited goods' on redemption fine is discretionary. In the case of Raj Grow Impex (supra), the Hon'ble Supreme Court has, while relying upon Garg Woolen Mills (supra), 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 "*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)], 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.*" In the present case, the original authority has, after appropriate consideration of judicial precedents, ordered for absolute confiscation of the gold items, for reasons recorded in paras 26 to 31 of his Order. Therefore, keeping in view the judicial pronouncements above and the facts of the case, the Commissioner (Appeals) has correctly refused to interfere with the discretion exercised by the original authority.

9.1 A request for allowing re-export of offending goods has been made. 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."

9.2 From 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, the Applicant had not made the requisite declaration, under Section 77. 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."

9.3 Hence, the request for allowing re-export of the offending goods cannot be accepted.

10. In the facts and circumstances of the case, the quantum of penalty imposed is neither harsh nor excessive. Hence no relief is merited in this respect.

11. The case laws relied upon by the Applicant, in support of his various contentions, are not applicable in view of the dictum of Hon'ble Supreme Court and Hon'ble High Courts, as above.

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



(Sandeep Prakash)

Additional Secretary to the Government of India

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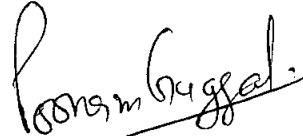
Order No. 200 /23-Cus dated 24-05-2023

Copy to:

1. The Commissioner of GST, Service Tax & Central Excise (Appeals), No.1, Williams Road, Cantonment, Tiruchirapalli-620001.
2. The Commissioner of Customs (P), No. 1, Williams Road, Cantonment, Tiruchirapalli-620001.

3. Sh. A. Selvaraj, Superintendent of Customs (Retd.), 68, Krishnamurthynagar, Tiruchirappalli-620021.
4. PPS to AS(RA)
5. Guard File
6. Spare Copy
7. Notice Board

ATTESTED


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