

SPEED POST



F. No. 373/255/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. 25/5/23

Order No. 201/23-Cus dated 25-05-2023 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. TCP-CUS-000-APP-150-18 dated 08.08.2018, passed by the Commissioner of GST, Service Tax & Central Excise (Appeals), Tiruchirappalli.

Applicant : Sh. Habeebur Rahman, Thanjavur

Respondent : The Commissioner of Customs (P), Tiruchirappalli

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ORDER

A Revision Application, bearing No. 373/255/B/SZ/2018-RA dated 26.09.2018, has been filed by Sh. Habeebur Rahman, Thanjavur (hereinafter referred to as the Applicant), against the Order-in-Appeal No. TCP-CUS-000-APP-150-18 dated 08.08.2018, passed by the Commissioner of GST, Service Tax & Central Excise (Appeals), Tiruchirappalli, whereby the Commissioner (Appeals) has upheld the Order-in-Original No. 50/2018 dated 28.02.2018, passed by the Assistant Commissioner of Customs (Airport), Tiruchirappalli. Vide the aforementioned Order-in-Original, 04 nos. of gold bangles, 01 no. of gold chain and 03 nos. of gold coins, of 22 carat purity, totally weighing 119.200 grams and collectively valued at Rs. 3,29,350/-, 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. 33,000/- was also imposed on the Applicant, under Section 112(a) & 112 (b) of the Act, *ibid*.

2. Briefly stated, the Customs Officers intercepted the Applicant upon his arrival at Tiruchirappalli Airport, from Dubai, on 11.04.2017. On verification, it was found that he had not filed the Custom Declaration Form. Further, on being asked whether he had any items to be declared to the baggage officers, he replied in negative. Upon being further asked as to whether he had brought any valuables or gold in any form with him either in his person or in his baggage, the Applicant again replied in negative. However, upon search of his person, 04 nos. of gold bangles, 01 no. of gold chain and 03 nos. of gold coins (wrapped in cello tape) were recovered. The Government approved assayer assayed the gold items and certified them to be of 22 carat purity, totally weighing 119.20 grams and collectively valued at Rs. 3,29,350/-. Consequent to recovery of said items, the Applicant was asked as to why he did not declare the gold in the Customs Declaration Form, he replied that the above said gold items do not belong to him and that a stranger requested him outside Dubai airport to carry the gold items concealed in his ticket pocket and to clear the gold. He further revealed that the said stranger had taken his photo and told him that the photo had been forwarded to the person who will receive the said gold items outside Trichy Airport from him and for which he would be given a commission amount of Rs. 4,000/-. The Applicant further said that he intended to clear the gold

without declaring and without payment of customs duty by concealing in his pant pocket. The Applicant, in his statement dated 11.04.2017, recorded under Section 108 of the Customs Act, 1962, inter-alia, stated that he was working at Dubai as a manager in a motorbike shop for the past 10 years and used to earn Rs. 30,000/- per month; that he came to India for medical treatment; that he did not declare the possession of gold ornaments of 22 carat in Customs Declaration Form; that he did not have sufficient foreign currency to pay the Customs duty for the above said gold; that he did not have any valid permit/license for importing the said gold in India; and that, accordingly, he admitted his offence. The matter was adjudicated by the original authority, as above, vide aforesaid Order-in-Original dated 28.02.2018. The appeal filed by the Applicant herein, before the Commissioner (Appeals), has been rejected.

3. The revision application has been filed, mainly, on the grounds that the Applicant produced bills for the licit purchase of gold ornaments at Dubai both before the adjudicating and appellate authority; that the gold items were kept in pant pockets and not concealed; that import of gold is not prohibited; and that the order of Commissioner (Appeals) be set aside, and 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 placed on record additional submissions. He submitted that the seized goods were owned by the Applicant and these may be released on RF and duty. Sh. Arvind Kumar, Superintendent, appeared for the department in virtual mode, supported the Orders of 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. The Applicant had, in his statement recorded under Section 108 *ibid*, admitted the recovery of 04 nos. of gold bangles, 01 no. of gold chain, 03 nos. of gold coins from him

and had revealed that the goods did not belong to him, which he was carrying for monetary benefit. Further, the admissions made by the Applicant in his statement are corroborated by the Mahazar proceedings. As regards the contention that the goods were purchased by the Applicant, against the purchase bills copies whereof have been annexed to the revision application, the Government observes that copies of four Bills/Invoices dated 22.12.2016, 10.04.2017, 15.12.2016 & 31.12.2016 have been placed on record. These bills are in the name of "Habeb", "Habib", "Habeb" & "Habeb Rahman", respectively. Thus, none of these documents are in the name of the Applicant herein, i.e. Habeebur Rahman. As such, the contentions based on these bills cannot be accepted.

6. In terms of Section 123 of the Customs Act, 1962, in respect of 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. As already brought out hereinabove, the Bills produced are not in the name of the Applicant. The Applicant has, thus, failed to discharge the burden placed on him, in terms of Section 123, *ibid*. In 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 is in agreement with the lower authorities that the seized gold items were liable to confiscation under Section 111 *ibid* and, consequently, 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', in terms of Section 2(33) of the Customs Act, 1962.

8. The original authority had denied the release of seized gold items on payment of redemption fine under Section 125 of Customs Act, 1962. As affirmed by the Hon'ble Supreme Court, vide its judgment 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 option to release 'prohibited goods' on redemption fine in terms of Section 125 *ibid* is discretionary. 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 "*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 detailed consideration and for relevant consideration has recorded in paras 28 to 33 of his Order, ordered for absolute confiscation. Therefore, 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. Section 80 of the Customs Act, 1962, that makes a specific provision regarding re-export of baggage articles, reads as under:

"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."

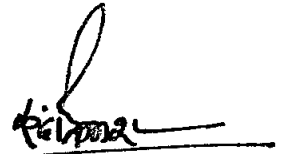
9.2 From a plain reading of Section 80, it is apparent that a declaration under Section 77 is a pre-requisite for allowing re-export. Hon'ble Allahabad High Court has, in the case of Deepak Bajaj {2019 (365) ELT 695 (All.)}, held that a declaration under Section 77 is a *sine qua non* for allowing re-export 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. The Government finds that the quantum of penalty imposed, in the instant case, is neither harsh nor excessive. Hence, no reduction in penalty amount is merited.

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. In view of the above, the revision application is rejected.



(Sandeep Prakash)

Additional Secretary to the Government of India

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No. 29/D, East Street,
Adirampattinam, Thanjavur District,
Tamil Nadu

Order No. 201/23-Cus dated 25-5-2023

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, Tiruchirappalli-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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