

**SPEED POST**



F. No. 373/297/B/SZ/2018-RA  
GOVERNMENT OF INDIA  
MINISTRY OF FINANCE  
(DEPARTMENT OF REVENUE)

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

Date of Issue. 25/5/23

Order No. 203 /23-Cus dated 25-5-2023 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-167-18 dated 07.09.2018, passed by the Commissioner of GST & Central Excise (Appeals), Tiruchirappalli.

Applicant : Sh. Ashik Ahmed, Chennai

Respondent : The Commissioner of Customs (P), Tiruchirappalli

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**ORDER**

A Revision Application, bearing No. 373/297/B/SZ/2018-RA dated 26.11.2018, has been filed by Sh. Ashik Ahmed, Chennai (hereinafter referred to as the Applicant), against the Order-in-Appeal No. TCP-CUS-000-APP-167-18 dated 07.09.2018, passed by the Commissioner of GST & Central Excise (Appeals), Tiruchirappalli, whereby the Commissioner (Appeals) has upheld the Order-in-Original No. TCP-CUS-PRV-JTC-043-18 dated 16.03.2018, passed by the Joint Commissioner of Customs (Airport), Tiruchirappalli. Vide the aforementioned Order-in-Original, 06 nos. of cylindrical shaped gold items and 02 nos. of gold items of foreign origin of 24 carat purity, totally weighing 408.800 grams and collectively valued at Rs. 12,03,507/-, 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. 1,00,000/- 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 Kuala Lumpur, on 27.10.2017. 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 baggage (one carton box), the officers found Milo, Soap, Clothes, food items, one wireless speaker (Salpido Grand Luxury Portable Wireless Speaker) and 02 nos. of small Quarto2 Speaker boxes (each box contained 2 speakers). Upon dismantling of all the speakers, 06 nos. of cylindrical shaped gold items were found concealed in these Speakers (02 nos. of cylindrical shaped gold items wrapped with black colour insulation tape kept inside the Salpido Grand Luxury Portable Wireless

Speaker and 04 nos. of cylindrical shaped gold items wrapped with black colour insulation tape kept inside the 04 small speakers (Quarto2). Upon search of his person, 01 blue coloured purse was found from his pant ticket pocket and on opening of that purse, 02 nos. of gold items were found. The Central Government approved gold assayer assayed the aforementioned gold items and certified them to be of 24 carat purity, totally weighing 408.800 grams and collectively valued at Rs. 12,03,507/-. Upon being further asked as to why he did not declare the gold items in Customs Declaration Form, the Applicant replied that he intended to clear the above said gold items without payment of Customs Duty. The Applicant, in his statement dated 27.10.2017, recorded under Section 108 of the Customs Act, 1962, inter-alia, stated that he used to bring courier goods to India; that he was having a monthly income of Rs. 20,000/- through that business; that some of his friends suggested to him to purchase gold from Malaysia and sell the same in Chennai that would fetch him more profit; that lured over money he borrowed money from his friends and relatives; that he went to Malaysia from Chennai on 25.10.2017 and purchased the above said gold items from unknown person of Malaysia; and that he concealed the 06 numbers of cylindrical shaped gold items in the above said speakers and 02 numbers of gold items kept in a small purse and concealed in his pant pocket. The matter was adjudicated by the original authority, as above, vide aforesaid Order-in-Original dated 16.03.2018. 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 not voluntary and was retracted; that oral declaration was made; 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 08.05.2023, 15.05.2023 & 24.05.2023. In the hearing held on 24.05.2023, Sh. A. Selvaraj, Consultant appeared for the Applicant physically and reiterated the contents of the RA. He requested that atleast the gold which was found in pant pocket may be released on RF & duty. Sh. Arvind Kumar, Superintendent, who appeared for the department in virtual mode, supported the Order of Commissioner (Appeals).

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 06 nos. of cylindrical shaped gold items and 02 nos. of gold items of foreign origin and that he intended to clear these goods without payment of Customs duty. Further, the entire proceedings have been covered under Mahazar dated 27.10.2017, in the presence of two independent witnesses. Mahazar proceedings have not been disputed with any evidence. In absence thereof, the sequence of events recorded in the Mahazar has to be relied upon. Further, the ingenious manner of concealment leaves not even an iota of doubt that the Applicant had no intention to declare the goods. Therefore, the contention of the Applicant that he had declared the goods orally 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. Even otherwise, Hon'ble Supreme Court has, in the case of Surjeet Singh Chhabra vs. UOI {1997 (89) ELT 646 (SC)}, held that confession statement before Customs officer, though retracted within six days, is an admission and binding.

6. As per 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. Manner of concealment makes the intention to smuggle manifest. 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 agrees 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. 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 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, for appropriate reasons recorded in paras 33 to 38 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. 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. The Government observes that the quantum of penalty imposed in the instant case is just about 8.3% of the value of offending goods. Keeping in view the ingenious nature of concealment adopted by the Applicant, the penalty imposed is not commensurate with the gravity of the offence. Evidently, the original authority has been excessively lenient in his approach. Hence, no further relief 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

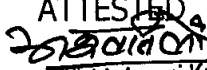
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Order No. 203/23-Cus dated 25-5-2023

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, 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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