

SPEED POST



F. No. 373/354/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. 26/05/23

Order No. 207/23-Cus dated 26-05-2023 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. TVM-EXCUS-000-APP-772-2018 dated 25.09.2018, passed by the Commissioner of Central Tax, Central Excise & Customs (Appeals), Kochi.

Applicant : Sh. Kuliyan Motta Basheer, Kasaragod

Respondent : The Commissioner of Customs (P), Cochin

ORDER

A Revision Application, bearing No. 373/354/B/2018-RA dated 26.12.2018, has been filed by Sh. Kuliyan Motta Basheer, Kasaragod (hereinafter referred to as the Applicant), against the Order-in-Appeal No. TVM-EXCUS-000-APP-772-2018 dated 25.09.2018, passed by the Commissioner of Central Tax, Central Excise & Customs (Appeals), Kochi, whereby the Commissioner (Appeals) has upheld the Order-in-Original No. 01/2015 CUS (JC) dated 10.02.2015, passed by the Joint Commissioner of Customs (Airport), Thiruvananthapuram. Vide the aforementioned Order-in-Original, 69 nos. of gold chains of 22 carat purity, totally weighing 332.660 grams and collectively valued at Rs. 7,65,118/-, recovered from the Applicant, had been absolutely confiscated, under Section 111(d), (l) & (o) of the Customs Act, 1962. Besides, Curtain Cloths 120 metres, valued at Rs. 3,600/-, Saree Rolls 260 metres, valued at Rs. 7,800/- and 32" LCD, valued at Rs. 11,000/-, were also held liable to confiscation but were allowed to be redeemed on payment of a fine of Rs. 7,800/- and applicable Customs duties. Further, penalty of Rs. 7,800/- 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 at the exit gate upon his arrival at Trivandrum International Airport, on 23.03.2013. On perusal of the gate pass it was seen that he had not declared any value for the goods carried by him. Upon being enquired as to whether he was carrying any valuable goods in his baggage or in his possession, he replied in negative. However, upon examination of his baggage, Curtain Cloths 120 metres, Saree Rolls 260 metres and 01 no. of 32" LCD were found. Upon examination of his person, 02 packets were found concealed under knee caps worn by him on both legs. These 02 packets were found to contain 69 nos. of gold chains wrapped in white paper and covered with brown cellophane tape. A Gold Assayer examined the said gold chains and confirmed that all of them were made of 18 carat gold, totally weighing 332.66 grams and having total value of Rs. 7,65,118/-. The Applicant was not in possession of any documents to show that the above gold chains were being imported into India legally. He admitted that he had attempted to smuggle the said gold into India in contravention of the Customs Act, by not declaring the gold before the Customs authorities by way of concealing on his body. The Applicant, in his statement

dated 23.03.2013, recorded under Section 108 of the Customs Act, 1962, also deposed that he, with the financial help of his brother and a friend, had purchased the above gold chains from SANA Jewellery at Dubai and they were intended for sale. He further admitted that the Curtain Cloths, Saree Rolls and 32" LCD seized by the officers were brought by him for sale. The matter was adjudicated, vide the aforementioned Order-in-Original dated 10.02.2015. Aggrieved, the Applicant filed appeal before the Commissioner (Appeals), which has been rejected.

3. The revision application has been filed, mainly, on the grounds that gold chains ought to have been released on imposition of redemption fine; that gold ought to have been allowed for re-export; that redemption fine imposed on items other than gold is excessive; and that penalty imposed is excessive.

4. Personal hearing in the matter was held on 26.05.2023, in virtual mode. Sh. K.M. Suresh Chandran, Advocate appeared for the Applicant and reiterated the grounds presented in the RA. Ms. R. Latha, AC supported the orders of lower authorities.

5. The Government has carefully examined the matter. It is observed that the Applicant was intercepted with gold chains, and other items, without making the requisite declaration, in terms of Section 77 of the Act, *ibid*, in respect thereof.

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 chains, as required in terms of Section 77 *ibid*. No documents evidencing ownership and licit purchase were produced at the time of interception. Further, the ingenious manner of concealment, *i.e.*, inside the knee caps, leaves not even an iota of doubt that the Applicant intended to smuggle the goods. 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, consequently, penalty was imposable on the Applicant.

7.1 The Applicant has, in fact, not disputed the confiscation of the offending goods but a contention has been raised that gold ought to have been released on imposition of redemption fine, which in other words, implies that the import of gold is not 'prohibited'. 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 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 the meaning assigned to it under Section 2(33) of the Customs Act, 1962.

7.2. 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.*" Such a case is not made out.

Therefore, keeping in view the judicial pronouncements, as above, and the facts of the case, the Commissioner (Appeals) has correctly refused to interfere with the discretion exercised by the original authority.

8.1 A request for allowing re-export of offending gold items 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.”

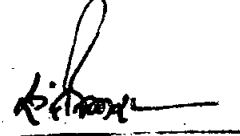
8.2 Thus, in terms of Section 80, a declaration under Section 77 is a pre-requisite for allowing re-export. This position is affirmed by the judgment of Hon’ble Allahabad High Court, in the case of Deepak Bajaj {2019 (365) ELT 695 (All.)}, wherein it is held that a declaration under Section 77 is a *sine 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.”

8.3 Hence, the question of allowing re-export does not arise.

9. In the facts and circumstances of the case, the quantum of fine and penalty imposed is neither harsh nor excessive. In fact, the penalty imposed is just about 1% of

the value of offending goods and, as such, very much on a lower side. However, as the department is not aggrieved, the Government refrains from interfering in the matter.

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



(Sandeep Prakash)

Additional Secretary to the Government of India

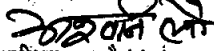
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Order No. 207/23-Cus dated 26-05-2023

Copy to:

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2. The Commissioner of Customs (Preventive), Cochin, 5th Floor, Catholic Centre, Broadway, Cochin-682031.
3. Sh. K.M Suresh Chandran, Advocate, 9/426, Court Road, Calicut-673001.
4. PPS to AS(RA)
5. Guard File
6. Spare Copy
7. Notice Board

ATTESTED



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