

SPEED POST



F. No. 380/04/B/2016-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. 02/11/22

Order No. 333/22-Cus dated 02-11-2022 of the Government of India passed by Sh. Sandeep Prakash, Additional Secretary to the Government of India under section 129DD of the Custom Act, 1962.

Subject : Revision Application filed under section 129 DD of the Customs Act 1962 against the Order-in-Appeal C.Cus-I No. 390/2015 dated 03.07.2015, passed by the Commissioner of Customs (Appeals-I), Custom House, Chennai.

Applicant : Commissioner of Customs, Airport, Chennai.

Respondent : Sh. Mohamed Rishad, Sri Lanka.

ORDER

Revision Application, bearing No. 380/04/B/2016-RA dated 11.01.2016, has been filed by the Commissioner of Customs, Airport Commissionerate, Chennai, (hereinafter referred to as the Applicant department) against the Order-in-Appeal C.Cus-I No. 390/2015 dated 03.07.2015, passed by the Commissioner of Customs (Appeals-I), Custom House, Chennai. Commissioner (Appeals), vide the impugned Order-in-Appeal, has modified the Order-in-Original No. 156/2015-16-Airport dated 22.06.2015, passed by the Joint Commissioner of Customs, Anna International Airport, Meenambakkam, Chennai, to the extent of allowing redemption of impugned goods for re-export on a reduced redemption fine i.e from Rs. 1,70,000/- to Rs. 70,000/- under section 125 of the Customs Act, 1962 and reduction in penalty from Rs. 50,000/- to Rs. 25,000/- imposed under 112(a) of the Act, ibid on Sh. Mohamed Rishad, Sri Lanka (hereinafter referred to as the Respondent).

2. Brief facts of the case are that the Respondent, holder of Sri Lankan Passport, arrived, on 23.01.2015, at Chennai Airport from Colombo and was intercepted by the Customs Officers as he was walking out through the Green Channel. The Respondent had declared the value of the dutiable goods as Rs. 1000/- in Customs Declaration Card. During the search of the Respondent, 01 gold ring of 24 Carat purity, weighing 24 gms and 01 gold chain of 24 Carat purity, weighing 162 gms, collectively weighing 186 gms and collectively valued at Rs. 4,64,671/- were recovered. The gold ring was recovered from the back side pocket of the Respondent whereas the gold chain was recovered from a black coloured adhesive tape packet kept concealed by the Respondent in his innerwear. The recovered gold items were seized. The Respondent in his statement, recorded under Section 108 of the Customs Act, 1962, stated that the subject gold items were given to him by one person at Colombo Airport to carry the same to India and handover these items to a person outside Chennai airport; that the person outside Chennai Airport would identify him and collect the gold and would pay him Rs. 15,000/-; that the gold does not belong to him and he will not make any claim for the same; and that he admitted his offence and requested to be pardoned. The original authority, vide the Order-in-Original dated 22.06.2015, confiscated the seized gold items under Section 111(d) and (l) of the

Customs Act, 1962 but allowed its redemption on payment of fine of Rs. 1,70,000/- under Section 125 Act, *ibid.* Penalty, of Rs. 50,000/- was also imposed on the Applicant under Section 112 (a) of the Customs Act, 1962. Aggrieved, the Respondent filed an appeal before the Commissioner (Appeals), who, vide the impugned Order-in-Appeal, allowed re-export and reduced the redemption fine to Rs. 70,000/- and penalty to Rs. 25,000/-, respectively.

3. The revision application has been filed by the Applicant department, mainly, on the grounds that the Respondent attempted to smuggle the gold items by way of deep concealment in the backside pocket of the pant worn by him and in the innerwear worn by him; that the impugned gold items were not declared by the Respondent to the Customs authorities under Section 77 of the Customs Act, 1962 and neither was he in possession of any foreign currency to pay the duty and hence the same becomes prohibited; and that the original authority and Commissioner (Appeals) had erred in allowing redemption of the impugned gold items on payment of fine and penalty in view of the fact that the Respondent had attempted to smuggle the impugned gold items with the intent to evade duty.

4. During the pendency of instant revision application, the Respondent herein filed a Writ Petition No. 18537/2016 before the Hon'ble Madras High Court pleading therein issuance of writ of *Mandamus* directing the Applicant department to release the goods detained in the subject case and to give effect to the Order-in-Appeal dated 30.07.2015, within a reasonable time frame. Hon'ble Madras High Court disposed of the aforesaid Writ Petition, vide Order dated 07.06.2016, by directing the Applicant department to release the gold items on payment of redemption fine and personal penalty, as ordered by the Commissioner (Appeals) and subject to the Respondent herein giving an undertaking to comply with the order of the Revisional Authority, in the event the department succeeds in the revision.

5. Personal hearing was fixed on 27.08.2018, 17.09.2018, 26.09.2018, 23.09.2022, 17.10.2022 & 31.10.2022. In the hearing held on 31.10.2022, in virtual mode, Sh. V. Anburaju, Assistant Commissioner appeared for the Applicant department and submitted

that in this case both the department and passenger had preferred appeals before the Commissioner (Appeals). The Commissioner (Appeals) first decided the appeal filed by the passenger vide the impugned Order-in-Appeal dated 03.07.2015 and thereafter decided the appeal filed by the department vide Order-in-Appeal dated 30.10.2015 holding that the department's appeal had been rendered infructuous in view of Order-in-Appeal dated 03.07.2015. Sh. V. Anburaju, further submitted that the goods had been released for re-export in compliance of Hon'ble Madras High Court's Common Order dated 07.06.2016, including in respect of W.P No. 18537/2016 filed by the Respondent passenger, and undertaking dated 29.07.2016 has been filed by the passenger to comply with the order of Revisional Authority in this revision application. Sh. Anburaju, Assistant Commissioner reiterated the contents of the RA. No one appeared for the Respondent nor any request for adjournment has been received. Since sufficient opportunities have been granted, it is presumed that the Respondent has nothing to say in the matter.

6. The Government has examined the matter carefully. It is observed that the Respondent did not declare the gold brought by him, as required under Section 77 of Customs Act, 1962, to the Customs Authorities at the airport. The Respondent has admitted the recovery of gold from him and the fact of non-declaration in his statement tendered under Section 108 of Customs Act, 1962. The issue of smuggling of gold and its liability to confiscation stand concluded with the order of Commissioner (Appeals), who has upheld the confiscation ordered by the original authority. The only question that, therefore, needs to be examined is whether the order of lower authority releasing the goods on payment of redemption fine and subsequent modification by Commissioner (Appeals) and ordering the re-export of goods on payment of redemption fine is sustainable.

7.1 Government observes that the original authority had concluded in his findings that the import of gold is not prohibited and, therefore, found that it was mandatory for him to give option to redeem the goods. The Commissioner (Appeals) has not interfered with these findings of the original authority. The Government observes that the findings of the original authority are in the teeth of law settled by various judgments of Hon'ble Supreme Court. In the case of Sheikh Mohd. Omer vs Collector of Customs, Calcutta & Ors {1983

(13) ELT 1439 (SC)} the Apex Court has held that for the purpose of Section 111(d) of the Customs Act, 1962, the term "*Any prohibition means every prohibition. In other words, all types of prohibition. Restriction is one type of prohibition*". In the case of M/s Om Prakash Bhatia Vs. Commissioner of Customs, Delhi [2003 (155) ELT 423 (SC)], the Hon'ble Supreme Court has held that "*if the conditions prescribed for import or export of goods are not complied with, it would be considered to be prohibited goods*". Further, in the case of UOI & Others vs. M/s Raj Grow Impex LLP & Others (2021-TIOL-187-SC-CUS-LB), the Hon'ble Supreme Court has followed the judgments in Sheikh Mohd. Omer (supra) and Om Prakash Bhatia (supra) to hold that "*any restriction on import or export is to an extent a prohibition; and the expression "any prohibition" in Section 111(d) of the Customs Act includes restrictions.*"

7.2 In the case of Malabar Diamond Gallery P. Ltd. Vs ADG, DRI, Chennai [2016 (341) ELT 65 (Mad.)], the Hon'ble Madras High Court, i.e., the jurisdictional High Court has summarized the position on the issue, specifically in respect of gold, as under:

"64. Dictum of the Hon'ble Supreme Court and High Courts makes it clear that gold, may not be one of the enumerated goods, as prohibited goods, still, if the conditions for such import are not complied with, then import of gold, would squarely fall under the definition "prohibited goods", in Section 2 (33) of the Customs Act, 1962----."

7.3 Thus, the findings of the lower authorities that offending gold articles are not 'prohibited goods' cannot be sustained.

7.4 As per Section 125 of the Act *ibid*, the option to redeem the seized goods is 'discretionary' in respect of 'prohibited goods' whereas such option is 'mandatory' in respect of all 'other goods'. In the present case, the original authority has allowed redemption holding the goods as other than prohibited goods, which finding is legally erroneous for the reasons brought out hereinabove. Consequently, the order allowing the redemption of goods cannot also be sustained, being premised in these patently illegal findings.

8.1 The Commissioner (Appeals), consequent upon confiscation of subject goods under provisions of Section 111 of Customs Act, 1962, has allowed the redemption of the said gold/ gold articles under Section 125 of Act, *ibid*, for re-export on payment of fine. The Government observes that a specific provision has been made, under Section 80 of the Act, *ibid*, which governs the re-export of goods contained in the baggage of any passenger, which are either dutiable or the import of which is prohibited and further in respect of which a true declaration has been made under Section 77. The goods so detained may be returned to the passenger at the time of his leaving India or to any other authorized person or through cargo consigned in the name of such passenger. There is no specific provision under Section 125 *ibid* to permit re-export of goods contained in baggage. It is trite that a specific law prevails over the general law. Therefore, it was not open to the authorities below to permit redemption under Section 125 by way of re-export, without the provisions of specific law i.e., Section 80 having been complied with.

8.2 In the case of Commissioner of Customs (Prev), Lucknow vs. Deepak Bajaj {2019 (365) ELT 695 (All.)}, the respondent Deepak Bajaj, a holder of British passport, was intercepted while entering India through Nepal and 4320 gms of gold was recovered from him. In the second appeal, the CESTAT allowed the gold to be re-exported. However, the Hon'ble Allahabad High Court set aside the order of CESTAT and held that re-export can be allowed under Section 80 only if a declaration has been made under Section 77. In the present case, such a declaration has not been made and, thus, the requirements for re-export are not satisfied.

8.3. In view of the above, the order of redemption of seized goods, in lieu of confiscation, for re-export of goods cannot be upheld.

9. In the facts and circumstances of the case, there was no need for the Commissioner (Appeals) to interfere with the order of original authority in respect of penalty imposed on the Respondent herein.

10. In view of the above, Revision Application is allowed and the seized goods are ordered to be absolutely confiscated. Further, the order of original authority in respect of penalty imposed on the Respondent is restored.



(Sandeep Prakash)

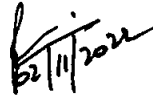
Additional Secretary to the Government of India

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Order No. 333 /22-Cus dated 02-11-2022

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4. PA to AS(RA)
5. Guard File
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ATTESTED

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