

SPEED POST



F. No. 380/54/B/SZ/2018-R.A.
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. 6/2/23.

ORDER NO. 34/23 - Cus dated 03.02.2023 of the Government of India, passed by Shri Sandeep Prakash, Additional Secretary to the Government of India, under Section 129DD of the Customs Act, 1962.

SUBJECT : Revision Application, filed under Section 129DD of the Customs Act, 1962 against the Order-in-Appeal No. C. Cus-I No. 42/2018 dated 22.03.2018, passed by the Commissioner of Customs (Appeals-I), Chennai.

APPLICANT : Pr. Commissioner of Customs, Airport, Chennai-I Commissionerate, Chennai.

RESPONDENT : Sh. Sathish Delly, Kanchipuram, Tamil Nadu.

ORDER

Revision Application No. 380/54/B/SZ/2018-R.A. dated 11.06.2018 has been filed by the Pr. Commissioner of Customs, Chennai-I Commissionerate, Chennai (hereinafter referred to as the Applicant department) against Order-in-Appeal No. C. Cus-I-No. 42/2018 dated 22.03.2018, passed by the Commissioner of Customs (Appeals-I), Chennai. The Commissioner (Appeals-I) has on an appeal filed by Sh. Sathish Delly, Kanchipuram, Tamil Nadu (herein-after referred to as the Respondent), vide the impugned OIA, modified the order of the Joint Commissioner of Customs (Adjudication-Air), New Custom House, Meenambakkam, Chennai, bearing no. 195/2017-18-Airport dated 09.01.2018.

2.1 Brief facts of the case are that the Respondent arrived at Chennai airport, on 09.08.2017, from Riyadh via Sharjah and was intercepted by the Customs officers at the exit point of the arrival hall after he had passed through the Customs Green Channel. The Respondent was questioned about the possession of gold/ gold ornaments/ dutiable items/ contrabands to which he had replied in negative. Thereafter, on examination of his hand baggage & checked-in baggage, four (04) pouches placed in between the two pairs of CDs and concealed inside a white colour electric rice cooker, were recovered from the Checked-in baggage. Further examination of these pouches resulted in recovery of four (04) gold bars with foreign markings, totally weighing 349.2 grams and collectively valued at Rs. 9,96,367/-. As the Respondent herein had attempted to smuggle the said gold bars by not declaring the same and as he was not in possession of any foreign currency for payment of duty, the recovered gold bars were seized under a Mahazar. The Respondent in his statement dated 09.08.2017, recorded under Section 108 of the Customs Act, 1962, admitted his offence and stated that the recovered gold belonged to him and he brought the same by concealing it in between the CDs which in turn were kept concealed inside an electric cooker to escape from the vigil of Customs and in order to avoid payment of customs duty; that he himself placed the said gold bars in between the CDs and concealed inside the electric cooker; that he did not have any foreign currency for payment of customs duty; that he knew that smuggling of gold by way of non-declaration, non-payment of duty and by concealment and without valid documents was an offence; that

he had committed the offence to transfer his salary savings to India as he did not have any bank account in Riyadh; and that he requested for pardon & to take a lenient view. The Respondent vide his letter dated 09.08.2017 requested that the case may be adjudicated without issuance of show cause notice. The Respondent further, vide letter dated 17.08.2017, requested for re-export of the gold bars as the customs duty leviable was not affordable.

2.2 The original authority vide the aforesaid OIO dated 09.01.2018 ordered for absolute confiscation of the recovered gold bars under Section 111(d) & 111(l) of the Customs Act, 1962. Penalties of Rs. 1,00,000/- and Rs. 10,000/- were also imposed upon the Respondent under Section 112(a) and 114AA of the Act, *ibid*, respectively. The Respondent herein filed an appeal before the Commissioner (Appeals), who vide the impugned OIA dated 22.03.2018, modified the Order of the original authority and set aside the absolute confiscation of the impugned gold bars and allowed release on payment of applicable rate of duty for home clearance. The Commissioner (Appeals) also set aside the penalties imposed under Section 112(a) and Section 114AA of the Customs Act, 1962.

3. The revision applications have been filed by the Applicant department, mainly, on the grounds that the Respondent herein had attempted to smuggle the gold by way of concealment and non-declaration to Customs as required under Section 77 of the Customs Act, 1962; that he was not an eligible passenger to import gold; that the Respondent was allowed to get the gold released on mere payment of applicable duty without levying any redemption fine; that once violation of the provisions of the Customs Act is confirmed, the offending goods which become liable for confiscation under Section 111 of the Customs Act, 1962, can't be released without atleast levying appropriate redemption fine vide Section 125 of the Act, *ibid*; that the person violating the provisions, can't be acquitted without levy of appropriate personal penalties under Section 112 and 114AA of the Customs Act, 1962; that the Commissioner (Appeals) proceeded to drop the charges against the Respondent without offering any justification; that as per judicial pronouncements, any goods which can be imported subject to certain conditions and if the

said condition is not fulfilled, it has to be treated as prohibited; and that, therefore, OIA may be set aside. The Respondent has filed written submissions dated 21.12.2018.

4. In the personal hearing held on 02.02.2023, in virtual mode, Sh. V. Anburaju, AC appeared for the Applicant department and reiterated the contents of the RA. He highlighted that the case is of ingenious concealment and apparent smuggling. Therefore, the Commissioner (Appeal) has erred in allowing clearance of gold on payment of duty. Sh. Sathish D., Respondent appeared and submitted that the case has been foisted on him as he did not yield to the demands of the officers. As per him, the gold was procured legitimately from his hard earned money. Hence, the Commissioner (Appeals) has done justice in the matter. Sh. Anburaju, AC denied the allegations made by Sh. Sathish D. and informed that the seized gold has been disposed off on 29.12.2020.

5.1 The Government has examined the matter carefully. For appropriate disposal of the subject revision application, it is necessary to first recapitulate the Orders passed by the lower authorities in the matter.

5.2 The original authority, vide OIO dated 09.01.2018, has passed the following Order:

- (i) I order absolute confiscation of the seized 4 no. of gold bars totally weighing 349.2 gms and valued at Rs. 9,96,267/- under Section 111(d) & 111(l) of the Customs Act, 1962 read with Section 3(3) of the Foreign Trade (Development and Regulation) Act, 1992.
- (ii) I order absolute confiscation of the seized Material Objects viz. white coloured electric rice cooker, 4 nos. of CDs and 3 nos. of transparent pouch and glaze paper of no commercial value used to conceal the smuggled gold under Section 119 of the Customs Act, 1962 read with Foreign Trade (Development and Regulation) Act, 1992.
- (iii) I impose a penalty of Rs. 1,00,000/- (Rupees One Lakh Only) on Shri Sathish Delly under Section 112 (a) of the Customs Act, 1962.
- (iv) I impose a penalty of Rs. 10,000/- (Rupees Ten Thousand Only) on Shri Sathish Delly under Section 114AA of the Customs Act, 1962."

5.3 The Commissioner (Appeals), vide OIA dated 22.03.2018, has passed the following Order:

“Accordingly, I set aside the absolute confiscation of the impugned gold and allow release of gold on payment of the applicable rate of duty for home consumption. I set aside both the penalties imposed under Section 112(a) and Section 114AA of the Customs Act, 1962. Appeal allowed”

5.4 Thus, the Commissioner (Appeals) has allowed the release of the impugned gold bars on payment of applicable rate of duty without imposition of any redemption fine and has waived penalties imposed as well. The Government, however, observes that the Commissioner (Appeals) has in paras 6 & 7 of the OIA specifically found that the offending goods were concealed in between two pairs of CDs further concealed inside an electric rice cooker; that the Respondent was not an eligible passenger; and that the Respondent had neither declared the goods nor did he possess any valid permit to import the gold into India. In the conspectus of these facts, held to be established by the Commissioner (Appeals) himself, the liability of the goods to confiscation, under Section 111(d) & 111(l), *ibid*, is established. However, strangely, the Commissioner (Appeals) has omitted to record such apparent legal consequences of his own findings. At the same time, he has confined himself to only setting aside the “absolute confiscation”. However, as no redemption fine has been imposed in lieu of confiscation and as the penalty under Section 112 has also been set aside, it is clear that the Commissioner (Appeals) has set aside the ‘confiscation’ itself and not merely ‘absolute confiscation’, that too without assigning any reasons for the same. Thus, the Government has no hesitation in holding that the OIA impugned herein is self-contradictory and a non-speaking order, which has been passed by the Commissioner (Appeals), as if in a predetermined fashion, by ignoring his own findings.

5.5 It is the contention of the Respondent that the subject gold was purchased by him from his own savings and that he is the owner thereof. This contention, however, is not supported by any evidence such as purchase invoice etc. Only contention appears to be

that the Respondent had sufficient savings to support the purchase. However, merely because the Respondent supposedly had sufficient savings to support the purchase, it would by itself not be sufficient to establish that the Respondent had indeed purchased the gold. Further, ingenious manner of concealment of offending goods and act of non-declaration suggest that the gold was illicitly acquired. Any prudent and law abiding person would not carry the licitly acquired gold in this fashion. It is also to be observed that, in terms of Section 123 of the Customs Act, 1962, the onus of proof that the seized gold is not smuggled lies squarely on the Respondent herein.

5.6 Another contention of the Respondent here is that this case has been foisted upon him by the officers for ulterior motives. However, the Government is not persuaded to accept this contention for the following reasons:

- (i) The allegations of malafide and ulterior motives are serious in nature. Such allegations need to be supported by independent evidences/ proof, which is entirely missing in the present case.
- (ii) The goods were recovered and seized in the presence of independent witnesses. Entire sequence of events was also recorded in the seizure Mahazar.
- (iii) The Respondent has admitted the facts of the case, as brought out in the Mahazar, in his statement recorded under Section 108 of the Customs Act, 1962. There is nothing on record to indicate that this statement has been retracted by the Respondent herein.
- (iv) Manner of concealment and fact of non-declaration clearly establish that the Respondent was himself acting malafide.

5.7 In the facts and circumstances of the case and keeping in view the discussion above, there is no doubt that the original authority had correctly held the offending goods to be liable for confiscation and, accordingly, appropriate penalties had also been imposed on the Respondent. Further, the original authority has for relevant and reasonable considerations recorded in paras 8, 9 & 10 of the OIO ordered absolute confiscation. Since

order of absolute confiscation is based upon relevant and reasonable considerations, the same could also not have been interfered with by the Commissioner (Appeals) [Ref. M/s Raj Grow Impex LLP & Ors {2021 (377) ELT 0145 (SC)}, P. Sinnasamy {2016 (344) ELT 1154 (Mad.)}, Mangalam Organics Ltd. {2017 (349) ELT 369 (SC)} & Raju Sharma {2020 (372) ELT 249 (Delhi)}].

6. The OIA impugned herein is set aside for the reasons aforesaid and the revision application is allowed. Consequently, the OIO dated 09.01.2018 is restored.



(Sandeep Prakash)

Additional Secretary to the Government of India

The Principal Commissioner of Customs, Airport,
Chennai-I Commissionerate,
New Custom House, Meenambakkam,
Chennai-600027

Order No. 34 /23-Cus dated 03.01.2023

Copy to:

1. The Commissioner of Customs (Appeals-I), 60 Rajaji Salai Custom House, Chennai-600001.
2. Shri Sathish Delly, S/o Late Shri Delly, R/o 105/88, Pillayar Kovil Street, Pandur, Guduvanchery, Kanchipuram, Tamil Nadu – 603 202.
3. PPS to AS(RA).
4. Guard File.
5. Spare Copy
6. Notice Board.

ATTESTED

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