

SPEED POST



F. No. 373/07/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...17/11/22

Order No. 350/22-Cus dated 17-11-2022 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 129DD of the Customs Act 1962 against the Order-in-Appeal No. C.Cus. No. 121/2017 dated 07.07.2017, passed by the Commissioner of Customs Appeals-I), Chennai.

Applicant : Sh. Shaik Hussain Basha, Chennai.

Respondent : Pr. Commissioner of Customs, Airport, Chennai.

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ORDER

A Revision Application No. 373/07/B/2018-RA dated 15.01.2018 has been filed by, Sh. Shaik Hussain Basha, Chennai (hereinafter referred to as the Applicant), against the Order-in-Appeal No. C.Cus No. 121/2017 dated 07.07.2017, passed by the Commissioner of Customs (Appeals-I), Chennai. The Commissioner (Appeals) has, vide the impugned Order-in-Appeal, upheld the Order-in-Original No. 266/2016-17-AIRPORT dated 08.02.2017, passed by the Additional Commissioner of Customs (Adjudication-Air), Chennai, except to the extent of dropping the penalty under Section 114AA of the Customs Act, 1962 which was imposed on the Applicant herein by the original authority.

2. Briefly stated, the Applicant herein arrived at Chennai from Kuwait, on 05.08.2016. He was intercepted by the Customs Officers at the exit gate of the arrival hall, after he had passed through the Green Channel. He was asked whether he was carrying any gold ornaments or contraband, to which the Applicant herein replied in negative. It was also ascertained that the Applicant herein had not submitted the Indian Customs Declaration Form and orally stated that he had no dutiable goods to declare. Upon his personal search, two transparent polythene adhesive tape wrapped packets concealed in the underwear worn by the Applicant were recovered wherein 04 cut pieces of gold, totally weighing 338 gms. and valued at Rs. 10,84,980/-, were recovered. The original authority, vide the aforesaid Order-in-Original dated 08.02.2017, ordered absolute confiscation of the seized gold under Section 111(d) and (i) of the Customs Act, 1962. Penalties of Rs. 1,00,000/- and Rs. 1,50,000/- were also imposed on the Applicant herein under Section 112(a) and Section 114AA of the Act *ibid*, respectively. In the appeal filed by the Applicant herein, the Commissioner (Appeals) set aside the penalty under Section 114AA but upheld the rest of the order passed by the original authority.

3. The revision application has been filed, mainly, on the grounds that the statement made by the Applicant herein before the Customs authorities was not voluntary and had been retracted; that the gold is not a prohibited item; that in the case of goods other than prohibited goods, option of redemption under Section 125 of the Act *ibid* is mandatory; that, therefore, the goods may be ordered to be released and penalty may be set aside.

4. Personal hearing was held on 16.11.2022, in virtual mode. Sh. T. Cheziyan, Advocate appeared for the Applicant and submitted that at this stage he is limiting the challenge to the absolute confiscation of gold. In his submission, gold is not a 'prohibited item'. Hence, in terms of Section 125 of the Customs Act, 1962, the authorities are required to release the gold on redemption fine mandatorily. He relied upon the judgments of Hon'ble Rajasthan High Court in the case of Commissioner of Customs (P), Jodhpur vs. Mehboob (Order dated 22.02.2022 in CWP No. 5640/2019) and that of Hon'ble Allahabad High Court in the case of Commissioner of Customs, Lucknow vs. Sh. Rajesh Jhamatmal Bhat and Anr. (Order dated 06.07.2022 in Customs Appeal No. 7 of 2019). No one appeared for Respondent department nor any request for adjournment has been received. Therefore, it is presumed that the Respondent department has nothing to add in the matter.

5. The instant revision application has been filed with a delay of about 2 months and 28 days. The delay, attributed to misplacement of papers at the end of Power of Attorney of the Applicant herein, is condoned. However, the Applicant has failed to deposit RA Fee of Rs. 1000/-, as required in terms of sub-section (3) of Section 129DD, despite being advised to do so vide letters dated 23.03.2018, 19.10.2022 and 28.10.2022. Therefore, the revision application is liable to be rejected on this ground alone.

6.1 Nevertheless, the Government has carefully examined the matter on merits as well. In the personal hearing, the Applicant has limited to challenge to the impugned Order-in-Appeal only to the extent of absolute confiscation of gold since in his say the gold is not a 'prohibited item'. The Government observes that the authorities below have relied upon the orders of Hon'ble Supreme Court in the cases of Sheikh Mohd. Omer {1983 (13) ELT 1439 (SC)} and Om Prakash Bhatia {2003 (155) ELT 423 (SC)} and that of the Hon'ble Madras High Court in the case of Swaminathan Murugesan {2009 (247) ELT 21(Mad.)} to hold that the subject goods are 'prohibited goods'. The Government observes that the gold is not allowed to be imported freely in baggage and it is permitted to be imported only subject to fulfilment of certain conditions. In the present case, it is not even contended that these conditions were fulfilled by the Applicant herein. As correctly pointed out by the authorities below, the Hon'ble Supreme Court has held that

if the conditions prescribed for import or export of any goods are not complied with, such goods would be considered to be prohibited goods. It is further observed that in the case of UOI & Ors. vs. M/s Raj Grow Impex LLP & Ors (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 restriction."*

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

"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 condition 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----."

The judgment in Malabar Diamond Gallery (supra) has been followed by another Division Bench of the Hon'ble Madras High Court in the case of P. Sinnasamy {2016 (344) ELT 1154 (Mad.)}.

6.3 The Applicant has cited a judgment dated 06.07.2022 of the Hon'ble Allahabad High Court in the case of Rajesh Jhamatmal Bhat and another (supra) to contend otherwise. The relevant extracts of the aforesaid judgment of the Hon'ble Allahabad High Court are as under:

"20. Moreover, we find that in the order dated 27.08.2018, the Commissioner (Appeals) has held that the import of gold was not prohibited under the Foreign Trade Policy or any other law for the time being in force and, therefore, there is no sufficient ground for absolute confiscation of the gold. This finding has not been reversed by the Tribunal as the Tribunal has affirmed the order passed by Commissioner (Appeals). Nothing has been placed before this Court to establish that this finding of the Commissioner (Appeals) is wrong or erroneous and that gold falls within the category of "prohibited goods". Therefore, we proceed to decide the appeal on the

factual premise that Gold does not fall within the category of 'prohibited goods'. "

It is thus apparent that in the case before the Hon'ble Allahabad High Court, there was no challenge to the findings of the authorities below that the gold was not a 'prohibited item' and, therefore, the Hon'ble High Court decided the appeal before it on the premise that gold does not fall within the category of prohibited goods. In other words, there is no finding of the Hon'ble High Court itself in the matter. As such, the said judgment of Hon'ble Allahabad High Court is of no assistance to the case of the Applicant herein. In any case, the judgments in the cases of Swaminathan Murugesan (surpra), P. Sinnasamy (supra) and Malabar Diamond Gallery (supra) are the judgments of the jurisdictional High Court i.e., the Hon'ble Madras High Court.

6.4 In view of the above, the Government holds that the seized goods are 'prohibited goods'.

7.1 The authorities below have denied the release of seized goods on redemption fine under Section 125 of the Customs Act, 1962. In terms of Section 125, the option to release 'prohibited goods', on redemption fine, is discretionary, as held by 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.)]. The Applicant has, however, relied upon the judgment dated 22.02.2022 of the Hon'ble Rajasthan High Court in the case of Mehboob (supra) to seek redemption of the goods.

7.2 The Government observes that, in the case of Mehboob (supra), the Hon'ble Rajasthan High Court has followed its earlier judgment dated 17.02.2022 in the case of Manoj Kumar Sharma vs. UOI and Ors. (CWP No. 12001/2020). The Government finds that in the said judgment, the Hon'ble High Court has agreed with the judgment of Hon'ble Gujarat High Court, in the case of Bhargavraj Rameshkumar Mehta Vs. UOI [2018 (361) ELT 260 (Guj)], wherein it is held that for the purpose of Section 111 "----
goods, import of which is conditional, would fall within the definition of prohibited goods if such conditions are not complied with." The Hon'ble Rajasthan High Court has, however, subsequently in its judgment distinguished between the interpretation of

"prohibited goods" in respect of Section 125 and that in respect of Section 112 read with Section 111 in the following terms:

"This view may seem incongruent with the view expressed by Gujarat High Court in case of Bhargavraj Rameshkumar Mehta (supra) which we have also followed in this judgment but flavours of Section 112 and 125 of the Customs Act are entirely different. Section 125 on the other hand pertains to option to pay fine in lieu of confiscation. As noted, sub-section (1) of Section 125 comes in two parts. Whenever confiscation of goods authorised under the Act, as per sub-section (1) of Section 125 the adjudicating officer has a discretion to offer redemption fine in lieu of confiscation in case of goods importation or exportation whereof is prohibited. In all other cases, there is a statutory mandate on the adjudicating officer to offer such redemption fine. If the interpretation of Section 112 and 125(1) is not reconciled as above, this latter portion of sub-section (1) of Section 125 which covers all cases except where the importation or exportation of the goods is prohibited, would become otiose."

Thus, Hon'ble Rajasthan High Court has, in effect, held that while the goods, import/export of which is conditional, have to be considered as "prohibited goods" for the purposes of imposition of penalty under Section 112/114, however, for the purposes of Section 125, such goods cannot be considered to be so. The Government respectfully observes that this distinction drawn by the Hon'ble Rajasthan High Court is at variance with the judgment of Hon'ble Supreme Court in the case of Raj Grow Impex (surpa). The Apex Court has, in Raj Grow Impex, held that the goods which were imported beyond permissible quantity and without licence (i.e., in contravention of the conditions) were "prohibited goods" and thereafter proceeded to hold such goods liable to absolute confiscation, i.e., without affording the option of redemption under Section 125. Thus, the Hon'ble Supreme Court has not made any distinction between the meaning of "prohibited goods" for the purpose of section 112 read with Section 111 and that for the purpose of Section 125. The judgment in Raj grow Impex (supra) case has not been considered by the Hon'ble Rajasthan High Court in the case of Manoj Kumar Sharma and Mehboob. As such, the Government respectfully follows the dictum of Hon'ble Supreme Court in the

matter and holds that the subject goods being "prohibited goods". The option to redeem such goods in lieu of confiscation is discretionary.

7.3 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 reasons'*". Hon'ble Delhi High Court has, in the case of Raju Sharma Vs. UOI {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 motives.*" In holding so, the Hon'ble High Court has relied upon the judgment of Apex Court in the case of Mangalam Organics Ltd. {2017 (349) ELT 369 (SC)}. Thus, the Commissioner (Appeals) could have interfered with the discretion exercised by the original authority only if it would have been tainted by any of vices highlighted by the Hon'ble Courts. Such a case is not made out. Hence, the Commissioner (Appeals) has correctly refused to interfere with discretion exercised by the original authority.

8. The penalty imposed is just and fair, in the facts and circumstances of the case.
9. The revision application is rejected for the reasons aforesaid.



(Sandeep Prakash)

Additional Secretary to the Government of India

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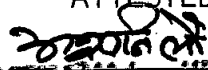
Order No. 350/22-Cus dated 17-11-2022

Copy to:

1. The Pr. Commissioner of Customs, Anna International Airport, New Customs House, Meenambakkam, Chennai-600027.

2. The Commissioner of Customs (Appeals-I), 60, Rajaji Salai, Custom House, Chennai-600001.
3. Sh. T. Chezhiyan, Advocate, No. 99, Armenian Street, 3rd Floor, Chennai-600001.
4. PA to AS(RA).
5. Guard File.
6. Spare copy

ATTESTED


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