SPEED POST

F. No. 373/519/B/2019-RA
F. No. 373/520/B/2019-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 22/11/22

Order No. 359-360 /22-Cus dated 22-11-2022 of the Government of India passed by Shri Sandeep Prakash, Additional Secretary to the Government of India, under section 129DD of the Custom Act, 1962.

Subject	:	Revision Applications under Section 129 DD of the Customs Act 1962 against the Order-in-Appeal C.Cus.I. Nos. 296 & 297/2019 dated 27.11.2019 passed by the Commissioner of Customs (Appeals-I), Chennai
Applicants	:	Sh. Omprakash Triloki Chandwani, Mumbai Sh. Pritpal Singh Kalsi, Mumbai
Respondent	:	Pr. Commissioner of Customs (Airport), Chennai.

ORDER

Revision Applications, bearing Nos. 373/519/B/2019-RA & 373/520/B/2019-RA both dated 09.12.2019, have been filed by Sh. Omprakash Triloki Chandwani, Mumbai & Sh. Pritpal Singh Kalsi, Mumbai (hereinafter referred to as the Applicant-1 and Applicant-2, respectively) against the Order-in-Appeal C.Cus.I Nos. 296 & 297/2019 dated 27.11.2019, passed by the Commissioner of Customs (Appeals-I), Chennai. The Commissioner (Appeals) has upheld the Order-in-Original of the Joint Commissioner of Customs, Adjudication-Air, Chennai, bearing no. 228/2018-19-Commissionerate-I dated 11.01.2019, ordering absolute confiscation of 23 nos. of gold bars of 24 Karat purity, totally weighing 23000 gms, valued at Rs. 6,59,41,000/-, which were recovered from the Applicant-1, under Section 111(d) & (i) of the Customs Act, 1962. However, the penalty of Rs. 1,00,00,000/-, imposed on each of the Applicants, under Section 112(a) of the Act, vide the aforementioned Order-in-Original, has been reduced to Rs. 50,00,000/- each.

2. Brief facts of the case are that the Applicant-1 arrived, on 22.06.2014, at Chennai Airport from Singapore and was intercepted near the exit gate while passing through the Green Channel. After search of his person and of his baggage, 23 pieces of gold bars of 1 KG each with foreign marking, collectively weighing 23000 grams and valued at Rs. 6,59,41,000/-, were recovered from his possession. Further, an invoice dated 16.06.2014 issued by M/s. R.K Enterprise, Singapore for shipment of 23 nos of 1 Kg gold bars,

through hand delivery, from Singapore to Colombo by Applicant-1 to Heritage, Sri Lanka was also recovered from him. Applicant-1, in his statement dated 22.06.2014, recorded under Section 108 of the Customs Act, 1962, stated that he accompanied his friend, Applicant-2 from Mumbai to Chennai on 21.06.2014 and then to Singapore on the same day where the gold was given to him by the friend of Applicant-2; that all travel arrangements were made by Applicant-2; that he and Applicant-2 both returned to Chennai by the same flight on 22.06.2014; that Applicant-2 cleared through immigration and Customs at Chennai Airport itself as he was supposed to travel to Delhi; that the gold had to be transferred to Applicant-2 in the Transit Lounge where he (Applicant-1) had to board the flight to Sri Lanka and handover the gold to Applicant-2; and that Applicant-2 had promised him a remuneration of Rs. 50000/- to do so. In his statement dated 23.06.2014, recorded under Section 108 of the Customs Act, 1962, Applicant-2 elaborated the planned modus operandi to smuggle the impugned gold from Singapore to India and stated that as per his plan, on landing at Chennai from Singapore, he cleared immigration and customs and went to the departure terminal and checked-in with his e-boarding pass; that he offloaded himself as he could not meet Applicant-1 at the departure terminal and checked himself into a hotel. The case was adjudicated by Additional Commissioner of Customs (Adjudication-Air), vide Order-in-Original No. 170 dated 09.12.2016, who ordered absolute confiscation of the gold bars under Section 111(d) & (l) of the Customs Act, 1962

and imposed a penalty of Rs. 66,00,000/- each on both the Applicants under Section 112(a) and also imposed a penalty of Rs. 1,00,000/- on Applicant-1 under Section 114AA of the act, ibid. Subsequently, both the Applicants filed Writ Petitions in the Hon'ble Madras High Court, bearing nos 4834 and 4916 of 2017. The Hon'ble High Court, vide Order dated 03.08.2017, set aside the Order-in-Original No. 170 dated 09.12.2016 and remanded the matter back for de-novo adjudication to the original authority after permitting the perusal of relied-upon documents by the petitioners/authorized representatives and hearing them afresh. Thereafter, the Joint Commissioner (Adjudication-Air), vide Order-in-Original no. 228/2018-19 dated 11.01.2019, absolutely confiscated the 23 nos of gold bars valued at Rs. 6,59,41,000/-, under Section 111(d) and 111(l) of the Customs Act, 1962 and imposed personal penalty of Rs. 1,00,00,000/- on each of the Applicants. Aggrieved, the Applicants filed appeals before the Commissioner (Appeals), which have been rejected, except to the extent of reducing the penalty from Rs. 1,00,00,000/- each to Rs. 50,00,000/- each.

3.1 The Applicant-1 has filed the revision application, mainly, on the grounds that he was a transit passenger to Colombo but Customs officers compelled him to complete the immigration formalities and directed him to move to the Arrival Hall where he was intercepted and shown to have crossed the Green Channel; that CCTV footage was not provided to him; that cross-examination of witnesses was not permitted; that gold is not

prohibited and, hence, the gold may be released on payment of redemption fine and duty or re-export may be allowed.

3.2 Applicant – 2 has filed the revision application, mainly, on the grounds that the relied upon documents were not provided to him; that nothing was seized from him; that the cross examination of witnesses was not allowed; that the officers of customs forcibly obtained the statements that the gold belonged to someone else; that the statements were retracted by him and, hence, cannot be the basis for imposing penalty; that his antecedents cannot be the basis to conclude his involvement in the case; and that the statements of co-accused cannot be taken as a substantive piece of evidence against him.

4.1 Personal hearing in the matter was fixed on 03.12.2021 and 09.12.2021. In response to the hearing notice dated 23.11.2021, Sh. Krishna Pratap Singh, Advocate filed his vakalatnama, vide email dated 09.12.2021, and stated that "*the Applicant has recently appointed the undersigned as counsel on 05.12.2021 (signed vakalatnama is enclosed herewith). The undersigned has to collect all the relevant papers from the Applicant and the undersigned requires at-least one month's time to go through the papers to appreciate the facts.*" Accordingly, the learned Advocate requested that the hearing may be adjourned to any suitable date in second fortnight of January 2022. Hearing was thereafter granted on 05.01.2022, 19.01.2022, 23.02.2022 and 02.03.2022. However, there was no response.

4.2 Upon change of revisionary authority, personal hearing in the matter was fixed on 13.09.2022. In response to the hearing notice dated 30.09.2022, Sh. Krishna Pratap Singh, Advocate, again filed vakalatnamas dated 16.09.2022 and vide e-mail dated 29.09.2022, requested for adjournment as he had "*been recently engaged in this matter and some time is required to study the voluminous records of the case*". The hearing was adjourned to 17.10.2022. However, in response, the learned Advocate again requested for adjournment stating that "*the advocate previously engaged by the Applicants, passed away during the COVID time & the requisite documents of the case have still not been made available to me*". The personal hearing scheduled for 17.10.2022 was, thereafter, again adjourned to 15.11.2022. In the personal hearing held on 15.11.2022, Sh. K.P. Singh, Advocate appeared for the Applicants, in physical mode. He requested for further adjournment on the grounds that he had not been able to collect papers from the office of the previous counsel of the Applicants as the client has not provided the same. It was pointed out to him that the matter had been assigned to him 2 months ago and had been repeatedly adjourned at his request. Hence, no further adjournment can be allowed. Thereafter, Sh. Singh submitted a hand written note after an half hour adjournment, which was taken on record.

4.3 The hand written submission made by the learned Advocate are reproduced hereunder for the sake of clarity:

"Spot submission due to non-allowance of additional time for detailed submission:

(1) The Appellant Mr. Chandwani was carrying invoice issued by R.K. Enterprise. R.K. Enterprise invoice have details like:- Supplier, Receiver, Date of purchase, Invoice Number., O.P. Chandwani as carrier with his passport no. Z2026432, Gold quantity and value. The address with Pin Code and phone number. All these details should have been verified by the Customs department with the help of COIN officers/Embassy staff. Department without doing any verification, straightway came to conclusion of being it fabricated one.

(2) Dept conclusion of being fabricated one on the basis of online search is incorrect procedure to arrive at the conclusion.

(3) I have been informed that there is claimant but the Hon'ble RA has refused to give further time so not able to conclusively make my submission on this score.

(4) The cross-examination of key witnesses/officers were not allowed. It has been one-sided adjudication/Appellate proceedings.

(5) As per the invoice Mr. Chandwani was the physical owner of gold during flight transit.

(6) CCTV footage have not been given of transit area, Immigration & green channel area. O.P. Chandwani was forcibly taken to cross green channel making him guilty of evasion.

(7) Statements were retracted in time but Department has not made any finding of the revised statements.

(8) I am not fully prepared to argue and make submission today. However, I am forced to submit this written submission in an incomplete manner, due to refusal by the Hon'ble RA for not providing additional time.

(9) From the nature and conduct of this PH, I do not expect justice from the Hon'ble RA. So I would request that my matter may be heard by some other RA.

(10) I have not been allowed additional time even for making further additional submission with case laws."

4.4 This was followed by an e-mail dated 15.11.2022 (01:50 pm) by the learned Advocate, which is again reproduced for the sake of Clarity:

"PFA Spot submission which may be kept on record. I reiterate that I needed extra time to submit complete defence by documents which are not in my possession along with case laws. Hon'ble RA has actively denied this opportunity. He has also not allowed to provide Synopsis and Written

Submission in short time. Therefore, in a hurry I submitted handwritten Spot Submission which do not fully capture my elaborate defence submission and relevant case laws.

I have genuine apprehension of getting justice from the current Hon'ble RA hence he is requested not to decide. I will request that the current Hon'ble RA should not decide this matter and matter May be transferred to some learned RA."

5.1 In view of the submissions made in the hand written note submitted by the learned Advocate at the time of PH held on 15.11.2022 and his e-mail dated 15.11.2022, it would be appropriate to first address the request of learned Advocate for this authority to not decide the subject matter. At the outset, it is observed that the reasons for making this request though are not specifically stated but from the communications of the learned Advocate it would appear that denial of his request for further adjournment and alleged denial of opportunity to submit Synopsis and Written Submissions have led to this request.

5.2 To address this issue, it would be pertinent to examine the correspondence by the learned Advocate chronologically. The first correspondence was received on 09.12.2021, by way of email, when the learned Advocate represented that he had been engaged "*as a counsel on 05.12.2021*" and that he "*has to collect all the relevant papers from the Applicant and ----- requires at-least one month's time to go through the papers to*

appreciate the facts". Next correspondence was received, by way of an e-mail dated 29.09.2022 (06:02 pm), in response to the hearing notice for the hearing fixed on 30.09.2022, alongwith vakalatnamas dated 16.09.2022, stating that he had been engaged recently in the matter and some time was required to study "*the voluminous records of the case*". In the next e-mail dated 15.10.2022 (11:42am), in response to the hearing notice for the hearing fixed on 17.10.2022, the adjournment was sought on the grounds that the "*advocate previously engaged by the Applicants, passed away during COVID time & the requisite documents of the case have still not been made available to me.*" In the personal hearing held on 15.11.2022, learned Advocate sought further adjournment on the grounds "*he has not been able to collect papers from the office of the previous counsel of the Applicants as the client has not provided the same.*" Thus, it is on record that the learned Advocate, by his own admission, had been engaged in the matter on 05.12.2021 itself but on 29.09.2022 (i.e. more than 9 ½ months after being engaged) again represented that he had been engaged recently and to buttress this claim filed vakalatnamas dated 16.09.2022. Further, on 09.12.2021, it was represented that the papers had to be taken over from the previous counsel and that it will take one month's time to peruse them whereas on 29.09.2022, it was represented that sometime was required to study the voluminous records. It goes without saying that unless the records were available with the learned Advocate, he could not have concluded that these were

"voluminous". However, strangely, on 15.10.2022, it was urged that the records of the case were not available to the learned Advocate as the counsel previously engaged by the Applicants had passed away whereas on 15.11.2022 the reason urged for adjournment was that the papers could not be collected from the office of the previous counsel as the client had not provided the same. Thus, as per e-mail dated 29.09.2022, the records of the case were available with the learned Advocate but he needed the time to peruse them as these were voluminous whereas in two subsequent communications/submissions it is claimed that the records itself were not available with the learned Advocate. The submissions made by the learned Advocate to seek adjournment are, therefore, not only self contradictory but also suffer from falsehood-having been already engaged on 05.12.2021, the learned Advocate again presented papers, vide email dated 29.09.2022, and represented as if he had been engaged only on 16.09.2022. It is due to this web of misrepresentations that this authority was constrained to reject the request for further adjournment on 15.11.2022. It would also not be out of place to recollect here that in all 09 opportunities for personal hearing were provided to the Applicants, before the request for further adjournment came to be rejected.

5.3 As regards the other contention of the learned Advocate that he was not provided additional time to submit the Synopsis and Written Submissions, suffice it to say that learned Advocate had been engaged by the Applicants on 05.12.2021 and, as on

15.11.2022, i.e., after 11 months sufficient time was available to the learned Advocate to prepare the Synopsis and the Written Submissions, if any. In any case, as would be evident from the records of personal hearing held on 15.11.2022, no request was made to file any Written Submissions or Synopsis, rather, the learned Advocate was insistent upon seeking adjournment. In any case, if the documents were not available with the learned Advocate he could not have made any further submissions and if documents were indeed available as represented by him in his e-mail dated 29.09.2022, sufficient time was available to him to make such submissions.

5.4 In the light of above discussions, it is apparent that the repeated requests for adjournment were nothing but dilatory tactics. Having been thwarted in seeking further adjournments, the learned Advocate has requested this authority not to adjudicate the matter. The conduct of the learned Advocate, as brought out hereinabove, leaves no manner of doubt that the allegations of apprehending injustice at the hands of this authority are intended to browbeat this authority into not discharging its duty of adjudicating the revision applications so as to achieve the original objective of delay. It is observed that the Hon'ble Delhi High Court has, in the case of Court on its own motion vs. State and Ors {judgment dated 21.08.2008 in WP (Crl.) No. 796/2007}, shown the path to the adjudicators faced with such unfortunate situations by observing "*that the path of recusal often is convenient and soft option and that where unfounded and motivated*

allegations of bias are made with a view of forum hunting or Bench preference, succumbing to its pressure would amount to not adhering to judicial oath." Guided by these observations of the Hon'ble Delhi High Court, this authority rejects the allegations of prejudice and consequent request for not deciding the case as baseless and malicious.

6.1 The Applicants have raised certain preliminary issues i.e., the copies of relied upon documents were not provided to them; that CCTV footage was not provided; that cross examination of witnesses and the officers concerned was not allowed; and that the statements made had been retracted.

6.2 As regards the documents, the Government observes that the original authority has specifically noted that the Advocate for the Applicants was allowed to peruse the documents on 27.11.2017 and, thereafter, he took copies of 52 documents (309 pages) whereafter, an additional reply dated 30.11.2017 to the show cause notice was filed (Paras 5 & 12 of the OIO). As such, it is apparent that not only the copies of relied upon documents were provided, the originals thereof were also allowed to be inspected/perused. Therefore, there is no merit in the contention of the Applicants that the copies of the relied upon documents were not provided.

6.3 As regards the CCTV footage, it is observed that the CCTV footage has not been relied upon by the department in the show cause notice. Despite the same, upon the requests of the Applicants, the Airports Authority of India (AAI) was requested to provide

the CCTV footage. It would appear that the CCTV footage in respect of Sh. Om Prakash Chandwani (i.e,. Applicant-1) was not available with the AAI whereas CCTV footage in respect of Sh. Pritpal Singh Kalsi (i.e., Applicant-2) was supplied in a CD to the learned Advocate on 20.03.2018 (Para 7 of the OIO). The Hon'ble Madras High Court has, in the case of S. Vardharajan vs. Commissioner of Customs, Tuticorin {2019 (370) ELT 194 (Mad.)}, held that "*11. Right to seek certain documents from the department during the enquiry can be considered as vested right, if those documents are relied upon by the department in the show cause notice. ----------. At the same time, if the department has not relied upon on certain documents, which are sought to be furnished by the other side, certainly, there is no vested right on the person to seek such documents, in the domestic enquiry/adjudicatory proceedings.*" Thus, it is clear that the Applicants had no vested right to seek the subject CCTV footage (which had not been relied upon by the department) and correspondingly the department had no obligation to furnish the same. Despite the same, the department has proactively pursued the matter with the AAI and provided the CCTV footage in respect of Sh. Pritpal Singh Kalsi (i.e., Applicant-2) as was available. As such, there is no merit in the subject contention as well.

6.4 As regards the cross examination of witnesses and the concerned officers, the original authority has appropriately considered the matter and denied the same by relying upon Hon'ble Supreme Court's judgments in the case of Surjeet Singh Chhabra vs. Union

of India {1997 (89) ELT 646 (SC)} and in the case of M/s. Kannungo & Company vs. Collector of Customs and another {(1973) 2SCC 438}. The Government finds that the view so taken by the original authority is in accordance with law and, therefore, no prejudice has been caused to the Applications herein by the denial of their request for cross examination.

6.5 It has been contended that the statements made by them before the Customs officers had been retracted by them and, hence, could not be relied upon. The Government observes that in the case of Surjeet Singh Chhabra (supra), the Hon'ble Supreme Court has held that a confession made before a Customs officer is an admission and binding, even if retracted within six days. Further, it is evident from the facts and circumstances of the case that the statements and admissions made by the Applicants are substantively corroborated by other evidence. To illustrate, the Applicant-2 was not intercepted by the Customs officers at the airport but was subsequently picked up upon identification by Applicant-1. The Applicant-2 financed the travel of Applicant-1 from Mumbai to Chennai to Singapore to Chennai to Colombo to Chennai to Mumbai – there was no need for him to do so if they were not acting in cahoots.

7.1 On merits, the case of the department is that that Applicant-1 and Applicant-2 were acting in cahoots, they travelled together from Mumbai to Chennai then from Chennai to Singapore and from Singapore to Chennai-on the last leg carrying the gold. The modus-

operandi was that the Applicant-1, who was a transit passenger from Chennai to Colombo, due to his onwards flight to Colombo, was to meet the Applicant-2 in the Transit Lounge in the Airport when the Applicant-2 had booked himself on a flight from Chennai to Delhi, which was a domestic leg of an international flight, and, therefore, he also would have to board the flight from the same Transit Lounge, where the Applicant-1 was to handover the gold to the Applicant-2 for further carriage to Delhi. However, as the Singapore to Chennai leg of the travel of Applicant-1 was by Air India Express and the Chennai to Colombo leg was on Sri Lankan Airlines, the Air India and Immigration officials did not treat Applicant-1 as a transit passenger and, consequently, he was not able to move to the Transit Lounge upon his arrival at Chennai from Singapore. Therefore, he had to clear immigration and customs at which stage he was intercepted and the gold was found on him. Thereafter, upon the identification by the Applicant-1, the Applicant-2 was finally traced and apprehended. As per department, the Applicant-2 was the mastermind who had funded the trip and who was to take the gold from the Applicant-1 in the Transit Lounge of the Chennai International Airport. On the other hand, the defence of Applicant-1 is that he was actually intercepted in the lounge area when the Customs Officers recovered the gold but compelled him to complete immigration formalities etc., and then registered a case as if he had crossed the green channel. The Applicant-2 has submitted that no recovery whatsoever had been made from him and he had been unnecessarily dragged into the

proceedings. An invoice dated 16.06.2014 issued by M/s R.K. Enterprise, Singapore for shipment of 23 pieces of 01 Kg bars, through hand delivery, from Singapore to Colombo by Applicant-1 to M/s Heritage, Sri Lanka has been heavily relied upon to underline that the Applicant-1 was only a transit passenger and was legitimately carrying gold from Singapore to Colombo .

7.2 The Government observes that this defence of the Applicants has been examined by the Commissioner (Appeals). The Government agrees with the findings of the Commissioner (Appeals) for the following reasons:

(i) It has been brought out that though the invoice was issued on 16.06.2014, there had been no claim for gold-neither by the purported seller i.e., M/s R.K. Enterprise, Singapore nor by the purported buyer i.e., M/s Heritage Sri Lanka. Therefore, the invoice was not a true document. Though at this stage, it has been contended by the learned Advocate (on 15.11.2022) that the claim had indeed been made but the claimant has not been identified nor has any evidence been furnished to substantiate the same. Therefore, this submission is completely bereft of any details. Further, it is to be observed that the seizure was made on 22.06.2014, i.e., about eight and a half years ago. If the details of the claimant, if any, are still not available, it is

obvious that the subject contention is nothing but an afterthought to somehow contradict the findings of the authorities below.

(ii) It has been brought out that the tickets for travel by Applicant-1 from Singapore to Chennai and from Chennai to Colombo were by Air India Express and Sri Lankan Airlines respectively. Since the onward travel was by a different airline, the Air India and immigration at Chennai Airport did not give Applicant-1 the status of a transit passenger. Therefore, he was made to complete immigration formalities at Chennai by these agencies and the Customs Department had no role in the matter. As such, the contention that the Customs Officers compelled Applicant-1 to complete immigration formalities at Chennai is not acceptable. This contention of the Applicant-1 has also not been found reliable for the reason that there was no reason for him to fly from Singapore to Chennai and then to Colombo rather than flying directly from Singapore to Colombo, which would be cost effective and time saving. The Government finds that there is no credible explanation in this regard even at this stage. In fact, any prudent person would normally travel direct when carrying a precious commodity, with value in excess of Rs. 6.59 crores, so as to avoid any risk in transit.

(iii) It is also undisputed that the tickets were booked and paid for by the Applicant-2 for travel of Applicant -1. There is no explanation forthcoming as to why Applicant-2 will fund the travel of Applicant-1 who had gone to Singapore only for carriage of gold, on his own admission, if Applicant-2 had no interest in the matter.

(iv) It is also brought out that the Applicant-2 after arrival from Singapore at Chennai checked-in himself into the flight to Delhi but offloaded himself twice. It has been admitted by the Applicant-2, in his statement made under Section 108 of the Customs Act, 1962, that he did so on not finding Applicant-2 in the departure transit lounge as per plan. If Applicant-2 and Applicant-1 were not collaborators in the smuggling of gold, there was no reason for Applicant-2 to offload himself that too twice. It is also on record that the culpability of Applicant-2 in the matter was initially pointed out by the Applicant-1 which would not have been the case if they were not working together in the matter.

7.3 In view of the above, the Government does not find any merit in the contentions to the contrary made by the Applicant-1 & 2. It is obvious that Applicant 1 & 2 had in a very clever and pre-meditated manner attempted to smuggle gold into the country and had also created an advance defense by way of the Invoice dated 16.06.2014. However, their

well thought out plans fell flat as the airline and immigration authorities did not consider the Applicant-1 as transit passenger, which prevented him from handing over the smuggled gold to the Applicant-2 in the Transit Lounge.

8.1 It is contended that the import of gold is not 'prohibited'. However, the Government observes that this contention of the Applicant is in the teeth of law settled by a catena of judgments of Hon'ble Supreme Court. In the case of Sheikh Mohd. Omer vs Collector of Customs, Calcutta & Ors {1971 AIR 293}, 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".* Gold is not allowed to be imported freely in baggage and it is permitted to be imported by a passenger subject to fulfillment of certain conditions. In the case of M/s Om Prakash Bhatia Vs. Commissioner of Customs, Delhi {2003(155) ELT423(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 & 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 restrictions."*

8.2 In the case of Malabar Diamond Gallery P. Ltd. Vs ADG, DRI, Chennai [2016(341) ELT65(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----."*

The judgment in Malabar Diamond Gallery (supra) has been followed by the Hon'ble Madras High Court in the case of Commissioner of Customs (Air), Chennai-I vs. P. Sinnasamy {2016 (344) ELT 1154 (Mad.)}.

8.3 In view of the above, the contention of the Applicants that the offending goods are not 'prohibited goods', cannot be accepted.

9. The original authority has denied the release of impugned goods on redemption fine under Section 125 of Customs Act, 1962. The Government observes that, in terms of Section 125 of the Customs Act, 1962, 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.)]. 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)], relying upon the judgment of Apex Court in Mangalam Organics Ltd. [2017 (349) ELT 369 (SC)], 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."* It is observed that the original authority has duly considered the matter and denied redemption for relevant and reasonable considerations indicated in para 21 of the OIO. Hence, the Commissioner (Appeals) has correctly refused to interfere in the matter.

10.1 Other contention of the Applicant is that re-export of gold may be allowed. The Government finds 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."

10.2 On a plain reding 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 ibid. In this case, the Applicant-1 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 {2009 (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.*" Hence, the request for re-export does not merit consideration.

11. As regards the penalty imposed on the Applicants herein, the Commissioner (Appeals) has already provided substantial relief to them by reducing the penalty imposed on each of them from Rs. 1,00,00,000/- to Rs. 50,00,000/- each. In the facts and

circumstances of the case, the Commissioner (Appeals) has been rather lenient and, as such, there is no scope for reduction in penalty.

12. In view of the above, the revision applications are rejected.

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Order No. 359-360 /22-Cus dated 22-11-2022

Copy to:

1. The Commissioner of Customs (Appeals-I), No. 60, Custom House, Rajaji Salai, Chennai-600001.
2. The Pr. Commissioner of Customs, Airport and ACC, New Custom House, Meenambakkam, Chennai-600027.
3. Sh. K.P Singh, Advocate, M/s. ASAV Attorneys & Advisors LLP, D-42, LGF, South Extension Part-2, New Delhi.
4. PA to AS(RA).
5. Guard file.
6. Spare Copy.

ATTESTED

नरेंदर कुमार सिंह / Narender Kumar Singh
अधीक्षक / Superintendent (R.A. Unit)
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राजस्व विभाग / Department of Revenue
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