

**SPEED POST**



F. No. 373/50/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. 23/11/22

Order No. 363/22-Cus dated 23-11-2022 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 No. C.Cus-I No. 5/2016 dated 25.01.2016, passed by the Commissioner (Appeals-I), Chennai.

Applicant : Sh. Thirunavukkarasu, Perambalur .

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

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## ORDER

A Revision Application, bearing No. 373/50/B/2016-RA dated 13.04.2016, has been filed by Sh. Thirunavukkarasu, Perambalur (hereinafter referred to as the Applicant), against Order-in-Appeal No. C.Cus-I No. 5/2016 dated 25.01.2016, passed by the Commissioner of Customs (Appeals-I), Chennai. Vide the impugned Order-in-Appeal, the Commissioner (Appeals) has upheld the order of the Additional Commissioner of Customs (Airport), Chennai, bearing Order-in-Original No. 313/2015-16-AIRPORT dated 11.09.2015, wherein 04 numbers of Gold Tola bars totally weighing 400 grams, valued at Rs. 10,18,000/-, which were recovered from the Applicant herein, have been confiscated absolutely, under Section 111(d) and 111(l) of the Customs Act, 1962 read with Section 3 (3) of the Foreign Trade (Development & Regulation) Act, 1992. Besides, penalty of Rs. 1,00,000/- was also imposed on the Applicant, under Section 112(a) of the Act *ibid*.

2. The brief facts of the case are that the Applicant arrived, on 26.07.2015, at Chennai Airport from Singapore and was intercepted near the exit gate after he had crossed the Customs Green Channel. On being asked by the Customs officers whether he was carrying any gold with him, he replied in negative. On search of his person and baggage, 04 numbers of gold bars, which were concealed in the multimedia speaker system and in the battery compartment area of mobile phone, totally weighing 400 grams, were recovered. The value of the seized gold items was appraised at Rs. 10,18,000/-. The Applicant in his statement dated 26.07.2015, tendered under Section 108 of the Customs Act, 1962, admitted the recovery of gold from him and stated that the recovered gold belonged to him and his plan was to sell the gold in India and use the money for construction of his house; that he was well aware that smuggling of gold by non-declaring to Customs and without any valid permit is an offence; he further admitted his offence and stated that he was aware that he was not eligible to import gold on concessional rate of duty.

3. The revision application has been filed, mainly, on the grounds that the Applicant had orally declared the gold brought by him when asked by the officers in

the baggage hall; that the impugned gold belongs to him; that the import of gold is not prohibited and hence may be allowed for home consumption on payment of appropriate fine; and that personal penalty of Rs. 1,00,000/- may be set aside.

4. Personal hearing was held, in virtual mode, on 23.11.2022. Sh. Daleel Ahmed, Advocate appeared for the Applicant and reiterated the contents of revision application. In addition, he submitted that the goods should at least be allowed to be re-exported on payment of redemption fine. No one appeared for the Respondent department nor any request for adjournment has been received. Therefore, it is presumed that the department has nothing to add in the matter.

5. The Government has examined the matter carefully. It is observed that the gold bars were found concealed in the speaker system and the mobile phone carried by the Applicant. No written declaration was made as required under Section 77 of Customs Act, 1962, to the Customs Authorities at the airport. The Applicant 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 manner of concealment indicates a pre-meditated and well thought out attempt of smuggling, which belies the claim that an oral declaration was made.

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 items carried by him, as stipulated under Section 77 of the Act, *ibid*. Further, the modus-operandi adopted makes the intention to smuggle manifest. No documents evidencing ownership and licit purchase have also been placed on record. The Applicant has, thus, failed to discharge the burden placed on him, in terms of Section 123, *ibid*.

7.1 The question of law raised by the Applicant is that the import of gold is not 'prohibited'. The Government observes that the law on this issue is settled by the judgment of Hon'ble Supreme Court in the case of Sheikh Mohd. Omer vs Collector

of Customs, Calcutta & Ors {1971 AIR 293} wherein 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*". The Gold is not allowed to be imported freely in baggage. It is permitted to be imported by a passenger subject to fulfillment of certain conditions. These conditions have not been fulfilled in the present case. 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 (377) ELT 145 (SC)}, 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 Hon'ble jurisdictional High Court, has summarized the position on the issue, 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 P. Sinnasamy {2016 (344) ELT 1154 (Mad.)} as well.

7.3 Thus, following the ratio of the aforesaid judgments, there is no doubt that the subject goods are 'prohibited goods'.

8. The original authority has denied the release of seized goods on redemption fine under Section 125 of Customs Act, 1962, which has been assailed in the revision

application. 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."* In the present case, the original authority has after appropriate consideration denied redemption for relevant and reasonable considerations, as brought out in para 12 of the OIO. Hence, the Commissioner (Appeals) has correctly refused to interfere in the matter.

9.1 Other contention of the Applicant is that re-export of gold was not considered. 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 authorised by him and leaving India or as cargo consigned in his name"*

9.2 On a plain reading 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 Commissioner of Customs, Lucknow vs. 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 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, there is no infirmity in the orders of lower authorities, in this respect as well.

10. The original authority has been rather lenient while imposing penalty, specifically keeping in view the ingenious nature of concealment adopted by the Applicant herein. Therefore, no case for relief is made out in this respect as well.

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



(Sandeep Prakash)

Additional Secretary to the Government of India

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Kunnam Taluk, Perambalur District,  
Tamil Nadu-621713

Order No. 363/22-Cus dated 23-11-2022

Copy to:

1. The Commissioner of Customs (Appeals-I) 60, Rajaji Salai, Custom House, Chennai-600001
2. The Pr. Commissioner of Customs (Airport), Anna International Airport, Meenabakkam, Chennai-600027

3. Sh. M. Manimaran & Daleel Ahmad, Advocates, India Tax Counsel, 2786, 6<sup>th</sup> Street, 12<sup>th</sup> Main Road, Anna Nagar, Chennai-600040
4. PA to AS(RA)
5. Guard file
6. Notice Board

F. Spare Copy

ATTESTED

*[Handwritten Signature]*

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