

SPEED POST



F. No. 373/21/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 27/12/22

Order No. 406/22-Cus dated 27-12-2022 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 62/2017-TRY (CUS) dated 19.10.2017, passed by the Commissioner of CGST & Central Excise (Appeals), Coimbatore @ Tiruchirapally.

Applicant : Sh. A. Sarvana Kumar, Pudukkottai, Tamilnadu.

Respondent : The Commissioner of Customs, Tiruchirapally.

.....

ORDER

A Revision Application No. 373/21/B/2018-RA dated 12.12.2017 has been filed by Sh. A. Sarvana Kumar, Pudukkottai, Tamilnadu (hereinafter referred to as the Applicant) against the Order-in-Appeal No. 62/2017-TRY (CUS) dated 19.10.2017, passed by the Commissioner of CGST & Central Excise (Appeals), Coimbatore @ Tiruchirapally. The Commissioner (Appeals) has, vide the impugned Order-in-Appeal, upheld the Order-in-Original No. TCP-CUS-PRV-JTC-060-16 dated 29.08.2016, passed by the Joint Commissioner of Customs, Trichy.

2. Briefly stated, the Applicant herein arrived at the Trichy International Airport, on 16.11.2015, from Singapore. He was intercepted by the Customs officers while passing through the green channel. On being questioned about the possession of any contraband goods, he replied in negative. Verification of his Custom Declaration Form revealed that no declaration was made against Column 9 meant for "Total value of dutiable goods being imported" and Column 10. On examination of his checked-in baggage and one Carton Box, 12 gold articles, purity 24 Carat, in the form of round shaped plates and cylindrical shapes, totally weighing 697 gms, concealed in "Panasonic SC-XH105 (Black) DVD Home Theater Sound System", were recovered. The Govt. approved valuer appraised the value of the recovered gold articles as Rs. 18,19,170/-. A statement of the Applicant herein was recorded, under Section 108 of the Customs Act, 1962, on 16.11.2015, wherein he, inter-alia, stated that at Singapore airport, one unknown person handed over the recovered gold articles, concealed in the Home Theater, with the request to hand it over to a receiver outside Trichy airport. The Applicant herein further stated that he did not know of the concealment of gold articles in the Home Theater and the person who gave him the Home Theater at Singapore airport also did not inform him about the concealment of gold articles inside the Home Theater; that he did not have any foreign exchange or Indian Currency to pay the duty; that the gold articles did not belong to him; and that he finally disowned the Home Theater and admitted his offence. The original authority, vide the aforesaid Order-in-Original dated 29.08.2016, ordered for absolute confiscation of the subject gold articles, under Sections 111(d), 111(i), 111(l) and 111(m) of the Customs Act, 1962. Penalty of Rs. 4,00,000/- was also imposed on the Applicant herein under Section 112 (a) of Act, ibid. The appeal filed by the Applicant herein has been rejected by the Commissioner (Appeals).

3. The revision application has been filed, mainly, on the grounds that under Rule 3 of FTO, 1993, import of certain quantity of gold as part of baggage by a person of Indian origin or a passenger, holder of valid Indian Passport subject to the conditions that the passenger importing the gold is coming to India after a period of not less than six month of stay abroad and that the import duty on gold is to be paid in convertible foreign currency, is exempted under the provisions of Foreign Trade (Regulations) Rules, 1993 and thus, import of gold is dutiable and not prohibited; that the Applicant was working as a lift fitter for the past five years thereby earning Rs. 25000/- per month and was returning to India on completion of work, and thus he is neither a carrier nor smuggler of gold; that the concerned officer had not asked the Applicant to fill up the Customs Declaration Form completely; that the gold was kept in the Home Theater for safety purpose; that the Respondent ought to have applied Section 125 of the Customs Act, 1962 and given an option to pay fine in lieu of confiscation or should have ordered re-export of the gold; that the penalty imposed may be set-aside. Additional submissions were also made vide email dated 21.12.2022

4. Personal hearing was held on 26.12.2022. Sh. A. Selvaraj, Consultant appeared for the Applicant and reiterated the contents of the RA and submitted that the goods may be allowed to be redeemed on payment of redemption fine, penalty and applicable duty. 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.

5.1 The Government has carefully examined the matter. It is observed that the Applicant had concealed the gold articles inside the Home Theater carried by him. He had also not declared the offending goods in the Customs Declaration Form submitted by him to the Customs officers. Even when asked orally, after being intercepted, the Applicant denied carrying any valuable goods or dutiable goods other than the personal effects etc. This position has also been admitted by the Applicant in his statement recorded under Section 108 of the Customs Act, 1962. There is nothing on record that this statement has been retracted.

5.2 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 articles carried by him, as stipulated under Section 77 of the Act, *ibid*. Further, the ingenious manner of concealment adopted by the Applicant 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*.

5.3 The Applicant has stated that being the eligible passenger, he is allowed to import gold on payment of duty in convertible foreign currency under the provisions of Foreign Trade (Regulations) Rules, 1993. It is observed that the subject contention would be relevant in case the passenger had made a declaration before the Customs officer and he had offered to pay duty thereon. In the present case, to the contrary, the Applicant did not make any declaration nor did he report at Red Channel for payment of duty. Significantly, he was also not carrying the foreign currency required to pay duty. Thus, the subject contention does not help the case of the Applicant in any way.

6.1 The original authority has denied the release of seized gold on payment of redemption fine under Section 125 of Customs Act, 1962, which has been assailed in the revision application. It is observed that the lower authorities have held the seized gold to be 'prohibited goods'. The Government is in agreement with these findings as these are in line with the decisions of the Hon'ble Supreme Court in the cases of Sheikh Mohd. Omer vs Collector of Customs, Calcutta & Ors {1971 AIR 293}, Om Prakash Bhatia Vs. Commissioner of Customs, Delhi {2003(155) ELT423(SC)}, and UOI & Ors vs. M/s Raj Grow Impex LLP & Ors {2021 (377) ELT 145 (SC)}. 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, 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. Thus, following the ratio of the aforesaid judgments, there is no doubt that the subject goods are 'prohibited goods'.

6.2 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 38 to 43 of the OIO. Hence, the Commissioner (Appeals) has correctly refused to interfere in the matter.

7.1 Other contention of the Applicant is that re-export of gold was not considered. The Government observes 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"

7.2 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 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 of the Act, *ibid*. In this case, as already held, 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, on this count as well.

8. In the facts and circumstances of the case and specifically keeping in view the ingenious nature of concealment, the penalty imposed is neither harsh nor excessive.

9. In view of the above, the Revision Application is rejected.



(Sandeep Prakash)

Additional Secretary to the Government of India

Sh. A. Sarvana Kumar,
S/o Shri. Adaikkan,
Old No. 4/13, New No. 3/226, Yadhavar Street,
Odukkur-PO, Kulathur-TK,
Pudukkottai-622504, Tamilnadu

Order No. 406/22-Cus dated 27-12-2022

Copy to:

1. The Commissioner of Customs, No. 1 William Road, Cantonment, Tiruchirapally-620001.

2. The Commissioner of CGST & Central Excise (Appeals), Coimbatore @ Tiruchirapally, No. 1 William Road, Cantonment, Tiruchirapally -620001.
3. Sh. A. Selvaraj, Consultant, 68, Krishnamurthy Nagar, Tiruchirapally-620021
4. PA to AS(RA)
5. Guard file.
- ✓ 6. Spare copy.
7. Notice board.

ATTESTED



अश्वनी कुमार लो / Ashwani Kumar Lau
अधीक्षक / Superintendent (R.A. Unit)
राजस्व विभाग / Department of Revenue
वित्त मंत्रालय / Ministry of Finance
Room No. 606, 6th Floor, C.A. Building
12, Huda House Building, New Delhi-110002