

SPEED POST



F. No. 380/123/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. 30/12/22

Order No. 407/22-Cus dated 30-12-2022 of the Government of India passed by Sh. Sandeep Prakash, Additional Secretary to the Government of India, under Section 129DD of the Customs Act, 1962.

Subject : Revision Application filed, under Section 129 DD of the Customs Act 1962, against the Order-in-Appeal No. CAL-EXCUS-000-APP-549-15-16 dated 28.03.2016, passed by the Commissioner of Central Excise, Customs & Service Tax (Appeals-II), Cochin.

Applicant : Commissioner of Customs (Preventive), Cochin

Respondent : Sh. Thavarayil Namish, Kannur

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ORDER

A Revision Application No. 380/123/B/2016-RA dated 05.07.2016 has been filed by the Commissioner of Central Excise & Customs, Calicut, presently, Commissioner of Customs (P), Cochin (hereinafter referred to as the Applicant department) against the Order-in-Appeal No. CAL-EXCUS-000-APP-549-15-16 dated 28.03.2016 passed by the Commissioner of Central Excise, Customs & Service Tax (Appeals-II), Cochin. The Commissioner (Appeals) has, vide the impugned Order-in-Appeal, upheld the Order-in-Original dated 24.01.2014 (in OS No. 71/2013 dated 17.12.2013), passed by the Additional Commissioner of Customs, Calicut Commissionerate. Vide the aforesaid Order-in-Original, 19 nos of yellow and white coloured 18 Karat gold chains, weighing 150.470 gms and valued at Rs. 4,10,359/- and 01 no. of gold chain made of balls of 18 Karat, weighing 52.670 gms and valued at Rs. 1,43,641/-, have been confiscated under Sections 111(d), 111(i), 111(l) and 111(m) of the Customs Act, 1962. However, the said gold chains have been allowed to be redeemed by imposing Redemption Fine of Rs. 2,00,000/-. Besides, penalties of Rs. 1,50,000/- & Rs. 75,000/- have also been imposed upon Sh. Thavarayil Namish, Kannur (hereinafter referred to as Respondent) under Sections 112(a) & (b) and 114AA, respectively, of the Act, *ibid*.

2. Brief facts of the case are that the Respondent, arrived, on 04.10.2013, at Calicut International Airport, from Dubai. He was intercepted by the customs officers, at the exit gate of the arrival hall. After detailed examination of his baggage/person, 20 nos of gold chains, as above, were recovered from him. The Respondent had not declared the said gold chains imported by him before customs on his arrival. He also did not declare the same in his Customs Declaration Slip. He opted for Customs clearance through Green Channel and attempted to avoid customs duty.

3. The revision application has been filed, mainly, on the grounds that the Respondent did not declare the said gold chains as required under Section 77 of the Customs Act, 1962; that he failed to declare the gold chains imported by him in his Customs Declaration Slip; that gold cannot be considered to be not prohibited in this

case as the item was imported without complying with the conditions laid down in in this regard; and that the passenger concealed the gold and attempted to evade detection by non-declaring the gold in his possession and by passing through the Green Channel.

4. Personal hearing was granted on 28.08.2018, 25.09.2018, 17.08.2021, 24.08.2021, 27.10.2021, 10.11.2021, 08.12.2021, 07.11.2022, 21.11.2022 & 14.12.2022. In personal hearing held, in virtual mode, on 14.12.2022, Ms. Latha R., AC appeared for the Applicant department and reiterated the contents of the RA. Upon being asked about the status of release of goods allowed to be redeemed by the lower authorities, she requested for time to confirm the same by email. The time was granted. No one appeared for the Respondent on any of the dates nor any request for adjournment has been received. A letter dated 28.12.2022 has been submitted by the department, by email, confirming that the Respondent has not redeemed the gold.

5. The Government has examined the matter carefully. It is observed that the issue of smuggling of gold items and their liability to confiscation stand concluded with the order of Commissioner (Appeals), who has upheld the confiscation ordered by the original authority. The only question that, therefore, needs to be examined is whether the order of Commissioner (Appeals) upholding the order of original authority for release of the goods on payment of redemption fine is sustainable.

6.1 The Commissioner (Appeals) has upheld redemption of seized gold on the ground 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}. It was held by the Hon'ble Supreme Court 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*". It is not in dispute that the Gold is allowed to be imported in baggage, only subject to certain conditions, which are not fulfilled in this case. In the case of M/s Om Prakash Bhatia

vs. Commissioner of Customs, Delhi {2003(155) ELT 423(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."*

6.2 In the case of Malabar Diamond Gallery P. Ltd. Vs ADG, DRI, Chennai [2016(341) ELT 65(Mad.)], the Hon'ble Madras High Court has specifically held that

"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----."

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

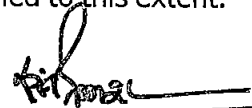
6.3 Thus, following the ratio of the aforesaid judgments, there is no doubt that the subject goods are 'prohibited goods'. As such, the Commissioner (Appeals) has erred in holding that the seized gold is not prohibited goods.

7.1 The original authority has allowed the release of subject 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."

7.2 In the present case, the original authority has disclosed no reasons to support the redemption of seized gold. Therefore, being an unreasoned order, the order passed by the original authority does not pass the test of reason and justice laid down by the Hon'ble Courts, as brought out herein above. The Commissioner (Appeals) has, on the other hand, upheld the order of the original authority on a legally erroneous finding that gold is not a prohibited item. Therefore, the orders of the authorities below, in respect of redemption of seized gold, cannot be sustained.

8. In view of the above, the revision application is allowed by way of ordering absolute confiscation of the offending goods, under Section 111(d), (i), (l) and (m) of the Customs Act, 1962. The orders of the authorities below are modified to this extent.



(Sandeep Prakash)
Additional Secretary to the Government of India


The Commissioner of Customs (P),
5th Floor, Catholic Centre, Broadway
Cochin-682031

Order No. 407/22-Cus dated 30-12-2022

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2. The Commissioner of Central Excise, Customs & Service Tax (Appeals-II), C.R Building, I.S Press Road, Cochin-18
3. PS to AS(RA).
4. Guard File.
5. ~~Spare Copy.~~
6. Notice Board.

ATTESTED


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