

F. No. 373/148/B/2018-RA

SPEED POST



F. No. 373/148/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. 13/02/23

Order No. 46/23-Cus dated 13-02-2023 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. 58/2018-TRY (CUS) dated 13.03.2018, passed by the Commissioner of CGST & Central Excise (Appeals-II), Tiruchirappalli.

Applicant : Sh. S. Shanmugarajeshwaran, Sivagangai, Tamil Nadu.

Respondent : The Commissioner of Customs, Tiruchirappalli.

.....

ORDER

A Revision Application No. 373/148/B/2018-RA dated 11.05.2018 has been filed by Sh. S. Shanmugarajeshwaran, Sivagangai, Tamil Nadu (hereinafter referred to as the Applicant) against the Order-in-Appeal No. 58/2018-TRY (CUS) dated 13.03.2018, passed by the Commissioner of CGST & Central Excise (Appeals-II), Tiruchirappalli. The Commissioner (Appeals) has, vide the impugned Order-in-Appeal, modified the Order-in-Original No. 171/2017 dated 29.08.2017, passed by the Assistant Commissioner of Customs, Airport, Trichy by reducing the penalty imposed upon the Applicant herein, from Rs. 60,000/- to Rs. 30,000/-.

2. Briefly stated, the Applicant herein arrived, on 31.03.2017, at the Trichy Airport from Kuala Lumpur and the Customs officers intercepted him while he was crossing the green channel in a suspicious manner. On enquiry, the Applicant informed that he had not submitted Customs Declaration Form and had not declared dutiable items to them. On being further asked whether he had any items to be declared to the baggage officer, he replied in negative. However, he was found to be wearing, 01 unfinished gold chain of foreign origin, purity 24 carat, weighing 99 gms, valued at Rs. 2,91,159/-, as appraised by Govt. valuer. Statement of the Applicant herein was recorded, under Section 108 of the Customs Act, 1962, on 31.03.2017, wherein he, inter-alia, stated that he went to Malaysia on 22.03.2017; that he brought the said gold from his own savings and brought to India wearing the same on his neck purposefully to avoid declaring the same in the Declaration Form; that as he wanted to clear the gold without payment of custom duty, he kept the gold around his neck. The original authority, vide the aforesaid Order-in-Original dated 29.08.2017, read with Corrigendum dated 05.10.2017, ordered for absolute confiscation of the subject gold chain, under Sections 111(d), 111(i), 111(l) and 111(m) of the Customs Act, 1962. Penalty of Rs. 60,000/- was also imposed on the Applicant herein under Section 112(a) and 112(b) of Act, *ibid*. The appeal filed by the Applicant herein has been partly allowed by the Commissioner (Appeals) by way of reducing the amount of penalty imposed to Rs. 30,000/-.

3. The revision application has been filed, mainly, on the grounds that the proposal in the show cause notice was for confiscation whereas the original authority has ordered for absolute confiscation which is not only arbitrary but also against the provisions and thus beyond the scope of the show cause notice. On merits, it is submitted that the both the lower authorities have passed the orders on a wrong premise that import of gold is prohibited without quoting the relevant legal provisions under Section 11 of the Customs Act, 1962; that redemption as per provisions of Section 125 was not granted; that the Applicant was wearing the gold chain around his neck, thus body of Applicant cannot be treated a baggage and there was no need for declaring the same to the Customs; and that there is no violation, thus, there is no need to penalize the Applicant.

4. Personal hearing was held, in virtual mode, on 09.02.2023. Ms. V. Pramila, Advocate appeared for the Applicant and reiterated the contents of RA. She highlighted that the Applicant is not a repeat offender and quantity involved is very small. Hence, a lenient view may be taken. No one appeared for the Respondent department nor any request for adjournment has been received. As such, it is presumed that the department has nothing to add in the matter.

5. The Government has carefully examined the matter. It is observed that the Applicant was in possession of gold chain and despite being questioned by the Customs officers failed to declare the same. The Applicant, after being intercepted, could also not produce any documents evidencing licit possession of the recovered gold chain. This position has also been admitted by him in his statement recorded under Section 108 *ibid*, which does not appear to have been retracted at any stage.

6.1 Contention of the Applicant is that no declaration was required to be made under Section 77 of the Act *ibid*, since gold chain worn on person cannot be termed as 'baggage'. The judgment of Hon'ble Kerala High Court in the case of Vigneswaran Sethuraman vs. UOI {2014 (308) ELT 394 (Ker.)} has been relied upon.

6.2 At the outset, it is to be observed that a revision is maintainable before the Government, under Section 129DD of the Act, only if the case relates to any of the matters listed in first proviso to Section 129A. These matters are – (a) baggage, (b) short landing, and (c) drawback. Since the present case neither relates to 'short landing' nor to 'drawback', the present revision application is evidently filed since the matter relates to 'baggage'. Therefore, by filing the present RA as the matter relates to 'baggage', while simultaneously contending that the goods are not 'baggage', the Applicant has taken self-contradictory stands.

6.3 On merits, the Government is not persuaded by this contention of the Applicant, as evident from the Baggage Rules, 2016 themselves. Rule 3 & Rule 4 of the Rules *ibid* specify the entitlement for duty free clearance in bonafide baggage, in respect of passengers arriving from countries other than Nepal, Bhutan or Myanmar and those arriving from Nepal, Bhutan or Myanmar, respectively. These rules read as under:

"Rule 3. Passenger arriving from countries other than Nepal, Bhutan or Myanmar - An Indian resident or a foreigner residing in India or a tourist of Indian origin, not being an infant arriving from any country other than Nepal, Bhutan or Myanmar, shall be allowed clearance free of duty articles in his bona fide baggage, that is to say, -

(a) used personal effects and travel souvenirs; and

(b) articles other than those mentioned in Annexure-I, upto the value of fifty thousand rupees if these are carried on the person or in the accompanied baggage of the passenger:

Provided that a tourist of foreign origin, not being an infant, shall be allowed clearance free of duty articles in his bona fide baggage, that is to say,

(a) used personal effects and travel souvenirs; and

(b) articles other than those mentioned in Annexure- I, upto the value of fifteen thousand rupees if these are carried on the person or in the accompanied baggage of the passenger:

Provided further that where the passenger is an infant, only used personal effects shall be allowed duty free.

Explanation - The free allowance of a passenger under this rule shall not be allowed to pool with the free allowance of any other passenger.

Rule 4. Passenger arriving from Nepal, Bhutan or Myanmar - An Indian resident or a foreigner residing in India or a tourist, not being an infant arriving from Nepal, Bhutan or Myanmar, shall be allowed clearance free of duty articles in his bona fide baggage, that is to say,

(a) used personal effects and travel souvenirs; and

(b) articles other than those mentioned in Annexure -I up to the value of fifteen thousand rupees if these are carried on the person or in the accompanied baggage of the passenger:

Provided that where the passenger is an infant, only used personal effects shall be allowed duty free: Provided further that where the passenger is arriving by land, only used personal effects shall be allowed duty free.

Explanation - The free allowance of a passenger under this rule shall not be allowed to pool with the free allowance of any other passenger."

Thus, it is clear that, as per Baggage Rules, 2016, articles "carried on the person or in the accompanied baggage of the passenger" both are part of 'baggage'. It is also to be noted that the judgement in the case of Vigneswaran Sethuraman (supra) is with reference to the Baggage Rules, 1998 and not the Baggage Rules, 2016, which are applicable in the present case.

6.4 Further, several Hon'ble High Courts have upheld allegations of contravention of Section 77 when the person concerned failed to declare the gold kept by him/her on his/her body or in the clothes worn by him/her. In the case of Commissioner of Customs (Preventive), Lucknow vs. Deepak Bajaj {2019 (365) ELT 695 (All.)}, the Hon'ble Allahabad High Court has held that the person concerned was required to make a declaration under Section 77 *ibid* in respect of gold recovered from his jean, vest, coat and shoes. Similarly, the Hon'ble Delhi High Court has, in the case of Air Customs vs. Begaim Akynova {WP (CrI.) 1974/2021}, *vide* judgment dated 03.01.2022, upheld the punishment imposed in a case where the passenger was found carrying gold concealed inside the body around the waist and thigh wherein the department had, *inter-alia*, alleged contravention of Sections 77 & 79 of the Customs Act, 1962.

6.5 In view of the above, the contention of the Applicant that the offending goods worn by him are not covered as "baggage" cannot be accepted. As such, it is held that the Applicant was required to make a declaration, under Section 77, in respect of the crude gold items worn by him.

7. 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 the goods are recovered. The Applicant has failed to submit any document evidencing ownership and licit possession of gold chain recovered from his possession. The Applicant has, thus, failed to discharge the burden placed on him, in terms of Section 123, *ibid*.

8.1 Another contention of the Applicant is that the goods are not prohibited goods under Section 11 of the Customs Act, 1962. The Government observes that the term 'prohibited goods' is defined under Section 2(33) of the Customs Act, 1962, as under:

"Section 2(33) of the Customs Act, 1962, "**prohibited goods**" means any goods the import or export of which is subject to any prohibition under this Act

or any other law for the time being in force but does not include any such goods in respect of which the conditions subject to which the goods are permitted to be imported or exported have been complied with".

Thus, the term 'prohibited goods' encompasses not only the goods the import or export of which is subject to any prohibition under the Customs Act, 1962 but also under any other law for the time being in force. As such, it is incorrect to contend that the goods can be considered to be 'prohibited goods' only if their import or export is prohibited in terms of a notification issued under Section 11A, *ibid*.

8.2 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)}. Further, 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'.

8.3 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 26 to 31 of the OIO. Hence, the Commissioner (Appeals) has correctly refused to interfere in the matter.

8.4 It has also been contended that the show cause notice only proposed 'confiscation' whereas the original authority has ordered 'absolute confiscation', which is beyond the scope of show cause notice. The Government observes that 'absolute confiscation' is a term of common usage, which is applied when the authority concerned does not offer redemption, under Section 125 *ibid*, in lieu of confiscation. This term is extensively used by the departmental officers, legal practitioners and litigants alike. Therefore, it is disingenuous to aver that by ordering 'absolute confiscation', the original authority has proceeded beyond the scope of show cause notice.

9. It is observed that the Commissioner (Appeals) has already reduced the penalty imposed on the Applicant herein from Rs. 60,000/- to Rs. 30,000/-. In the facts and

circumstance of the case, the Government considers the reduced penalty of Rs. 30,000/- to be neither harsh nor excessive.

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



(Sandeep Prakash)

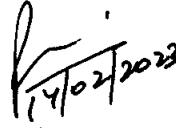
Additional Secretary to the Government of India

Sh. S. Shanmugarajeshwaran,
No. 2/1, Pandi Kovil Street,
Soodamanipuram, Karaikudi (PO),
Sivagangai, District, Tamil Nadu,

Order No. 46/23-Cus dated 13-02-2023

Copy to:

1. The Commissioner of Customs, No. 1, Williams Road, Cantonment, Tiruchirappalli – 620 001.
2. The Commissioner of Customs (Appeals-II), No. 1, Williams Road, Cantonment, Tiruchirappalli – 620 001.
3. Ms. V. Pramila, Advocate, 8D2, 8th Floor, J. P. Towers, Nungambakkam, Chennai – 600 034.
4. PPS to AS(RA)
5. Guard file.
6. Spare copy.
7. Notice board.



ATTESTED
प्रवीण नेगी / Praveen Negi
अधीक्षक / Superintendent (R.A. Unit)
वित्त मंत्रालय / Ministry of Finance
राजस्व विभाग / Department of Revenue
Room No. 605, 6th Floor, B-Wing
14, Hudco Vishala Building, Bhikaji Cama Place
New Delhi-110066