

F. No. 373/157/B/2018-RA
F. No. 373/158/B/2018-RA
F. No. 373/158-A/B/2018-RA

SPEED POST



F. No. 373/157/B/2018-RA
F. No. 373/158/B/2018-RA
F. No. 373/158-A/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 02/03/23

Order No. 76-78/23-Cus dated 01-03-2023 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, filed under Section 129 DD of the Customs Act 1962 against the Order-in-Appeal No. 48 to 50/2018-TRY(CUS) dated 28.02.2018, passed by the Commissioner of Customs & Central Excise (Appeals), Tiruchirapalli

Applicants : Ms. Chittal, Villupuram
Ms. Prema, Erode
Sh. Palaniappan, Villupuram

Respondent : The Commissioner of Customs, Tiruchirapalli

.....

ORDER

Revision Application Nos. 373/157/B/2018-RA, 373/158/B/2018-RA & 373/158-A/B/2018-RA all dated 15.05.2018 have been filed by Ms. Chittal, Villupuram, Ms. Prema, Erode & Sh. Palaniappan, Villupuram (hereinafter referred to as the Applicant-1, Applicant-2 & Applicant-3, respectively) against the Order-in-Appeal No. 48 to 50/2018-TRY(CUS) dated 28.02.2018, passed by the Commissioner of Customs & Central Excise (Appeals), Tiruchirapalli. The Commissioner (Appeals) has upheld the Order-in-Original of the Additional Commissioner of Customs, Tiruchirapalli bearing no. TCP-CUS-PRV-ADC-025-17 dated 24.05.2017 ordering absolute confiscation of 04 nos. of roughly finished gold bangles of 22 carat purity, weighing 108 grams, valued at Rs. 3,05,640/-, 01 unfinished gold chain of 22 carat purity, weighing 151.100 grams, valued at Rs. 4,27,613/- & 01 roughly finished gold ring of 22 carat purity, weighing 8.700 grams, valued at Rs. 24,621/- recovered from Applicant-1; 04 nos. of roughly finished gold bangles of 22 carat purity, weighing 111 grams, valued at Rs. 3,14,130/-, 01 unfinished gold chain of 22 carat purity, weighing 81.2 grams, valued at Rs. 2,29,796/- & 01 roughly finished gold ring of 22 carat purity, weighing 8.700 grams, valued at Rs. 24,621/- recovered from Applicant-2 & 01 unfinished gold chain of 22 carat purity, weighing 69.500 grams, valued at Rs. 1,96,685/- recovered from Applicant-3. However, the Commissioner (Appeals) has reduced the penalty imposed under Section 112(a) & (b) of the Customs Act, 1962 on Applicant-1 from Rs. 2,00,000/- to Rs. 75,000/-, on Applicant-2 from Rs. 1,50,000/- to Rs. 50,000/- & on Applicant-3 from Rs. 40,000/- to Rs. 20,000/-.

2. Brief facts of the case are that the officers of AIU intercepted the Applicants herein, on 08.10.2016, who had arrived at Tiruchirapalli from Kuala Lumpur and were about to exit the arrival hall by crossing the Green Channel. They had not filled & submitted the Customs Declaration Form and had not declared any dutiable items. Upon enquiry whether they had brought any gold in any form with them either in their person or in their baggage, they replied in negative. Upon the search of their person, gold items mentioned above were recovered from them. The Government approved appraiser certified the gold items as totally weighing 538.200 grams, collectively valued at Rs. 15,23,106/-. Upon

enquiry as to why the Applicants did not submit the Customs Declaration Form, they replied that since they wanted to clear the same without payment of Customs duty and without the knowledge of Customs, they had not filled and submitted their Customs Declaration Form and also did not go through the Customs Red Channel for paying the Customs duty. Upon further enquiry as to whether they had any convertible foreign currency to pay the Customs duty, they replied that they did not bring any money and they intended to clear the same without declaring to Customs and without paying the Customs duty. Sh. Palaniappan, i.e., Applicant-3, in his statement dated 08.10.2016, recorded under Section 108 of the Customs Act, 1962, inter-alia, stated that he was an SBI insurance agent and his monthly income was only Rs. 10,000/- which was not sufficient for him; that his friends told him that by buying the foreign gold and selling the same in India he would get profit of Rs. 130/- per gram; that, therefore, he had taken 1600 USD and went to Malaysia along with his wife Ms. Chittal, i.e., Applicant-1 and sister Ms. Prema, i.e., Applicant-2 through Trichy airport on 04.10.2016; that he purchased the gold in Malaysia, totally weighing 538.200 grams, from the money he had taken with him and by sale proceeds of old jewels worn by his wife and sister; that they did not declare the gold so as to make more profit; and that they did not have the foreign currency for payment of Customs duty for the same. He admitted his offence and told that his wife and his sister did not know anything about the incident and he only was responsible for the happenings. Other two Applicants reiterated the version of Applicant-3 in their respective statements and admitted their role in the offence. The case was adjudicated by original authority who ordered for absolute confiscation of gold and imposed penalty on the Applicants as mentioned above. Aggrieved, the Applicants filed appeals before the Commissioner (Appeals), which were partially allowed to the extent mentioned above.

3. The revision applications have been filed, mainly, on the grounds that gold is not prohibited item and hence can be released on payment of redemption fine and duty; that the gold was worn by them and was not in baggage and hence violation of baggage rules does not arise; that no declaration card was provided to them and hence question of filling up the declaration card does not arise; that they were not told about the provisions of

Section 102 of the Customs Act, 1962 and their permission for their search was not taken; and that they were first time travellers abroad and were not aware of the rules.

4. Personal hearing was fixed on 15.02.2023 & 01.03.2023. In the hearing held on 01.03.2023, Sh. S. Narayanan, Authorised Representative appeared for the Applicants, and reiterated the contents of RA. He requested that the goods may be released on payment of fine & duty. No one appeared for the Respondent department nor any request for adjournment has been received. Hence, 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 gold items were recovered from the Applicants. In terms of Section 123 of the Act, *ibid*, 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. In the present case, the Applicants have failed to produce any evidence that the gold items recovered from them were not smuggled. The gold items were not declared by the Applicants to the Custom officers, as required under Section 77 of Customs Act, 1962. No documents evidencing ownership and licit acquisition of gold items have also been produced. The Applicants have, thus, failed to discharge the burden placed on them, in terms of Section 123, *ibid*.

6.1 Applicants have contended that the gold articles were worn by them and these were not in baggage. Hence, the question of violation of Baggage Rules does not arise as gold ornaments 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 three 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 applications are 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 Applicants have taken self-contradictory stands.

6.3 On merits also, the Government is not persuaded by this contention of the Applicants, 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'.

6.4 It is 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. 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 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 of the Act ibid in respect of gold recovered from his jeans, vest, coat and shoes. Similarly, the Hon'ble Delhi High Court has, in the case of

Air Customs vs. Begaim Akynova {WP (Crl.) 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 Applicants that the offending goods worn by them are not covered as "baggage" cannot be accepted. Consequently, it is also held that the Applicants were required to make a declaration, under Section 77, in respect of the jewellery worn by them.

7.1 It is also contended on behalf of the Applicants that the import of gold is not 'prohibited'. However, the Government observes that this contention of the Applicants 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 present case, it is not even contended that the Applicants fulfilled these 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."*

7.2 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-----."

Hon'ble Madras High Court has held on the same lines in the case of Commissioner of Customs (Air), Chennai-I vs. P. Sinnasamy {2016 (344) ELT 1154 (Mad.)}.

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

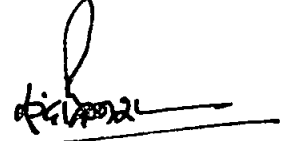
8. The original authority has denied the release of the offending goods on redemption fine under Section 125 of Customs Act, 1962. It is observed that, in terms of Section 125 of the Customs Act, 1962, the option to release 'prohibited goods', on redemption fine, is discretionary, as held by the Hon'ble 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 elaborate consideration, denied release of gold

F. No. 373/157/B/2018-RA
F. No. 373/158/B/2018-RA
F. No. 373/158-A/B/2018-RA

articles for reasonable and relevant considerations recorded in paras 44 to 50 of his Order. Hence, the Commissioner (Appeals) has correctly refused to interfere in the matter.

9. The Commissioner (Appeals) has substantially reduced the penalties imposed on the Applicants herein. In the facts and circumstances of the case, no further relief is merited.

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



(Sandeep Prakash)
Additional Secretary to the Government of India

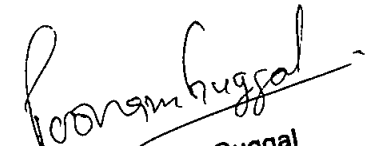
1. Ms. Chittal
W/o Sh. Palaniappan, Door No. 1/65,
TVN main road, Kalamarudur, Ulundurpet
Villupuram-606102
2. Ms. Prema
W/o Sh. Narayanan, No. 24, avvaiyar street,
Municipal Colony Road, Veerappanchatiran,
Erode-638004
3. Sh. Palaniappan
S/o Sh. Arumugam, Door No. 1/65,
Main Road, Kalamarudur, Ulundurpet,
Villupuram-606102

Order No. 76-78/23-Cus dated 01-03-2023

Copy to:

1. The Commissioner of Customs & Central Excise (Appeals), No.1, Williams Road, Cantonment, Tiruchirapalli-620001.
2. The Commissioner of Customs, No. 1, Williams Road, Cantonment, Tiruchirapalli-620001.
3. Ms. Kamalamalar Palanikumar, Advocate, No. 10, Sunkurama Street, Second Floor, Chennai-600001.
4. PPS to AS(RA).
5. Guard file.
6. Spare Copy.
7. Notice Board.

ATTESTED



पूनाम गुग्गल / Poonam Guggal
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 e 9 | 9