

SPEED POST



F. No. 380/159/B/2018-RA
GOVERNMENT OF INDIA
MINISTRY OF FINANCE
(DEPARTMENT OF REVENUE)

14, HUDCO VISHALA BLDG., B WING
6th FLOOR, BHICAJI CAMA PLACE,
NEW DELHI-110 066

Date of Issue... 06/03/23

Order No. 81 /23-Cus dated 06-03-2023 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 AIRPORT. C.Cus.No.I No. 52/2018 dated 19.04.2018, passed by the Commissioner of Customs (Appeals-I), Chennai.

Applicant : Sh. Fakruddin Thondaladinne, YSR District

Respondents : Pr. Commissioner of Customs, Chennai-I

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ORDER

A Revision Application No. 373/159/B/2018-RA dated 15.05.2018 has been filed by Sh. Fakruddin Thondaladinne, YSR District (hereinafter referred to as the Applicant), against the Order-in-Appeal AIRPORT. C.Cus.I. No. 52/2018 dated 19.04.2018, passed by the Commissioner of Customs (Appeals-I), Chennai. The Commissioner (Appeals) has, vide the impugned Order-in-Appeal, modified the Order-in-Original No. 216/2017-18-AIRPORT dated 31.01.2018, passed by the Joint Commissioner of Customs (Adjudication-Air), Chennai by reducing the redemption fine from Rs. 6,50,000/- to Rs. 3,00,000/- and setting aside the penalty of Rs. 20,000/- imposed on the Applicant herein under Section 114AA of the Customs Act, 1962. Vide the aforementioned Order-in-Original, 04 nos of gold bars of 24 carat purity, totally weighing 448 grams and valued at Rs. 13,07,264/- recovered from the Applicant were confiscated under Section 111(d) and (l) of the Customs Act, 1962. However, the gold bars were allowed to be redeemed on payment of fine of Rs. 6,50,000/-. Besides, penalties of Rs. 1,30,000/- & Rs. 20,000/- were imposed on the Applicant under Sections 112(a) and 114AA, respectively, of the Act, ibid.

2. Brief facts of the case are that the Applicant arrived at Chennai airport from Bahrain, on 06.12.2017, and was intercepted by the Customs officers at the exit point of the arrival hall of the International terminal of Chennai airport. On being questioned whether he was carrying dutiable goods or gold/gold jewellery either in his baggage or on his person, he replied in negative. During examination of his checked-in baggage, i.e., one brown colour carton box, one packet wrapped in brown colour adhesive tape concealed inside a black colour burkha was found. On opening the said packet, two yellow colour metal bars, which were packed in transparent packing material and wrapped in carbon paper were recovered. During the search of another checked-in baggage, one packet wrapped in brown colour adhesive tape concealed inside the inner pocket of black colour trouser was found. On opening the said packet, two yellow colour metal bars, packed in transparent packing material and wrapped in carbon paper were recovered. The Government of India approved Gold Appraiser

certified them to be 04 nos of gold bars of 24 carat purity, totally weighing 448 grams, and appraised the value at Rs. 13,07,264/-. Thereafter, the Applicant was questioned as to whether he had any valid permit/licence documents for the legal import of the said gold bars to which he replied in negative. In his statement, recorded under Section 108 of the Customs Act, 1962, immediately after seizure, the Applicant, inter-alia, stated that he works as a Cook and earns Rs. 15,000/- per month; that 04 nos of gold bars recovered from him were purchased by his son Sh. Mohammed Ali who was working as Computer Operator in Dammam; that during his visit to mecca on 19.11.2017, his son visited him in Jeddah and bought the said gold bars using his personal savings and handed over to him for converting to jewellery for his daughter's wedding; and that he admitted his attempt to smuggle the same by concealing inside his checked-in baggage and not declaring to Customs. The original authority ordered for confiscation of the seized gold bars under Section 111(d) & 111(l) of the Customs Act, 1962. However, the gold bars were allowed to be redeemed for re-export on payment of redemption fine of Rs. 6,50,000/-. Penalties of Rs. 1,30,000/- & Rs. 20,000/- were imposed on the Applicant under Section 112(a) & 114AA of the Act, *ibid*. On appeal filed by the Applicant herein, the Commissioner (Appeals) modified the Order-in-Original as mentioned above.

3. The revision application has been filed, mainly, on the grounds that during his visit to Mecca, his son visited him in Jeddah and bought the said gold bars using his personal savings and handed over to him for converting to jewellery for his daughter's wedding; and that confiscation of goods, imposition of R.F of Rs. 3,00,000/- and personal penalty of Rs. 1,30,000/- is very high and unreasonable. He further requested to set aside or reduce the redemption fine and penalty imposed upon him.

4. Personal hearing in the matter was granted on 15.02.2023. An email letter dated 14.02.2023 was received from Ms. Kamalamalar Palanikumar, Advocate of the Applicant wherein she has requested to pass order with the available records as she could not attend the personal hearing. As such, the matter is taken up for disposal based on records.

5. The Government has examined the matter carefully. It is observed that the issues of smuggling of gold and liability to confiscation as 'prohibited goods' as well as imposition of penalty stand concluded with the order of Commissioner (Appeals), as the Applicant herein has not challenged the same. The department has also not been aggrieved in the matter and no revision application challenging the relief granted by the Commissioner (Appeals) has been filed. In fact, it would appear that the order of original authority itself was not taken in appeal before the Commissioner (Appeals), by the department. The only question that, therefore, arises for consideration is whether further relief by way of reduction in redemption fine and personal penalty is merited in the facts and circumstances of the case.

6.1 The original authority has released the seized 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 {2021 (377) ELT 145 (SC)}, 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 {2016 (344) ELT 1154 (Mad.)}, the Hon'ble Madras High Court (i.e. the jurisdictional 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."* Thus, the test for review of the discretion exercised by the original authority is that discretion should be exercised for relevant and reasonable

considerations and exercise thereof should not suffer from any of the vices indicated in Raju Sharma (supra).

6.2 The Government observes that the original authority has exercised his discretion to extend the option of redemption on the grounds *"that the passenger had claimed the ownership of the gold in his initial statement itself and had produced the copies of the purchase invoice and the source of funding and the ownership has not been disputed. I also note that there is no ingenious concealment of the gold and also that no previous offence is registered against the passenger."* However, the Government observes that these grounds narrated in para 9 of the Order-in-Original are at total variance with the original authority's own findings recorded earlier in this Order. In para 6 of the OIO, it is recorded that *"Further, the issue is not mere non-declaration of gold, the passenger kept the gold in such a manner as to conceal the visibility of the impugned gold to achieve unlawful and illegal profits. The passenger has totally ignored the legal requirement including the due 'Customs Baggage Declaration' and attempted to smuggle the secretly concealed gold through the green channel."* Similarly in para 7 of the OIO, the original authority has recorded that *"I find that the passenger has concealed the said gold to evade customs duty."* Thus, the Government finds that:

- i) The discretion has been exercised on the grounds which are in stark contradiction of the original authority's own findings.
- ii) Carrying of offending goods packed in carbon paper packed in transparent packing material, wrapped in brown colour adhesive tape concealed inside a burkha cannot but be termed as ingenious concealment. In this light, the ground that the passenger had not resorted to any ingenious concealment is bereft of any reasons and, in fact, suffers from perversity.

Thus, it is evident that the order of original authority is self contradictory and perverse.

6.3 In view of the above, the Commissioner (Appeals) ought not have upheld the redemption of offending goods by the original authority.

7.1 Further, as far as re-export of offending goods is concerned, 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 authorized by him and leaving India or as cargo consigned in his name.”

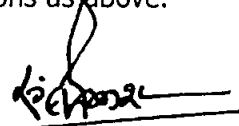
7.2 On a plain reading of Section 80 it is apparent that a declaration under Section 77 is a pre-requisite for allowing re-export. Hon’ble Allahabad High Court has, in the case of Deepak Bajaj {2019 (365) ELT 695 (All.)} that also involved smuggling of gold, held that a declaration under Section 77 is a *sine qua non* for allowing re-export under Section 80 of the Act, *ibid*. In this case, it is undisputed that the Respondents 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 {2019 (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.”

7.3 Hence, the re-export of offending goods could also not have been permitted.

8. In light of the observations made in paras 6.1 to 7.3 above, the order of original authority allowing redemption for re-export ought not have been sustained, if challenged before the appropriate authority, i.e., Commissioner (Appeals). The Commissioner (Appeals) has, by reducing the redemption fine and by setting aside the penalty imposed under Section 114AA *ibid*, further sweetened the unmerited relief

already granted to the Applicant herein by the original authority. In these facts and circumstances, any further relief shall be anathema to justice.

9. The revision application is, accordingly, rejected with observations as above.



(Sandeep Prakash)

Additional Secretary to the Government of India

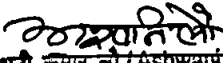
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Order No. 81 /23-Cus dated 06-03-2023

Copy to:

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2. The Commissioner of Customs (Appeals-I), Chennai Airport & Chennai Air Cargo, 3rd Floor, New Custom House, GST Road, Meenambakkam, Chennai-600016.
3. PPS to AS(RA).
4. Guard File.
5. Spare Copy.
6. Notice Board.

ATTESTED


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