

**SPEED POST**



F. No. 373/162/B/2018-RA  
GOVERNMENT OF INDIA  
MINISTRY OF FINANCE  
(DEPARTMENT OF REVENUE)

14, HUDCO VISHALA BLDG., B WING  
6<sup>th</sup> FLOOR, BHIKAJI CAMA PLACE,  
NEW DELHI-110 066

Date of Issue..09.03/23

Order No. 85 /23-Cus dated 09-03-2023 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 129 DD of the Customs Act 1962 against the Orders-in-Appeal No. 65/2018 dated 27.04.2018, passed by the Commissioner of Customs (Appeals-I), Chennai.

Applicant : Sh. Ashiq Nawaz, Chennai

Respondent : The Pr. Commissioner of Customs, Chennai-I.

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**ORDER**

Revision Application, bearing No. 373/162/B/2018-RA dated 15.05.2018, has been filed by Sh. Ashiq Nawaz, Chennai (hereinafter referred to as the Applicant), against the Order-in-Appeal No. C.Cus.I 65/2018 dated 27.04.2018, passed by the Commissioner of Customs (Appeals-I), Chennai. Vide the aforesaid Order-in-Appeal, the Commissioner (Appeals) has upheld the Order-in-Original No. 254/2017-18 dated 19.03.2018, passed by the Joint Commissioner of Customs (Adjudication-Air), Chennai, to the extent of absolute confiscation of the seized goods/ concealing materials and imposition of penalty under Section 112 of the Customs Act, 1962. However, the penalty imposed, on the Applicant herein, under Section 114AA of the Act, *ibid*, has been set aside by the Commissioner (Appeals).

2. Briefly stated, Applicant arrived at Chennai Airport, on 01.01.2018, from Singapore and was intercepted by the Customs officers with one checked-in baggage and questioned whether he was in possession of any gold/ contraband items either inside his baggage or on his person. The Applicant replied in negative. On his personal search, in the presence of independent witnesses, 04 nos. of semi-finished gold chains of 24 carat purity, totally weighing 317 gms, valued at Rs. 9,38,637/-, were recovered from the Applicant, concealed in one transparent polythene zip lock pouch which was kept in the inner pocket of the trouser worn by him and seized under Mahazar. In his statement, recorded under Section 108 of the Customs Act, 1962, the Applicant admitted that the seized gold articles did not belong to him and the same were handed over to him by his relative, named Sh. Syed Ibrahim, in Singapore with the instructions to hand over to another relative outside Chennai Airport; that his intention was to carry it out of the airport by concealing on his person and by not declaring the same to Customs; and that he committed this offence to help his relatives. The original authority ordered absolute confiscation of the gold articles recovered from Applicant, under Sections 111 (d) and (l) of the Customs Act, 1962. Penalty of Rs. 95,000/- was imposed on the Applicant under Section 112 of the Customs Act, 1962 while penalty of Rs. 10,000/- was imposed under Section 114AA of the Act *ibid*. The appeal filed by the Applicant herein has been partly allowed vide the impugned Order-in-Appeal, as mentioned in Para 1, above.

3. The revision application has been filed, mainly, on the grounds that the gold is not a prohibited item and can be released on payment of redemption fine and baggage duty; that the Respondent has not made any efforts to find out who is supposed to receive the gold outside the Chennai airport and no enquiry was conducted by the Officers of customs to locate the receiver; that gold jewellery should have been allowed to be redeemed for re-export and the personal penalty imposed under Section 112, of the Act, *ibid* be reduced substantially and reasonably.

4. Personal hearing in the matter was fixed for 03.03.2023. No one appeared for either side nor any request for adjournment has been received. However, Smt. Kamalamalar Palanikumar, Advocate, on behalf of the Applicant herein, vide emailed letter dated 03.03.2023, submitted various contentions in support of her claim for redemption of confiscated gold for re-export and requested to pass order accordingly.

5.1 The Government has carefully examined the matter. Primary contention of the Applicant is that the gold is not a 'prohibited' item. However, the Government observes that this contention of the Applicant 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 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."*

5.2 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 Hon'ble 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 taken an identical view in the cases of P. Sinnasamy {2016 (344) ELT 1154 (Mad.)} and Samyanathan Murugasen {2009 (247) ELT 21 (Mad.)}.

5.3 In view of the above, this contention of the Applicant cannot be accepted.

6. The Government further observes that, in terms of Section 125 of the Customs Act, 1962, the option to release 'prohibited goods', on redemption fine, is discretionary. 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 9 of the OIO. Hence, the Commissioner (Appeals) has correctly refused to interfere in the matter

7. The Applicant has further contended that he should have been allowed to re-export the goods. The Government observes that a specific provision has been made in Section 80

of the Customs Act, 1962 regarding re-export of articles imported in baggage. As per said Section 80, making of true declaration under Section 77 is a condition precedent to the re-export being allowed. In this case, such a declaration was not made. Therefore, the re-export could not have been allowed. This position is supported by the judgment of Hon'ble Allahabad High Court, in the case of Commissioner of Customs (Prev.), Lucknow vs. Deepak Bajaj {2019 (365) ELT 695 (All.)} wherein it is held that a declaration under Section 77 "is a sine qua non for extending the benefit of Section 80 of the Act."

8. The case laws relied upon by the Applicant, in support of various contentions, are not relevant/ applicable in view of the discussions above.

9. The penalty imposed on the Applicant, under Section 112 ibid, is just and fair in the facts and circumstances of the case.

10. In view of the above, the revision application is rejected.



(Sandeep Prakash)

Additional Secretary to the Government of India

1. Sh. Ashiq Nawaz,  
S/o Shri Kajamaideen Samsu Gani,  
New No. 144/2, Old No. 139/2,  
Adam Sahib Street, Royya Puram,  
Chennai – 600 013.

Order No. 85/23-Cus dated 03-03-2023

Copy to:

1. The Pr. Commissioner of Customs, Chennai-I (Airport), New Customs House, GST Road, Meenambakkam, Chennai-600027
2. The Commissioner of Customs (Appeals-I), 60, Rajaji Salai, Customs House, Chennai-600001.
3. Smt. Kamalamalar Palanikumar, Advocate, No. 10, Sunkurama Street, Chennai – 600 001, Mobil - 9841050029.
4. PPS to AS(RA).
5. Guard File.
6. Spare Copy.
7. Notice Board.

ATTESTED  
20/2018/21

अश्वनी कुमार लो / Ashwari Kumar Lau  
अधीक्षक / Superintendent (R.A. Unit)  
राजस्व विभाग / Department of Revenue  
वित्त विभाग / Ministry of Finance  
Room No. 006, 0th Floor, B-Wing  
14, Hudco Vehicle Building, New Delhi-110006

U.S. AIR FORCE  
OFFICE OF THE ASSISTANT SECRETARY  
FOR AIR FORCE POLICY  
ROOM 3000, 1100 PENTAGON  
WASHINGTON, D.C. 20330