

F. No. 373/122/B/2018-RA  
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**SPEED POST**



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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. 13/03/23.

Order No. 90-92 /23-Cus dated 13-03- 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. VIZ-CUSTOM-000-APP-024 To 26-17-18 dated 10.08.2017, passed by the Commissioner of Central Tax & Customs (Appeals), Visakhapatnam.

Applicants : Sh. Hakim KA, Palakkad  
Sh. Firos Pandiyadath, Kozhikode  
Sh. Aslam PP, Kannur

Respondent : Pr. Commissioner of Customs, Visakhapatnam

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**ORDER**

Revision Applications, bearing Nos. 373/122/B/2018-RA, 373/123/B/2018-RA & 373/124/B/2018-RA all dated 28.02.2018, have been filed by Sh. Hakim KA, Palakkad, Sh. Firos Pandiyadath, Kozhikode & Sh. Aslam PP, Kannur (hereinafter referred to as the Applicant-1, Applicant-2 & Applicant-3, respectively) against the Order-in-Appeal No. VIZ-CUSTOM-000-APP-024 to 26-17-18 dated 10.08.2017, passed by the Commissioner of Central Tax & Customs (Appeals), Visakhapatnam. The Commissioner (Appeals) has upheld the Order-in-Original of the Additional Commissioner of Customs, Visakhapatnam, bearing no. 10/2017 dated 18.04.2017, ordering absolute confiscation of 04 nos. of foreign origin gold chains of 24 carat purity, weighing 499 grams each, totally weighing 1996 grams and valued at Rs. 56,88,600/-, recovered from Applicant-1 & Applicant-3, respectively, and handed over to them by the Applicant-2. Besides, penalties of Rs. 2,70,000/- each were imposed on Applicant-1 & Applicant-3 and a penalty of Rs. 5,35,000/- was imposed on Applicant-2, under Section 112(a) & (b) of the Customs Act, 1962.

2. Brief facts of the case are that Customs officers at Visakhapatnam International Airport intercepted Applicant-1 & Applicant-3, on 07.12.2016, who had arrived from Hyderabad while attempting to exit through Green Channel. Upon being questioned whether they were carrying any contraband goods in the baggage/ on their person, they replied in negative. Upon the search of their person, 02 gold metal coated chains were recovered from each of them, i.e. 04 yellow metal coated chains in total, concealed in their shoes wrapped around their socks and secured with ankle supports. Upon recovery of the metal chains, they revealed that these metal coated chains were handed over to them on board the flight by a passenger sitting alongside them in row 18. Thereafter, one already detained person at the Hand Bag Scanner for examination i.e. the Applicant-2 was identified by both of them as the person who handed over to them those metal coated chains. Thereafter the Government approved gold assayer certified that all the chains are made of gold weighing 499 grams each, 1996 grams in total, with 24 carat purity and totally valued at Rs. 56,88,600/-. Applicant-3, in his statement dated 07.12.2016, recorded

under Section 108 of the Customs Act, 1962, inter-alia, stated that he was approached by an acquaintance Sh. Ramsik in Kannur to smuggle gold in exchange of Rs. 10,000/- for which he agreed; that Sh. Ramsik told him to catch a flight from Trivandrum to Chennai along with his friend Sh. Abdul Hakim KA i.e Applicant-1. Later he told him that conditions in Chennai were not conducive because of the death of Chief Minister of Tamil Nadu and told them to go to Kochi instead and catch a flight to Hyderabad on 06.12.2016 and then catch the early morning Air India flight to Visakhapatnam on 07.12.2016; that Sh. Ramsik gave the tickets to them for the same; that Sh. Ramsik told him to go to seat no. 18A and sit alongside the passenger on that seat and the passenger at seat no. 18A will give him some gold chains which he should conceal in his shoes and bring them out of Visakhapatnam Airport; that he exchanged his seat with the passenger at seat no. 18B as his seat no. was 23D, accordingly, he and his friend i.e. Applicant-1 got seated next to the passenger at seat no. 18A as his friend's seat no. was 18C; that the passenger at seat no. 18A gave 02 silver coated gold chains to each of them on board the flight after which they went to the toilet and concealed the gold chains by wrapping around their feet over socks and secured it with ankle supports. 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 rejected as mentioned above.

3. The revision application has been filed by Applicant-1, mainly, on the grounds that he is not an international passenger but a domestic passenger; that he has retracted his statement; that absolute confiscation is without considering the aspect of Section 125 of the Customs Act, 1962; that penalty is highly excessive; that he knows only Malayalam and has not made any statement; that there is no document to connect him to Applicant-2.

4. The revision application has been filed by Applicant-2, mainly, on the grounds that nothing has been seized from his possession; that there is no document to connect him to any other passenger; that he has retracted his statement; that absolute confiscation is

without considering the aspect of Section 125 of the Customs Act, 1962; that he knows only Malayalam.

5. The revision application has been filed by Applicant-3, mainly, on the grounds that he is a domestic passenger; that there is no document to connect him to the international passenger i.e. Applicant-2; that he has retracted his statement; that absolute confiscation is without considering the aspect of Section 125 of the Customs Act, 1962; that he knows only Malayalam.

6. Personal hearing was fixed on 06.02.2023, which was adjourned to 27.02.2023 at the request of the Ld. Advocate for the Applicants. In the personal hearing held on 27.02.2023, Sh. Firdous C.P, Proxy for the Ld. Advocate appeared and requested for adjournment. Accordingly, last and final opportunity was granted on 10.03.2023. In the hearing held, in virtual mode, on 10.03.2023, Sh. Piyo Herald, Advocate appeared for the Applicants and requested for adjournment on the grounds of sickness of father of the Counsel. It was pointed out to the Ld. Advocate that on the last occasion at their request last and final opportunity was granted today. Therefore the request for adjournment cannot be granted. Sh. Piyo Herald, Advocate reiterated the contents of the RA and highlighted that two of the Applicants are domestic passengers. 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.

7. The Government has carefully examined the matter. It is observed that gold items were recovered from the Applicant-1 & Applicant-3 who later identified Applicant-2 as the person who handed over these items to them. 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. Further, the intention to smuggle is manifest by the way of concealment of gold in their shoes wrapped around their socks and secured with ankle

supports. No document 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*.

8. The other contention of the Applicants is that their statements had been obtained involuntarily and they had retracted the original statements. while filing the reply to the SCN. At the outset, it is observed that no retraction has been placed on record. Retraction, if any, as part of reply dated 17.03.2017 to show cause notice, was filed more than three months after the statements were originally recorded and, thus, these appear to be in the nature of afterthought rather than any genuine effort to set the record straight. Further, the factual matrix recorded in the Mahazar proceedings corroborate the admissions made in the statements made by the Applicants herein. Therefore, the Government finds that the statements made were voluntary. In the case of K.I. Pavunny {1997 (90) ELT 241 (SC)}, the Hon'ble Supreme Court has held that the confessional statement of an accused if found voluntary, can form the sole basis for conviction. Further, the Hon'ble Supreme Court has, in the case of Surjeet Singh Chhabra vs. U.O.I {1997 (89) ELT 646 (SC)}, held that a confession statement made before the Customs Officer, though retracted within six days, is an admission and binding since Customs Officers are not Police Officers. Hence, the subject contention of the Applicants can not be accepted.

9.1 It is contended on behalf of the Applicants that absolute confiscation is without considering the aspect of Section 125 of the Customs Act, 1962. In other words, it is claimed that the subject goods are not 'prohibited goods'. The Government observes that, 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."*

9.2 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 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----*"

9.3 In this case, the conditions, subject to which gold could have been legally imported by the Applicant-2 in baggage, have not been fulfilled. Thus, following the ratio of the aforesaid judgments, there is no doubt that the subject goods are 'prohibited goods'.

10. The original authority has denied the release of seized goods on redemption fine under Section 125 of the Customs Act, 1962 which has been upheld in appeal. In terms of Section 125, 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. Sinnasammy {2016 (344) ELT 1154 (Mad.)}, 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 reasons'"*. Hon'ble Delhi High Court has, in the case of

Raju Sharma Vs. UOI {2020 (372) ELT 249 (Del.)}, 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 motives.*" In holding so, the Hon'ble High Court has relied upon the judgment of Apex Court in the case of Mangalam Organics Ltd. {2017 (349) ELT 369 (SC)}. Thus, the Commissioner (Appeals) could have interfered with the discretion exercised by the original authority only if it would have been tainted by any of vices highlighted by the Hon'ble Courts. In the present case, the original authority has, for relevant and reasonable consideration specifically recorded in para 25 of the OIO, denied the option of redemption. Therefore, the Commissioner (Appeals) has correctly refused to interfere with discretion exercised by the original authority.

11. In the facts and circumstances of the case, the penalties imposed are just and fair.
12. In view of the above, the revision applications are rejected.



(Sandeep Prakash)  
Additional Secretary to the Government of India

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S/o Sh. Abdul Rajiman  
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2. Sh. Firos Pandiyadath  
S/o Late Moideen Koya Pandiyadath  
Pandiyadath House, Eranhikal (PO)  
Elathur, Kozhikode, Kerala-673303
3. Sh. Aslam PP  
S/o Sh. Mustafa PP  
PP House, Chirakkal  
Kannur, Kerala-670111.

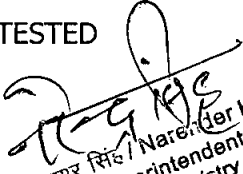
Order No. 90-92 /23-Cus dated 13-03-2023  
Copy to:

1. The Commissioner of Central Tax & Customs (Appeals), 4<sup>th</sup> Floor, Custom House, Port Area, Visakhapatnam-530035.

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2. Pr. Commissioner of Customs, Custom House, Port Area, Visakhapatnam-530035.
3. Sh. C.N Abdul Nazer, Advocate, 5/493, B3, Shastri Nagar Colony, Eranjipalam 6, Kozhikode.
4. PPS to AS(RA).
5. Guard file.
6. ✓ Spare Copy.
7. Notice Board.

ATTESTED

  
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