

SPEED POST



F. No. 373/149/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.....15/03/23

Order No. 97 /23-Cus dated 15-03-2023 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. I. No. 15/2018 dated 31.01.2018 passed by the Commissioner of Customs (Appeals-I), Chennai.

Applicant : Sh. R. Backiamuthu, Chennai

Respondent : Pr. Commissioner of Customs, Chennai-I

ORDER

A Revision Application, bearing No. 373/149/B/2018-RA dated 01.05.2018, has been filed by Sh. R. Backiamuthu, Chennai (hereinafter referred to as the Applicant), against the Order-in-Appeal AIRPORT. C. Cus. I. No. 15/2018 dated 31.01.2018, passed by the Commissioner of Customs (Appeals-I), Chennai, whereby the Commissioner (Appeals) has upheld the Order-in-Original of the Joint Commissioner of Customs, Anna International Airport, Chennai, bearing no. 143/2017-18-Airport dated 31.10.2017. Vide the aforementioned Order-in-Original, 04 nos of gold bars, recovered from the Applicant, weighing 1 Kg each, totally weighing 4 Kgs and valued at Rs. 1,21,40,000/-, had been absolutely confiscated under Section 111(d) & 111(l) of the Customs Act, 1962. Besides, penalties of Rs. 12,00,000/- each were also imposed on the Applicant along with two other persons, under Section 112(a) of the Act, *ibid*.

2. Brief facts of the case are that, on the basis of specific information, the officers of Directorate of Revenue Intelligence intercepted the Applicant who had arrived at Chennai Airport, from Bangkok, on 12.10.2016, while he was at the Aerobridge. On enquiry by the officers as to whether he was in possession of foreign origin gold bars, he replied in negative. On persistent enquiry by the officers, he admitted that he was carrying two packets in his pant pockets each containing two gold bars. As a result of the personal search of the Applicant, the officers recovered two packets found wrapped with black colour self-adhesive tape, which upon opening were found to contain 04 gold bars with foreign markings. The Government approved Assayer examined and certified the said four gold bars to be of 24 carat purity, weighing 1 Kg each, totally weighing 4 Kgs and totally valued at Rs. 1,21,40,000/-. The Applicant, in his statement dated 13.10.2016, recorded under Section 108 of the Customs Act, 1962, *inter-alia*, stated that after college, he started business of buying gunny bags from provision stores and hotels and sell it in the local market; that one Sh. Abdul Khader is his friend from his childhood days; that because of less business in gunny bags, he started travelling abroad for earning more money; that during that time he told Sh. Abdul Khader about his difficulty in earning through gunny bag business; that then Sh. Abdul Khader told him that he will help him in getting more income if he can carry gold from Dubai and Bangkok; that he agreed for

smuggling the gold; that Sh. Abdul Khader told him that he has to bring the gold in hand luggage and to keep the gold in toilet near the duty-free shop in Arrival hall of the Airport; that Sh. Abdul Khader also told him that he will book the to and fro tickets and also give him money for travelling and lodging expenses and also give him Rs. 4,000/- to Rs. 10,000/- once he smuggles the gold and kept it in the toilet near the duty-free shop; that he agreed and went to Dubai four times and also in September 2016, he went to Bangkok and smuggled foreign marked gold bars; that when he goes to Dubai, Sh. Abdul Khader used to give him 1,000/- Dinars for his expenses and to Bangkok, he gives 10,000/- Baht for his expenses and he used to collect the tickets at Parrys; that as soon as he reached Dubai, he would call Sh. Abdul Khader and inform the lodge details and some person will come and give the foreign marked gold; that as regards Bangkok also, he would inform his lodge details to Sh. Abdul Khader and some unknown person would come and hand over the packets containing gold bars to him; that as soon as he landed in Chennai, he would inform Sh. Abdul Khader and he would inform him to place the gold packets in the toilet near duty free shop in the Customs Arrival Hall; that he does not know any details or mobile numbers of the person, who will take the gold from the toilet and handing over to Sh. Abdul Khader; that after placing the gold packets in the toilet he would go out of the Airport and receive Rs. 10,000/- as his consideration for smuggling the gold and after that he would leave the airport to his home.

3. The revision application has been filed, mainly, on the grounds that the statement of the Applicant was recorded under duress and coercion and was retracted by him; that he was not given a chance to declare the gold as he was intercepted at the Aerobridge itself; and that penalty imposed and absolute confiscation of the gold is very harsh and severe. It is further requested that orders of lower authorities be set aside, penalty be set aside and re-export of gold bars be allowed.

4. Personal hearing was fixed on 09.02.2023, 01.03.2023 & 15.03.2023. No one appeared for either side nor any request for adjournment has been received. As sufficient opportunities have been granted, the matter is taken up for decision based on records.

5. The Government has carefully examined the matter. It is observed that the Applicant was intercepted at the Aerobridge based on specific intelligence. The Applicant admitted the recovery of gold items from him and that he intended to clear the gold by way of concealment for monetary benefit of Rs. 10,000/-. Further, no material has been placed on record to support the allegation that his statement was recorded under threat or coercion. A copy of retraction said to have been filed has also not been placed on records. As such, the claim to this effect is not tenable. Further, as correctly observed by the Commissioner (Appeals), 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. As such the culpability of the Applicant is well established.

6. 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 goods are recovered. No document evidencing ownership and licit purchase have also been placed on record. The gold bars were concealed. Hence, the intention to smuggle is manifest. The Applicant has, thus, failed to discharge the burden placed on him, in terms of Section 123, *ibid*. Keeping in view the facts of the case and as the Applicant has failed to discharge the onus placed on him in terms of Section 123, the Government holds that the lower authorities have correctly held the goods to be liable to confiscation under Section 111 of the Act, *ibid*.

7.1 Applicant had contended before the lower authorities that the import of gold is not 'prohibited', which contention has been adopted in the revision application. 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 present

case, it is not even contended that the Applicant herein had fulfilled the conditions specified in this behalf. 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 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-----."

The Commissioner (Appeals) has also brought out that Hon'ble Madras High Court has taken a similar view in the cases of P. Sinnasamy {2016-TIOL-2544-HC-MAD-CUS} and Samyanathan Murugesan {2009 (247) ELT 21(Mad.)}.

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

8. The original authority has denied the release of offending 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 (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 *"non-consideration or non-application of mind to the relevant factors, renders exercise of discretion manifestly erroneous and it causes for judicial interference."* Further, *"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."* Such a case is not made out. Hence, the order of absolute confiscation could not have been interfered with.

9.1 As regards the prayer for permitting re-export of the offending goods, the Government observes that a specific provision regarding re-export of articles imported in baggage is made in Chapter-XI of the Customs Act, 1962, by way of Section 80. The said Section 80 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 authorised by him and leaving India or as cargo consigned in his name"

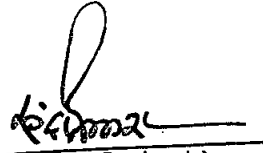
9.2 On a plain reading of Section 80, it is apparent that a declaration under Section 77 is a pre-requisite for allowing re-export. Hon'ble Allahabad High Court has, in the case of

Deepak Bajaj vs Commissioner of Customs (P), Lucknow {2019(365) ELT 695(All.)}, 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, the Applicant had not made a true declaration under Section 77 as he replied in negative to the question whether he was in possession of any foreign origin gold, when asked initially. It is also to be observed that the Hon'ble Delhi High Court has, in the case of Jasvir Kaur vs. UOI {2009 (241) ELT 621 (Del.)}, held that re-export is not permissible when article is recovered from the passenger while attempting to smuggle it.

9.3 Hence, the question of allowing re-export, in the present case, does not arise.

10. In the facts and circumstances of the case, the quantum of penalty imposed is neither harsh nor excessive.

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



(Sandeep Prakash)

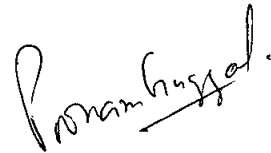
Additional Secretary to the Government of India

Sh. R. Backiamuthu
S/o Sh. Rahinam
Old No. 8, New No. 23, N.N Garden
8th Lane, 2nd Floor, Old Washermenpet
Chennai-600021

Order No. 97/23-Cus dated 15-03-2023

Copy to:

1. The Commissioner of Customs (Appeals-I), Chennai Airport & Chennai Air Cargo, 3rd Floor, New Custom House, GST Road, Meenambakkam, Chennai-600016.
2. The Pr. Commissioner of Customs, Commissionerate-I, Chennai Airport and Air Cargo Complex, New Custom House, Meenambakkam, Chennai-600027.
3. Sh. Abdul Huck, Advocate & Notary Public, No. 12/35, First Floor, Jones Street, Mannady, 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
14, Hudco Vishala