

SPEED POST



F. No. 373/181/B/2019-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...05/01/24

Order No. 06 /24-Cus dated 05-01-2024 of the Government of India passed by Smt. Shubhagata Kumar, 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 No. TCP-CUS-000-APP-053-19 dated 28.05.2019, passed by the Commissioner of GST, Service Tax & Central Excise (Appeals), Tiruchirappalli.

Applicant : Sh. Jalaldeen, Pudukkottai

Respondent : The Commissioner of Customs (P), Tiruchirappalli

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ORDER

A Revision Application, bearing No. 373/181/B/2019-RA dated 19.06.2019, has been filed by Sh. Jalaldeen, Pudukkottai (hereinafter referred to as the Applicant), against the Order-in-Appeal No. TCP-CUS-000-APP-053-19 dated 28.05.2019, passed by the Commissioner of GST, Service Tax & Central Excise (Appeals), Tiruchirappalli, vide which the Commissioner (Appeals) has modified the Order-in-Original No. TCP-CUS-PRV-JTC-133-18 dated 20.12.2018, passed by the Joint Commissioner of Customs (Airport), Tiruchirappalli, by reducing the penalty imposed upon the Applicant under Section 112 (a) & (b) from Rs. 4,00,000/- to Rs. 2,50,000/-. Vide the aforementioned Order-in-Original, six gold biscuits of 24 carat purity, totally weighing 599.500 grams and collectively valued at Rs. 18,78,833/-, recovered from the Applicant, had been absolutely confiscated under Section 111(d), 111(i), 111(l) & 111(m) of the Customs Act, 1962. Besides, penalty of Rs. 4,00,000/- was also imposed on the Applicant, under Section 112(a) & 112 (b) of the Act, *ibid*.

2. Brief facts of the case are that the Customs Officers intercepted the Applicant upon his arrival at Tiruchirappalli Airport, from Kuala Lumpur, on 06.05.2018 while he was attempting to exit through the Green Channel. Upon being asked as to whether he had brought any valuables or gold in any form with him either in person or in his baggage, he replied in the negative. When the Applicant was made to walk through the Door Frame Metal Detector (DFMD), the DFMD sounded an alarm. Thereafter he was again asked as to whether any gold items or other valuables were in his possession to which he again replied in the negative. Consequently, he was subjected to a search of his person which resulted in the recovery of one pouch covered with black colour insulation tape and medical bandage concealed inside his underwear and one pouch pasted to the soles of his feet, which were covered by socks inside his shoes. From each pouch, the officers found and recovered two gold biscuits; thus, a total six gold biscuits were recovered. A Central Government Approved Gold Assayer appraised the said six gold biscuits to be of 24 carat purity, totally weighing 599.500 grams and collectively valued at Rs. 18,78,833/-. The Applicant was asked why he did not declare the gold in the Customs Declaration Form, to which he replied that the said gold biscuits belong to him; that he intended to clear the

same without being detected by Customs and without payment of Customs Duty. The Applicant did not have any license/permit. The Applicant in his voluntary statement dated 06.05.2018, recorded under Section 108 of the Customs Act, 1962, stated inter-alia that he was into the flex board business; that he purchased six gold biscuits from his earnings; that while returning to India, he concealed the said gold biscuits in his underwear and covered with socks and returned to Tiruchirappalli from Malaysia; that he intentionally attempted to smuggle the gold biscuits into India by concealment without knowledge of Customs and without payment of Customs Duty and hence he did not declare the said gold biscuits in his Indian Customs Declaration Form; that he did not go to the Red Channel to pay Customs duty; and that he did not possess any valid license/permit to import the gold into India.

The matter was adjudicated by the original authority, vide aforesaid Order-in-Original dated 20.12.2018. Aggrieved, the Applicant filed an appeal before the Commissioner (Appeals), which was modified as mentioned above.

3. The revision application has been filed, mainly, on the grounds that Show Cause Notice was not served on the Applicant and the personal hearing intimations were not received by him; that the gold was concealed in his socks and innerwear only for safety purposes; and that the gold biscuits were intended for the marriage of his daughter. He prays that the impugned goods should be allowed to be redeemed upon payment of fine and that the penalty should be reduced.

4. Personal hearing in the matter was held on 16.10.2023. Sh. Manickam, Advocate, appeared for the Applicant and stated that the Applicant is a respectable businessman in Malaysia, who runs his own business and has no previous offence against him. He purchased the gold biscuits from his own savings, though he does not readily have the purchase invoices. The purpose of the gold was to make jewellery for his daughter's wedding and the body concealment was done out of the fear of robbery as his residence was 70 Kms away from the airport. He prayed that a lenient view be taken and quoted CESTAT case laws in support of his case.

5. The Government has carefully examined the matter. It is observed that the Applicant was intercepted without making any declaration in respect of gold carried by him. The Applicant had admitted to the recovery of six gold biscuits concealed upon his person and also that he intended to clear these goods without payment of Customs duty. He has not retracted his statement nor has he been able to furnish any proof of ownership. Hence, the contention of the Applicant that he was carrying the gold in socks and innerwear only for safety purposes is not sustainable, since he did not declare the items at the red channel and had the Customs not detected the concealment he would have succeeded in evading the Customs duty.

6. It has been contended by the Applicant that Show Cause Notice was not served upon him nor were personal hearing notices were sent to him. In this connection, it is found that the adjudicating authority sent the Show Cause Notice (SCN) and the notice of personal hearing to the Applicant's address as mentioned in his passport which were returned undelivered by the postal authorities. The SCN/PH notices were also displayed in the notice boards of Airport/Headquarters, Tiruchirappalli Offices but no reply or representation was received either from the Applicant or his representatives. Hence the adjudicating authority has followed the right procedure in the matter.

7. 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 the goods are recovered. The Applicant did not declare the gold biscuits, as stipulated under Section 77 of the Act, *ibid*. No documents evidencing ownership and licit purchase were produced at the time of interception. The Applicant has, thus, failed to discharge the burden placed on him, in terms of Section 123, *ibid*. Keeping in view the facts and circumstances of the case and as the Applicant has failed to discharge the onus placed on him in terms of Section 123, the Government is in agreement with the lower authorities that the seized gold items were liable to confiscation under Section 111 *ibid* and, consequently, the Applicant was liable for imposition of penalty.

8.1 The Government observes that import of gold and articles thereof in baggage is only allowed subject to fulfillment of certain conditions. In the present case, the stipulated

conditions have not been fulfilled by the Applicant herein. Hon'ble Supreme Court has repeatedly held that goods, in respect of which conditions subject to which their import/export is allowed are not fulfilled, are to be treated as 'prohibited goods'. [Ref: Sheikh Mohd. Omer {1983 (13) ELT 1439 (SC), Om Prakash Bhatia {2003 (155) ELT 423 (SC)} & Raj Grow Impex LLP {2021 (377) ELT 145 (SC)}]. Further, the Hon'ble Madras High Court has, in the cases of Malabar Diamond Gallery P. Ltd. {2016 (341) ELT 465 (Mad.)} and P. Sinnasamy {2016 (344) ELT 1154 (Mad.)}, taken this view specifically in respect of import of gold in baggage. Moreover, the Hon'ble High Court of Delhi in its order dated 23.11.2023 in Writ Petition No. 8976 of 2020 in the matter of Kiran Juneja Vs. Union of India & Ors. has held that "*A fortiori and in terms of the plain language and intent of Section 2(33), an import which is effected in violation of a restrictive or regulatory condition would also fall within the net of "prohibited goods".* Hence, there is no doubt that the goods seized in the present case are to be treated as 'prohibited goods', within the meaning assigned to it under Section 2(33) of the Act, *ibid*.

8.2 In view of the above, the contention of the Applicant that the offending gold items are not 'prohibited goods' and are bonafide baggage cannot be accepted.

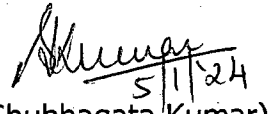
9. The Government observes that the original authority had denied the release of seized gold items and cigarettes on payment of redemption fine under Section 125 of Customs Act, 1962. It is settled by the judgment of the Hon'ble Supreme Court in the case of Garg Woollen Mills (P) Ltd vs. Additional Collector of Customs, New Delhi [1998 (104) E.L.T. 306 (S.C.)], that 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.*" Hon'ble Delhi High Court has, in the case of Raju Sharma [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 motive.*" Now in the latest judgment the Hon'ble Delhi High Court in its order dated 21.08.2023 in W.P. (C) Nos. 8902/2021; 9561/2021; 13131/2022; 531/2022; & 8083/2023

held that ".....an infraction of a condition for import of goods would also fall within the ambit of Section 2(33) of the Act and thus their redemption and release would become subject to the discretionary power of the Adjudging Officer".

Therefore, keeping in view the judicial pronouncements above and the facts of the case, the Commissioner (Appeals) has correctly refused to interfere with the discretion exercised by the original authority.

10. The Appellate Authority has reduced the penalty from Rs. 4,00,000/- to Rs. 2,50,000/- imposed on the Applicant, which is about 13% of the value of offending goods. In view of the facts and circumstances of the case, the penalty is reduced to Rs. 2 lakhs.

11. In view of the above, the revision application is disposed of in above terms.


(Shubhagata Kumar)

Additional Secretary to the Government of India

Sh. Jalaldeen
S/o Sh. Noor Mohamed
1406 North Main Street
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Order No. 06 /24-Cus dated 05-01-2024

Copy to:

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2. The Commissioner of Customs (P), No. 1, Williams Road, Cantonment, Tiruchirapalli-620001.
3. Sh. N. Manickam, Advocate & Consultant, 37, 8th Cross, RengaNagar, K.K Nagar Post, Tiruchirappalli-620021.
4. PPS to AS(RA)
5. Guard File
- ✓ 6. Spare Copy
7. Notice Board


ATTESTED

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