

SPEED POST



F. No. 373/37/B/2016-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...09/05/24

Order No. 102/24-Cus dated 09-05-2024 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. COC-CUSTOM-000-APP-333/2015-16 dated 31.12.2015, passed by the Commissioner of Customs (Appeals), Cochin.

Applicant : Sh. Abdul Nasser Kolavayal, Kasaragod

Respondent : The Commissioner of Customs, Cochin

ORDER

A Revision Application, bearing No. 373/37/B/2016-RA dated 30.03.2016, was filed by Sh. Abdul Nasser Kolavayal, Kasaragod (hereinafter referred to as the Applicant), against the Order-in-Appeal No. COC-CUSTOM-000-APP-333/2015-16 dated 31.12.2015, passed by the Commissioner of Customs (Appeals), Cochin, vide which the Commissioner (Appeals) upheld the Order-in-Original No. 6/2014 dated 02.05.2014, passed by the Joint Commissioner of Customs (Airport), Cochin. The aforesaid RA was decided vide order No. 1040/2018-CUS (SZ)/ASRA/MUMBAI dated 30.11.2018, vide which the absolute confiscation of the impugned gold bars was set aside and they were allowed to be redeemed on payment of redemption fine of Rs. 25,00,000/- and the penalty imposed upon the applicant under Section 112(a) of the Customs Act, 1962 was reduced from Rs. 10,00,000/- to Rs. 8,00,000/-. Thereafter, the applicant filed a Writ Petition WP (C) No. 34118 of 2023 in the Hon'ble High Court of Kerala against the aforesaid RA order dated 30.11.2018. The Hon'ble High Court vide its order dated 17.11.2023 set aside the aforesaid RA order and remitted back the matter to Revisionary Authority for deciding the matter afresh.

2. Brief facts of the case are that the applicant was intercepted by Customs officers upon his arrival at the Cochin International Airport on 13.06.2013 while he was walking through the exit gate of the Customs Arrival Hall after passing through the Green Channel. Upon being asked as to whether he was carrying any dutiable goods, he replied in the negative. Two gold bars of one Kg each were recovered from him which were concealed in specially made pockets on the inside of his trousers. The Government approved Valuer assayed the gold and certified that the gold bars were 995/24 carat purity of one Kg each and totally valued at Rs. 52,18,830/- (assessable value) & 55,98,000/- (market value).

In his statement dated 13.06.2013, recorded under Section 108 of the Customs Act, 1962, the Applicant stated inter-alia that he had been working in Dubai for the last 20 years; that he was in a big financial crisis about which his friends were also aware; that one of his friends Iqbal told him that if he smuggled gold, he would give him half of the profit which would approximately amount to Rs. 1.5 lakhs and that he agreed to that; that on 12th June, Iqbal telephoned him and asked him to prepare for the trip and reach Dubai airport; that he reached the airport at about 6 pm; that Iqbal gave him two gold bars each

weighing one Kilogram with a bill of M/s. Viren Jewellers LLC and a letter to the airport police intimating regarding the sale; that he entered the airport and submitted the gold bars along with his baggage for examination; and that after the examination and before entering into the aircraft, he kept the gold bars in the internal secret pockets on both sides of his pants and entered the aircraft. The matter was adjudicated by the original authority, vide aforesaid Order-in-Original dated 02.05.2014. Aggrieved, the Applicant filed an appeal before the Commissioner (Appeals), which was rejected as mentioned above.

3. The revision application has been filed mainly on the grounds that the absolute confiscation of the gold has resulted in a serious miscarriage of justice and is contrary to law and against the principles of natural justice; that the import of gold is not prohibited; that the adjudication authority should have released the gold on redemption fine and penalty; and that absolute confiscation is unwarranted and Section 125 of the Customs Act is very clear on release of the gold on redemption fine and penalty.

4. Personal hearing in the matter was held on 12.12.2023. Sh. Bindu Saran appeared for the applicant and submitted that the applicant was an eligible passenger returning after 15-20 years, that he was unfamiliar with the new/renovated airport and was not trying to exit through the Green Channel; that he was forcefully taken by Customs. He submitted that the short point is that Customs authorities disposed of the gold without the authority of law; that gold being a non-perishable item should not have been disposed of without an adjudication order being passed & therefore the SCN should be quashed and OIO set aside; that sale proceeds along with interest are to be paid to the applicant. Ms. Marykutty Chacko & Sh. Oomen Joseph, Assistant Commissioners appeared for the respondent and stated that the disposal was proper; the department is empowered to sell the gold once the Magistrate of Economic Offences Court has permitted the same after certifying the inventory. Personal hearing was again held on 14.02.2024. Sh. Naushad Assanar appeared on behalf of Respondents and reiterated the material on record mentioned in the letter dated 23.01.2024 sent in the matter. Vide the said letter it has been submitted that the facts of the present case clearly point to an attempted smuggling of ingeniously concealed gold into the country and the matter deserves no leniency by allowing redemption of the same; and that even if the redemption fine is decided to be

imposed in lieu of confiscation as per the provisions of Section 125 of the Customs Act, 1962, the same merits being of equal value to the gold seized, since gold is liquid capital and allowing redemption at lesser value would necessarily put the Government at an unjustified disadvantage. No one appeared on behalf of the Applicant. However, a written submission on behalf of the Applicant was sent vide email dated 14.02.2024 by Sh. K. Bindusaran, the advocate for the Applicant. The written submission which reiterates the earlier submission of the advocate for the applicant has been taken on record.

5. The Government has examined the matter. The Hon'ble Kerala High Court has set aside the RA Order No. 1040/2018-CUS (SZ)/ASRA/MUMBAI dated 30.11.2018 and remanded the matter back to the Revisionary Authority to decide the matter afresh. In this context, the government observes that the Applicant was intercepted by Customs at the exit gate and found to be carrying two gold bars weighing one Kg each, though no Customs Declaration Form was submitted by him nor did he report to red channel to declare the dutiable gold; rather the two gold bars far in excess of the quantity permitted under notification 26/2012-Cus dated 18.04.2012, as amended were found concealed in two pockets specially stitched to the inside of the pants worn by him. The Government also observes that in his statement under section 108 of the Customs Act, he stated that his business was in loss, he was in debt and hence he agreed to carry gold bars given to him by his friend Iqbal in the lure of half the profit from the sale of the impugned gold. The statement contains specific details eg. that Iqbal's house was at Tellichery and he stayed at Naiful in Dubai and that they used to meet at a barber shop there and that they were partners in the matter. These details were given by Abdul in his own voluntary statement under section 108 of the Customs Act, 1962, which has not been retracted and is sufficient to prove his intent to smuggle in terms of the judgment in the case of Surjeet Singh Chhabra vs. U.O.I {1997 (89) ELT 646 (SC)}, in which the Hon'ble Supreme Court has held that a confession statement made before the Customs Officer, is an admission and binding since Customs Officers are not Police Officers. 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.

6. The applicant has contended that he was not trying to exit through the Green Channel and he was forcefully taken by Customs. In this connection, the government observes that entire proceedings have been covered under the Mahazar dated 13.06.2013 signed by two witnesses as well as by the applicant himself. Thus, the contention of the applicant is not tenable.

7. It is also observed from the case records that after the passing of the RA Order dated 30.11.2018 which set aside the absolute confiscation and allowed the goods to be redeemed for re-export on payment of redemption fine of Rs. 25 lakhs under Section 125 of the Customs Act, 1962 and reduced the penalty of Rs. 10 lakhs to Rs. 8 lakhs under section 112(a) of the Act, *ibid*, the applicant did not approach the Respondent for payment of said redemption fine and penalty until October, 2020. Later, vide letter dated 03.10.2020, Sh. K.P.A Shukoor, Advocate of the applicant, requested for action on the order of the Revisionary Authority. In reply, Deputy Commissioner of Customs, vide letter dated 16.06.2021 informed the advocate that since the applicant had failed to pay the redemption fine under Section 125 of the Customs Act within 120 days from the date of the order, the option of redemption stood void as per Section 125(3) of the Customs Act, 1962. In response, the applicant vide letter dated 10.10.2021 submitted that he lost contact with the advocate after a certain point of time and he was under the impression that the appeal was still pending as he did not receive any correspondence from the Revisionary Authority on his appeal. In this context the government observes that as per records, the RA order was despatched on 13.12.2018 and was not returned undelivered. It is further recorded that as per the All India Delivery (Transit) Norms for speed post, a speed post article is usually delivered within 4-6 days from the date of booking. Section 153 of the Customs Act, 1962, which provides for mode for service of notice, orders, etc., as it stood at the relevant time, read as under:

"153. Service of order, decision, etc. – Any order or decision passed or any summons or notice issued under this Act, shall be served, -

(a) By tendering the order, decision, summons or notice or sending it by registered post to the person for whom it is intended or to his agent; or

(b) If the order, decision, summons or notice cannot be served in the manner provided in clause (a), by affixing it on the notice board of the customs house."

Further, Section 27 of the General Clauses Act, 1897 provides as under:

"27. Meaning of service by post. – Where any Central Act or Regulation made after the commencement of this Act authorizes or requires any document to be served by post, whether the expression "serve" or either of the expressions "give" or "send" or any other expression is used, then, unless a different intention appears, the service shall be deemed to be effected by properly addressing, pre-paying and posting by registered post, a letter containing the document, and, unless the contrary is proved, to have been effected at the time at which the letter would be delivered in the ordinary course of post."

Thus, on a combined reading of the two provisions extracted above, it is apparent that the service of the Order is deemed to have been effected at the time at which it would be delivered in the ordinary course of post, unless the contrary is proved. As regards the use of Speed Post, the Government finds that the Hon'ble Orissa High Court has, in the case of Jay Balaji Jyoti Steels Ltd. Vs. CESTAT, Kolkata {2015 (37) STR 673 (Ori.)}, held that "speed post" also has to be treated as "registered post", in view of Section 28 of the Indian Post Office Act, 1898 read with Rule 66B of Indian Post Office Rules, 1933. Thus, it can be safely presumed that the RA order was received by the Applicant, within 4-6 days of date of dispatch (13.12.2018) by speed post unless the Applicant proves to the contrary. The Applicant has stated that he did not receive the RA order, but has also admitted that he lost track of the matter for nearly two years on account of his advocate. In this context the Government finds that the Applicant had participated in the proceedings before the Revisionary Authority, his advocate also attended the personal hearing and as such, they were well aware of the revisionary proceedings. Hence, the contention of not receiving the RA order appears to be an afterthought to cover up the lapse of time on his part in paying the redemption fine and penalty, especially since the order was dispatched by Speed Post and did not return undelivered.

8. As per Notification No. 12/2012-Cus dated 17.03.2012, as amended, the term 'eligible passenger' is defined as a passenger of Indian origin or a passenger holding a valid passport, issued under the Passports Act, 1967 (15 of 1967), who is coming to India after a period of not less than six months of stay abroad; and short visits, if any, made by the 'eligible passenger' during the aforesaid period of six months shall be ignored if the

total duration of stay on such visits does not exceed thirty days and such passenger has not availed of the exemption under this notification or under the notification being superseded at any time of such short visits. Further, one of the conditions of the aforesaid notification is that duty has to be paid in convertible foreign currency and no foreign currency was found on the Applicant. Most importantly, as per proviso to condition 35, the Applicant was also required to make a declaration in this regard, which has not been done in this case. Moreover, as per the above notification, gold is allowed upto 1 Kg and in this case, it was in excess of the same i.e. 2 Kg. Hence, the contention of the Applicant that he was an eligible passenger under Notification No. 12/2012-Cus dated 17.03.2012 cannot be accepted.

9. 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. The Applicant did not declare the gold items, as stipulated under Section 77 of the Act, *ibid*. Further the gold was ingeniously concealed i.e. concealed in the specially made pockets on the inside of the trousers. Hence, the intent to smuggle is obvious. Moreover, his contention in the letter dated 09.08.2021 that he carried gold in the secret pockets of his pants for safety is not credible since he did not declare the gold and did not fill the Customs Declaration Form as required under Section 77 of the Customs Act, 1962. As far as the Cash Bill SAL NO. HO -11497 dated 12.06.2013 issued by M/s. Viren Jewellers LLC, towards purchase of 2 No. 'Kilo Bar 995' recovered from the pant pocket of the applicant showing the cost of the gold as UAE Dirhams 3,24,000 or Rs. 52,18,830/- is concerned, the Government concurs with the observation of original adjudicating authority and the appellate authority regarding the contention of the applicant that he purchased the gold from his life's savings appears to be farfetched and untrue, as a person whose business was in loss and who was deeply in debt could hardly have been able to buy the impugned gold at a cost of more than Rs. 52 lakhs, especially in view of the fact that the applicant's own voluntary statement containing specific details about how the applicant's friend gave him the impugned gold, the bill etc., contradicts this contention.

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

conditions have not been fulfilled by the Applicant. 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 (i.e. the Hon'ble jurisdictional 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*.

10.2 In view of the above, the contention of the Applicant that the impugned gold items are not 'prohibited goods', cannot be accepted.

11. The Government observes that the original authority had denied the release of seized gold items 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 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)], 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.*" Further, the Hon'ble Delhi High Court in the case of Nidhi Kapoor Vs. Pr. Commissioner and Additional Secretary to the

Government of India & Ors. took up 5 Writ Petitions in one bunch and settled the matter on the aspect of discretion. 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, in light of the judicial pronouncements above, the discretion exercised by the original authority has been rightly upheld by Commissioner (Appeals) especially since the gold was concealed in specially stitched pockets on the inner side of his garment and the intent to smuggle was manifest as discussed above.

12. As far as the contention of the applicant that gold could not have been disposed of before passing of the adjudication order is concerned, it is seen that the Respondents vide letter dated 21.09.2021 have informed the Applicant under RTI Act, 2005 that the copy of intimation regarding the disposal of the impugned gold was forwarded to the applicant under Section 150 of the Customs Act, 1962, that the gold was disposed of with the permission of the Magistrate (Economic Offences) as per law/rules. In this context it is observed that Section 110 (1A) of the Customs Act empowers the Central Government by notification in the official gazette to specify the goods or class of goods which shall, as soon as may be after its seizure under sub-section (1), be disposed of by the proper officer in such manner as the Central Government may, from time to time, determine. Accordingly, the government has issued Notification no. 36/86-Cus dated 05.02.1986 as amended, where gold figures at Sl. No. 4A. The Government thus observes that the matter was placed before the Hon'ble Court of Additional Chief Judicial Magistrate (Economic Offences) and disposed of subsequently. Therefore since the disposal has been done in terms of Section 110(1A) of the Customs Act, it cannot be held as illegal.

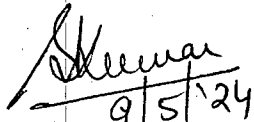
13. It is also contended by the Applicant that the gold ought to have been released for re-export by the lower authorities. As regards the prayer for permitting re-export of the offending goods, the Government observes that a specific provision regarding re-export of articles imported in baggage is made in Chapter-XI of the Customs Act, 1962, in Section 80 of the Customs Act. On a plain reading of Section 80, it is apparent that a declaration under Section 77 is a pre-requisite for allowing re-export. The 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 did not make a true declaration under Section 77, rather he replied in the negative to the question when asked by Customs whether he was in possession of any foreign origin gold. It is also 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. In the context of re-export the Government further observes that the original authority has clearly noted in para 19 of his order that the Applicant in the personal hearing before him stated that all his belongings had been sold and that he was returning to India permanently as his visa was cancelled. Hence, the claim for re-export of the impugned gold is clearly untenable.

14. The case laws relied upon by the Applicant in support of his various contentions do not come to his rescue in view of the dictum of Hon'ble Supreme Court and Hon'ble High Courts, as above.

15. In view of the facts and circumstances of the case, considering the financial condition of the applicant, the Government is of the view that a reduction in quantum of penalty would be in the interest of justice. Accordingly, the Government while upholding the OIA reduces the penalty imposed under Section 112(a) of the Customs Act, 1962 to Rs. 5,00,000/-.

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


9/5/24
(Shubhagata Kumar)
Additional Secretary to the Government of India

Sh. Abdul Nasser Kolavayal
S/o Sh. Chappayil Kunhabdulla
Chappayil House, Kolavayal PO
Kasaragod District, Kerala

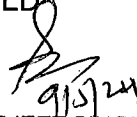
Order No. 102/24-Cus dated 09-05-2024

Copy to:

1. The Commissioner of Customs (Appeals), Custom House, Willingdon Island, Cochin-682009

2. The Commissioner of Customs, Custom House, Willingdon Island, Cochin-682009
3. M/s. Dheep Insights, Race Course Road, Coimbatore-641018.
4. PPS to AS(RA).
5. Guard File.
6. Spare Copy.
7. Notice Board.

ATTESTED



सरबजीत सिंह / SARABJEET SINGH
अधीक्षक / Superintendent (R.A. Unit)
वित्त मंत्रालय / Ministry of Finance
राजस्व विभाग / Department of Revenue
Room No. 605, 6th Floor., B-Wing
14, Hudco Vishala Building, Bhikaji Cama Place,
New Delhi-110066

