SPEED POST

F. No. 373/503/B/SZ/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 09/07/24.

Order No. 129 /24-Cus dated 09-07- 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. VIZ-CUSTM-000-APP-045-19-20 dated 29.10.2019, passed by the Commissioner (Appeals), Guntur Central Tax & Customs, Visakhapatnam.
Applicant	:	Shri Naina Mohamed Syed Sathick Ali, Chennai
Respondent	:	The Pr. Commissioner of Customs, Visakhapatnam

ORDER

A Revision Application, bearing No. 373/503/B/SZ/2019-RA dated 14.11.2019, has been filed by Shri Naina Mohamed Syed Sathick Ali, Chennai (hereinafter referred to as the Applicant), against the Order-in-Appeal No. VIZ-CUSTM-000-APP-045-19-20 dated 29.10.2019, passed by the Commissioner (Appeals), Guntur Central Tax & Customs, Visakhapatnam. The Commissioner (Appeals) vide the aforesaid Order-in-Appeal, has upheld the Order-in-Original of the Assistant Commissioner of Customs, Custom House, Port Area, Visakhapatnam, bearing No. 18/2019 dated 16.04.2019 vide which ingeniously concealed gold pieces (08 pieces in ball shape) totally weighing 194 grams and valued at Rs. 5,66,480/-, recovered from Applicant, were confiscated absolutely under Section 111(d), 111(i) and 111(l) of the Customs Act, 1962 without giving option for redemption under the provisions of Section 125 of the Customs Act, 1962; a penalty of Rs. 57,000/- was imposed on the Applicant under Sections 112(a) & 112(b) of the Customs Act, 1962. He ordered for confiscation of the material objects viz. black coloured polythene adhesive tapes (NCV) which were used to wrap the gold for concealment in his abdomen, under the provisions of Section 119 of the Customs Act, 1962.

2. Brief facts of the case are that, the Applicant, an Indian passport holder arrived from Kuala Lumpur on 27.10.2018, at Visakhapatnam International Airport. He was intercepted by the Customs officers while he was passing through green channel on suspicion that he might have concealed gold/contraband/prohibited goods either in his baggage or on his person and when questioned he replied in the negative. A personal search and frisking of the Applicant with a hand metal detector was done by the Customs Officers in the presence of two independent witnesses. The hand metal detector sounded a beep when it was placed around the abdomen area of the Applicant's body indicating the presence of metal objects. On further questioning by the Customs officers, the Applicant confessed that gold pieces were concealed in his abdomen.

2.2 A statement dated 27.10.2018 of the Applicant was recorded under Section 108 of the Customs Act, 1962 wherein he admitted to the concealment of gold / contraband / prohibited goods in his stomach.

2.3 On 28.10.2018, the Applicant ejected 07 round pieces wrapped in black polythene adhesive tape. On opening the packet, yellow metal pieces were found. The yellow metal pieces and the packing material were seized vide a Panchanama dated 28.10.2018, as there was reason to believe that the same are liable for confiscation under Section 111 / Section 119 of the Customs Act, 1962 and also for the purpose of assaying and valuation.

2.4 On suspicion that there may be more metal pieces in the Applicant's stomach, he was admitted in King George Hospital (KGH), Visakhapatnam on 28.10.2018. During the Applicant's stay in the hospital, he ejected 01 round packet covered covered with black adhesive tape on 29.10.2018. The round piece of yellow metal and the packing tape so ejected was seized vide a Panchanama dated 29.10.2018, as there was reason to believe that the same were liable for confiscation under Section 111 / Section 119 of the Customs Act, 1962 and also for the purpose of assaying and valuation. Thereafter, the doctors of KGH confirmed after conducting medical tests on the Applicant on 30.10.2018 that no more foreign material was present in his body.

2.4 The 08 yellow metal pieces recovered from the Applicant were examined and valued by a Government Approved Gold Assayer who issued the Valuation Certificate dated 30.10.2018, certifying that the recovered metal was Gold of 24 carat purity, weighing 194 grams in total and valued at Rs. 6,30,500/- in the Indian Market. As per Notification No. 86/2018 – Customs (NT) dated 15.10.2018, tariff value of the gold seized, as on 27.10.2018, weighing 194 grams was valued at Rs. 5,66,480/-. The proceedings were recorded vide a Panchanama dated 30.10.2018.

2.5 Another written statement dated 31.10.2018 of the Applicant was recorded under Section 108 of the Customs Act, 1962 wherein he inter-alia stated that the impugned gold did not pertain to him and he was not the owner of the gold; that this was the first time that he was smuggling gold to India; that no offences have been booked against him previously; that he knew well that it was an illegal act and takes the responsibility for the same; that he had done it to make some quick money as he was poor and not well

educated; that he did not wish to be issued with a written Show Cause Notice and also did not want to be heard in person; that he confessed that he had committed an offence and requested for a lenient view while adjudicating the matter.

2.6 The adjudicating authority adjudicated the matter vide Order-in-Original No. 18/2019 dated 16.04.2019. Aggrieved, the Applicant filed an appeal before the Commissioner (Appeals), Guntur Central Tax & Customs, Visakhapatnam, which has been rejected. Hence, this revision application has been filed.

3. The revision application has been filed mainly on the grounds that order of the respondent is against law, weight of evidence and circumstances and probabilities of the case; that no declaration card was provided; that he orally declared that he brought the gold for his family use; option ought to have been given for the release of impugned gold under Section 125 of the Customs Act, 1962 on payment of redemption fine; that gold is not a prohibited item and that the impugned order should be set aside, the gold item be permitted for re-export/released and that the penalty be reduced. The Applicant also quoted several case laws in support of their case.

4. Personal hearing in the matter was fixed on 05.04.2024. Smt. P. Kamalamalar, Advocate on behalf of the Applicant appeared and reiterated the submissions made in the revision application. Sh. Rakesh Kumar Singh, Superintendent (Review Cell), Vizag appeared from the Respondent's side and submitted that the modus operandi adopted by the Applicant establishes to the intention to smuggle the impugned gold into India. He quoted several judgements which have laid down the principal that if the conditions imposed on the import of gold are not fulfilled, it renders the gold 'prohibited' and consequently the adjudicating authority has the discretion to absolutely confiscate the offending goods or allow redemption, and that discretion cannot be called into question if the goods are rendered 'prohibited'. He also quoted some RA orders where the facts of the case are similar and as such he requested that the impugned O-I-A should be upheld.

5. The Government has carefully examined the matter. The contentions of the Applicant that no declaration card was provided and that he had verbally declared that he brought gold etc., does not appear credible as the same had not been stated before the Customs authorities when the charges were explained to him and his statement under section 108 of the Customs Act, 1962 was recorded; the entire proceedings have been covered under a Mahazar in presence of independent witnesses which also corroborates the sequence of events. This is a signed statement which has not been retracted by the Applicant. Thus, it is not open to the Applicant to dispute the facts at this stage. Further, though the Applicant claimed that he was the owner of the offending goods, he has failed to produce any evidence in support of his claim. Thus, there is no evidence on record to establish that the Applicant was the legitimate owner of the goods. As such, the subject contentions of the Applicant appear to be an afterthought. Further, it is observed that the Applicant has not declared the possession of impugned gold in his Customs declaration form and it was only through persistent enquiry and examination of the Applicant, that the body concealment of the impugned gold came to light. He was well aware that smuggling of the impugned gold items in the aforesaid manner and without declaring the same to Customs, without possession of any valid permit/license/document, is an offence. The impugned goods smuggled into India via ingenious body concealment cannot be considered as bonafide baggage.

6. As per 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. The Applicant did not declare the impugned goods, as stipulated under Section 77 of the Act, ibid. No documents evidencing ownership and licit purchase have been produced. 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 concurs with the adjudicating & appellate authorities that the impugned goods were liable to confiscation under Section 111 ibid and that the penalty was imposable on the Applicant.

7.1 The Applicant has contended that the import of gold is not 'prohibited'. However, the Government observes that this contention of the Applicant is against several judgements of the Hon'ble Supreme Court in which it has been held that the goods, import/export whereof is allowed subject to certain conditions, are to be treated as 'prohibited goods' in case such conditions are not fulfilled. 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 fulfilment of certain conditions. In the present case, as correctly brought out by the lower authorities, the Applicant in this case did not fulfil 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----."*

7.3 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 of assigned to it under Section 2(33) of the Act, ibid.

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

8. The Government observes that the original authority had denied the release of 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 the option to release 'prohibited goods' on redemption fine is discretionary. 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 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, the Commissioner (Appeals) has correctly refused to interfere with the discretion exercised by the original authority.

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. 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.

9.2 Further, 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. Hence, the question of allowing re-export does not arise.

10. The case laws relied upon by the Applicant, in support of his various contentions, are not applicable in view of the dictum of Hon'ble Supreme Court and Hon'ble High Courts, as above.

11. In the facts and circumstances of the case, the Government finds that the order of Commissioner (Appeals) does not require any interference. Also, the quantum of penalty imposed on the Applicant is neither harsh nor excessive.

12. The revision application is therefore rejected.

9/7/24

(Shubhagata Kumar)
Additional Secretary to the Government of India

Shri Naina Mohamed Syed Sathick Ali,
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Order No. 129 /24-Cus dated 09-07-2024

Copy to:

1. The Commissioner (Appeals), Guntur, Central Tax & Customs, 4th Floor, Custom House, Port Area, Visakhapatnam – 530035.
2. The Principal Commissioner of Customs, Visakhapatnam, GST Bhawan, Port Area, Visakhapatnam – 530035.
3. Sh. S. Palanikumar, Kameshwaran & P. Kamala Malar, Advocates, No. 10, Sunkurama Street, 2nd Floor, Chennai-600001.
4. PPS to AS (RA)
5. Guard file
6. Spare Copy
7. Notice Board

Shailendra 9/7/24

ATTESTED (शैलेन्द्र कुमार मीना)
(Shailendra Kumar Meena)
अनुभाग अधिकारी / Section Officer
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