

SPEED POST



F. No. 373/27/B/SZ/2020-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. 10/07/24...

Order No. 132 /24-Cus dated 10-07-2024 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. 11/2020 dated 10.01.2020 passed by the Commissioner of Customs (Appeals), Bengaluru.

Applicant : Smt. Amutha Subramaniam, Srilanka

Respondent : Pr. Commissioner of Customs, Airport & Air Cargo Complex, Bengaluru.

ORDER

Revision Application No. 373/27/B/SZ/2020-RA dated 24.01.2020 has been filed by Smt. Amutha Subramaniyam, Srilanka (hereinafter referred to as the Applicant) against the Order-in-Appeal No. 11/2020 dated 10.01.2020, passed by the Commissioner of Customs (Appeals), Bengaluru. The Commissioner (Appeals) has upheld the Order-in-Original of the Additional Commissioner of Customs, Airport and Air Cargo Complex, Kempegowda International Airport, Devanahalli, Bengaluru, bearing No. 52/2019-20 (AP-ADM) dated 08.08.2019, except to the extent of reducing the penalty imposed on the Applicant to 2,75,000/- under Section 112(a) and Rs. 70,000/- under Section 114AA of the Customs Act, 1962. Vide the aforementioned Order-in-Original, 450 grams of gold jewellery, consisting of two silver colour coated gold anklets, one gold chain with five pendant and two gold bangles valued at Rs. 13,70,460/-, recovered from the Applicant, had been absolutely confiscated under Section 111(d), 111(i), 111(l) and 111(m) of the Customs Act, 1962. Besides, penalty of Rs. 3,43,000/- under Section 112 of the Customs Act, 1962 and Rs. 3,43,000/- under Section 114AA of the Act, ibid were also imposed on the Applicant.

2. Brief facts of the case are that the Applicant, a Sri Lankan passport holder, who had arrived at Bengaluru International Airport from Sri Lanka, on 15.10.2017, was intercepted by the Customs officers on reasonable belief that she was trying to smuggle gold into India. The Applicant carried a biscuit coloured hand bag and no check in bag. On being enquired about the contents of her baggage, the Applicant replied that there was nothing valuable to declare to Customs. Detailed examination of the bag was performed by the officers and it was found that the bag contained used clothes and personal effects. Thereafter, a body search of the Applicant was conducted and she was found to possess two silver coloured coated anklets, one gold chain with five pendants and two gold bangles. The approved gold appraiser and valuer examined the impugned goods and certified that the said gold jewellery weighing 450 grams consisted of 2 silver colour coated gold anklets-225 grams, and chain with five pendant weighing 165 grams which are of 24 carat purity totally weighing 390 grams, valued at Rs. 12,01,200/- and two bangles weighing 60 grams are of 22 carat purity, and valued at Rs. 1,69,260/-. Thus, The

net weight of the gold jewellery was 450 grams and valued at Rs. 13,70,460/-. The search was conducted in the presence of independent witnesses and was recorded in Mahazar dated 15.10.2017 and said gold jewellery weighing 450 gms were seized under the said Mahazar.

3. In her voluntary statement dated 15.10.2017 recorded under Section of 108 of the Customs Act, 1962, the Applicant stated inter-alia that she came to Bangalore for making purchases for her daughter's wedding; that on reaching Kempegowda International Airport on 15.10.2017, the Customs officers intercepted her and informed her that they needed to examine her baggage in the presence of independent witnesses so as to ascertain the correctness of the baggage declaration made by her wherein she had not declared any valuable articles or any other items; that on scanning the bag the officers noticed that the bag contained used clothes and personal effects; that on conducting body search with her consent, the Lady Officers after following due procedures, recovered the impugned goods. The adjudicating authority adjudicated the matter vide aforesaid Order-in-Original No. 52/2019-20 (AP-ADM) dated 08.08.2019. Aggrieved, the Applicant filed an appeal before the Commissioner of Customs (Appeals), Bengaluru, which has been rejected and the O-I-O has been upheld to the extent of reducing the penalty imposed on the Applicant and regarding absolute confiscation of the impugned gold, the penalty imposed on the Applicant has been reduced by Commissioner (Appeals).

4. The revision application has been filed, mainly, on the grounds that Order-in-Appeal passed by the Commissioner (Appeals) is against law, weight of evidence and probability of the case; that the Applicant never attempted or pass through the green channel and she was all along under the control of the officers; that ownership of gold is not disputed; there is no ingenious concealment and gold jewellery is not in commercial quantity, that she purchased in Sri Lanka out of her own earning for own use; that the wearing of gold ornaments by a passenger is not prohibited by the Baggage Rules, 1998; gold is dutiable goods not prohibited goods. It has been prayed for allowing re-export of the gold

jewellery and to set aside the impugned order and set aside or reduce the penalty under Section 112(a) & (b) and 114AA of the Customs Act, 1962.

5. Personal hearing in the matter was fixed on 19.04.2024 and 01.05.2024. Smt. Kamalamalar Palanikumar, Advocate vide her letter dated 01.05.2024 submitted that her client was a Sri Lankan national and brought gold jewellery of 22 and 24 carats. She was wearing the gold jewellery, hence it is personal jewellery; that the Applicant never concealed the jewellery which was worn by her at time of interception and that the same is not covered under the baggage rules as per the Vigneswaran Sethuraman and Supreme Court judgements. She prayed that the seized gold jewellery be ordered for re-export and the penalty be either set aside or reduced. No one appeared for the Respondents. Hence, it is presumed that the Respondent has nothing to add in the matter.

6.1 The Government has examined the matter. The Applicant is a foreign national and brought gold ornaments which were worn by her on her body. Admittedly there was no ingenious concealment but the Applicant did not declare the same to Customs as was required under Section 77 of the Customs Act, 1962. She has admitted as much in her statement tendered under Section 108 of Customs Act, 1962. Upon enquiry about any dutiable goods, the Applicant replied that there was nothing to declare to Customs which points to the intent of evading customs duty.

6.2 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 Applicant was intercepted after passing through the Green Channel. No documents evidencing ownership and licit purchase were produced at the time of interception. The gold items are made of 22 and 24 carat. The Applicant has, thus, failed to discharge the burden placed on her, in terms of Section 123, *ibid*. In terms of Rule 2(vi) of the Baggage Rules, 2016, "personal effects" means things required for satisfying daily necessities but does not include jewellery. Jewellery is

therefore distinguished from articles of 'personal effect'. Thus, the contention that the gold jewellery is personal jewellery as it was worn by the applicant is not sustainable.

6.3 Keeping in view the facts of the case and as the Applicant has failed to discharge the onus placed on her in terms of Section 123, the Government agrees with the lower authorities that the seized goods were liable to confiscation under Section 111 *ibid* and the penalty was imposable on the Applicant.

6.4 As regards the argument of the Applicant that impugned gold is not covered under the baggage rules as per the decision of Kerala High Court decision in the case of *Vigneswaran Sethuraman Vs. UOI* cited at {2015 (325) ELT 573 (Ker.)}, the appellate authority in para-9 of the impugned O-I-A has already explained the non- applicability of the same in present case in detail in para 9 of the OIA. The government concurs with the same.

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, 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." 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.*" Thus, the discretion exercised by the original authority could have been interfered with only if it suffered from any of these vices. In the present case, the original authority has for relevant and reasonable considerations recorded in the OIO refused to grant redemption. Thus, the Commissioner (Appeals) has correctly refused to interfere in the matter.

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 decisions relied upon by the Applicant do not assist the applicant in the present case in view of the dictum of Hon'ble Supreme Court and Hon'ble High Courts, as above.

11. The Commissioner (Appeals) has already reduced the penalty imposed from Rs. 3,43,000/- to 2,75,000/- under Section 112(a) and from Rs. 3,43,000/- Rs. 70,000/- under Section 114AA of the Customs Act, 1962. In view of the facts and circumstances of the case, no further relief is merited.

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

Shubhagata Kumar
10/7/24
(Shubhagata Kumar)

Additional Secretary to the Government of India

Smt. Amutha Subramaniam,
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SRI LANKA

Order No. 132 /24-Cus dated 10-07-2024

Copy to:

1. The Commissioner of Customs (Appeals), BMTC Building, Above BMTC Bus Stand, Old-Airport-Road, Domlur, Bengaluru-560071.
2. The Pr. Commissioner of Customs, Airport & Air Cargo Complex, Air India SATS, Air Freight Terminal, Kempegowda, Bengaluru-560300.
3. Sh. S. Palanikumar, Kameshwaran & P. Kamala Malar, Advocates, No. 10, Sunkurama Street, 2nd Floor, Chennai-600001.
4. PA to AS(RA)
5. Guard File
6. ✓ Spare Copy
7. Notice Board.

ATTESTED

Shailendra Kumar Meena
10/7/24
(शैलेन्द्र कुमार मीना)
(Shailendra Kumar Meena)
अनुभाग अधिकारी / Section Officer
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