

**SPEED POST**



F. No. 373/457/B/SZ/2019-RA  
GOVERNMENT OF INDIA  
MINISTRY OF FINANCE  
(DEPARTMENT OF REVENUE)

14, HUDCO VISHALA BLDG., B WING  
6<sup>th</sup> FLOOR, BHIKAJI CAMA PLACE,  
NEW DELHI-110 066

Date of Issue..18/07/24..

Order No. 135 /24-Cus dated 18-07-2024 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 Applications under Section 129 DD of the Customs Act, 1962, against the Order-in-Appeal C. Cus. I. No. 256/2019 dated 22.10.2019, passed by the Commissioner of Customs (Appeals-I), Chennai.

Applicant : Shri T. Mohamed Nizar, Chennai

Respondent : The Principal Commissioner of Customs, Chennai-I

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**ORDER**

Revision Application No. 373/457/B/SZ/2019-RA dated 11.11.2019 has been filed by Shri T. Mohamed Nizar, Chennai (hereinafter referred to as the Applicant) against the Order-in-Appeal C. Cus. I. No. 256/2019 dated 22.10.2019, passed by the Commissioner of Customs (Appeals-I), Chennai. The Commissioner (Appeals) has rejected the appeal filed by the Applicant against the Order-in-Original No. 74/2019-20-Commissionerate-I dated 10.06.2019, passed by the Joint Commissioner of Customs (Adjudication-Air), Chennai-I, Chennai Airport and Air Cargo Complex, Chennai, except to the extent of allowing the release of seized electronic goods valued at Rs. 12,50,000/- only on payment of Redemption fine of Rs. 2,50,000/- under Section 125 of the Customs Act, 1962.

2. Brief facts of the case are that, on 13.11.2018, the Applicant, an Indian passport holder, while arriving into India at Anna International Terminal of Chennai Airport, Meenambakkam, Chennai from Kuala Lumpur, was intercepted by Customs officers while he was about to exit the arrival hall after passing through green channel, on reasonable suspicion that he might be carrying gold / contraband goods either in his baggage or on his person. On search of his person, one gold bit weighing 40 grams of value Rs. 1,29,160/- concealed in his right ankle socks was recovered. On examination of his checked-in-baggage resulted in the recovery of 17 nos. of 'Apple' watches, 900 nos. of RAM/Memory Cards, 10 nos. of i-Phone 6S-128GB without accessories & cover and 6 nos. of 'Sigma' camera lens for 'Nikon', altogether valued at Rs. 12,50,000/-. As he did not possess any valid documents for the legal import of the gold and also tried to smuggle the gold and electronic items by way of concealment and non-declaration, the goods were seized under a mahazar under Section 110 of the Customs Act, 1962 read with Section 3(3) of the Foreign Trade (Development & Regulation) Act, 1992.

3. In his voluntary statement recorded under Section of 108 of the Customs Act, 1962 immediately after seizure of the impugned gold, the Applicant stated inter-alia that the gold bit was his own which he tried to smuggle into India and the electronic goods were given to him by a person by name Rowther to be handed over to an unknown person

outside Chennai Airport. The Applicant, vide letter dated 13.11.2018, requested for adjudication of the case without issue of show cause notice. The adjudicating authority adjudicated the matter vide aforesaid Order-in-Original No. 74/2019-20-Commissionerate-I dated 10.06.2019. Aggrieved, the Applicant filed an appeal before the Commissioner of Customs (Appeals-I), Chennai, which has been rejected except to the extent of allowing the release of seized electronic goods only on payment of Redemption fine.

4. The adjudicating authority adjudicated the matter vide aforesaid Order-in-Original No. 74/2019-20-Commissionerate-I dated 10.06.2019 except to the extent of allowing the release of seized electronic goods only on payment of Redemption fine of Rs. 2,50,000/-. Vide aforementioned O-I-O, one gold bit weighing 40 gms and valued at Rs. 1,29,160/-, 900 nos. of 2 GB Ram/Memory Cards totally valued at Rs. 2,70,000/-, 17 nos. of Apple watches totally valued at Rs. 5,10,000/-, 10 nos. of i-phones 6S 128 GB totally valued at Rs. 3,50,000/- and 6 nos. of Sigma Camera lens for Nikon totally valued at Rs. 1,20,000/-; thus altogether totally valued at Rs. 13,79,160/-, recovered from the Applicant, were confiscated absolutely under Section 111(d) and 111(l) of the Customs Act, 1962 read with Section 3(3) of the Foreign Trade ( Development & Regulation) Act, 1992. Besides, a penalty of Rs. 1,30,000/- was also imposed on the Applicant under Section 112 (a) of the Act, *ibid.* Aggrieved, the Applicant filed an appeal before the Commissioner of Customs (Appeals-I), Chennai, which has been rejected.

5. The revision application has been filed mainly on the grounds that the order of the lower adjudicating authority is against law, weight of evidence, circumstances and probabilities of the case; that the appellant was all along in control of the officers at the red channel; and did not pass through or cross the Green Channel; that gold is a restricted item and not a prohibited good; 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. The prayer is for the impugned Order-in-Appeal be set aside; that the impugned gold items be permitted for re-export/released and that the penalty be set aside/ reduced.

6. Personal hearing in the matter was fixed on 03.04.2024. Smt. P. Kamalamalar, Advocate appeared on behalf of the Applicant and submitted that the allegation of Customs that the Applicant concealed the 40 gms of gold in his socks is without any evidence and that if that were the case, the socks used to conceal the gold also ought to have been seized, which is not the case. She admitted however that no Customs declaration form was filed; declaration would have been oral. She further admitted that there is no document or purchase invoice to establish licit acquisition. She requested for release or re-export of the goods. Shri S. Ramesh, Assistant Commissioner of Customs (Legal & Review), Chennai-I appeared on behalf of the Respondent and submitted that the option of re-export/release can be given only if goods are declared to Customs. He prayed that O-I-A be upheld.

7.1 The Government has examined the matter. It is observed that the Applicant did not declare the impugned gold which was concealed in his socks and the same was recovered from him only after he was intercepted by the Customs. Thus the requirement of Section 77 of the Customs Act, 1962 to declare the goods was not met. He admitted in his own statement recorded under Section 108 of the Custom Act, 1962 to smuggling of the said gold alongwith electronic items. The original adjudicating authority has also noted that intent to smuggle on part of the Applicant, was lucidly established as he ignored the legal requirement of Section 77, did not make any declaration to Customs and attempted to smuggle the ingeniously concealed impugned gold through the green channel.

7.2 As regard the non-confiscation of material object used for concealment of the impugned gold i.e. ankle socks, the Appellate Authority has discussed it in detail in para (6) of the O-I-A. He has found that the Applicant was ineligible for the import of gold and that is not disputed; that the passenger had not declared these goods was also a fact; that the whole process of seizure has been recorded in the presence of independent witnesses and therefore it was held that merely because the material object used for concealment was not seized, the seizure of the contraband and the duly drawn mahazar cannot be nullified. The government finds force in this observation of the adjudicating authority and appellate authority and concurs with their decisions in this regard.

8. 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. In the instant case, not only did the Applicant not declare the gold items, as stipulated under Section 77 of the Customs Act, 1962, but ingeniously concealed them in his ankle socks with an intent to avoid detection by Customs. Also, the counsel of the Applicant admitted that there is no document or purchase invoice to establish licit acquisition of the gold. 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 agrees with the lower authorities that the seized gold item was liable to confiscation under Section 111 *ibid* and that the Applicant was liable to penalty.

9.1 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.*"

9.2 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-----."*

9.3 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.*

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

10. 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*

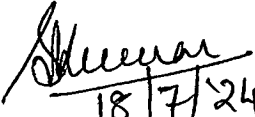
*power of the Adjudging Officer*". Therefore, keeping in view the judicial pronouncements above, the Commissioner (Appeals) has correctly refused to interfere with the discretion exercised by the original authority.

11. The Applicant has requested to be allowed to re-export the impugned gold. The Government observes that a specific provision regarding re-export of baggage articles has been made under Section 80 of the Act, *ibid* and upon a plain reading of the same, 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 {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 made no declaration in respect of the subject goods. Further, the Hon'ble Delhi High Court has, in the case of *Jasvir Kaur vs. UOI {2019 (241) ELT 521 (Del.)}*, held that re-export "*cannot be asked for as of right----- The passenger cannot be given a chance to try his luck and smuggle Gold into the country and if caught he should be given permission to re-export.*" Hence, the request for re-export cannot be allowed.

12. 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.

13. In view of the facts and circumstances of the case, there is no ground to interfere with order of appellate authority and the same is upheld.

14. The revision application is, accordingly, rejected.

  
18/7/24

(Shubhagata Kumar)

Additional Secretary to the Government of India

Shri T. Mohamed Nizar,  
Door No.2, Narayana Naickan Street,  
8<sup>th</sup> Lane, Pudupet, Chennai -600002.

Order No. 135 /24-Cus dated 18-07-2024

Copy to:

1. The Commissioner of Customs (Appeals-I), Chennai Airport & Air Cargo, 3<sup>rd</sup> floor, New Custom House, GST Road, Meenambakkam, Chennai – 600016
2. The Principal Commissioner of Customs, Commissionerate-I, Chennai-I (Airport), New Custom House, Meenambakkam, Chennai-600027
3. Sh. S. Palanikumar, Kameshwaran & P. Kamala Malar, Advocates, No. 10, Sunkurama Street, 2<sup>nd</sup> Floor, Chennai-600001.
4. PPS to AS (RA).
5. Guard file.
6. ✓ Spare Copy
7. Notice Board

ATTESTED

*Shailendra*

18/7/24  
(शैलेन्द्र कुमार मीना)  
(Shailendra Kumar Meena)  
अनुभाग अधिकारी / Section Officer  
वित्त मंत्रालय (राजस्व विभाग)  
Ministry of Finance (Dept. of Rev.)  
भारत सरकार / Govt. of India  
नई दिल्ली / New Delhi