

SPEED POST



F. No. 373/28/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. 26/07/24

Order No. 143/24-Cus dated 26-07-2024 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 12/2020 dated 16.01.2020 passed by the Commissioner of Customs (Appeals), Bengaluru.

Applicant : Shri Sheik Abdullah Rahamadullah, Tamilnadu

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

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ORDER

A Revision Application, bearing No. 373/28/B/SZ/2020-RA dated 24.01.2020, has been filed by Shri Sheik Abdullah Rahamadullah, Tamilnadu (hereinafter referred to as the Applicant), against the Order-in-Appeal 12/2020 dated 16.01.2020, passed by the Commissioner of Customs (Appeals), Bengaluru.

2. Brief facts of the case are that the Applicant arrived from Singapore at the international arrival hall in Bengaluru International Airport, on 27.03.2016, and was intercepted by the officers of Air Intelligence Officers of Customs, Bengaluru at the customs arrival hall. The Applicant was carrying a black coloured laptop bag with marking as "acer" as his hand bag and had one check-in baggage. On being enquired about the contents of his baggage, the Applicant replied that there was nothing valuable to declare to Customs. Detailed examination of the hand bag was performed by the officers and it was found that the bag contained some chocolates and used clothes. Thereafter, detailed examination of check in baggage was performed and it was found to contain one new camera of the brand – "Panasonic AVCCAM AG-AC160AEN" make and S.No. B6TDA0133. On his agreeing to undergo body search, when the hand held metal detector was placed near his buttocks, there was a beep indicating the presence of metal object in his body. On persistent enquiry, the Applicant confessed that he had concealed gold in his rectum. He agreed to remove the same and handed over two concealed gold biscuits weighing 200 grams valued at Rs. 5,76,000/-. The whole examination was conducted in presence of independent witness. The goods were seized under Mahazar dated 27.03.2016 under Section 110 of the Customs Act, 1962. Further, the camera of brand "Panasonic AVCCAM AG-AC160AEN" was taken for valuation and was found that the market value of the said camera is Rs. 1,29,000/- as on 27.03.2016. The camera was also seized as it was non bonafide baggage and was in violation of the Baggage Rules, 1988.

3. The notice was issued and the Applicant attended the personal hearing consequent to which the original authority i.e. the Deputy Commissioner of Customs, Kempegowda International Airport, Bengaluru has passed the Order-in-Original No. 118/2019-20 dated

06.11.2019. The original authority besides absolutely confiscating the gold and the camera under Section 111(d), 111(i), 111(l) and 111(m) of the Customs Act, 1962, imposed penalties of Rs. 2,25,000/- each under Section 112(a) and Section 114AA of the Act, *ibid*.

4. Aggrieved, the Applicant filed appeal before the Commissioner of Customs (Appeals), Bengaluru who has upheld the order of absolute confiscation of the impugned gold, modified to the extent of reduction of penalty to Rs. 2,00,000/- under Section 112(a) and Rs. 75,000/- under Section 114AA of the Customs Act, 1962. Also, allowed redemption of confiscated camera under Section 125 of the Customs Act, 1962 and imposition of applicable penalties. Aggrieved by this order, the Applicant filed this appeal.

5. During the personal hearing before the original authority, he stated *inter alia* that he carried some garments and went to Singapore through Chennai International Airport and during his travel, a person by name Mr. Ismail had approached him to carry gold and one camera from Singapore for a commission of Rs. 11,500/- and deliver it to a contact person in Chennai; Mr. Ismail had instructed the Applicant to carry the said packet containing gold by concealing in his rectum to avoid detection from the Customs authorities. He further stated that he was well aware of the fact that carrying gold in a concealed manner and camera, without declaring it to Customs was an offence.

6. The instant 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 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 also set aside or reduce the personal penalties sum of Rs. 2,00,000/- and Rs. 75,000/- under Sections 112(a) and 114AA of the Customs Act respectively.

7. Personal hearings in the matter were fixed on 26.04.2024, 07.05.2024 and 15.05.2024. Smt. P. Kamalamalar, Advocate on behalf of the Applicant appeared on

15.05.2024 and reiterated the written submissions made with nothing further to state. No one appeared from the Respondent's side and also no request for adjournment has been received. Therefore, it is presumed that the department has nothing to add in the matter.

8. The Government has examined the matter. It is observed that the Applicant did not declare 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. The impugned gold did not belong to Applicant. He only acted as a carrier and smuggled the same for monetary consideration. He was not an eligible passenger for exemption in terms of Notification No. 12/2012-Cus. dated 17.03.2012, as amended, and 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.

9. 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 lower authorities that the impugned goods were liable to confiscation under Section 111 *ibid* and that the penalty was imposable on the Applicant.

10.1 The Applicant has contended is 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 herein had not fulfilled 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."*

10.2 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----."

10.3 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.*

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

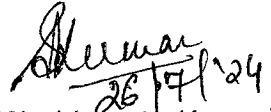
11. The Government observes that the original authority had denied the release of gold items on payment of redemption fine, under Section 125 of Customs Act, 1962. It is settled by the judgment of the Hon'ble Supreme Court, in the case of Garg Woollen Mills (P) Ltd vs. Additional Collector of Customs, 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.

12. 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.

13. In view of the facts and circumstances of the case, there is no ground to interfere with order of Commissioner (Appeals) regarding absolute confiscation of impugned gold. As regard penalties imposed on the Applicant under Sections 112(a) and 114AA, the appellate authority has already considered and reduced the same, which appears to be just and fair.

14. The revision application is rejected for the reasons aforesaid.


26/7/24
(Shubhagata Kumar)

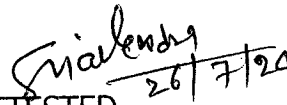
Additional Secretary to the Government of India

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Order No. 143/24-Cus dated 26-07-2024

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.


26/7/24
ATTESTED

(शैलेन्द्र कुमार मीना)
(Shailendra Kumar Meena)
अनुभाग अधिकारी / Section Officer
वित्त मंत्रालय (राजस्व विभाग)
Ministry of Finance (Deptt. of Rev.)
भारत सरकार / Govt. of India
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