

SPEED POST



F.No. 373/63/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. 144 /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 Applications under Section 129 DD of the Customs Act, 1962, against the Order-in-Appeal Airport. Cus. I. No. 37/2020 dated 24.01.2020, passed by the Commissioner of Customs (Appeals-I), Chennai.

Applicant : Shri Mohamed Faisal, Thanjavur (Tamilnadu)

Respondent : The Principal Commissioner of Customs, Chennai-I

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ORDER

Revision Application No. 373/63/B/SZ/2020-RA dated 24.02.2020 has been filed by Shri Mohamed Faisal, Thanjavur (Tamilnadu) (hereinafter referred to as the Applicant) against the Order-in-Appeal Airport. Cus. I. No. 37/2020 dated 24.01.2020, 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. 156/2019-20-Commissionerate-I dated 04.09.2019 passed by the Joint Commissioner of Customs (Adjudication-AIR), Chennai Airport and Air Cargo Complex, Chennai-I.

2. Brief facts of the case are that, the Applicant, an Indian passport holder, who arrived into India on 16.05.2019 at Anna International Terminal of Chennai Airport, Meenambakkam, Chennai from Bangkok, was intercepted by the Customs officer at the exit of the arrival hall of the Airport on the reasonable suspicion that he might be carrying any gold/contraband goods either in his baggage or on his person. During the personal search in the presence of independent witnesses, one black pouch concealed in his underwear was recovered. On opening the pouch, it was found to contain one cut gold bar weighing 400 gms of value Rs. 13,35,600/-. As the Applicant attempted to smuggle the gold by way of concealment and non-declaration of the same to Customs at Chennai Airport and as he was not an eligible passenger to bring gold into India and was not in possession of any valid documents for the legal import of impugned gold into India, the impugned gold was seized under Section 110 of the Customs Act, 1962 under a mahazar on 16.05.2019.

3. In his voluntary statement dated 16.10.2018 recorded under Section of 108 of the Customs Act, 1962, the Applicant stated inter-alia that he worked as a tour operator and earned around Rs. 30,000/- per month; that the cut gold bar concealed in small black pouch belonged to him which he had bought in Bangkok from the money he borrowed from his family and friends and that he had done this to make a profit of Rs. 1,00,000/-. The Applicant vide his letter dated 16.05.2019 requested for waiver of Show Cause Notice.

4. The adjudicating authority adjudicated the matter vide aforesaid Order-in-Original No. 156/2019-20-Commissionerate-I dated 04.09.2019 vide which the gold cut bar weighing 400 grams and valued at Rs. 13,35,600/-, recovered from the Applicant, was 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. The material objects used to conceal the said gold i.e. the black pouch of nil commercial value was also confiscated absolutely under Section 119 of the Customs Act, 1962. 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 instant revision application has been filed mainly on the grounds that order of adjudicating authority is against law, weight of evidence and circumstances and probabilities of the case; he was all along under the control of the officers of Customs and he was at the red channel; gold is a restricted item and not prohibited goods; 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. It is prayed to set aside the impugned order and to permit the Applicant to re-export or release the gold and also to set aside/ reduce the penalty.

6. Personal hearings in the matter were fixed on 03.05.2024 and 10.05.2024. On 10.05.2024, Smt. P. Kamalamalar, Advocate appeared on behalf of the Applicant and submitted that the impugned gold unlike the Customs' allegation, was not concealed in the Applicant's innerwear but in his pant pockets. She further submitted that the gold was bought by the Applicant with money borrowed from friends and that a purchase invoice is submitted, though it does not bear his name or passport number and is in another language. She requested for re-export or release of the goods. Shri S. Ramesh, Assistant Commissioner of Customs (Legal & Review), Chennai-I vide letter dated 10.05.2024 submitted that the Applicant did not declare the gold and tried to smuggle the impugned gold; he was intercepted at exit point on reasonable suspicion and it is prayed that the appeal filed by the Applicant be set aside.

7. The Government has examined the matter. The contentions of the Applicant that he had not crossed the Green Channel and had declared the gold articles in his possession to the Customs officers verbally are not acceptable as the same had not been contested before the Customs authorities when the charges were explained to him and his statements recorded under section 108 of the Customs Act, 1962. Further, he waived the requirement of a show cause notice and availed the opportunity of personal hearing, at which stage also contentions to this effect were not made. Thus, disputing the facts at this stage is not tenable. The Government also observes that the search and recovery leading to the seizure were conducted in the presence of independent witnesses and the applicant has also admitted to this in his statement under Section 108 of the Custom Act, 1962. The contention that the concealment was in his pants and not innerwear does not make any material difference to the fact that the gold was concealed and was not declared to Customs. As regards the contention of the authorize representative during personal hearing regarding an invoice, purported to be the purchase document for the impugned gold is concerned, the government observes that the adjudicating authority in para 13 of its order has clearly mentioned that the Applicant did not produce the bill for the legal purchase of the gold, and therefore, disputing the facts at this stage is not tenable. In any case, as admitted during personal hearing, the said document is in a different language does not bear any details such as name or passport number etc. which could establish its authenticity & veracity and that cannot be taken into consideration, especially at this stage. It was also found that the Applicant was not eligible to bring the gold since he had stayed abroad only for a day. It is clear that had he not been intercepted by Customs, he would have walked out with 400 gms of gold concealed in his clothes without paying Customs duty. It is also clear that he did this with full knowledge that it was against the law, because he was lured by profit. He was not in possession of any valid document for the legal import of gold. The government agrees with Commissioner (Appeals) observation in para 8 of the O-I-A that a voluntary statement is admissible evidence and the seizure of gold and attempt to bring the gold in an ingeniously concealed manner establishes culpability.

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. The Applicant did not declare the gold item, 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 cut gold bar was liable to confiscation under Section 111 *ibid* and that the Applicant was liable for penalty.

9.1 Another contention of the Applicant is that the import of gold is not 'prohibited'. However, the Government observes that this contention of the Applicant is in the teeth of 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.


11.1 The Applicant has requested for permitting re-export for 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.

11.2 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.

12. 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.

13. In view of the facts and circumstances of the case, there is no ground to interfere with order of Commissioner (Appeals). Penalty imposed by the original authority, as upheld by the Commissioner (Appeals), is neither harsh nor excessive.

14. The revision application is, accordingly, rejected.


26/7/24

(Shubhagata Kumar)

Additional Secretary to the Government of India

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Order No. 144 /24-Cus dated 26-07-2024

Copy to:

1. The Commissioner of Customs (Appeals-I), Chennai Airport & Air Cargo, 3rd 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, 2nd Floor, Chennai-600001.
4. PPS to AS (RA).
5. Guard file.
6. Spare Copy
7. Notice Board

ATTESTED

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