

SPEED POST



F. No. 373/446/B/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.. 29/07/24..

Order No. 149 /24-Cus dated 29-07-2024 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. COC-CUSTOM-000-APP-38/2019-20 dated 31.07.2019, passed by the Commissioner of Customs (Appeals), Cochin.

Applicant : Sh. Rajnas Chenoth Kayyalakath, Kannur

Respondent : Commissioner of Customs, Cochin

ORDER

A Revision Application, bearing No. 373/446/B/2019-RA dated 04.11.2019, has been filed by Sh. Rajnas Chenoth Kayyalakath, Kannur (hereinafter referred to as the Applicant), against the Order-in-Appeal No. COC-CUSTOM-000-APP-38/2019-20 dated 31.07.2019, passed by the Commissioner of Customs (Appeals), Cochin, whereby the Commissioner (Appeals) has upheld the Order-in-Original O.S No. 15/2018 dated 17.01.2018, passed by the Additional Commissioner of Customs, Cochin International Airport. Vide the aforementioned Order-in-Original, assorted gold jewellery of 22 carat purity, totally weighing 254 grams and valued at Rs. 6,79,895/-, recovered from the Applicant, had been confiscated under Section 111(d), (i), (l) & (m) of the Customs Act, 1962. However, the same was allowed to be redeemed on payment of redemption fine of Rs. 50,000/- and payment of Customs duty at full baggage rate of 36.05%. Besides, a penalty of Rs. 10,000/- was also imposed on the Applicant, under Section 112(a) of the Act, *ibid*.

2. Brief facts of the case are that the officers of Air Intelligence Unit of Customs, Cochin International Airport seized assorted gold jewellery of 22 carat purity, weighing 254 grams, valued at Rs. 6,79,895/- from the applicant upon his arrival from Dubai on 17.01.2018. The applicant opted for Green Channel and he was intercepted at the exit gate for personal search and baggage examination. Upon the search of his person the aforementioned gold jewellery was found concealed in the pocket of his innerwear.

During the personal hearing before the original adjudicating authority, he submitted that he bought the gold for his sister's marriage; that he bought the gold from the shop in cut pieces form only; that he worked for a milk company in Saudi Arabia; that he kept the gold in his innerwear for safety and security; that he did not do this with an intention to evade customs duty. The matter was adjudicated by the original authority, vide aforesaid Order-in-Original dated 17.01.2018. Aggrieved, the Applicant filed an appeal before the Commissioner (Appeals), which has been rejected.

3. The revision application has been filed mainly on the grounds that the original adjudicating authority's finding that the applicant did not declare the gold is not correct

and is liable to be set aside; that he is an eligible passenger and hence the direction issued under the impugned order to collect duty at full baggage rate of 36.05% is illegal and the same is in violation of Notification No. 12/2012; that he should have been permitted to clear the gold on payment of applicable duty under Notification No. 12/2012; that in light of above imposition of redemption fine and penalty is liable to be set aside and the customs duty for the gold is liable to be reduced to the applicable rate envisaged under Notification No. 12/2012-Customs dated 17.03.2012.

4. Personal hearing in the matter was held on 22.03.2024. None appeared from the side of applicant. Sh. Roy Verghese, Deputy Commissioner, Cochin Airport appeared for the side of respondent and submitted that the passenger, though eligible for bringing gold into India, had concealed the impugned gold in his innerwear and had opted for green channel without declaring the same to Customs. He was intercepted at the exit gate when the DFMD beeped. He submitted that the applicant was given the option to redeem the goods upon payment of duty, redemption fine and personal penalty which is legal and proper and rightly upheld by Commissioner (Appeals), hence revision application should be rejected. Another personal hearing was held on 08.04.2024. Sh. Zahir, advocate appeared for the applicant and submitted that the applicant was an eligible passenger and was not a carrier, as recorded in the OIO as well. While the goods were held liable for confiscation due to non-declaration, they were allowed to be redeemed against duty, fine and penalty. However, since he was held to be an eligible passenger, he ought to have been charged the concessional rate of duty and not the baggage rate of duty. Once the eligibility is established, the law does not give scope for charging of baggage rate of duty. It is unjust and should be set aside and he should be given back the difference.

5. The Government has carefully examined the matter. It is noticed from the order of original authority that the applicant opted for green channel and he was intercepted at the exit gate. Had he been not intercepted at the exit gate he would have walked away with the gold without payment of Customs duty. Opting for the green channel is in itself a deemed declaration that the passenger is not carrying any dutiable items and has nothing to declare. Hence the applicant's contention that Commissioner (Appeals)'s/adjudicating authority's finding of non declaration of gold is not sustainable.

6. The applicant has contended that he is an eligible passenger and charging him full baggage rate of duty is illegal and is in violation of Notification No. 12/2012-Customs dated 17.03.2012. In this regard the Government observes that the date of incident is 17.01.2018, by which date the said notification was superseded by Notification No. 50/2017-Customs dated 30.06.2017 and the same was in force. The benefit of the said notification can be extended to those eligible passengers who voluntarily declare the possession of dutiable goods at the red channel. The goods were not declared and the passenger opted for green channel, the goods were attempted to be smuggled in without payment of Customs duty. Hence the declaration under Section 77 of the Customs Act, 1962 is *sine qua non* for availing benefit of Notification No. 50/2017 dated 30.06.2017. Hence this contention also does not merit consideration.

7. 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*. 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 is in agreement with the lower authorities that the seized gold items were liable to confiscation under Section 111 *ibid* and, consequently, the Applicant is liable to penalty.

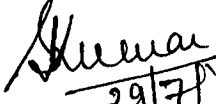
8. The Government observes that import of gold and articles thereof in baggage is allowed subject to fulfillment of certain conditions. In the present case, the stipulated conditions have not been fulfilled by the Applicant herein. Hon'ble Supreme Court has repeatedly held that goods, in respect of which conditions subject to which their import/export is allowed are not fulfilled, are to be treated as 'prohibited goods'. [Ref: Sheikh Mohd. Omer {1983 (13) ELT 1439 (SC)}, Om Prakash Bhatia {2003 (155) ELT 423 (SC)} & Raj Grow Impex LLP {2021 (377) ELT 145 (SC)}]. Further, the Hon'ble Madras High Court (i.e. the Hon'ble jurisdictional High Court) has, in the cases of Malabar Diamond Gallery P. Ltd. {2016 (341) ELT 465 (Mad.)} and P. Sinnasamy {2016 (344) ELT 1154 (Mad.)}, taken this view specifically in respect of import of gold in baggage. Hence,

there is no doubt that the goods seized in the present case are to be treated as 'prohibited goods', within the meaning assigned to it under Section 2(33) of the Act, *ibid*.

9. The Government observes that the original authority had allowed the release of seized 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 option to release 'prohibited goods' on redemption fine is discretionary. 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.*" Further, in the case of P. Sinnasamy (*supra*), the Hon'ble Madras High Court has held that "*when discretion is exercised under Section 125 of the Customs Act, 1962, ----- the twin test to be satisfied is "relevance and reason".*" 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.*" Therefore, keeping in view the judicial pronouncements above and the facts of the case, the Commissioner (Appeals) has correctly refused to interfere with the discretion exercised by the original authority.

10. In view of the facts of the case the redemption fine and penalty imposed is just and fair.

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


29/7/24

(Shubhagata Kumar)

Additional Secretary to the Government of India

Sh. Rajnas Chenoth Kayyalakath
S/o Sh. Jaleel Puthiyandi
Hafila Mahal, Meruvambayi
Neerveli (PO), Kannur
Kerala-670701

Order No. 149 /24-Cus dated 29-07-2024

Copy to:

1. The Commissioner of Customs (Appeals), Custom House, Willingdon Island, Cochin-682009
2. The Commissioner of Customs, Custom House, Willingdon Island, Cochin-682009

3. Sh. Mohd. Zahir, Advocate, Kerala Bar Council Roll No. K-289/1985, 3/57-A, Nedungadi Gardens, West Nadakkavu, Calicut-Kerala-673011.
4. PPS to AS(RA).
5. Guard File.
6. Spare Copy.
7. Notice Board.

Shailendra
29/7/24
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
नई दिल्ली / New Delhi