

SPEED POST



F. No. 373/84/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. 31/07/24.

Order No. 150/24-Cus dated 31-07-2024 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. 72/2020 dated 20.02.2020, passed by the Commissioner of Customs (Appeals-I), Chennai.

Applicant : Shri Whysul Karni, Chennai

Respondent : The Principal Commissioner of Customs, Chennai-I

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ORDER

Revision Application No. 373/84/B/SZ/2020-RA dated 13.03.2020 has been filed by Shri Whysul Karni, Chennai (hereinafter referred to as the Applicant/passenger) against the Order-in-Appeal Airport. Cus. I. No. 72/2020 dated 20.02.2020, passed by the Commissioner of Customs (Appeals-I), Chennai. The Commissioner (Appeals) has partially allowed the appeal filed by the Applicant against the Order-in-Original No. 269/2019-20-Commissionerate-I dated 26.11.2019, passed by the Assistant Commissioner of Customs (Adjudication-Air), Chennai-I, Chennai Airport and Air Cargo Complex, Chennai, except to the extent of allowing the re-export of seized saffron on payment of fine of Rs. 20,000/- and release of seized 08 old and used Lenovo Thinkpad laptops on payment of redemption fine of Rs. 4,000/- under Section 125 of the Customs Act, 1962.

2. Brief facts of the case are that, on 28.11.2018, the Applicant, an Indian passport holder, while arriving into India at Anna International Terminal of Chennai Airport, Meenambakkam, Chennai from Dubai, was intercepted by Customs officers at the exit point of arrival hall, on reasonable suspicion that he might be carrying gold / contraband goods either in his baggage or on his person. During examination of his checked-in baggage, 08 old and used Lenovo Thinkpad laptops without accessories valued at Rs. 40,000/-, 500 grams Iranian saffron "Grade 1 filament" valued at Rs. 1,20,000/- and 10 cartons (2400 sticks) of Gudang Garam cigarettes valued at Rs. 24,000/- were recovered. During personal search, 1 gold bit of 24 carat purity weighing 35 grams was recovered from his pant pocket. Further, on persistent questioning, the passenger admitted to concealing gold in rubbery form in his rectum and ejected two bundles wrapped with black colour adhesive tape. Mr. Gopi Achari, a Govt. approved assayer, was called to examine and extract the gold from the brown colour rubbery spread, which was then heated to yield one gold ingot of 24 carat purity weighing 123 grams. In all, the gold bit and the gold ingot, totally weighing 158 grams and valued at Rs. 5,01,650/-, was then seized under a mahazar since the Applicant did not possess any valid document for its legal import and was trying to smuggle the impugned gold by way of concealment. The 08 old and used Lenovo Thinkpad laptops were seized as they were in commercial quantity, as

also the 500 grams Iranian saffron "Grade 1 filament" since the passenger could not produce the required FSSAI certificate. In addition, the 10 cartons (2400 sticks) of Gudang Garam cigarettes were seized as they were in commercial quantity and did not contain the pictorial warning required under Cigarettes and other Tobacco Products (Prohibition of Advertisement and Regulation of Trade and Commerce, Production, Supply and Distribution) Act, 2003 (COTPA, 2003).

3. The Applicant in his voluntary statement had stated that the recovered gold cut bit and two bundles of brown rubbery spread containing gold was given to him by a person named Abdul Rahman at Dubai with the instruction to hand over the same to an unknown person outside Chennai airport for a monetary consideration of Rs. 6,000/- The Applicant, vide letter dated 28.11.2018, requested for adjudication of the case without issue of show cause notice.

4. The adjudicating authority adjudicated the matter vide aforesaid Order-in-Original No. 269/2019-20-Commissionerate-I dated 26.11.2019 by absolutely confiscating the impugned gold weighing 158 gms & all other goods totally valued at Rs. 6,85,650/- 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 and imposed a penalty of Rs. 70,000/- on the Applicant under Section 112 (a) of the Customs Act, 1962. Aggrieved, the Applicant filed an appeal before the Commissioner of Customs (Appeals-I), Chennai, who has vide Order-in-Appeal Airport. Cus. I. No. 72/2020 dated 20.02.2020 partially allowed the appeal of the Applicant and modified except to the extent of allowing the re-export of seized saffron on payment of fine of Rs. 20,000/- and release of seized 08 old and used Lenovo Thinkpad laptops on payment of redemption fine of Rs. 4,000/- under Section 125 of the Customs Act, 1962. Aggrieved by this order, the Applicant filed this appeal.

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 22.05.2024. None appeared on the said hearing. Smt. P. Kamalamalar, Advocate vide letter dated 22.05.2024 reiterated the written submissions with a request to take a lenient view while passing the order. 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 ingeniously concealed gold and tried to smuggle the same; that he was intercepted at exit point on reasonable suspicion and that the appeal filed by the Applicant ought to be set aside.
7. The Government has examined the matter. It is observed that the Applicant brought the gold in an ingeniously concealed manner with a clear intent to evade detection by Customs and would have gone undetected but for the interception by Customs. Since the goods were not declared to Customs, the requirement of Section 77 of the Customs Act, 1962 was not met. The Applicant in his own statement recorded under Section 108 of the Custom Act, 1962 has admitted to the smuggling of the said gold, which did not belong to him and which he carried for monetary benefit. The original adjudicating authority has also noted that the passenger attempted to smuggle the gold by not only changing the form of gold into rubbery material but also by concealing it ingeniously. Therefore, the impugned goods cannot be considered as bonafide baggage. The Commissioner (Appeals) has also noted that the voluntary statement is admissible evidence and the seizure of gold and attempt to bring the gold in an ingeniously concealed manner establishes his culpability. Apart from the gold, the Applicant also brought used laptops & cigarettes in commercial quantity and saffron without FSSAI certificate, which were also held liable for confiscation but allowed to be redeemed the saffron and used laptops only by Commissioner (Appeals) on payment of fine under Section 125 of the Customs Act, 1962.
8. On the issue of foreign origin cigarettes recovered from the Applicant, it is on record that the pax had not made any declaration in respect of the offending goods carried by him, as required under Section 77 of the Customs Act, 1962. As per the

cigarettes and other tobacco products (Packaging & Labelling) Rules, 2008, cigarettes without pictorial warnings are prohibited for import into India.

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. 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 changed the form of the gold and concealed it in his body with an intent to avoid detection by Customs. Also, as admitted by the counsel of the Applicant, 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 was liable to confiscation under Section 111 *ibid* and that the Applicant was liable to penalty.

10.1 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, rather ingeniously concealed the impugned gold in his body. 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 in respect of absolute confiscation of impugned gold. As regards the other items brought by the Applicant, namely the saffron, laptops and cigarettes, the appellate authority has held that the seized saffron cannot be allowed for home consumption in absence of FSSAI certificate but can be allowed for re-export as requested by the Applicant, the used laptops have been for release under redemption fine under Section 125 of Customs Act, 1962 and that the cigarettes cannot be released since cigarettes without pictorial warnings are prohibited as per the cigarettes and other tobacco products (Packaging & Labelling) Rules, 2008. The government finds no cause for interference in the OIA.

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 of impugned gold cannot be allowed.

13. 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. The penalty imposed by the original authority, as upheld by the Commissioner (Appeals), is neither harsh nor excessive.

14. 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.

15. The revision application is, accordingly, rejected.


31/7/24

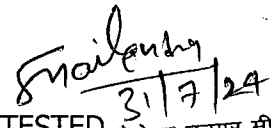
(Shubhagata Kumar)
Additional Secretary to the Government of India

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Order No. 150 /24-Cus dated 31-07-2024

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


31/7/24
ATTESTED (शैलेन्द्र कुमार मीना)
(Shailendra Kumar Meena)
अनुभाग अधिकारी / Section Officer
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