

SPEED POST



F. No. 373/30/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. 02/08/24.

Order No. 152 /24-Cus dated 02-08-2024 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. 06/2020 dated 03.01.2020, passed by the Commissioner of Customs (Appeals), Bengaluru.

Applicant : Smt. Pathmapriya Jagajeevanraj, Sri Lanka

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

.....

ORDER

Revision Application No. 373/30/B/SZ/2020-RA dated 24.01.2020 has been filed by Smt. Pathmapriya Jagajeevanraj, Sri Lanka (hereinafter referred to as the Applicant/passenger), against the Order-in-Appeal No. 06/2020 dated 03.01.2020, passed by the Commissioner of Customs (Appeals), Bengaluru. The Commissioner (Appeals) has upheld the Order-in-Original of the Additional Commissioner of Customs, Kempegowda International Airport, Bengaluru, bearing No. 50/2019-20 (AP-ADM) dated 07.08.2019, except to the extent of reducing the penalty imposed on the Applicant to Rs. 3,50,000/- under Section 112(a) and Rs. 1,00,000/- under Section 114AA of the Customs Act, 1962.

2. Brief facts of the case are that, the Applicant, holder of Sri Lankan Passport, arrived from Sri Lanka on 15.10.2017, at the International arrival hall at Bengaluru International Airport. She was intercepted by the Customs officers of Bengaluru airport. The Applicant carried a blue coloured bag with marking "POLOGY", a brown coloured bag marked "ANDAMAN" and a black bag marked "CHIVAS" as her check in bags. On being enquired about the contents of her baggage, the Applicant replied that there was nothing valuable to declare to Customs. Detailed examination of the baggage was performed by the officers in presence of independent witnesses and it was found that the bag marked "CHIVAS" contained two silver coloured coated anklets in the inner part of the bag. Thereafter, a body search of the passenger was conducted and she was found to possess two more silver coloured coated anklets, one gold chain with five pendants and six gold bangles. As per the certificate issued by the approved assayer, 598 grams of jewellery in all, comprising 4 silver colour coated gold anklets weighing 350 gms of 24 carat purity, chain with 5 pendant weighing 163 gms of 22 carat purity and 6 bangles weighing 85 gms of 22 carat purity. The total value of the recovered gold jewellery was Rs. 17,77,608/-.

3. The original authority vide said Order-in-Original No. 50/2019-20 (AP-ADM) dated 07.08.2019 ordered for absolute confiscation of the smuggled gold under Section 111(d), 111(i) and 111(m) of the Customs Act, 1962 and imposed a penalty of Rs. 4,45,000/- each under Section 112(a) and Section 114AA on the Applicant. Aggrieved, the Applicant filed an appeal before the Commissioner of Customs (Appeals), Bengaluru, who has vide Order-

in-Appeal No. 06/2020 dated 03.01.2020 upheld the impugned OIO and modified to the extent of reducing the penalty imposed on the Applicant to Rs. 3,50,000/- under Section 112(a) and Rs. 1,00,000/- under Section 114AA of the Customs Act, 1962. Aggrieved by this order, the Applicant has filed this Revision Application.

4. The revision application has been filed, mainly, on the grounds that Order-in-Appeal passed by the Commissioner (Appeals) is against law, weight of evidence and probability of the case; that the Applicant never attempted or pass through the green channel and she was all along under the control of the officers; no declaration card was provided; that ownership of gold is not disputed and there is no ingenious concealment and gold jewellery are not commercial quantity and she purchased in Sri Lanka out of her own earning for own use; that the wearing of gold ornaments by a passenger is not prohibited by the Baggage Rules, 1998; gold is dutiable goods not prohibited goods. It has been prayed for re-export the gold jewellery and set aside impugned order and set aside or reduce the penalty under Section 112(a) & (b) and 114AA of the Customs Act, 1962.

5. Personal hearings in the matter were fixed on 26.04.2024, 07.05.2024 and 15.05.2024. Smt. Kamalamalar Palanikumar, Advocate appeared on 15.05.2024 on behalf of the Applicant and submitted that the Applicant is a Sri Lankan national who came to India for a pilgrimage to various religious places. She wore most of the jewellery on her person which was of 22 carat purity; that the metallic coating on the 24 carat anklets was for safety purpose only; that this was her first trip to India; that the ownership of gold is of the Applicant and that there is no allegation by Customs of any wrong doing except non-declaration. She prayed for allowing re-export of the impugned gold or release against redemption fine. No one appeared for the Respondent. Hence, it is presumed that the Respondent department has nothing to add in the matter.

6.1 The Government has examined the matter. The Applicant is a foreign national and brought gold ornaments which were worn by her on her body. The Applicant however did not declare the same to Customs as was required under Section 77 of the Customs Act, 1962. She has admitted as much in her statement tendered under Section 108 of Customs

Act, 1962. Upon enquiry about any dutiable goods, the Applicant replied that there was nothing to declare to Customs.

6.2 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*. Further, the Applicant was intercepted after passing through the Green Channel. No documents evidencing ownership and licit purchase were produced at the time of interception. The gold items are made of 22 and 24 carat. The Applicant has, thus, failed to discharge the burden placed on her, in terms of Section 123, *ibid*.

6.3 Keeping in view the facts of the case and as the Applicant has failed to discharge the onus placed on her in terms of Section 123, the Government agrees with the lower authorities that the seized goods were liable to confiscation under Section 111 *ibid* and the penalty was imposable on the Applicant.

6.4 As regard the argument of the Applicant that impugned gold is not covered under the baggage rules as per the decision of Kerala High Court decision in the case of Vigneswaran Sethuraman Vs. UOI cited at {2015 (325) ELT 573 (Ker.)}. The appellate authority in para-9 of the impugned O-I-A has discussed in detail the non- applicability of the same in present case and the government concurs with the findings of the appellate authority.

7.1 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."*

7.2 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----."

7.3 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.*

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

8. 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.

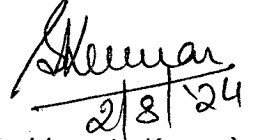
9.1 As regards the prayer for permitting re-export of the offending goods, the Government observes that a specific provision regarding re-export of articles imported in baggage is made in Chapter-XI of the Customs Act, 1962, by way of Section 80. On a plain reading of Section 80, it is apparent that 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. The appellate authority has also discussed this point in para 10 of the OIA.

9.2 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.

10. The decisions relied upon by the Applicant, are of no assistance to the Applicant's case in view of the dictum of Hon'ble Supreme Court and Hon'ble High Courts and discussions as above.

11. The Commissioner (Appeals) has already reduced the penalty imposed from Rs. 4,45,000/- to 3,50,000/- under Section 112(a) and from Rs. 4,45,000/- to Rs. 1,00,000/- under Section 114AA of the Customs Act, 1962. In the facts and circumstances of the case, no further relief merited.

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


2/8/24

(Shubhagata Kumar)

Additional Secretary to the Government of India


Smt. Pathmapriya Jagajeevanraj,
D/o Shri V Jagajeevanraj,
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Order No. 152 /24-Cus dated 02-08-2024

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. Kamalamalar, Advocates, No. 10, Sunkurama Street, 2nd Floor, Chennai-600001.
4. PA to AS(RA)
5. Guard File
6. Spare Copy
7. Notice Board.

ATTESTED


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