

**SPEED POST**



F.No. 373/157/B/SZ/2020-RA  
GOVERNMENT OF INDIA  
MINISTRY OF FINANCE  
(DEPARTMENT OF REVENUE)

14, HUDCO VISHALA BLDG., B WING  
6<sup>th</sup> FLOOR, BHIKAJI CAMA PLACE,  
NEW DELHI-110 066

Date of Issue... 09/08/24

Order No. 158/24-Cus dated 09-08-2024 of the Government of India passed by Smt. Shubhagata Kumar, Additional Secretary to the Government of India, under section 129DD of the Custom Act, 1962.

Subject: Revision Application filed, under Section 129 DD of the Customs Act 1962 against the Order-in-Appeal No. TCP-CUS-000-APP-053-20 dated 29.06.2020 passed by the Commissioner of Customs & Central Excise (Appeals), Tiruchirappalli.

Applicant : Smt. Jaibunisha, Trichy

Respondent : The Commissioner of Customs (Preventive), Tiruchirappalli.

**ORDER**

A Revision Application, bearing No. 373/157/B/SZ/2020-RA dated 24.07.2020, has been filed by Smt. Jaibunisha, Trichy (hereinafter referred to as the Applicant/passenger), against the Order-in-Appeal No. TCP-CUS-000-APP-053-20 dated 29.06.2020, passed by the Commissioner of Customs & Central Excise (Appeals), Tiruchirappalli who has rejected the appeal of the Applicant and upheld the Order-in-Original No. TCP-CUS-PRV-JTC-71/2019 dated 18.11.2019 of the Joint Commissioner of Customs (Preventive), Tiruchirappalli.

2. Brief facts of the case are that, the Applicant, an Indian Passport holder, arrived from Malaysia on 28.11.2018, at Trichy International Airport. She was intercepted by the officers of DRI, Coimbatore Regional Unit (DRI-CRU), when she was attempting to exit through the green channel in a suspicious manner. The officers enquired from the Applicant as to whether she was carrying any gold/contraband on her person or in her checked in luggage/ hand baggage, to which she replied in the negative. The search of the Applicant resulted in the recovery of eight crude gold bangles weighing 850.00 grams and two gold chains weighing 399.500 grams, all of 24 carat purity. The total quantity of gold items thus recovered from the Applicant was 1249.500 grams which was assessed by a Govt. approved gold assayer at a value of Rs. 38,19,721/- (@ Rs. 3,057/- per gram). The DRI-CRU officers on the reasonable belief that the impugned gold items were attempted to be smuggled into India, seized them for taking further action under the Customs Act, 1962.

3. The Applicant was arrested on 28.11.2018 under the provisions of the Customs Act, 1962 and later released on payment of surety of Rs. 30,000/-.

4. The Applicant in her voluntary statement dated 28.11.2018 given under Section 108 of the Customs Act, 1962, has inter-alia stated that she went to Malaysia to do house maid work, that the impugned gold items were handed over by one Smt. Ayusha who promised Rs. 10,000/- if the gold was successfully smuggled into India and handed over to her accomplice. Smt. Ayusha also told the Applicant that if she completed this job

successfully, she could regularly travel to Malaysia and smuggle gold items into India for monetary benefit. The Applicant accepted the offer due to her poor financial status. The impugned gold items did not belong to her but belonged Smt. Ayusha. The Applicant in her further statement dated 12.12.2018 admitted that the contents of her earlier statement were completely true.

5. After due process of law, the original authority i.e. the Joint Commissioner of Customs (Preventive), Tiruchirappalli vide Order-in-Original No. TCP-CUS-PRV-JTC-71/2019 dated 18.11.2019 ordered for absolute confiscation of the aforesaid ten nos. of crude gold chains/bangles of foreign origin weighing 1249.5 grams valued at Rs. 38,19,721/- under Section 111(d), 111(l) and 111(m) of the Customs Act, 1962 and imposed penalty of Rs. 4,00,000/- on the Applicant under Section 112(b) of the Act, *ibid*.

6. Aggrieved, the Applicant filed appeal before the Commissioner of Customs & Central Excise(Appeals), Tiruchirappalli who has upheld the order of absolute confiscation of the impugned gold and penalty imposed on the Applicant and rejected the appeal vide above said Order-in-Appeal No. TCP-CUS-000-APP-053-20 dated 29.06.2020. Aggrieved by this order, the Applicant filed this revision application.

7. 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 she was all along at the red channel at the arrival hall of Airport; that she never attempted or pass through the green channel and the officers intercepted her while she was in the hand scan area and she was all along under the control of the officers; that no declaration card was provided; 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 penalty under Section 112(b) of the Customs Act, 1962.

8. In the personal hearing held on 10.07.2024, in virtual mode, Smt. P. Kamala Malar, Advocate appeared for the Applicant and submitted that the Applicant, an Indian national,

wore a crude raw gold chain and bangles on her person and that there was no ingenious concealment. She prayed for the goods to be allowed for re-export on RF and penalty. Sh. Manimaran, Superintendent appeared on behalf of the Respondent and submitted that the Applicant did not declare the goods which were in crude form and also that the Applicant was intercepted on the basis of specific intelligence and prayed for the OIO to be upheld.

9.1 The Government has examined the matter. The Applicant has attempted to smuggle the impugned gold items into India and did not make a true declaration to the Customs Authority required under Section 77 of the Customs Act, 1962. But for the interception of the officers of DRI-CRU, the Applicant would have exited undetected without payment of Customs dues. The impugned gold items cannot be considered as bonafide baggage under the Customs Act, 1962. The Applicant has admitted in her voluntary statement that the impugned gold items did not belong to her and were given to her by Smt. Ayusha who promised a remuneration Rs. 10,000/- if the gold was successfully smuggled by her into India and handed over to her accomplice. She was also not in possession of any valid documents for the legal import of impugned gold into India.

9.2 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 Applicant has, thus, failed to discharge the burden placed on her, in terms of Section 123, *ibid*.

9.3 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.

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

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



(Shubhagata Kumar)

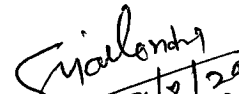
Additional Secretary to the Government of India

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Order No. 158 /24-Cus dated 09-08-2024

Copy to:

1. The Commissioner of GST, Service Tax & Central Excise (Appeals), No.1, Williams Road, Cantonment, Tiruchirappalli-620001.
2. The Commissioner of Customs (P), No. 1, Williams Road, Cantonment, Tiruchirappalli-620001.
3. Shri S. Palanikumar, Kameshwaran & P. Kamalamalar, Advocates, No. 10, Sunkurama Street, 2<sup>nd</sup> 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  
वित्त मंत्रालय (राजस्व विभाग)  
Ministry of Finance (Deptt. of Rev.)  
भारत सरकार / Govt. of India  
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