

SPEED POST



F. No. 373/32/B/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..09.08.24...

Order No. 159 /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 Customs Act, 1962.

Subject : Revision Application, filed under Section 129 DD of the Customs Act 1962 against the Order-in-Appeal No. TVM-EXCUS-000-APP-570-2019 dated 01.10.2019, passed by the Commissioner of Central Tax, Central Excise & Customs (Appeals), Kochi.

Applicant : Sh. Jubin Thomas Mathes, Alappuzha

Respondent : The Commissioner of Customs (P), Kochi

ORDER

A Revision Application, bearing No. 373/32/B/2020-RA dated 10.12.2019, has been filed by Sh. Jubin Thomas Mathes, Alappuzha (hereinafter referred to as the Applicant), against the Order-in-Appeal No. TVM-EXCUS-000-APP-570-2019 dated 01.10.2019, passed by the Commissioner of Central Tax, Central Excise & Customs (Appeals), Kochi, vide which the Commissioner (Appeals) has upheld the Order-in-Original No. 03/2018-19 Customs (Prev.) dated 24.10.2018, passed by the Joint Commissioner of Customs, Customs Preventive Commissionerate, Kochi. Vide the aforementioned Order-in-Original, 6 gold items, all of 24 carat purity, totally weighing 600 grams and valued at Rs. 18,16,800/- recovered from the Applicant, had been absolutely confiscated under Section 111(d), 111(l) & 111(m) of the Customs Act, 1962 and Canon Cameras and their lenses were held liable to confiscation under Section 111(d), 111(l) and 111(m) of the Act, *ibid*, however, they were allowed to be redeemed on payment of fine of Rs. 1,00,000/- under the provisions of Section 125 of the Act *ibid*. Besides, penalty of Rs. 50,000/- was also imposed on the Applicant, under Section 112(a) & 112 (b) of the Act, *ibid*.

2. Brief facts of the case are that the officers of Air Intelligence Unit (AIU), Trivandrum International Airport intercepted the Applicant, an Indian Passport Holder, upon his arrival, on 19.01.2018 at the Customs Exit Gate as he was going out of the Customs Baggage Hall by opting for the Green Channel. He was asked whether he was carrying any dutiable items in his possession, he replied in the negative. Thereafter the officers subjected his checked-in baggage to a detailed X-ray scanning which showed a dark image along the inner tube of the trolley handle in both of his checked-in baggage. He was once again asked whether he had concealed any gold in any form inside the trolley bags for which he replied in the negative. On examination of the checked-in trolley bags, it was noticed that on the inner tubes of the trolley handle inside the bag, beneath the covered base of the trolley bag, there was a brown coloured cello taped portion. On opening it, 4 yellow coloured metallic items were found in one trolley bag and 2 yellow coloured metallic items in the other trolley bag. Further, a high valued Canon Camera and its lenses valued at Rs. 16,73,000/- were also recovered from the checked-in baggage. The Government Approved Assayer assayed and certified that the aforesaid yellow

coloured metallic items were made of gold of 24 carat purity, each weighing 100 grams, totally weighing 600 grams, having a market value of Rs. 18,16,800/-. In his statement dated 18.01.2018, recorded under Section 108 of the Customs Act, 1962, the Applicant stated inter-alia that he went to Singapore in search of a job on 18.01.2018 and he arrived at Trivandrum International airport from Singapore by Silk Air Flight MI 492; that he had purchased the said gold biscuits from a jewellery shop in Singapore for his personal use and the money for the same was given to him in cash by his uncle Sh. Mathew who was working in Singapore Shipping Company and the Cannon Cameras and its lenses were purchased by him for selling to his friends; that he concealed the same in both of his trolley bags; that he knew that smuggling of gold without declaring to Customs was an offence; that he did not have any documents to show the legal possession of the said gold; that he had not declared the high valued Canon Camera with the intention to evade payment of Customs duty. The matter was adjudicated by the original authority, vide aforesaid Order-in-Original dated 24.10.2018. Aggrieved, the Applicant filed an appeal before the Commissioner (Appeals), which was rejected.

3. The revision application has been filed mainly stating that the applicant did not conceal any dutiable or prohibited items which attract the provisions of Section 111(i) of Customs Act rather the applicant voluntarily disclosed the gold; that he was detained by respondent before making any declaration; that goods were not concealed nor misdeclared and were for the bonafide use of the applicant; and that the applicant was holding sufficient foreign currency to pay Customs duty as applicable. It is further prayed that gold be either released or re-export or for home consumption.

4. Personal hearing in the matter was fixed on 26.04.2024. No one appeared for PH from either side on the said date. In the hearing held on 07.05.2024, Sh. Baby Anthony, Advocate appeared for the Applicant and submitted that the application contains all their submissions which are reiterated. The applicant was working abroad and when he visited Singapore, he bought the camera and gold bars from his own money and for his own use. He is a genuine passenger and seeks release of the confiscated gold as he stands to lose the money invested in the gold. In many cases, the gold brought under similar circumstances has been allowed release against RF and the same is sought in this case as

well. No one appeared from the side of Respondent. As such, it is presumed that the Respondent has nothing to add in the matter.

5. The Government has carefully examined the matter. It is observed that the impugned items were recovered from the Applicant only when he was intercepted by Customs as he did not declare the same to Customs. The Applicant's contention that he had verbally declared the items to Customs is not borne out by the facts on record. Moreover, he has himself admitted in his statement under Section 108 of the Customs Act, 1962, that these items were brought into India for monetary gain and he could not produce any proof of purchase. Hence, the contentions of the Applicant that he did not conceal the dutiable or prohibited items which attract the provisions of Section 111(i) of the Customs Act; that he was detained by the respondent before making any declaration and that the goods were for his own bonafide use are not sustainable.

6. Further, it is on record that the Applicant was apprehended after he had crossed the green channel and gold which was ingeniously concealed inside the inner tubes of the trolley handle of his checked-in baggage was recovered from his baggage upon a search. The relevant sequence of events recorded in the Panchnama also substantiate the Applicant's attempt to smuggle the confiscated goods. Further, the Hon'ble Supreme Court has, in the case of Surjeet Singh Chhabra vs. U.O.I {1997 (89) ELT 646 (SC)}, held that a confession statement made before the Customs Officer, though retracted within six days, is an admission and binding since Customs Officers are not Police Officers. In the case of K.I. Pavunny {1997 (90) ELT 241 (SC)}, the Hon'ble Supreme Court has held that the confessional statement of an accused, if found voluntary, can form the sole basis for conviction. In the present case, the Applicant has admitted his involvement in smuggling by concealment and the fact that the gold was recovered from the inside of his trolley handle has not been disputed. Therefore the contention that the he was holding sufficient foreign currency and he had voluntarily declared the gold to Customs is incorrect.

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*. No documents evidencing ownership and licit purchase were produced at the time of interception. Further the gold was ingeniously concealed i.e. inside the inner tubes of the trolley handle of his checked-in baggage. Hence, the intent to smuggle is obvious. The Applicant has, thus, failed to discharge the burden placed on him, in terms of Section 123, *ibid* and it is evident that the impugned goods cannot be considered as bonafide baggage. 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 both adjudicating authorities that the seized gold items were liable to confiscation under Section 111 *ibid* and that the applicant is liable to penalty.

8.1 The applicant has requested to release the gold items either for re-export or for home consumption which in turn implies that they were not prohibited goods and should have been released on payment of redemption fine. 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. 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. 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 assigned to it under Section 2(33) of the Act, *ibid*.

8.2 In view of the above, the contention of the Applicant that the impugned gold items are not 'prohibited goods', cannot be accepted.

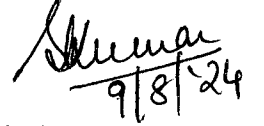
9. The Government observes that the original authority had denied the release of seized gold items on payment of redemption fine under Section 125 of Customs Act, 1962. It is settled by the judgment of the Hon'ble Supreme Court in the case of Garg Woollen Mills (P) Ltd vs. Additional Collector of Customs, 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.*" Now in the latest judgment 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 and the facts of the case, the Commissioner (Appeals) has correctly refused to interfere with the discretion exercised by the original authority.

10. Further, as far as re-export of offending goods is concerned, the Government observes that a specific provision regarding re-export of baggage articles has been made under Section 80 of the Customs Act, 1962. On a plain reading, it is apparent that a declaration under Section 77 is a pre-requisite for allowing re-export in terms of Section 80 *ibid*. 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. 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 option of re-export also cannot be given.

11. In view of the facts and circumstances of the case, the penalty imposed is just and fair.
12. In view of the above, the revision application is rejected.


9/8/24

(Shubhagata Kumar)

Additional Secretary to the Government of India

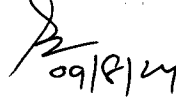
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Order No. 159 /24-Cus dated 09-08-2024

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2. The Commissioner of Customs (Appeals), 4th Floor, C.R Building, I.S Press Road, Cochin-18.
3. Sh. Augustian P.A, Advocate, Faizal Chambers, Palleppady Cross Road, Cochin-18.
4. PPS to AS(RA).
5. Guard File.
- ✓ 6. Spare Copy.
7. Notice Board.

ATTESTED


09/8/24

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