

SPEED POST



F. No. 373/87/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. 02/03/24...

Order No. 179 /24-Cus dated 02-03-2024 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. C. Cus. I. No. 70/2020 dated 17.02.2020, passed by the Commissioner of Customs (Appeals-I), Chennai.

Applicant : Shri Abdul Salam, Chennai

Respondent : The Principal Commissioner of Customs, Chennai-I

ORDER

Revision Application No. 373/87/B/SZ/2020-RA dated 13.03.2020 has been filed by Shri Abdul Salam, Chennai (hereinafter referred to as the "Applicant") on behalf of his father Late Mohamed Rafi, S/o Shri Panchpeer who passed away on 19.05.2019, against the Order-in-Appeal Airport. C. Cus. I. No. 70/2020 dated 17.02.2020, passed by the Commissioner of Customs (Appeals-I), Chennai.

2. Brief facts of the case are that, on 04.10.2018, Mohamed Rafi, an Indian passport holder, upon his arrival into India at Anna International Terminal of Chennai Airport, Meenambakkam, Chennai from Dubai via Colombo, was intercepted by officers of Air Intelligence Unit of Customs, Chennai Airport officers, while he was about to exit the arrival hall of the Airport, on reasonable suspicion that he might be carrying gold / contraband goods either in his baggage or on his person. Search conducted on the passenger resulted in recovery of three gold chains of 24 carat purity weighing 102 grams, valued at Rs. 3,27,930/-. The said gold chains were recovered from the passenger's pant pocket. On examination of his checked-in baggage, 8800 sticks of Gudang Garam cigarettes of value Rs. 88,000/-, 12 nos. of i-phone with accessories, concealed in a Chivas Regal Whisky carton box, valued at Rs. 9,25,000/- and one play station valued at Rs. 21,500/- were recovered. The total value of recovered goods was Rs. 13,62,630/-. As the passenger was not eligible to import gold into India, was not in possession of any valid documents for the legal import of the impugned gold into India, nor had he declared the gold and since he had attempted to smuggle it by concealing, the recovered gold was seized under a mahazar dated 28.11.2018 under Section 110 of the Customs Act, 1962 read with Section 3(3) of the Foreign Trade (Development & Regulation) Act, 1962 for further action under the said act. The officers also seized the other recovered goods i.e. the i-phones and play station as well as Cigarettes which were in commercial quantity since the packets did not contain the appropriate pictorial warning as required under the Cigarettes and other Tobacco Products (Prohibition of Advertisement and Regulation of Trade and Commerce, Production, Supply and Distribution) Act, 2003.

3. In his voluntary statement recorded under Section of 108 of the Customs Act, 1962 immediately after seizure of the impugned goods, the Applicant stated inter-alia that he was a frequent traveler; that he carried textile goods from Chennai to sell them in Dubai for a profit and on return he brought electronic goods to sell in India and by doing this he earned Rs. 20,000/- per month; and that he knew that smuggling of gold by way of concealment and bringing the prohibited/restricted/contraband etc. into India without declaration to Customs is an offence. Mohamed Rafi vide his letter dated 04.10.2018, requested for adjudication of the case without issue of show cause notice.

4. The adjudicating authority i.e. the Joint Commissioner of Customs (Adjudication-Air), Chennai-I, Chennai Airport and Air Cargo Complex, Chennai adjudicated the matter vide Order-in-Original No. 260/2019-20-Commissionerate-I dated 23.11.2019 absolutely confiscating 102 grams of gold, 8800 sticks of Gudang Garam cigarettes, one play station and 12 nos. of i-phones, totally valued at Rs. 13,62,300/- under Section 111(d), 111(i) and 111(l) of the Customs Act, 1962 read with Section 3(3) of the Foreign Trade (Development & Regulation) Act, 1992 and also imposed a personal penalty of Rs. 1,40,000/- under Section 112(a) of the Customs Act, 1962 on the passenger.

5. Aggrieved, the Applicant on behalf of Late Mohamed Rafi, filed an appeal before the Commissioner of Customs (Appeals-I), Chennai, who has upheld the absolute confiscation of impugned gold and cigarettes and ordered for the release of seized electronic goods i.e. i-phones and play station, on payment of Redemption fine of Rs. 1,90,000/- under Section 125 of the Customs Act, 1962 and also waived off the penalty of Rs. 1,40,000/- on the pax since he passed away before adjudication, as penalty imposed on a deceased person cannot be recovered from his heir. Aggrieved by this order, this revision application has been filed by the Applicant.

6. 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 Shri Mohamed Rafi died on 19.05.2019; that no declaration card was provided to him by Customs; 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 and that the impugned gold items be permitted for re-export/released.

7. Personal hearings in the matter were fixed on 10.06.2024 and 19.07.2024. But, no one appeared either from the Applicant's side or from the Respondent's side. Also no request for adjournment has been received. Therefore, the matter is taken up for decision based on available records.

8. The Government has examined the matter. It is observed that the Late Mohamed Rafi was intercepted at the exit point of the arrival hall after passing through the Customs Green Channel and that the impugned gold items alongwith other impugned items in his baggage were recovered from him. It is a fact on record that no declaration was made by him to Customs; that the gold was concealed in his pocket; electronic goods were concealed in a case of Chivas Regal and cigarettes were in commercial quantity. Thus the seized goods were not bonafide baggage. Mohamed Rafi in his statement recorded under Section 108 of the Customs Act, 1962 had admitted that he was a frequent traveler and had brought the goods for monetary consideration. He was not in possession of any valid document for the legal import of gold and was also not carrying convertible foreign currency to pay Customs duty. Late Mohamed Rafi was therefore not an eligible passenger to import gold as part of baggage.

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 Late Mohamed Rafi not declare the gold items, as stipulated under Section 77 of the Customs Act, 1962, but concealed them alongwith other goods with an intent to avoid detection by Customs. Therefore, he 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 item alongwith other goods were liable to confiscation under Section 111 *ibid.*

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 pax 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.*"

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

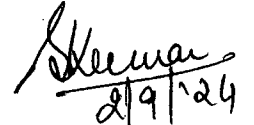
under Section 80 of the Act, *ibid*. In this case, the pax had made no declaration in respect of the subject goods. Further, the Hon'ble Delhi High Court has, in the case of *Jasvir Kaur vs. UOI {2019 (241) ELT 521 (Del.)}*, held that re-export "*cannot be asked for as of right-----*. *The passenger 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 cannot be allowed.

13. 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.

14. 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.

15. 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.

16. The revision application is, accordingly, rejected.



(Shubhagata Kumar)

Additional Secretary to the Government of India

Shri Abdul Salam,
S/o Late Mohamed Rafi,
New No.57, Old No. 26,
Arthoon Road, Royapuram,
Chennai – 600013.

Order No. 179 /24-Cus dated 02-09-2024

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

Shailendra
2/9/24
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