

**SPEED POST**



F. No. 373/318/B/SZ/2019-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..18.01.24

Order No. 18/24-Cus dated 18-01-2024 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.TCP-CUS-000-APP-062-19 dated 11.07.2019, passed by the Commissioner of GST, Service Tax & Central Excise (Appeals), Tiruchirappalli.

Applicant : Shri Naina Mohamed, Chennai

Respondent : The Commissioner of Customs (Preventive), Tiruchirappalli

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**ORDER**

A Revision Application, bearing No. 373/318/B/SZ/2019-RA dated 13.08.2019, has been filed by Shri Naina Mohamed, Chennai (hereinafter referred to as the Applicant), against the Order-in-Appeal No.TCP-CUS-000-APP-062-19 dated 11.07.2019, passed by the Commissioner of GST, Service Tax & Central Excise (Appeals), Tiruchirappalli, vide which the Commissioner (Appeals) has upheld the Order-in-Original No. 18/2019 dated 30.01.2019, passed by the Assistant Commissioner of Customs (Airport), Tiruchirappalli. Vide the aforementioned Order-in-Original, two unfinished gold chains and six gold rings of 24 carat purity, totally weighing 70.00 grams and valued at Rs. 2,14,690/-, recovered from the Applicant, had been absolutely confiscated under Section 111(d), 111(i), 111(l) and 111(m) of the Customs Act, 1962. Besides, penalty of Rs. 21,500/- was also imposed on the Applicant, under Section 112(a) and 112(b) of the Act, *ibid*.

2. Brief facts of the case are that, the Applicant arrived from Kuala Lumpur on 29.03.2018, at Trichy International Airport. He was intercepted by the officers of Central Intelligence Unit (CIU) Customs Hqrs., Trichy as he attempted to exit the green channel in a suspicious manner. On enquiry and personal search, the Applicant was found to have kept in the ticket pocket of his pants, two unfinished gold chains and six gold rings of 24 carat purity weighing 70.00 grams and valued at Rs. 2,14,690/- was recovered from him. He attempted to clear the above items without opting to declare the same in a Customs Declaration Form or even verbally to the Customs officials. Hence, on the reasonable belief that the Applicant attempted to import the impugned gold items in an illicit manner, the officers seized the same for taking further action under the Customs Act, 1962. The Applicant in his voluntary statement dated 29.03.2018 recorded before the Superintendent of Customs, CIU, Trichy under Section 108 of the Customs Act, 1962 has inter-alia deposed that he is a frequent flier and has stated that he attempted to clear the said gold items without declaration to customs and without payment of customs duty; that the impugned gold items did not belong to him and the same was handed over by an unknown person at the Kuala Lumpur Airport who promised him Rs. 5,000/- for handing over the same to his accomplice who would be waiting outside Trichy Airport; that he did not have any valid permit/license to import the gold into India; that he did not have any convertible foreign currency for paying customs duty for the said gold; that he was aware

that not declaring the presence of gold in Customs Declaration Form and attempting to clear the gold items without payment of duty by concealment is an offence and has accepted his offence. Hence, the officers on reasonable belief that the above impugned gold items recovered from the Applicant were attempted to be smuggled into India without any valid import license/document in violation of the provisions of the Customs Act, 1962 by concealment and without payment of Customs Duty, seized the same under a Mahazar dated 29.03.2018 for further action under the Customs Act, 1962. Thereafter, the Lower Adjudicating Authority vide the aforesaid Order-in-Original bearing 18/2019 dated 30.01.2019, adjudicated the matter and the impugned gold items were confiscated absolutely; besides that a penalty of Rs. 21,500/- was imposed on the Applicant. Aggrieved, the Applicant filed an appeal before the Commissioner of Customs (Appeals), Tiruchirappalli, which has been rejected.

3. The revision application has been filed, mainly, on the grounds that order of the respondent is against law, weight of evidence and circumstances and probabilities of the case; that gold is not a prohibited item; that he is the owner of the gold jewellery; that he was wearing the gold chain and submitted that no declaration card was provided by any authority and hence question of filling up declaration card did not arise; and that the impugned order should be set aside, the gold item be permitted for re-export/released and that the penalty be reduced. The Applicant has also quoted case laws in support of their case.

4. Personal hearings in the matter were fixed on 04.12.2023 and 20.12.2023, in virtual mode. But, no one appeared from the Applicant's side, nor has any request for adjournment has been made. However, Shri Vivek Kumar Rohilla, Superintendent from the Respondent's side appeared and submitted that the Order-in-Appeal is legal & proper and should be upheld. Therefore, the matter is taken up for decision based on the available records.

5.1 The Government has carefully examined the matter. The contentions of the Applicant that no declaration card was provided and that he had verbally declared the gold articles in his possession to the Customs officer etc., does not appear credible as the same

had not been stated before the Customs authorities when the charges were explained to him and his statement under section 108 of the Customs Act, 1962 was recorded; the entire proceedings have been covered under a Mahazar in presence of independent witnesses which also corroborates the sequence of events. This is a signed statement which has not been retracted by the Applicant. Thus, it is not open to the Applicant to dispute the facts at this stage. Further, though the Applicant claimed that he was the owner of the offending goods, he has failed to produce any evidence in support of his claim. Thus, there is no evidence on record to establish that the Applicant was the legitimate owner of the goods. As such, the subject contentions of the Applicant are appears to be an afterthought.

5.2 Further, it is observed that the Applicant is a frequent traveler and has not made a true declaration of his belongings to the Customs authorities under section 77 of the Customs Act, 1962. The Applicant being a frequent traveler ought to know the Customs law and procedures in India. The Applicant admitted that the gold items are not owned by him and he brought them for monetary benefit. It is observed that he was not in possession of valid permit/license/document to prove the licit import of the gold items, nor did he have any convertible foreign currency for paying the Customs duty on arrival. In view of the above, the impugned gold items which were attempted to be brought into India without declaration with an intent to evade payment of Customs duty has to be treated as non-bonafide baggage. As such, by virtue of section 3(3) of Foreign Trade (D&R) Act, 1992 and section 2(33) of the Customs Act, 1962, the impugned gold items have to be treated as prohibited goods under the Customs Act, 1962.

6. 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. The Applicant did not declare the gold items, as stipulated under Section 77 of the Customs Act, 1962. No documents evidencing ownership and licit purchase have been produced. 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 item was liable to confiscation under Section 111 *ibid* and that the penalty was imposable on the Applicant.

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.

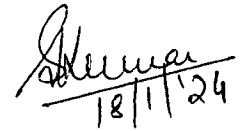
9. The Applicant has requested to be allowed to re-export the offending goods. The Government observes that a specific provision regarding re-export of baggage articles has been made under Section 80 of the Act, *ibid.* On a plain reading of Section 80, it is apparent that a declaration under Section 77 is a pre-requisite for allowing re-export. Hon'ble Allahabad High Court has, in the case of *Deepak Bajaj* {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 cannot be allowed.

10. 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.

11. In the facts and circumstances of the case, the penalty imposed by the original authority, as upheld by the Commissioner (Appeals), is neither harsh nor excessive.

12. The revision application is, accordingly, rejected.

  
18/11/24

(Shubhagata Kumar)

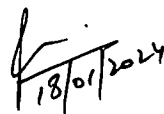
Additional Secretary to the Government of India

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Order No. 18/24-Cus dated 18-01-2024

Copy to:

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2. The Commissioner of Customs (Preventive), No.1, Williams Road, Cantonment, Tiruchirappalli-620001
3. Sh. S. Palanikumar, Kameshwaran & P. Kamala Malar, 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

  
18/01/2024

ATTESTED  
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