

SPEED POST



F. No. 373/20/B/2019-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...18/01/24...

Order No. 19 /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. HYD-CUS-000-APP-031-17-18 dated 21.06.2017, passed by the Commissioner of Customs & Central Excise (Appeals), Hyderabad.

Applicant : Sh. Lalani Amin Juma, Mumbai

Respondent : Pr. Commissioner of Customs, Hyderabad

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ORDER

A Revision Application, bearing No. 373/20/B/2019-RA dated 04.02.2019, has been filed by Sh. Lalani Amin Juma, Mumbai (hereinafter referred to as the Applicant), against the Order-in-Appeal No. HYD-CUS-000-APP-031-17-18 dated 21.06.2017, passed by the Commissioner of Customs & Central Excise (Appeals), Hyderabad, vide which the Commissioner (Appeals) has upheld the Order-in-Original No. 55/2016-Adjn.Cus (ADC) dated 17.05.2016, passed by the Additional Commissioner of Customs (Airport), Hyderabad. Vide the aforementioned Order-in-Original, two gold bars of 24 carat purity, totally weighing 233 grams and valued at Rs. 5,98,810/- recovered from the Applicant, had been absolutely confiscated under Section 111(l) of the Customs Act, 1962. Besides, penalties of Rs. 30,000/- each were also imposed on the Applicant, under Sections 112(a)(ii) & 114AA, respectively, of the Act *ibid*.

2. Brief facts of the case are that the officers of Air Intelligence Unit (AIU), Rajiv Gandhi International Airport, Hyderabad intercepted the Applicant upon his arrival at RGI Airport, from Bahrain, on 22.12.2015 at the exit gate of the Customs Arrival Hall after he had passed through the Green Channel. He was asked whether he was carrying any dutiable goods or prohibited goods either in the baggage or in person, he replied that he was not in possession of any dutiable or prohibited goods. Further on examination of the 'Indian Customs Declaration Form' carried by him, the officers noticed that he did not declare anything at S.No. 9 and S.No. 10 of the said declaration form. Thereafter the applicant was made to pass through the Door Frame Metal Detector (DFMD) machine which gave a beep sound indicating concealment of some metal in/on his body. Upon being persistently questioned, the applicant confessed to concealing two gold bars in his rectum. Subsequently two metal bars wrapped in white adhesive tape were recovered from his body. On unwrapping the adhesive tape, the officers found two yellow metal bars. Thereafter, the Government Registered Valuer examined and assayed the said two yellow metal bars and certified them to be of 24 carat (99.9% purity) gold, weighing 233 grams and valued at Rs. 5,98,810/-. The Applicant in his statement dated 23.12.2015, recorded under Section 108 of the Customs Act, 1962 stated *inter-alia* that he had intentionally not declared the gold bars brought by him in the 'Indian Customs Declaration

Form' and opted for Green Channel to avoid detection by the Customs authorities and to evade payment of duty; that he fully agreed with the facts mentioned in the panchanama dated 23.12.2015 which was drawn in his presence; that he purchased the said gold at Bahrain; and that he concealed the said gold bars in his rectum to hoodwink Customs officials to evade the payment of customs duty.

The matter was adjudicated by the original authority, vide aforesaid Order-in-Original dated 17.05.2016. Aggrieved, the Applicant filed an appeal before the Commissioner (Appeals), which was rejected.

3. The revision application has been filed mainly on the grounds that the Appellate Authority's findings are based on assumption and presumption without substantiating the claims; that gold is not to be treated as prohibited item; that there is no bar in releasing even the prohibited goods by the adjudicating authority; and that the gold has to be released to the applicant since he was in possession of it. It is prayed that impugned OIA be set aside as far as absolute confiscation of the gold is concerned, gold be allowed to be released with option to redeem the gold and set aside the penalties.

4. Personal hearing in the matter was fixed on 11.08.2023, however, the same was postponed on the request of Sh. Y. Sreenivasa Reddy, Advocate for the Applicant vide his request letter dated 09.08.2023. In the hearing held on 22.09.2023, Sh. Aditya Mishra, Advocate for M/s. YSR & Associates stated that their prayer is to allow redemption of the impugned gold upon payment of fine and penalty. He stated that several case laws in their favour have been cited in support of their application. No one appeared for the side of Respondent. As such, it is presumed that the Respondent has nothing to add in the matter.

5. The Government observes that this is a case of body concealment with an intent to evade duty wherein the Applicant has tried to smuggle gold by secreting gold inside his rectum and also admitted to his role in smuggling. His statement has not been retracted.

6. In terms of 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. Not only has the Applicant been unable to produce any proof of licit purchase of the gold, but he has admitted to ingenious concealment of gold in his rectum to evade Customs duty. The Applicant has not only intentionally violated Section 77 of the Customs Act but has also failed to discharge the burden placed on him, in terms of Section 123, *ibid*. As such the culpability of the Applicant is established beyond doubt.

7.1 The Applicant has contended that the gold ought to have been released to him since the import of gold is not 'prohibited'. However, the Government observes that this contention of the Applicant is against several judgments of Hon'ble Supreme Court. {Ref. Sheikh Mohd. Omer vs Collector of Customs, Calcutta & Ors 1983(13)ELT 1439(SC)}, M/s. Om Prakash Bhatia vs Commissioner of Customs, Delhi {2003(155) ELT 423(SC)}. In the recent 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."* 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".*

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 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----."

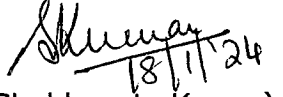
7.3 Gold is not allowed to be imported freely in baggage and it is permitted to be imported by a passenger subject to fulfillment of certain conditions. In this case, since the conditions, subject to which gold could have been legally imported, have not been fulfilled, there is no doubt that the subject goods are 'prohibited goods'.

8. The original authority has denied the release of impugned goods on redemption fine under Section 125 of Customs Act, 1962. The Government observes that, in terms of Section 125 of the Customs Act, 1962, the option to release 'prohibited goods', on redemption fine, is discretionary, as held by 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.)]. 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 Commissioner of Customs (Air), Chennai-I Vs P. Sinnasamy {2016(344)ELT1154 (Mad.)}, the Hon'ble Madras High Court has held that *"non-consideration or non-application of mind to the relevant factors, renders exercise of discretion manifestly erroneous and it causes for judicial interference."* Further, *"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)], relying upon the judgment of Apex Court in Mangalam Organics Ltd. [2017 (349) ELT 369 (SC)], 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.

9. In the facts and circumstances of the case, the Government finds that the penalties imposed on the Applicant by the original authority are just and fair.

10. In view of the above, the revision application is rejected for the reasons aforesaid.


18/11/24
(Shubhagata Kumar)

Additional Secretary to the Government of India

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Order No. 19 /24-Cus dated 18-01-2024

Copy to:

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3. Sh. Y. Sreenivasa Reddy, Advocate, M/s. YSR Associates, E-510, 5th Floor, SVSS Nivas, Road No. 1, Czech Colony, Opposite Gokul Theatre, Erragadda, Hyderabad-500018.
4. PPS to AS(RA).
5. Guard File.
- ✓ 6. Spare Copy.
7. Notice Board.


18/01/2024
ATTESTED

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