

SPEED POST



F. No. 373/148/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 28/09/24...

Order No. 202/24-Cus dated 25-09-2024 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-032-20 dated 20.04.2020, passed by the Commissioner of GST, Service Tax & Central Excise (Appeals), Tiruchirappalli.

Applicant : Smt. Vijaya, Malaysia

Respondent : The Commissioner of Customs (P), Tiruchirappalli

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ORDER

A Revision Application, bearing No. 373/148/B/2020-RA dated 22.07.2020, has been filed by Smt. Vijaya, Malaysia (hereinafter referred to as the Applicant), against the Order-in-Appeal No. TCP-CUS-000-APP-032-20 dated 20.04.2020, passed by the Commissioner of GST, Service Tax & Central Excise (Appeals), Tiruchirappalli, vide which the Commissioner (Appeals) has rejected the appeal of the Applicant filed against Order-in-Original No. TCP-CUS-PRV-JTC-038-19 dated 13.06.2019, passed by the Joint Commissioner of Customs (Airport), Tiruchirappalli. Vide this OIO, unfinished/unjoined gold rings forming two long unlinked chains and seven unfinished/unjoined gold rings forming small chains all of 24 carat purity, totally weighing 849.000 grams and collectively valued at Rs. 26,96,424/-, recovered from the Applicant, had been absolutely confiscated under Section 111(d), 111(i), 111(l) & 111(m) of the Customs Act, 1962. Besides, a penalty of Rs. 3,00,000/- 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 Customs Officers (AIU) intercepted the Applicant while she was attempting to exit through the Green Channel in a suspicious manner upon her arrival from Kuala Lumpur to Tiruchirappalli on 13.10.2018. The officers then verified from the Indian Customs Baggage officers whether she had submitted the Indian Customs Declaration Slip to them. They were informed that she had submitted the Indian Customs Declaration Slip but had not declared any dutiable items therein. When the officers asked her whether she had any other items to be declared to the baggage officers, she replied in the negative. When the officers asked her whether she had brought any valuables or gold in any form with her either in her person or in her baggage, she replied in the negative. Thereafter the applicant was made to pass through the Door Frame Metal Detector (DFMD) which sounded an alarm. Again she was asked by the officers whether any items like gold/heavy metal were present in her possession, to which she again replied in the negative. Upon the search of her person by a lady officer, two packets were found, one wrapped with yellow colour cloth and the other one wrapped with pink colour tissue paper concealed in her innerwear. On examination of the packets, the above mentioned gold items were recovered which were assayed by the Government approved assayer as gold

of 24 carat purity, totally weighing 849.000 grams and collectively valued at Rs. 26,96,424/-. When the officers asked the applicant why she did not declare the gold in her Indian Customs Declaration Slip, she replied that the above said gold did not belong to her and that an unknown person approached her and handed over the above said gold items to her at Kuala Lumpur Airport while she was waiting to board the flight for India. She also said that the unknown person asked her to clear the gold without declaring it and without payment of Customs duty, for which she would be given a commission amount of Rs. 18,000/-. Lured by the commission amount, she accepted and attempted to clear the said gold without payment of Customs duty. To the query whether she had any convertible foreign currency to pay the Customs duty, she replied that she did not bring any money as she intended to clear the gold without declaring to Customs and without paying the Customs duty. The applicant in her statement dated 14.10.2018, recorded under Section 108 of the Customs Act, 1962 stated the above again. As the subject case involves outright smuggling of high value precious metal, restricted for import notified under Section 123 of the Customs Act, 1962, she was placed under arrest on 14.10.2018 at Tiruchirappalli under Section 104 of the Customs Act, 1962 and was released on the same day on execution of surety/bail bond dated 14.10.2018 for value of Rs. 3,00,000/- as per the Guidelines for Arrest and Bail in relation to offences punishable under the Customs Act, 1962. The matter was adjudicated by the original authority, vide the aforesaid Order-in-Original dated 13.06.2019. 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 Applicant went through the Metal Frame Detector and at that time only she was asked to declare the jewellery on her person and she in good faith declared the same to the authorities; that the gold jewellery belonged to her and she produced the purchase bill in support of her claim vide her letter dated 29.10.2018; that gold jewellery imported by her is neither prohibited nor restricted; that in the retraction letter she had informed about the purchase bills tendered at the time of seizure and recording of statement; that she did not conceal the gold jewellery and kept in her jeans; and submitted that the gold jewellery be allowed for re-export.

4. Personal hearing in the matter was fixed on 05.07.2024, 19.07.2024 & 09.08.2024. No one appeared for personal hearing from either side on any one of the above-mentioned dates. It is therefore presumed that neither side has anything to add in the matter. Hence, the matter is being taken up for disposal based on available records.

5. The Government has examined the matter. It is observed that the impugned items were not declared by the applicant on the Indian Customs Declaration Form recovered from the Applicant only when she was intercepted by Customs. The Applicant's contention that she had verbally declared the items to Customs is not correct as the Customs Declaration Slip filed by her did not mention any dutiable items and it was only after the DFMD beeped and search was conducted that the concealed gold was recovered. She has herself stated that the gold belonged to someone else and that she carried it for monetary benefit with the intention to evade detection and payment of Customs duty. Moreover, it is common knowledge that wearable gold jewellery is usually less than 24 carat purity and never in an unfinished form. Thus, unfinished/unjoined gold rings forming two long unlinked chains and seven unfinished/unjoined gold rings forming small chains do not appear to be bonafide baggage for personal use. By her own admission she did not have any convertible foreign currency to pay the Customs duty as she intended to walk out with the concealed gold without paying duty. Therefore the intention to smuggle is manifest. Hence, the contentions of the Applicant that she had in good faith declared the gold jewellery to the authorities and the gold was not concealed are not sustainable.

6. As far as the retraction filed by the Applicant is concerned, it is on record that the Applicant was intercepted when she was made to pass through the DFMD and gold was recovered concealed inside her innerwear. The relevant sequence of events recorded in the Panchnama as mentioned in the OIO also substantiate the acts of Applicant and her attempt to smuggle in the confiscated goods. The Government observes that 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 her involvement in the case of smuggling in her statement under Section 108 of the Customs Act, 1962. The admissions made are corroborated by other material on record, as discussed hereinabove. Therefore, there is no doubt that the statement tendered was voluntary and that the retraction is an afterthought.

7. The applicant has contended that the gold jewellery belonged to her and she produced the purchase bill in support of her claim vide her letter dated 29.10.2018. It is further contended that vide her retraction letter the applicant has informed about the purchase bills tendered at the time of seizure and recording of statement. As brought out in para 6 above she had herself accepted her role in the smuggling activity and therefore the retraction is an afterthought. It is also seen that the original adjudicating authority has noted in para 9 of his order that the applicant was intercepted after the Customs officers were alerted by the system that she is a frequent traveller and necessitated special watch over her. She denied the possession of gold items even after repeated questioning and the gold items were recovered from her innerwear. In view of the foregoing the contention of the applicant is nothing but an afterthought.

8. Another contention raised by the applicant is that the personal search was conducted in the presence of two male witnesses. In this connection, the Government observes that it is mentioned in the Mahazar that the applicant consented that the personal search may be conducted by a lady Gazetted officer and accordingly Smt. S.P Radha, Superintendent, Baggage conducted personal search with her consent in a separate enclosure. The fact that the personal search was conducted and gold was recovered from her innerwear in a separate enclosure clearly negates the contention of the applicant that she was searched in the presence of two male witnesses. Further, the Mahazar is signed by the applicant along with Smt. S.P Radha, Superintendent and two other independent witnesses.

9. 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. The Applicant has, thus, failed to discharge the burden placed on her, 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 her in terms of Section 123, the Government is in agreement with the lower authorities that the seized gold items were liable to confiscation under Section 111 *ibid.* and, consequently, the Applicant was liable to penalty.

10.1 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.*

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

11. 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."* 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.

12. 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 written 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.

13. The case laws relied upon by the Applicant in support of her various contentions are either not relevant in the facts of this case or are not applicable in view of the dictum of Hon'ble Supreme Court and Hon'ble High Courts, as above.

14. 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.

15. In view of the above, the revision application is rejected.

Shubhagata Kumar
25/9/24

(Shubhagata Kumar)

Additional Secretary to the Government of India

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Order No. 202/24-Cus dated 25-09-2024

Copy to:

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2. The Commissioner of Customs (P), No. 1, Williams Road, Cantonment, Tiruchirapalli-620001.
3. Sh. B. Kumar, Consultant, BK Associates, No. 117/55, Egmore High Road, Egmore, Chennai-600008.
4. PPS to AS(RA)
5. Guard File
- ✓ 6. Spare Copy
7. Notice Board

Shailendra Kumar Meena
25/9/24
ATTESTED (शैलेन्द्र कुमार मीना)
(Shailendra Kumar Meena)
अनुभाग अधिकारी / Section Officer
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Ministry of Finance (Deptt. of Rev.)
भारत सरकार / Govt. of India
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