

SPEED POST



F. No. 373/155/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. 25/09/24.

Order No. 204/24-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-055-20 dated 30.06.2020, passed by the Commissioner of GST, Service Tax & Central Excise (Appeals), Tiruchirappalli.

Applicant : Smt. Magiswary, Srilanka

Respondent : The Commissioner of Customs (Preventive), Tiruchirappalli.

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ORDER

Revision Application No. 373/155/B/SZ/2020-RA dated 24.07.2020 has been filed by Smt. Magiswary, Srilanka (hereinafter referred to as the Applicant) against the Order-in-Appeal No.TCP-CUS-000-APP-055-20 dated 30.06.2020, passed by the Commissioner of GST, Service Tax & Central Excise (Appeals), Tiruchirappalli who has rejected the appeal of the Applicant and upheld the Order-in-Original No. 103/2018 dated 27.04.2018 of the Assistant Commissioner of Customs, Customs Airport, Trichy.

2. Brief facts of the case are that the Applicant, a Sri Lankan passport holder, arrived from Colombo on 09.08.2017, at Trichy International Airport. She was intercepted by the officers of AIU, Airport, Trichy, when she was attempting to cross the green channel with some suspicious movements. The AIU officers verified with the Customs baggage officers and found that the Applicant has submitted the Customs declaration form but not declared any valuable items in the CDF. AIU officers enquired the Applicant as to whether she was carrying any dutiable goods including gold, in any form, with her either on her person or in her baggage, to which she replied in the negative. Not satisfied with her reply, a lady officer conducted personal search on the Applicant and recovered one gold chain with two dollars worn on her neck and covered with dupatta and one gold bangle kept concealed inside her innerwear. The officers, on the reasonable belief that the Applicant attempted to smuggle the impugned gold items in contravention to the provisions of Customs Act, 1962, seized the same for taking further action under the Custom Act, 1962. The details of the gold items seized were as follows:

Sl. No.	Description	Weight (in grams)	Value (in Rs.)
1	One gold chain with two dollars having 22 carat purity	139.000	3,77,802
2	One gold bangle having 22 carat purity	12.500	33,975
	TOTAL	151.500	4,11,777

3. In her voluntary statement recorded under Section of 108 of the Customs Act, 1962, the Applicant stated inter-alia that the impugned gold items were handed over by an unknown at Srilankan Airport to be handed over to a person who would be waiting outside the Trichy Airport. She was offered a monetary commission of Rs. 3,000/- if the

same was cleared without payment of Customs duty and handed over to that person. She knew that bringing gold from abroad and attempting to clear the same without declaring to the Customs authorities is an offence. She was neither in possession of any valid document for legal import of gold into India nor had any convertible foreign currency for paying Customs duty. She told that she had no objection in Government confiscating the impugned gold items since she is not the owner of the said goods.

4. After due process of law, the original authority adjudicated the matter vide Order-in-Original No. 103/2018 dated 27.04.2018 ordered for absolute confiscation of one gold chain with two dollars and one gold bangle, all of 22 cart purity totally weighing 151.500 grams and valued at Rs. 4,11,777/- under section 111(d), 111(i), 111(l) and 111(m) of the Customs Act, 1962 and imposed penalty of Rs. 45,000/- on the Applicant under Section 112(a) & 112(b) of the Act, *ibid.* Aggrieved, the Applicant filed appeal before the Commissioner of Customs & Central Excise (Appeals), Tiruchirappalli who has upheld the order of absolute confiscation of the impugned gold and penalty imposed on the Applicant and rejected the appeal vide impugned OIA dated 30.06.2020. Aggrieved by this OIA, the Applicant had filed this revision application

5. The revision application has been filed, mainly, on the grounds that Order-in-Appeal passed by the Commissioner (Appeals) is against law, weight of evidence and probability of the case; that the Applicant never attempted or pass through the green channel and she was all along under the control of the officers; no declaration card was provided; that ownership of gold is not disputed and there is no ingenious concealment and gold jewellery are not commercial quantity and she purchased in Sri Lanka out of her own earning for own use; that the wearing of gold ornaments by a passenger is not prohibited by the Baggage Rules, 1998; that gold is dutiable goods not prohibited goods. She prayed for allowing re-export of the gold jewellery and set aside or reduce the penalty under Section 112(a) & (b) of the Customs Act, 1962.

6. Personal hearing in the matter was fixed on 08.07.2024, 22.07.2024 and 07.08.2024. Smt. Kamalamalar Palanikumar, Advocate appeared on behalf of the Applicant and submitted that Applicant is a Sri Lankan national with no previous offence against her; that the gold chain and bangles were not concealed in innerwear as alleged (in the case of

bangles) but worn on the person and that the gold was wearable jewellery of 22 carat purity. She prayed to re-export or release of the gold on payment of RF etc. Sh. Manimaran, Superintendent, Trichy Legal appeared on 22.07.2024 on behalf of the Respondent department and submitted that the Applicant brought the impugned gold concealed on her body and innerwear and did not declare the same; and that the O-I-O and O-I-A are legal and proper and should be upheld.

7. The Government has examined the matter. The Applicant has attempted to smuggle the impugned gold items into India and did not make a true declaration to the Customs Authorities as required under Section 77 of the Customs Act, 1962. But for the interception of the officers of AIU, Airport, Trichy, the Applicant would have exited undetected without payment of Customs dues. The impugned gold items cannot be considered as bonafide baggage under the Customs Act, 1962. The Applicant has admitted in her voluntary statement that the impugned gold items did not belong to her and was given to her by an unknown person who promised a remuneration Rs. 3,000/- if the gold was successfully smuggled by her into India and handed over to his accomplice. She was neither in possession of any valid documents for the legal import of impugned gold into India nor in possession of convertible foreign currency for payment of duty and therefore, she was not an eligible passenger to import impugned gold in terms of Notification No. 50/2017-Cus dated 30.06.2017.

8. 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*. Further, the Applicant was intercepted after passing through the Green Channel. 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*. Therefore, the Government agrees with the lower authorities that the seized goods were liable to confiscation under Section 111 *ibid* and the penalty was imposable on the Applicant.

9.1 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."

9.2 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----."

9.3 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*.

9.4 In view of the above, the contention of the Applicant that the offending goods are not 'prohibited goods', cannot be accepted.

10. 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 P. Sinnasamy (*supra*), it has been 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)], 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." Thus, the discretion exercised by the original authority could have been interfered with only if it suffered from any of these vices. In the present case, the original authority has for relevant and reasonable considerations recorded in paras 53 to 58 of the OIO refused to grant redemption. Thus, the Commissioner (Appeals) has correctly refused to interfere in the matter.

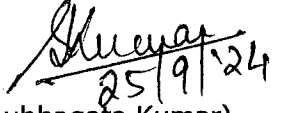
11.1 As regards the prayer for permitting re-export of the offending goods, the Government observes that a specific provision regarding re-export of articles imported in baggage is made in Chapter-XI of the Customs Act, 1962, by way of Section 80. On a plain reading of Section 80, it is apparent that 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 vs Commissioner of Customs (P), Lucknow{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 not made a true declaration under Section 77.

11.2 Further, the Hon'ble Delhi High Court has, in the case of Jasvir Kaur vs. UOI {2009 (241) ELT 621 (Del.)}, held that re-export is not permissible when article is recovered from the passenger while attempting to smuggle it. Hence, the question of allowing re-export does not arise.

12. The decisions relied upon by the Applicant, are of no assistance to the Applicant's case in view of the dictum of Hon'ble Supreme Court and Hon'ble High Courts, as above.

13. In view of the facts and circumstances of the case, however, the penalty imposed under Section 112(a) & 112(b) of the Customs Act, 1962 is reduced from Rs. 45,000/- to Rs. 20,000/- and the OIA is modified to this extent.

14. In view of the above, the revision application is disposed of on above terms.


(Shubhagata Kumar)

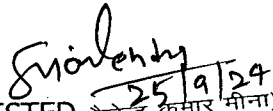
Additional Secretary to the Government of India

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Nawala Road, Rajagiri,
SRI LANKA

Order No. 204/24-Cus dated 25-09-2024

Copy to:

1. The Commissioner of GST, Service Tax & Central Excise (Appeals), Tiruchirappalli, No. 1, Williams Road, Cantonment, Tiruchirappalli-620001
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, 2nd Floor, Chennai-600001.
4. PA to AS(RA)
5. Guard File
- ✓ 6. Spare Copy
7. Notice Board.


ATTESTED (शैलेन्द्र कुमार मीना)
(Shailendra Kumar Meena)
अनुभाग अधिकारी / Section Officer
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