

SPEED POST



F. No. 373/356/B/2018-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...5/9/23

Order No. 210 /23-Cus dated 04.09.2023 of the Government of India passed by Ms. 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-022-18 dated 20.02.2018, passed by the Commissioner of GST, Service Tax & Central Excise (Appeals), Tiruchirappalli.

Applicant : Sh. Akbar Basha, Chennai

Respondent: The Commissioner of Customs (P), Tiruchirappalli

ORDER

A Revision Application, bearing No. 373/356/B/2018-RA dated 02.06.2018, has been filed by Sh. Akbar Basha, Chennai (hereinafter referred to as the Applicant), against the Order-in-Appeal No. TCP-CUS-000-APP-022-18 dated 20.02.2018, passed by the Commissioner of GST, Service Tax & Central Excise (Appeals), Tiruchirappalli, whereby the Commissioner (Appeals) has upheld the Order-in-Original No. 65/2017 dated 05.04.2017, passed by the Assistant Commissioner of Customs (Airport), Tiruchirappalli. Vide the aforementioned Order-in-Original, 2 gold pieces of 24 carat purity, weighing 40.500 grams and valued at Rs. 1,08,853/-, 20 packets of RMD Gutkha (200gms) valued at Rs. 10,000/- and 20 cartons of Gudang Garam cigarettes (240 sticks) valued at Rs. 24,000/-, recovered from the Applicant, had been absolutely confiscated, under Section 111(d), 111(l), 111(m) & 111(o) of the Customs Act, 1962 read with Section 3(3) of Foreign Trade (D&R) Act, 1992. Besides, 04 nos. of refurbished Lenovo Thinkpad valued at Rs. 40,000/-, 26 nos. of Perfume valued at Rs. 26,000/-, 01 no. Sony Play Station PS4 valued at Rs. 25,000/-, 01 no. I phone 6S (128gb) valued at Rs.35,000/- and 6 nos. Panasonic Video Camera HC V160 valued at Rs. 48,000/- were also held liable to confiscation but were allowed to be redeemed on payment of a fine of Rs. 45,000/- and applicable Customs duties. Besides, penalty of Rs. 35,000/- was also imposed on the Applicant, under Section 112(a) of the Act, *ibid*.

2. Brief facts of the case are that the Customs Officers intercepted the Applicant, who was a frequent traveler and had arrived at Tiruchirappalli Airport, from Sharjah, on 05.04.2017. The aforementioned gold items, Gudang Garam cigarettes and other items were recovered from the Applicant.

The Applicant did not declare the quantity and true value of the above mentioned goods in the declaration form nor did he declare these items to the Customs officials as required under the Customs Act, 1962. Rather the Applicant in the personal hearing held before the original authority, admitted his intent to evade Customs duty. The matter was adjudicated, vide the aforementioned Order-in-Original dated 27.09.2017, and the gold items along with cigarettes and gutkha were absolutely confiscated. Aggrieved, the Applicant filed an appeal before the Commissioner (Appeals), which was rejected and the order passed by the original authority was upheld in toto.

3. The revision application has been filed, mainly, on the grounds that the Applicant was intercepted by the Customs officials even before his declaration; that the original authority erroneously concluded that the goods were liable for confiscation as the applicant was a short visitor; that there was no concealment whatsoever either on his body or through any other means; that absolute confiscation of gold, cigarettes and gutkha is unjustified and so are the redemption fine and penalty imposed; that the gold was not concealed but only being carried in the pant pocket of the Applicant. It has further been prayed that the gold may be allowed to be redeemed on payment of appropriate customs duty and redemption fine or alternatively it may be allowed for re-export. It has also been prayed that the redemption fine and the penalty may be reduced. Additional submissions were filed by the Applicant on 08.08.2023, wherein, it was submitted that since Gold is not a prohibited good, the passenger has to be given an option to redeem the goods on payment of redemption fine with duty and penalty in terms of section 125 of customs Act, 1962. The Applicant relied on the case law reported as *2018(361) E.L.T 958 (GOI)*; that the adjudicating authority ought

to have allowed the gold Jewellery, which was not concealed on redemption and cited case laws reported as *2007 (213)ELT 555 (Tri. Chennai)* and *2019(370) ELT 590 (Tribunal)* in support.

4. In the personal hearing held on 08.08.2023, in virtual mode, Sh. P. Kulasekaran, Advocate appeared for the Applicant and stated that his client is a small time trader and had intended to declare all the items brought by him, including the gold. He accepted that the goods brought by his client were not bonafide baggage and sought a lenient view in the matter. No one appeared for the department nor has any request for adjournment been received. Hence, it is presumed that the department has nothing to add in the matter. As such, the matter is taken up for disposal.

5. The RA has been filed on 22.06.2018 while the date of receipt of Order-in-Appeal by the Applicant is 25.02.2018. Thus, there is a delay of 25 days in filing the appeal. Delay is attributed to illness of the Applicant and observation of Ramzan fast by the Applicant for one month. However, no supporting documents such as medical certificate etc. have been enclosed. Hence, the request for condonation is liable to be rejected as unsubstantiated. However, the Government observes that the Applicant is a Muslim and the holy month of Ramzan fell during the period to file the appeal. As such, the delay is condoned.

6. The Government has carefully examined the matter. It is observed that the Applicant was intercepted with gold items, Gudang Garam cigarettes and other items in commercial quantities, without the requisite declaration, either in terms of Section 77 of the Act, *ibid* in the Customs declaration form or any

declaration to Customs in respect thereof. The Applicant had, after waiving the requirement of Show Cause Notice, appeared before the original authority for hearing and admitted his intention of evading Customs duty. Further during the personal hearing conducted on 08.08.2023, it has been accepted by the counsel of the Applicant that the goods brought by the applicant were not bona-fide baggage. The quantities imported are undoubtedly of commercial nature and therefore the Applicant's claim that the goods were bonafide baggage is not acceptable. However, the Government also observes that the appellate authority has, except for restricted/prohibited items i.e. gold item, cigarettes and gutkha which had been absolutely confiscated allowed other imported items to be redeemed on payment of redemption fine, penalty imposed and applicable duties of Customs.

7. As regards the absolute confiscation of cigarettes and gutkha ordered by the lower authority, the Government observes that these goods brought by the applicant are in commercial quantity and in excess of the limits prescribed in the baggage rules, 1998, as amended. Therefore, these goods cannot be termed as bonafide baggage as defined in section 79 of the Customs Act. Further, the Applicant has also failed to declare the goods as required under Section 77 of Customs Act. Moreover, cartons of cigarettes and packets of gutkha did not have the statutory pictorial health warnings on them as required under the cigarettes and other tobacco Products (Packaging and Labelling)Rule, 2008, as amended. Hence, both these items have been correctly confiscated absolutely by the lower authority under Cigarettes and other Tobacco Products (P&L) Rules, 2008, as amended.

8. As per Section 123 of Customs Act 1962, in respect of the impugned gold, 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, as required in terms of Section 77 *ibid*. No documents evidencing ownership and licit purchase were produced at the time of interception, rather by his own admission, he has stated before the Customs officers that he did so with the intent of evading duty. 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 since the Applicant has failed to discharge the onus placed on him in terms of Section 123, the Government concurs with the LAA that the seized gold was liable to confiscation under Section 111 *ibid* and, consequently, penalty was imposable on the Applicant. Further, from the material on record placed before the Government, it is observed that the Applicant by his own admission did not declare the impugned goods to the Customs with an intent to evade Customs duty.

8.1. In terms of Notification No. 12/2012 dated 17.03.2012, as amended, the term 'eligible passenger' is defined as "*a passenger of Indian origin or a passenger holding a valid passport, issued under the Passports Act, 1967 (15 of 1967), who is coming to India after a period of not less than six months of stay abroad; and short visits, if any, made by the 'eligible passenger' during the aforesaid period of six months shall be ignored if the total duration of stay on such visits does not exceed thirty days and such passenger has not availed of the exemption under this notification or under the notification being superseded at any time of such short visits.*" The Government observes that as per the record placed before, the Applicant left India for Sharjah on 03.04.2017 and returned back on 05.04.2017 after a stay of one day, hence,

the original authority has correctly held that the Applicant cannot be treated as an 'eligible passenger' and baggage brought by him cannot be termed as bonafide baggage as the goods were brought by contravening the provisions of baggage rules, 1992.

8.2. The Government observes that import of gold and articles thereof, in baggage, is allowed subject to fulfillment of certain conditions. In the present case, it is not even contended that these conditions were fulfilled by the Applicant herein. It is settled by a catena of judgments of Hon'ble Supreme Court 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. Hence, there is no doubt that the goods seized in the present case are to be held to be 'prohibited goods', in terms of the meaning assigned to it under Section 2(33) of the Customs Act, 1962.

9. The Government observes that the original authority had denied the release of seized gold on payment of redemption fine under Section 125 of Customs Act, 1962 on the grounds that the Applicant failed to produce bill/invoice for the purchase of gold and he was not able to produce documents for purchase of the said gold. Further, the appellate authority has also recorded that the appellant (Applicant herein) has brought

restricted/prohibited items like Gutkha and Gudang Garam brand international cigarettes and did not declare the possession of gold pieces in primary form weighing 40.500 grams, as required under law. Hence, the lower authority's decision to absolute confiscate the undeclared gold , Gutkha and cigarettes is justified. 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.*" Further, in the case of P. Sinnasamy (supra), the Hon'ble Madras High Court has held that "*when discretion is exercised under Section 125 of the Customs Act, 1962, ----- the twin test to be satisfied is "relevance and reason".*" In a recent judgement, Hon'ble Delhi High Court vide its order dated 21.08.2023 in W.P. (C) Nos. 8902/2021, 9561/2021, 13131/2022, 531/2022 & 8083/2023 has held that "*The court holds 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. For reasons aforesaid, the Court finds no illegality in the individual orders passed by the adjudging officer and which were impugned in these writ petitions.*" Thus, in the instant case, taking into the consideration the conduct of the Applicant at the time of his arrival in India, the original authority has exercised the discretion vested in it diligently and the Commissioner (Appeals) has correctly chosen to not interfere with the discretion exercised

by the original authority in not giving the Applicant the option to release the impugned goods, on redemption fine etc.

10.1. A request for allowing re-export of offending gold has been made. The Government observes that a specific provision regarding re-export of baggage articles has also been made in the R.A. under Section 80 of the Customs Act, 1962, which reads as follows:

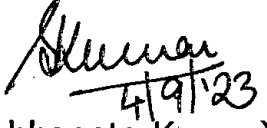
"Temporary detention of baggage.- Where the baggage of a passenger contains any article which is dutiable or the import of which is prohibited and in respect of which a true declaration has been made under Section 77, the proper officer may, at the request of the passenger, detain such article for the purpose of being returned to him on his leaving India and if for any reason, the passenger is not able to collect the article at the time of his leaving India, the article may be returned to him through any other passenger authorized by him and leaving India or as cargo consigned in his name."

10.2. 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.*"

10.3 Hence, the question of allowing re-export does not arise.

11. In view of the facts and circumstances of the case, the quantum of fine and penalty imposed in the OIO and as upheld in the OIA, is neither harsh nor excessive.

12. The revision application is, accordingly, rejected.


4/9/23
(Shubhagata Kumar)

Additional Secretary to the Government of India

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Order No. 210 /23-Cus dated 04.09.2023

Copy to:

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3. Sh. P. Kulasekran, Advocate, Time tower, room No.4, II Floor, Gengu Reddy Road (Opp. P.T. School), Egmore, Chennai-600008.
4. PPS to AS(RA)
5. Guard File
6. Spare Copy
7. Notice Board


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