

SPEED POST



F. No. 373/177/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...14/10/24...

Order No. 215 /24-Cus dated 14-10-2024 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 Airport C.Cus.I No. 71/2020 dated 19.02.2020, passed by the Commissioner of Customs (Appeals-I), Chennai.

Applicant : Sh. Patan Masthan Khan, Kadapa

Respondent : Pr. Commissioner of Customs, Chennai-I

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ORDER

A Revision Application, bearing No. 373/177/B/2020-RA dated 07.08.2020, has been filed by Sh. Patan Masthan Khan, Kadapa (hereinafter referred to as the Applicant), against the Order-in-Appeal Airport C.Cus.I No. 71/2020 dated 19.02.2020, passed by the Commissioner of Customs (Appeals-I), Chennai, vide which the Commissioner (Appeals) has upheld the Order-in-Original No. 160/2019-20-Commissionerate-I dated 06.09.2019, passed by the Joint Commissioner of Customs (Adjudication-Air), Chennai. Vide the aforementioned Order-in-Original, five gold cut bits and five gold Kadas, all of 24 carat purity, totally weighing 1456.5 grams and collectively valued at Rs. 48,09,363/- and assorted gold jewellery of 22 carat purity, totally weighing 223.5 grams and collectively valued at Rs. 6,76,311/- recovered from the Applicant, had been absolutely confiscated under Section 111(d) of the Customs Act, 1962. Besides, a penalty of Rs. 5,00,000/- was also imposed on the Applicant, under Section 112(a) of the Act, *ibid*.

2. Brief facts of the case are that the Officers of Air Intelligence Unit of Customs intercepted the Applicant on specific intelligence upon his arrival at Chennai Airport, from Goa, on 16.10.2018 at the exit of the arrival hall along with his one hand baggage on reasonable suspicion that he might be carrying gold or dutiable items/contraband either in his baggage or on his person. He was questioned as to whether he was in possession of gold/gold ornaments or dutiable items or contraband to which he replied in the negative. He was once again asked, before the commencement of the search of his person and his baggage, as to whether he was in possession of gold/gold jewellery either in his baggage or on his person to which he again replied in the negative. Upon the search of his bag nothing incriminating was found. On the search of his person the following gold items were found: -

S.No.	Item Description	Weight (gms)
1	05 yellow colour cut bits	758.5
2	05 yellow colour Kadas	698
3	1 yellow colour necklace	64.5
4	10 yellow colour chains	70.5
5	16 pairs of yellow colour earrings	84.5
6	2 yellow colour finger rings	04

The Government of India approved gold appraiser examined and certified the said seized items to be of gold as mentioned in above para. In his statement immediately after the seizure, recorded under Section 108 of the Customs Act, 1962, the applicant stated inter-alia that one Fayaz who is his friend, instructed him to board the Air India Flight AI 976 at Goa on 16.10.2018 which arrived from Kuwait via Goa to Chennai, to retrieve the gold which was kept concealed inside the tissue paper compartment situated in the rear side

toilet of said flight and hand over the same to an unknown person outside the Chennai Airport who would identify him with his photo and give him Rs. 25,000/- for carrying the same. He also stated that Fayaz had not provided him any details about the person who would receive the gold; that Fayaz was employed as a driver and both of them used to carry passengers who booked their vehicles from Chennai to Kadapa and vice-versa; and that he committed this offence out of his greed for monetary benefit. The matter was adjudicated by the original authority, vide aforesaid Order-in-Original dated 06.09.2019. 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 was a domestic passenger travelling within India and without any evidence the impugned order repeatedly emphasized that the seized gold is foreign gold, smuggled illegally into India; that the gold under seizure does not bear any foreign markings and should be returned to him; and that option for redemption under Section 125 ought to have been given to him which was not given.

4. Personal hearing in the matter was fixed on 15.07.2024, however, none appeared for either side. The personal hearing was again fixed for 07.08.2024. Ms. P. Kamalamalar, advocate appeared for the applicant and submitted that she is no longer the advocate on record in this case and that another advocate has submitted his Vakalatnama in the matter. It was pointed out to her that there is a delay of 80 days in the RA and that no CoD application has been submitted. She submitted that the new advocate would be submitting the required authorization and CoD etc. The personal hearing was held on 20.09.2024. Sh. Alifudeen, advocate appeared for the applicant and submitted that the delay of more than 70 days in filing the RA was due to the Covid pandemic and is therefore liable to be condoned. This is a case of seizure of 1680 grams of gold jewellery and cut gold pieces. The applicant was on a flight from Goa to Chennai and he was intercepted at Chennai. Customs alleged that the gold was picked up by the applicant from the rear of the aircraft which had a foreign leg from Kuwait to Goa before arriving at Chennai. He was asked if the applicant had any proof of ownership in respect of the gold but he has none. He retracted his statements and stated that these were obtained under duress. He prayed for reduction in RF & PP. No one appeared from the Respondent's side. However, a written submission dated 15.07.2024 has been received from Assistant Commissioner of Customs, Legal & Review, Chennai-1 Commissionerate which has been taken on record. The written submission states inter-alia that the orders of lower authorities are correct and should be upheld. Various case laws have been cited in support of their submission.

5. The date of receipt of OIA by the applicant is 20.02.2020 and the revision application has been filed on 07.08.2020. Thus there is a delay of around 77 days in filing

the revision application beyond the normal period of limitation. The applicant has cited lockdown due to Covid pandemic as the reason for the said delay in filing the revision application. Keeping in view the COVID pandemic, the Hon'ble Supreme Court, vide Order dated 23.03.2020, in SMW(C) No. 3/2020, directed extension of period of limitation prescribed under general law of limitation or under any special laws w.e.f. 15.03.2020, till further orders. Further orders in the matter were made on 08.03.2021. Vide order dated 08.03.2021 the Hon'ble Apex Court further extended the period of limitation to 28.02.2022. The delay is condoned.

6. The Government observes that the applicant was intercepted with the impugned gold and was unable to establish lawful ownership or possession of the same. It is also on record that the interception was on the basis of specific intelligence. The original adjudicating authority has observed in para 7 of the OIO that the applicant worked as a driver in Kuwait for 7 years till he returned to India; that his brother Sattar Khan had also gone to Kuwait and was working in a jewellery shop as tester of gold jewellery hence he could not come to India when summons were issued. These facts in conjunction with the fact that the aircraft had come from Kuwait to Goa, leads to the inescapable conclusion that this was a pre-meditated plan since it is evident that the applicant knew exactly where the gold was concealed and could not explain the lawful possession of the gold. Further, 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.

7. 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. In the present case, the Applicant has failed to produce any evidence that the gold was not smuggled. The manner of concealment, inside the tissue paper compartment situated in the rear side toilet of the flight points to the fact that the seized gold was smuggled into India and the Applicant was handling it in a premeditated manner to avoid detection. Applicant had admitted in his statement dated 16.10.2018 that he was instructed by one Fayaz to board the same flight and recover the gold from tissue paper compartment in the rear side toilet of the flight which was in turn to be handed over to an unknown person outside the Chennai airport. All this was done by him for a monetary consideration of Rs. 25,000/-. These statements dated 16.10.2018 have not been retracted. Furthermore, no documentary evidence has been produced to establish bonafide ownership. The Applicant has, thus, failed to discharge the burden placed on him, in terms of Section 123.

8. Further, the original authority has noted in para 19 of his order that the applicant not only brought the undeclared gold on his person to evade customs duty but also abetted in smuggling and his intention was to smuggle the said gold into India. He further denied the redemption of the gold items to the applicant citing case of UOI vs. Mohammed Aijaj Ahmed (W.P No. 1901/2003) reported in [2009(244) ELT 49 (Bom.)] vide which the Hon'ble Bombay High Court set aside the order of CESTAT ordering to allow redemption of gold to Mohammed Aijaj who acted as a carrier of gold and upheld the absolute confiscation of gold ordered by Commissioner of Customs. The said order of Bombay High Court was upheld by Hon'ble Supreme Court as reported in [2010 (253) ELT E83 (SC)]. Further, in para 21 of his order, the original authority noted that the applicant had accepted that he committed the act of smuggling on the request of an unknown person and this established the *mensrea*.

9.1 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 herein. 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 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*.

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

10. 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." 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".*" 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.

11. 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.
12. In view of the facts of the case the penalty imposed is just and fair.
13. In view of the above, the revision application is rejected.

Shubhagata Kumar
14/10/24

(Shubhagata Kumar)

Additional Secretary to the Government of India

Sh. Patan Masthan Khan
S/o Sh. Rasul Khan
No. 3-90, Janda Street
Nandaluru, Tanguturu
Kadapa, Andhra Pradesh-516151

of

Order No. 215 /24-Cus dated 14-10-2024

Copy to:

1. The Commissioner of Customs (Appeals-I), Chennai Airport & Air Cargo, 3rd floor, New Custom House, GST Road, Meenambakkam, Chennai – 600016
2. The Principal Commissioner of Customs, Commissionerate-I, Chennai-I (Airport), New Custom House, Meenambakkam, Chennai-600027
3. Sh. M.M.K. Alifudeen, Advocate, No. 19, Tippu Sahib Street, Ellis Road, Chennai-600002.
4. PPS to AS (RA).
5. Guard file.
6. Spare Copy
7. Notice Board

Shailendra Kumar Meena
19/10/24
ATTESTED

(शैलेन्द्र कुमार मीना)
(Shailendra Kumar Meena)
अनुभाग अधिकारी / Section Officer
वित्त मंत्रालय (राजस्व विभाग)
Ministry of Finance (Deptt. of Rev.)
भारत सरकार / Govt of India
नई दिल्ली / New Delhi