

SPEED POST



F. No. 373/155/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. 18/9/23

Order No. 216 /23-Cus dated 18.09.2023 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. 13/2019 dated 06.02.2019, passed by the Commissioner of Customs (Appeals), Bengaluru.

Applicant : Sh. Shailender Kishinchand Goplani, Thane

Respondent : Commissioner of Customs, Panambur, Mangaluru

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ORDER

A Revision Application, bearing No. 373/155/B/2019-RA dated 08.05.2019, has been filed by Sh. Shailender Kishinchand Goplani, Thane (hereinafter referred to as the Applicant), against the Order-in-Appeal No. 13/2019 dated 06.02.2019, passed by the Commissioner of Customs (Appeals), Bengaluru, whereby the Commissioner (Appeals) has upheld the Order-in-Original of the Additional Commissioner of Customs, Mangaluru Customs Commissionerate, Mangaluru bearing no. 23/2018 ADC dated 31.05.2018, except to the extent of setting aside the penalty of Rs. 2,17,413/-, imposed under Section 114AA of the Customs Act, 1962. Vide the aforementioned Order-in-Original, 01 silver coloured belt buckle with belt holder of gold, gent's kada of gold and 101 Nos of bead covers of Rudraksh Mala of gold, totally weighing 493 grams and collectively valued at Rs. 14,49,420/-, recovered from the Applicant, had been absolutely confiscated under Sections 111(d),(i), (l) & (m) of the Customs Act, 1962. Besides, penalties of Rs. 4,34,826/- & Rs. 2,17,413/- were also imposed on the Applicant, under Section 112(a) & 114AA, respectively, of the Act, *ibid*.

2. Brief facts of the case are that, the Customs Officers intercepted the Applicant who had arrived at Mangaluru International Airport, from Dubai, on 02.08.2017, while he was exiting the Customs Area. On verification of the Customs Declaration Form, it was seen that he had not mentioned anything regarding import of dutiable goods. Thereafter, upon the search of his personal items, the scanning machine indicated dense material in the belt buckle with belt holder, gent's kada and bead covers of the Rudraksh Mala. The said items were scraped with a knife and it revealed yellow coloured metal beneath the silver coating. The jewellery valuer in his report dated 02.08.2017 reported that the said items

were of 24 carat gold and that they were coated with chromium and that the net weight of the said items were 493 grams and were valued at Rs. 14,49,420/-. The Applicant in his statement dated 02.08.2017, under Section 108 of the Customs Act, 1962, inter-alia, stated that he was doing thread dying business at Ulhasnagar, Thane; that he attempted to smuggling by way of concealment of chromium coated belt buckle with belt holder, hand kada and bead covers of Rudraksh Mala made of gold, when he arrived on 02.08.2017; that above said items were given to him by one person named Ramesh from Alfaidi, Dubai; that Ramesh informed him that the above items are made of gold but coated with chromium and he would be able to pass through Customs without being detected; that Ramesh also asked him not to declare about the possession of gold in the Customs Declaration Form to be furnished to Customs at the airport on his arrival to India and informed him that gold had been concealed in the said items so as to evade payment of Customs duty; that Ramesh had told him that he need not know the identity of the person to whom the gold was to be handed over and that the said person himself would approach him outside the Mangalore airport; that Ramesh had paid him an amount of Rs. 10,000/- as advance for this work and told that another amount of Rs. 10,000/- would be given to him by the person collecting the above items at Mangaluru; that he had accepted the offer made by Ramesh and accordingly, in the night of 02.08.2017, he proceeded to Duabi airport along with the said items that were given to him by Ramesh.

3. The revision application has been filed mainly on the grounds that the dutiable goods brought in by the Applicant are neither restricted nor prohibited; and that the gold ought to be released on redemption fine and that the gold be released for re-export instead of absolute confiscation.

4. In the personal hearing held on 25.08.2023, in virtual mode, Sh. Narendra Heera, Advocate appeared on behalf of the Applicant and stated that the impugned gold is around 493 grams which is not a huge quantity; that the gold belongs to his client; that though concealment was there, an option to redeem against RF ought to have been given. He further states that the penalty imposed is very high and seeks reduction. He sought to submit additional case law citations in support of his case by EOD. No one appeared for the Respondent department nor any request for adjournment has 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 Government has carefully examined the matter. It is observed that the Applicant was intercepted at the exit of the arrival hall. The Applicant had not declared the impugned gold to Customs and he admitted in his statement that the gold recovered from him did not belong to him, and that he intended to clear the gold by way of concealment for monetary benefit of Rs. 20,000/-.

6. As per Section 123 of Customs Act 1962, in respect of gold and manufactures thereof, the burden of proof that such goods are not smuggled is on the person, from whom the goods are recovered. The gold items were ingeniously concealed under a white metallic coating to evade detection. Hence, the intention to smuggle is manifest. It has also been admitted that the Applicant acted as a carrier for monetary consideration and this statement under Section 108 of the Customs Act, 1962 has not been retracted. The Applicant has, thus, failed to discharge the burden placed on him, in terms of Section 123, *ibid*. Keeping in view the facts of the case and as the Applicant has failed to discharge the onus placed on him in terms of Section 123, the Government holds that the lower

authorities have correctly held the goods to be liable to confiscation under Section 111 of the Act, *ibid*.

7.1 Another contention of the Applicant is that the import of gold is not 'prohibited'. However, the Government observes that this contention of the Applicant is in the teeth of law settled by a catena of judgments of Hon'ble Supreme Court wherein 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 fulfillment of certain conditions. In the present case, as correctly brought out by the lower authorities, the Applicant herein had not fulfilled 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.*"

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 (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----."

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

8: The original authority has denied the release of offending 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 P. Sinnasamy {2016-TIOL-2544-HC-MAD-CUS}, 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)], 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.*" Hence, the Commissioner (Appeals) has correctly refused to interfere in the matter.

9.1 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. The said Section 80 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 authorised by him and leaving India or as cargo consigned in his name"

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

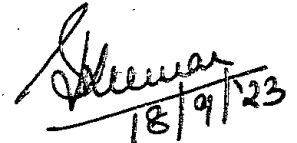
80 of the Act, *ibid.* In this case, the Applicant had not made a true declaration under Section 77.

9.2 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.

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

10. In view of the facts and circumstances of the case, the quantum of penalty imposed by the LAA is neither harsh nor excessive.

11. The revision application is rejected for reasons aforesaid.


18/9/23

(Shubhagata Kumar)

Additional Secretary to the Government of India

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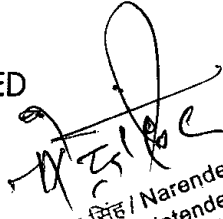
Order No. 216 /23-Cus dated 18.09.2023

Copy to:

1. The Commissioner of Customs (Appeals), BMTC Building, Above BMTC Bus Stand, Old Airport Road, Domlur, Bengaluru-560071.
2. The Commissioner of Customs, New Customs House, Panambur, Mangaluru-575010.
3. Sh. A.M Sachwani/V.M. Advani/N.J Heera/R.R Shah, Advocates High Court, Nulwala Building, Ground Floor, 41, Mint Road, Opposite G.P.O, Fort, Mumbai-400001.

4. PPS to AS(RA).
5. Guard file.
6. Spare Copy.
7. Notice Board.

ATTESTED


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