

SPEED POST



F. No. 373/51/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... 13/09/23.

Order No. 222/23-Cus dated 13-09-2023 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. Cal-Excus-000-APP-17-2019 dated 22.01.2019 passed by the Commissioner of Customs (Appeals), Cochin.

Applicant : Sh. Jabir Kottakunnummal, Kozhikode

Respondent : Commissioner of Customs, Calicut

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ORDER

A Revision Application, bearing No. 373/51/B/2019-RA dated 13.03.2019, has been filed by Sh. Jabir Kottakkunnummal, Kozhikode (hereinafter referred to as the Applicant), against the Order-in-Appeal No. CAL-EXCUS-000-APP-17-2019 dated 22.01.2019, passed by the Commissioner of Customs (Appeals), Cochin, whereby the Commissioner (Appeals) has upheld the Order-in-Original of the Joint Commissioner of Customs, Calicut International Airport, bearing no. 32/2016-17 dated 20.01.2017 except to the extent of setting aside the penalty imposed upon the Applicant under Section 114AA of the Customs Act, 1962. Vide the aforementioned Order-in-Original, 12 nos of gold bars, recovered from the Applicant, totally weighing 3 Kgs and valued at Rs. 73,56,480/-, had been absolutely confiscated under Section 111(d), (i), (j), (l), (m) and (o) of the Customs Act, 1962. Besides, penalties of Rs. 8,00,000/- each were also imposed on the Applicant under Section 112(a)&(b) and 114AA of the Act, *ibid*.

2. Brief facts of the case are that Customs officers intercepted the Applicant at the exit gate of Calicut International Airport upon his arrival at Calicut International Airport, from Muscat, on 16.04.2015. On enquiry by the officers as to whether he was in possession of any non-duty paid gold or any other valuable, he replied in the negative. Upon the examination of his baggage i.e. carton box, the officers recovered one Sanford Brand Emergency Light which was unusually heavy. Upon the dismantling of the said Emergency Light 12 yellow metal pieces covered with insulation tape and black carbon paper were recovered. The Goldsmith examined and certified the said 12 gold bars to be of 24 carat purity, totally weighing 3 Kgs. The Applicant, in his statement dated 16.04.2015, recorded under Section 108 of the Customs Act, 1962, *inter-alia*, stated that he was 30 years old; that he studied upto 10th standard; that on 12.04.2015 he went to Jeddah, anticipating a job in the shop of his brother, Siddhiq Al BadL; that since the business was dull there, he decided to return to his native place on 15.04.2015; that upon knowing this, his brother's friend handed over him a carton box in which the gold was concealed and offered an air ticket from Jeddah to Calicut (via Muscat) and a remuneration of Rs. 30,000/-; that he was further told that upon his arrival at Calicut, he should hand over the carton box containing gold to a person named Siddique, who would be identifying and approaching him outside Calicut airport; that his brother's friend had taken his photo in his mobile and

had sent it to the said person through 'whatsapp' and told him that his remuneration would be provided by that person.

3. The revision application has been filed mainly on the grounds that import of gold is not 'prohibited' and is only 'restricted'. The Applicant has also requested that the penalty imposed upon the Applicant be reduced.

4. In the hearing held on 17.08.2023, Sh. Mitra Prasad, Advocate accepted that the offending items were not bonafide baggage; that they did not belong to Mr. Jabir, but prayed for a lenient view and reduction in penalty on grounds of financial hardship of the passenger. No one appeared from the department's side, no request for adjournment has been received and as such, it is presumed that the department has nothing to add in the matter.

5. The Government has carefully examined the matter. It is observed that the Applicant was intercepted at the exit gate of the airport. Twelve gold bars ingeniously concealed in an emergency light were recovered from him. He admitted in his statement dated 16.04.2015 that he intended to clear the gold without paying duty by way of concealment for a monetary benefit of Rs. 30,000/- and this statement has not been retracted.

6. As per Section 123 of Customs Act 1962, when goods are seized by an officer under the reasonable belief that they are smuggled, the burden of proof that such goods are not smuggled is on the person, from whom such goods are recovered. No documents evidencing ownership and licit purchase have been placed on record. Three Kgs of gold bars were ingeniously concealed. Hence, the intention to smuggle is manifest. 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 for confiscation under Section 111 of the Act, *ibid*.


7. The Applicant has contended that the import of gold is not 'prohibited'. The Government observes that import of gold and articles thereof in baggage is allowed subject to fulfillment of certain conditions. In the present case, these conditions have not been 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 Section 2(33) of the Customs Act, 1962.

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 (supra), the Hon'ble Madras High Court has held that *"non-consideration or non-application of mind to the relevant factors, renders exercise of discretion manifestly erroneous and it causes for judicial interference."* Further, *"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."* Such a

case is not made out. Hence, the order of absolute confiscation does not merit interference.

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

10. In view of the above, the Order-in-Appeal is upheld.


19/9/23
(Shubhagata Kumar)
Additional Secretary to the Government of India

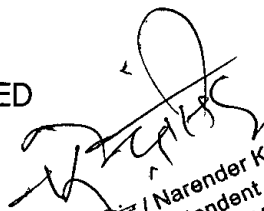
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Order No. 922/23-Cus dated 19-09-2023

Copy to:

1. The Commissioner of Customs (Appeals), C.R Building, I.S Press Road, Kochi-682031
2. The Commissioner of Central Excise, Customs & Service Tax, C.R Building, Mananchira, Calicut-673001.
3. PPS to AS(RA).
4. Guard File.
5. Spare Copy.
6. Notice Board.

ATTESTED


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