

**SPEED POST**



F.No. 373/05/B/SZ/2019-RA  
GOVERNMENT OF INDIA  
MINISTRY OF FINANCE  
(DEPARTMENT OF REVENUE)

14, HUDCO VISHALA BLDG., B WING  
6<sup>th</sup> FLOOR, BHIKAJI CAMA PLACE,  
NEW DELHI-110 066

Date of Issue... 4/10/2023

Order No. 225/23-Cus dated 03/10/2023 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 Applications under Section 129 DD of the Customs Act, 1962, against the Order-in-Appeal No. TCP-CUS-000-APP-223-18 dated 20.12.2018, passed by the Commissioner of CGST, Service Tax & Central Excise (Appeals), Tiruchirappalli.

Applicant : Sh. Jabbarkhan, Chennai.

Respondent : The Commissioner of Customs (Preventive), Tiruchirappalli

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**ORDER**

Revision Application No. 373/05/B/SZ/2019-RA dated 07.01.2019 has been filed by Sh. Jabbarkhan, Chennai (hereinafter referred to as the Applicant) against the Order-in-Appeal No. TCP-CUS-000-APP-223-18 dated 20.12.2018, passed by the Commissioner of CGST, Service Tax & Central Excise (Appeals), Tiruchirappalli. The Commissioner (Appeals) has rejected the appeal filed by the Applicant herein against the Order-in-Original passed by the Assistant Commissioner of Customs (Airport), Tiruchirappalli, bearing no. 155/2018 dated 11.09.2018, wherein 02 Nos. of Gold cut piece of 24 carat purity, weighing 79.00 grams valued at Rs. 2,41,108/- and 07 Nos. of Benson & Hedges Cigarette cartons valued at Rs. 12,110/-, totally valued at Rs. 2,53,218, recovered from Applicant, were confiscated absolutely under Section 111(d), 111(i), 111(l), 111(m) & 111(o) of the Customs Act, 1962 read with Section 3(3) of the Foreign Trade (Development & Regulation) Act, 1992 along with cigarettes and other tobacco products (P & L) Rules, 2008, besides Personal Penalty of Rs. 32,000/- was also imposed on the Applicant under Section 112 (a) 112(b) of the Act, *ibid*.

2. Brief facts of the case are that, the Applicant arrived, on 05.08.2018, at Tiruchirappalli International Airport. He was intercepted by the Customs officers and 02 Nos. of Gold cut pieces of 24 carat purity weighing 79.00 grams valued at Rs. 2,41,108/- and 07 Nos. of Benson & Hedges Cigarette cartons valued at Rs. 12,110/-, totally valued at Rs. 2,53,218/- were recovered from him. He attempted to clear the above items without opting to declare the same to the Customs officials. It was noticed that he is a frequent traveller. He admitted in his statement that he brought the above said items for sale in India for monetary benefit; that he departed for Dubai on 03.08.2018 from Chennai and returned to Tiruchirappalli on 05.08.2018. He admitted in his statement dated 11.09.2018 that he brought the impugned items for sale in India for monetary gain, but could not produce any documents to establish ownership of the gold. The impugned goods were seized by the Customs officers and the matter was adjudicated by the Assistant Commissioner of Customs (Airport), Tiruchirappalli vide aforesaid Order-in-Original bearing no. 155/2018 dated 11.09.2018 vide which the goods were confiscated absolutely, besides which a personal penalty of Rs. 32,000/- was imposed. Aggrieved, the

Applicant filed an appeal before the Commissioner of CGST & Central Excise (Appeals), Tiruchirappalli, which has been rejected.

3. The instant revision application has been filed mainly on the grounds that there is no specific allegation that he was intercepted while passing through green channel or crossed the green channel or was at the exit; that he kept the two nos. of gold cut pieces and that he was all along under the control of the officers of Customs; that he is the owner of the gold recovered and has not brought the same for third party or monetary consideration; that gold is a restricted item and not a prohibited goods; that ownership of the goods is not disputed and there is no ingenious concealment; that since the import of gold is not prohibited, the Order-in-Appeal may be set aside; Applicant may be given free allowance; he may be permitted to re-export the gold and the penalty may be set aside/reduced.

4. None appeared for the Personal hearing on 16.08.2023 from either the Applicant or the Respondent's side. In the personal hearing held on 06.09.2023, Smt. P. Kamala Malar, Advocate, appeared for the Applicant and reiterated that there has been no ingenious concealment of gold and that the cigarettes seized have been abandoned by her client. She accepted that her client could not produce any bill for the impugned gold nor establish his ownership of the impugned gold. She prayed that the gold cut pieces be allowed to be redeemed against reduced fine & penalty or allowed to be re-exported. No one appeared from the department's side nor anything has been heard from them regarding adjournment, hence it is presumed that the department has nothing to add in the matter.

5. The Government has carefully examined the matter. The contentions of the Applicant that he had not crossed the Green Channel and had verbally declared the gold articles in his possession to the Customs officer etc., are not acceptable as the same had not been stated before the Customs authorities when the charges were explained to him and his statement under section 108 of the Customs Act, 1962 was recorded; that statement has not been retracted. Further, he waived the requirement of a show cause notice and availed the opportunity of personal hearing, at which stage also arguments to this effect were not made. Thus, it is not open to the Applicant to dispute the facts at this stage.

Further, though the Applicant claimed that he was the owner of the offending goods, he has failed to produce any evidence in support of his claim. Thus, there is no evidence on record to establish that the Applicant was the legitimate owner of the goods. As such, the subject contentions of the Applicant are sans merit.

5.2 As per Section 123 of the Act, *ibid*, 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*. No documents evidencing ownership and licit purchase have been produced. 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 as the Applicant has failed to discharge the onus placed on him in terms of Section 123, the Government concurs with the lower authorities that the seized gold item was liable to confiscation under Section 111 *ibid* and that the penalty was imposable on the Applicant.

5.3 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 against several 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 the case of 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."*

5.4 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----."*

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

5.6 The Government observes that the original authority has denied the release of seized gold item 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 {2016 (344) ELT 1154 (Mad.)}*, 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."* Such a case is not made out. Therefore, keeping in view the judicial pronouncements above, the

Commissioner (Appeals) has correctly refused to interfere with the discretion exercised by the original authority.

5.7 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.

5.8 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.

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

5.10 Further, on the issue of foreign origin cigarettes recovered from the Applicant, it is on record that the Applicant had not made any declaration in respect of the offending goods carried by him, as required under Section 77 of the Customs Act, 1962. The Applicant had, in fact, waived the requirement of a show cause notice and admitted during the personal hearing that the goods were brought for commercial purposes. As such, the contention that there was no misdeclaration is not borne out from records and appears to be just an afterthought.

6. In the facts and circumstances of the case, the penalty imposed by the original authority, as upheld by the Commissioner (Appeals), is neither harsh nor excessive.

7. The revision application is, accordingly, rejected.

*Shubhagata Kumar*  
3/10/23

(Shubhagata Kumar)

Additional Secretary to the Government of India

Sh. Jabbarkhan  
C/o S. Palanikumar(Advocate)  
No. 10, Sunkurama Street  
2<sup>nd</sup> Floor, Chennai-600001

Order No. 225 /23-Cus dated 03.10.2023

Copy to:

1. The Commissioner of CGST, 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. Kamalamalar, Advocates, No. 10, Sunkurama Street, 2<sup>nd</sup> Floor, Chennai-600001.
4. PPS to AS (RA).
5. Guard file.
6. Spare Copy
7. Notice Board

ATTESTED

*Shallendra Kumar Meena*  
09/10/23  
(Shallendra Kumar Meena)  
अनुभाग अधिकारी / Section Officer  
वित्त मंत्रालय (राजस्व विभाग)  
Ministry of Finance (Deptt. of Rev.)  
भारत सरकार / Govt. of India  
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