

**SPEED POST**



F. No. 373/90/B/SZ/2023-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 25/10/24..

Order No. 226/24-Cus dated 25-10-2024 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 Applications under Section 129 DD of the Customs Act, 1962, against the Order-in-Appeal No. COC-CUSTOM-000-APP-32/2023-24 dated 16.06.2023, passed by the Commissioner of Customs (Appeals), Cochin.

Applicant : Shri Rafi Melepeedikakkal, Kerala

Respondent : The Commissioner of Customs (Preventive), Cochin

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**ORDER**

A Revision Application No. 373/90/B/SZ/2023-RA dated 20.10.2023 has been filed by Shri Rafi Melepeedikakkal, Kerala (hereinafter referred to as the Applicant) against the Order-in-Appeal No. COC-CUSTOM-000-APP-32/2023-24 dated 16.06.2023, passed by the Commissioner of Customs (Appeals), Cochin. The Commissioner (Appeals) has upheld the Order-in-Original of the Deputy Commissioner, Air Customs, Cochin, bearing O.S. No. 85/2021 dated 01.04.2021.

2. Brief facts of the case are that, the Applicant, an Indian passport holder, who arrived in India at Cochin International Airport, Nedumbassery, Cochin from Sharjah on 31.03.2021, was intercepted by the officers of Air Intelligence Unit at the exit gate when he passed through green channel without making any declaration before Customs and seized two gold chains totally weighing 233.2 grams and valued at Rs. 9,39,076/- (Assessable value) [Rs. 10,63,625/- (Market value)] from the Applicant. The said gold chains were ingeniously concealed by the Applicant inside a mask which was kept in his right pocket. The Applicant stated during his personal hearing to the Adjudicating Authority that the said gold was purchased for his sister's daughter marriage.

3. The Adjudicating Authority vide the aforementioned Order-in-Original dated 01.04.2021, absolutely confiscated the impugned gold under Section 111(d), 111(i) and 111(l) and 111(m) of the Customs Act, 1962 read with Section 3(3) of the Foreign Trade (D&R) Act, 1992. A penalty of Rs. 35,000/- was also imposed on the Applicant under Section 112(a) and (b) of the Customs Act, 1962. Aggrieved, the Applicant filed appeal before the Commissioner Appeals who has upheld the Order-in-Original and rejected the appeal vide impugned OIA dated 16.06.2023. Aggrieved by the OIA, the Applicant filed this Revision Application.

4. The instant revision application has been filed mainly on the grounds that the impugned order is not legal or proper; that the Applicant had not imported the gold for trade or business and the items were brought by the Applicant for his bonafide use and hence not liable for confiscation; that he had not concealed any dutiable or prohibited items; that gold is not a prohibited good; that the adjudicating authority ought to have allowed redemption of the seized gold. The prayer is to set aside the

impugned O-I-A and release the gold to the Applicant for home consumption or for re-export.

5. Personal hearing in the matter was fixed on 20.09.2024. Ms. Linda Rajeev, Advocate appeared on behalf of the Applicant and submitted that the RA was filed with delay owing to the negligence of her staff who did not post the application in time. Since the Applicant was not at fault, she prayed for condonation of the delay. She further submitted that the Applicant had been working in Sharjah as a sales manager for 14 years before coming to India with the impugned gold; that two gold chains were worn by him and were declared to Customs; still a spot adjudication was conducted without giving him any opportunity to represent his case with help of legal counsel and a penalty of Rs. 35,000/- imposed along with absolute confiscation of the gold. She referred to a case decided by the Tribunal & reported in ELT 2011 where it has been held that in the confiscation of gold, Section 125 of the Customs Act is not applicable. She prayed for a lenient view in the matter. None appeared from the Respondent's side and also no request for adjournment has been received. Therefore, it is presumed that department has nothing to add in the matter.

6. On examination of the relevant case records, it is observed that the impugned Order-in-Appeal dated 16.06.2023 was received by the Applicant on 20.06.2023 as admitted by him. The revision application has been filed on 20.10.2023. Thus, there is delay of around 32 days in filing revision application beyond the normal period of limitation. As per request application for condonation of delay filed by the Applicant, the reason cited for the delay has been attributed due to an inadvertent mistake by the concerned staff his Counsel's office who failed to dispatch the appeal on due date. The counsel has admitted to the delay as attributable to his office staff and not due to any fault of the applicant therefore in consideration of the counsel's submissions in this regard, the delay is condoned.

7. The Government has examined the matter. It is observed that the Applicant was intercepted at the exit point of the arrival hall after passing through the Customs Green Channel. The Applicant did not declare the gold brought by him before the Customs officer as required under Section 77 of the Customs Act, 1962. The impugned gold items were recovered from the Applicant which were ingeniously concealed by the Applicant inside mask which was kept in his right pocket and also

that he intended to clear the gold items by way of concealment thereby contravened the provisions of Customs Act, 1962. Though the Applicant claimed that the impugned gold chains were purchased by him for his sister's daughter marriage but no proof of licit ownership has been put forth by the Applicant. As per seizure report of O.S.No. 85/2021 dated 01.04.2021, it is observed that the Applicant's stay at abroad was 18 days only. The Applicant was also not an eligible passenger to import gold as part of baggage as he did not fulfil the conditions stipulated in the Notification No. 12/2012-Cus dated 17.03.2012 vide which he was required to have stayed abroad for not less than six months and should have had sufficient foreign currency to pay the duty which was not the case. It is observed that no documents evidencing ownership and licit purchase were produced at the time of interception. Furthermore, he did not declare the gold to Customs as required under Section 77 of the Customs Act, 1962. Hence the impugned goods were brought into India in violation of the provisions of the Customs Act & Baggage Rules.

8. 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 impugned goods, 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 adjudicating & appellate authorities that the impugned goods were liable to confiscation under Section 111 *ibid* and that the penalty was imposable on the Applicant.

9.1 The Applicant has contended that the import of gold is not 'prohibited'. However, the Government observes that this contention of the Applicant is against several judgements of the Hon'ble Supreme Court in which 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 fulfilment of certain conditions. In the present case, as correctly brought out by the lower authorities, the Applicant in this case did not fulfil 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.*"

9.2 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----."*

9.3 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 of assigned to it under Section 2(33) of the Act, *ibid.*

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

10. The Government observes that the original authority had denied the release of 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 the option to release 'prohibited goods' on redemption fine is discretionary. 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.*" Further, 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, the Commissioner (Appeals) has correctly refused to interfere with the discretion exercised by the original authority.

11.1 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. 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.

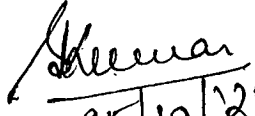
11.2 Further, the Hon'ble Delhi High Court has, in the case of *Jasvir Kaur vs. UOI* {2009 (241) ELT 621 (Del.)}, held that re-export is not permissible when article is

recovered from the passenger while attempting to smuggle it. Hence, the question of allowing re-export does not arise.

12. 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.

13. In the facts and circumstances of the case, the Government finds that the order for absolute confiscation of the impugned goods as upheld by Commissioner (Appeals) does not require any interference. Also, the quantum of penalty imposed on the Applicant is neither harsh nor excessive.

14. The revision application is rejected for the reasons aforesaid.

  
25/10/24

(Shubhagata Kumar)

Additional Secretary to the Government of India

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Order No. 226/24-Cus dated 25-10-2024

Copy to:

1. The Commissioner of Central Tax, Central Excise & Customs (Appeals), Central Revenue Building, I.S. Press Road, Kochi -682018.
2. The Commissioner of Customs (Preventive), 5<sup>th</sup> Floor, Catholic Centre, Broadway, Cochin -882031.
3. Ms. Linda M.J. Advocate, Faizal Chambers, Pullepady Cross Road, Cochin - 682 018.
4. PPS to AS (RA).
5. Guard file.
6. Spare Copy
7. Notice Board

  
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