

SPEED POST



F. No. 373/147/B/SZ/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. 25/10/24

Order No. 227/24-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 Application, filed under Section 129 DD of the Customs Act 1962 against the Order-in-Appeal No.TCP-CUS-000-APP-039-20 dated 04.05.2020, passed by the Commissioner of GST, Service Tax & Central Excise (Appeals), Tiruchirappalli.

Applicant : Shri Allapitchai, Ramanathapuram (T.N.)

Respondent : The Commissioner of Customs (Preventive), Tiruchirappalli

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ORDER

Revision Application No. 373/147/B/SZ/2020-RA dated 22.07.2020 has been filed by Shri Allapitchai, Ramanathapuram (T.N.) (hereinafter referred to as the Applicant), against the Order-in-Appeal No.TCP-CUS-000-APP-039-20 dated 04.05.2020, passed by the Commissioner of GST, Service Tax & Central Excise (Appeals), Tiruchirappalli. The Commissioner (Appeals) has rejected the appeal filed by the Applicant against the Order-in-Original No. 225/2019 dated 04.06.2019, passed by the Assistant Commissioner of Customs (Preventive), Tiruchirappalli vide which one gold chain with a golden dollar of 22 carat purity and four gold bangles of 22 carat purity totally weighing 210.800 gms and valued at Rs. 6,43,362/-, recovered from the Applicant, were confiscated absolutely under Section 111(d), 111(i), 111(l) and 111(m) of the Customs Act, 1962 and a penalty of Rs. 64,000/- was also imposed on the Applicant under Section 112 (a) of the Act, ibid.

2. Brief facts of the case are that, the Applicant, an Indian passport holder, arrived from Kuala Lumpur on 03.01.2019, at Trichy Airport. He was intercepted by the officers of Air Intelligence Unit (AIU), Airport, Trichy, when he was attempting to cross the green channel in a suspicious manner. The AIU officers verified with the Customs baggage officers and found that the Applicant had neither filed any Customs declaration form nor verbally declared, any dutiable goods to them. When the officers asked him whether he had brought any dutiable goods including gold in any form with him, either in person or in his baggage, he replied in the negative. Not satisfied with his reply, the officers conducted a search and recovered one unfinished gold chain with a golden dollar and four nos. of unfinished gold bangles, all of 22 carat purity totally weighing 210.800 gms. valued at Rs. 6,43,362/- which were kept in his pant pocket. The officer asked the Applicant why he did not declare the possession of gold even when specifically asked, he replied that the said gold chain did not belong to him and that an unknown person handed over the above said gold chain and bangles to him at Kuala Lumpur Airport while he was waiting to board flight to India. He requested him to clear the said gold items without declaring and without payment of Customs duty by concealing the same to hand them over to a person outside Trichy Airport as instructed, for which he would be paid a commission of Rs. 7,000/-. This was accepted by the Applicant. On the reasonable belief that the gold items were attempted to be smuggled into India in contravention of the Customs Act, 1962, the

officers seized the same under a Mahazar for taking further action under the Customs Act, 1962.

3. After due process of law, The adjudicating authority adjudicated the matter vide aforesaid Order-in-Original No. 225/2019 dated 04.06.2019. Aggrieved, the Applicant filed an appeal before the Commissioner of GST, Service Tax & Central Excise (Appeals), Tiruchirappalli, which has been rejected. Hence, this revision application has been filed by the Applicant.

4. The above revision application has been filed mainly on the grounds that the Applicant arrived at Trichy Airport alongwith his wife and daughter after attending a social function at Kuala Lumpur, Malaysia; that his wife was wearing the gold chain with a gold dollar and his daughter was wearing the four gold bangles; that they told the Customs officers that the impugned gold items were their personal belongings but the officers did not listen; that gold is not a prohibited item for import. The prayer is to set aside the order and to allow the Applicant to redeem the gold items on payment of fine and penalty under Section 80 of the Customs Act, 1962 or the order for release of gold ornaments on payment of duty and fine. The Applicant has also quoted case laws in support of their case.

5. Personal hearings in the matter were fixed on 14.06.2024, 08.07.2024 and 04.10.2024. Shri A. Selvaraj, Advocate appeared on 04.10.2024 on behalf of the Applicant and reiterated the written submissions and prayed for a lenient view and for release of the goods to the Applicant. Shri S. Sivakumar, Superintendent, Customs, Trichy appeared on 04.10.2024 on behalf of the Respondent department and submitted that the Applicant had concealed the impugned gold in his trouser pocket. He stated that the O-I-A is proper and should be upheld.

6. The Government has examined the matter. The Applicant's contention that gold ornaments were worn by his wife and daughter are at variance with the fact on record as well as his own statement under Section 108 of the Customs Act, 1962 made before Customs officers at the time of the seizure. If the gold was indeed his and worn by his

family members, there would have been no need for him to claim that the gold was handed over to him by someone at Kuala Lumpur airport for handing over the same to a person outside at Trichy airport in exchange for Rs. 7,000/-. In light of the facts on record, the Applicant's contention in the RA appears to be an afterthought. It is further observed that Applicant was a short visit passenger and not eligible to import gold as a part of baggage. The Applicant chose not to declare the gold, which as per facts on record was kept concealed in his pant pocket. The entire proceedings were covered under a Mahazar in presence of independent witnesses which also corroborates the sequence of events and has been acknowledged by the Applicant in his voluntary statement which has not been retracted. He did not possess any valid documents for legal import or possess foreign currency to pay the Customs duty. Furthermore, it is on record that the Applicant on being questioned about possession of gold/gold jewellery on his person/baggage, replied in the negative, instead of making a truthful declaration as required under Section 77 of the Customs Act, 1962. Further, reliance is placed on the judgement of Hon'ble Supreme Court, in the case of Surjeet Singh Chhabra vs. U.O.I {1997 (89) ELT 646 (SC)}, wherein Hon'ble Supreme Court 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."* In the present case, the Applicant has admitted his involvement in the case of smuggling due to the lure of earning easy money. The Government therefore concurs with the findings of the Commissioner Appeals.

7. 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 Customs Act, 1962. 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 agrees with the lower authorities that the seized gold items were liable to confiscation under Section 111 *ibid* and that the penalty was imposable on the Applicant.

8.1 The Applicant has contended that the import of gold is not 'prohibited'. However, the Government observes that this contention of the Applicant flies in the teeth of 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."

8.2 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----."

8.3 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*.

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

9. 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.

10. The case laws relied upon by the Applicant, in support of his various contentions do not come to his rescue in view of the dictum of Hon'ble Supreme Court and Hon'ble High Courts, as above.

11. In view of 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.

12. The revision application is, accordingly, rejected and the Order-in-Appeal is upheld.

Shubhagata Kumar
25/10/24

(Shubhagata Kumar)

Additional Secretary to the Government of India

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Order No. 227/24-Cus dated 25-10-2024

Copy to:

1. The Commissioner of GST, 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. A. Selvaraj, Superintendent of Customs (Retd.), 68, Krishnamurthynagar, Tiruchirappalli- 620 021
4. PPS to AS(RA)
5. Guard file
- ✓ 6. Spare Copy
7. Notice Board

Shailendra Kumar Meena
ATTESTED

(शैलेन्द्र कुमार मीना)
(Shailendra Kumar Meena)
अनुभाग अधिकारी / Section Officer
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