

SPEED POST



F.No. 373/01/B/SZ/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..13/10/23

Order No. 231 /23-Cus dated 12-10-2023 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-222-18 dated 20.12.2018, passed by the Commissioner of CGST, Service Tax & Central Excise (Appeals), Tiruchirappalli.

Applicant : Shri Md. Sameem Mullah, Chennai.

Respondent : The Commissioner of Customs (Preventive), Tiruchirappalli

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ORDER

Revision Application No. 373/01/B/SZ/2019-RA dated 07.01.2019 has been filed by Shri Md. Sameem Mullah, Chennai (hereinafter referred to as the Applicant) against the Order-in-Appeal No. TCP-CUS-000-APP-222-18 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. 138/2018 dated 30.08.2018, wherein two Gold cut pieces of 24 carat purity and 17 cartons of Gudang Garam Cigarette, together valued at Rs. 2,65,476/-, 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. 30,750/- 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 Customs officers and two Gold cut pieces of 24 carat purity, weighing 80.300 grams valued at Rs. 2,45,076/- and 17 Nos. of Gudang Garam Cigarette cartons valued at Rs. 20,400/-, totally valued at Rs. 2,65,476/- 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 30.08.2018 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. 138/2018 dated 30.08.2018. Aggrieved, the Applicant filed an appeal before the Commissioner of CGST, Service Tax & Central Excise (Appeals), Tiruchirappalli, which has been rejected.

3. The instant revision application has been filed mainly on the grounds that the order of the lower adjudicating authority is against law, weight of evidence, circumstances and probabilities of the case; that gold is not a prohibited item; that there was no ingenious concealment; that the appellant was all along the control of the officers at the red channel; and did not pass through or cross the Green Channel and submitted that no declaration card was provided by the Customs; that the Applicant can bring goods worth Rs. 45,000/- as free allowance as per section 79 of the Customs Act, 1962. He prayed that the impugned Order-in-Appeal be set aside, the impugned gold items be permitted for re-export/released and that the redemption fine and penalty be set aside/ reduced.

4. Personal hearing in the matter was fixed on 16.08.2023 but none appeared. Thereafter, in the personal hearing held on 06.09.2023, in virtual mode, Smt. P. Kamala Malar, Advocate, appeared on behalf of the Applicant and reiterated that there has been no ingenious concealment of gold by her client; that her client did not cross the green channel of Customs and that her client verbally declared to Customs that he was carrying gold. She accepted that the verbal declaration made to Customs was not part of her client's statement. As such, she prayed for a lenient view in the matter. No one appeared from the department's side nor has any request for adjournment been made. Therefore, 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. verbally are not acceptable as the same had not been contested before the Customs authorities when the charges were explained to him and his statements recorded under section 108 of the Customs Act, 1962. Further, he ~~waived the requirement of a show cause notice and availed the opportunity of personal~~ hearing, at which stage also contentions 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 but he has failed to produce any documents or evidence in support of his claim. As such, the contentions of the Applicant in this regard are unacceptable.

6. 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 for confiscation under Section 111 *ibid* and that the penalty was imposable on the Applicant.

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 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 *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 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.

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

10. 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.

11. The revision application is, accordingly, rejected.

Shubhagata Kumar
12/10/23

(Shubhagata Kumar)

Additional Secretary to the Government of India

Shri Md. Sameem Mullah
C/o S. Palanikumar (Advocate)
No. 10, Sunkurama Street
2nd Floor, Chennai-600001

Order No. 231 /23-Cus dated 12-10-2023

Copy to:

1. The Commissioner of CGST, Service Tax & Central Excise (Appeals), 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. Kamala Malar, Advocates, No. 10, Sunkurama Street, 2nd Floor, Chennai-600001.
4. PPS to AS (RA).
5. Guard file.
6. Spare Copy
7. Notice Board

ATTESTED

Shailendra Kumar Meena
13/11/23

(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
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