

SPEED POST



F. No. 373/04/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. 232/23-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 Application, filed under Section 129 DD of the Customs Act 1962 against the Order-in-Appeal No.TCP-CUS-000-APP-230-18 dated 20.12.2018, passed by the Commissioner of Customs & Central Excise (Appeals), Tiruchirappalli.

Applicant : Shri M. Ganapathy, Chennai

Respondent : The Commissioner of Customs (Preventive), Tiruchirappalli

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ORDER

A Revision Application, bearing No. 373/04/B/SZ/2019-RA dated 07.01.2019, has been filed by Sh. M. Ganapathy, Chennai (hereinafter referred to as the Applicant), against the Order-in-Appeal No.TCP-CUS-000-APP-230-18 dated 20.12.2018, passed by the Commissioner of Customs & Central Excise (Appeals), Tiruchirappalli, whereby the Commissioner (Appeals) has upheld the Order-in-Original No. 164/2018 dated 04.10.2018, passed by the Assistant Commissioner of Customs (Airport), Tiruchirappalli. Vide the aforementioned Order-in-Original, one unfinished unjoined gold chain of 24 carat purity weighing 51.000 gms valued at Rs. 1,43,109/-, recovered from the Applicant, had been absolutely confiscated under Section 111(d), 111(e), 111(l), 111(m) & 111(o) of the Customs Act, 1962 read with Section 3(3) of the Foreign Trade (Development & Regulation) Act, 1992. Besides, Personal Penalty of Rs. 18,600/- was also imposed on the Applicant, under Section 112(a) and 112(b) of the Act, *ibid*.

2. Brief facts of the case are that, the Applicant arrived from Singapore on 03.10.2018, at Trichy International Airport. He was intercepted by the Customs officers and one unfinished unjoined gold chain of 24 carat purity weighing 51.000 gms., valued at Rs. 1,43,109/- was recovered from him. He attempted to clear the above items without opting to declare the same in a Customs Declaration Form or verbally to the Customs officials. He admitted that he brought the above said items for sale in India and monetary benefit. He did not produce any purchase bills of the above said items; in his statement he admitted his role in this case as above. Thereafter, the aforesaid Order-in-Original bearing no. 164/2018 dated 04.10.2018 was adjudicated by the Assistant Commissioner of Customs (Airport), Tiruchirappalli, and the gold item was absolutely confiscated besides Personal Penalty of Rs. 18,600/- was imposed. Aggrieved, the Applicant filed an appeal before the Commissioner of Customs (Appeals), Tiruchirappalli, which has been rejected.

3. The revision application has been filed, mainly, on the grounds that gold is not a prohibited item; that the Applicant did not pass through or cross the Green Channel; that he was wearing the gold chain and submitted that no declaration card was provided by any authority and hence question of filling up declaration card does not arise; and that the

impugned order be set aside, the gold item be permitted for re-export/released and that the penalty be reduced.

4. Personal hearings in the matter were fixed on 16.08.2023 and 06.09.2023, in virtual mode. In the personal hearing held on 06.09.2023, Smt. P. Kamala Malar, Advocate, appeared on behalf of the Applicant and submitted that her client brought only one gold chain; there is no concealment and ownership is not disputed and that the chain was unfinished and of 24 carat purity since this is the form in which these chains are sold abroad. She accepted that her client was not able to produce any bill or invoice to establish ownership. She stated that the absolute confiscation is too harsh & that her client ought to be given an opportunity to redeem the impugned gold chain on payment of redemption fine and penalty etc., or allow re-export. No one appeared from the department's side and no request for adjournment etc. has been received from the department, 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 with an unfinished unjoined gold chain of 24 carat, without making any declaration in respect thereof. He had not declared the import of gold items voluntarily to the Customs officers, as required under Section 77 of the Customs Act, 1962. The Applicant herein had, after waiving the requirement of a Show Cause Notice, appeared before the original authority for hearing at which time he never raised any of the factual contentions, as raised in the revision application. Hence, there is no doubt that these contentions are nothing but afterthought and, as such, cannot be accepted. Further, the gold item was an item of unfinished, unjoined form of 24 carat purity. Hence, the only conclusion possible in this case is that this was not an item of commonly worn jewellery for personal use.

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 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 item was liable to 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 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.

9.1 The Applicant has requested to be allowed to re-export the offending goods. The Government observes that a specific provision regarding re-export of baggage articles has been made under Section 80 of the Act, *ibid*.

9.2 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 {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 made no declaration in respect of the subject goods. Further, the Hon'ble Delhi High Court has, in the case of *Jasvir Kaur vs. UOI {2019 (241) ELT 521 (Del.)}*, held that re-export "*cannot be asked for as of right-----*. The passenger cannot be given a

chance to try his luck and smuggle Gold into the country and if caught he should be given permission to re-export."

9.3 Hence, the request for re-export cannot be allowed.

10. In view of the facts and circumstances of the case, the quantum of penalty imposed by Lower Adjudicating Authority is neither harsh nor excessive.

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

Shubhagata Kumar
12/10/23

(Shubhagata Kumar)

Additional Secretary to the Government of India

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

Order No. 232/23-Cus dated 12-10-2023

Copy to:

1. The Commissioner of CGST & 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

Shailendra Kumar Meena
13/11/23
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