

SPEED POST



F. No. 373/268/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. 27.11.24...

Order No. 236/24-Cus dated 27-11-2024 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 Airport. Cus. I. No. 192/2020 dated 14.08.2020, passed by the Commissioner of Customs (Appeals-I), Chennai.

Applicant : Shri Mohammed Shikabudeen, Chennai

Respondent : The Principal Commissioner of Customs, Chennai-I

ORDER

A Revision Application, bearing No. 373/268/B/SZ/2020-RA dated 07.12.2020, has been filed by Shri Mohammed Shikabudeen (hereinafter referred to as the Applicant), against the Order-in-Appeal Airport. Cus. I. No. 192/2020 dated 14.08.2020, passed by the Commissioner of Customs (Appeals-I), Chennai. The Commissioner (Appeals) vide the aforesaid Order-in-Appeal, has upheld the Order-in-Original of the Joint Commissioner of Customs (Adjudication-AIR), Chennai Airport and Air Cargo Complex, Chennai-I, bearing No. 71/2020-21-Commissionerate-I dated 18.06.2020 vide which one gold ingot and one gold cut bit totally weighing 321 grams valued at Rs. 10,51,275/-, recovered from Applicant, were confiscated absolutely under Section 111(d) and 111(l) of the Customs Act, 1962 read with Section 3(3) of the Foreign Trade (Development & Regulation) Act, 1992 and a penalty of Rs. 1,00,000/- was imposed on the Applicant under Sections 112(a) of the Customs Act, 1962. Also, the material object which was used to conceal the impugned gold, viz. black colour adhesive tape (NCV), was confiscated under the provisions of Section 119 of the Customs Act, 1962.

2. Brief facts of the case are that, the Applicant, an Indian Passport holder, arrived from Kuala Lumpur on 13.04.2019, at Anna International Terminal, Chennai Airport, Mennambakkam, Chennai. He was intercepted by the Customs officers at the exit point of arrival hall of the Airport on a reasonable suspicion that he might be carrying gold/dutiable goods either in his baggage or on his person. When questioned, he replied in the negative. During his search, the officers recovered one gold cut bit weighing 32 grams concealed in his pants. As it was noticed the Applicant was very nervous and upon persistent questioning, the passenger admitted that he had concealed 04 bundles of gold in the form of a spread in his rectum, which he voluntarily ejected in normal course. The recovered brown coloured rubbery spread weighed 400 grams, from which 289 grams of 24 carat gold was extracted. Thus, a total of 321 grams of gold was recovered and valued at Rs. 10,51,275/-. As the Applicant attempted to smuggle the gold via ingenious concealment by not declaring it to Customs at Chennai Airport and as he was not an eligible passenger to bring gold into India and was also not in possession of any valid

document/permit/license for the legal import of impugned gold into India, the impugned gold was seized under a mahazar under Section 110 of the Customs Act, 1962 read with Foreign Trade (Development & Regulation) Act, 1992 for further action.

3. In his voluntary statement dated 14.04.2019 recorded under Section 108 of the Customs Act, 1962 immediately after the seizure of the impugned gold, the Applicant stated inter-alia that four bundles of brown colour rubbery spread containing gold and one gold cut bit were given to him by an unknown person outside Kuala Lumpur Airport with instructions to hand it over to somebody who would identify him outside Chennai airport; that he was promised a sum of Rs. 5,000/- for this, and that he knew that smuggling of gold by concealing is an offence. He also confessed that he had smuggled by attempting to avoid detection by Customs for monetary benefit. The Applicant vide his letter dated 14.04.2019 waived the requirement of show cause notice.

4. The original authority adjudicated the matter vide Order-in-Original No. 71/2020-21-Commissionerate-I dated 18.06.2020. Aggrieved, the Applicant filed an appeal before the Commissioner of Customs (Appeals-I), Chennai, which has been rejected. Hence, this revision application has been filed.

5. The revision application has been filed, mainly, on the grounds that order of the respondent is against law, weight of evidence and circumstances and probabilities of the case; that he was all along under the control of the officers of Customs and he was at the red channel and did not pass through green channel; that gold is not a prohibited item; option ought to have been given for the release of impugned gold under Section 125 of the Customs Act, 1962 on payment of redemption fine; and that the impugned order should be set aside, the gold item be permitted for re-export/released and that the penalty be set aside/reduced. Applicant has also filed a petition for condonation of delay of 18 days in filing the revision application.

6. Personal hearings in the matter were fixed on 16.10.2024 and 25.10.2024. No one appeared from the Applicant's side. However, On behalf of the Applicant, Smt. P.

Kamalamalar, Advocate vide letter dated 25.10.2024 reiterated the written submission and requested that the order be passed on that basis. Shri P. Saravanan, Deputy Commissioner (AIU), Chennai Airport Commissionerate appeared on 16.10.2024 and reiterated his detailed written submissions stating that the applicant had ingeniously concealed gold in his body which clearly establishes mensrea; the intent to smuggle the gold without payment of duty. He prayed therefore that re-export may not be allowed and that penalty imposed in the instant case is proper and does not warrant any interference. As such, the Respondent prayed for the O-I-A be upheld.

7. At the outset, it has been observed that the Applicant has filed an application for condonation of delay of 18 days in filing the instant revision application from the stipulated period on the ground that the delay occurred due to the Corona pandemic and related circumstances. The Government condones the delay in light of Hon'ble Supreme Court's order dated 10.01.2022, vide which the period from 15.03.2020 till 28.02.2022 was ordered to be excluded in computing the period of limitation.

8. The Government has examined the matter. It is observed the contentions of the Applicant that he had not crossed the Green Channel and was at the red channel are contrary to the facts on record. In his statement under section 108 of the Customs Act, 1962 he has admitted his role in this case and this statement has not been retracted. If he had an intention to declare the gold as per rules and clear the same upon payment of duty, he would have had no need to ingeniously concealed the gold into a rubbery spread and resort to rectum concealment. The entire proceedings have been covered under a Mahazar in presence of independent witnesses, which also corroborates the sequence of events. Further, he waived the requirement of a show cause notice in writing 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. Therefore, the subject contention of the Applicant appears to be an afterthought. It is also observed that the Applicant did not declare the possession of impugned gold to Customs and it was only through search and examination that the ingenious concealment of the impugned gold in the form of a spread in his rectum came to light. He was well aware that

smuggling of the impugned gold items in the aforesaid manner without declaring the same to Customs and without possession of any valid permit/license/document, is an offence. The act of smuggling is therefore established beyond doubt.

9. 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 chose to ingeniously conceal the gold in his body and brought it in violation of the provision of Sections 77 and 123 of the Customs Act, 1962. The manner of concealment and the facts of the case make it clear that the gold was neither legitimately acquired nor was it brought in accordance with provisions 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*. Therefore, the Government concurs with the adjudicating & appellate authorities that the impugned gold was liable to confiscation under Section 111 *ibid* and that the penalty was imposable on the Applicant.

10.1 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."*

10.2 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----."

10.3 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.*

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

11. 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.

12.1 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.

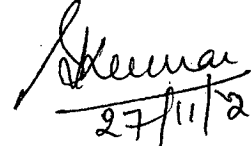
12.2 Further, the Hon'ble Delhi High Court has, in the case of *Jasvir Kaur vs. UOI* {2009 (241) ELT 621 (Del.)}, held that re-export is not permissible when article is recovered from the passenger while attempting to smuggle it. Hence, the question of allowing re-export does not arise.

13. 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.

14. 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) not

require any interference. Also, the quantum of penalty imposed on the Applicant is neither harsh nor excessive.

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


27/11/24

(Shubhagata Kumar)

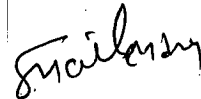
Additional Secretary to the Government of India

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Order No. 236 /24-Cus dated 27-11-2024

Copy to:

1. The Commissioner of Customs (Appeals-I), Chennai Airport & Air Cargo, 3rd floor, New Custom House, GST Road, Meenambakkam, Chennai – 600016
2. The Principal Commissioner of Customs, Commissionerate-I, Chennai-I (Airport), New Custom House, Meenambakkam, Chennai-600027
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
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ATTESTED (शैलेंद्र कुमार मीना)
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