

SPEED POST



F. No. 373/144/B/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 17/10/23

Order No. 240/23-Cus dated 17-10-2023 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-038-19 dated 26.04.2019, passed by the Commissioner of GST, Service Tax & Central Excise (Appeals), Tiruchirappalli.

Applicant : Smt. Hajara Umma, Sri Lanka

Respondent : The Commissioner of Customs (P), Tiruchirappalli

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ORDER

A Revision Application, bearing No. 373/144/B/2019-RA dated 06.05.2019, has been filed by Smt. Hajara Umma, Sri Lanka (hereinafter referred to as the Applicant), against the Order-in-Appeal No. TCP-CUS-000-APP-038-19 dated 26.04.2019, passed by the Commissioner of GST, Service Tax & Central Excise (Appeals), Tiruchirappalli, vide which the Commissioner (Appeals) has upheld the Order-in-Original No. TCP-CUS-PRV-JTC-126-18 dated 02.11.2018, passed by the Joint Commissioner of Customs (Preventive), Tiruchirappalli. Vide the aforementioned Order-in-Original, assorted gold jewellery of 22 & 24 carat, weighing 188.000 grams, valued at Rs. 5,73,100/-, which were recovered from the Applicant herein & 3084 grams of assorted gold jewellery, valued at Rs. 89,22,445/- recovered from other 17 passengers have been absolutely confiscated under Section 111(d) & 111(i) of the Customs Act, 1962. Besides, penalty of Rs. 60,000/- was also imposed on the Applicant, under Section 112 of the Act, ibid along with different amount of penalties imposed upon 17 other people.

2. Brief facts of the case are that Customs officers, based on a specific intelligence of Directorate of Revenue Intelligence, Coimbatore, identified and intercepted a group of 03 passengers, upon their arrival at Coimbatore International Airport, from Colombo, on 15.10.2017 who came out of the Green Channel in the Customs area without declaring anything. Thereafter, the DRI officers, after obtaining information from one of the intercepted passenger i.e. Smt. Fathima Roshana, further intercepted a group of passengers, including Smt. Hajara Umma, Sri Lanka i.e. the Applicant herein, crossing the Green Channel. It was found that the above said passengers had neither declared nor submitted any form to the Customs about the dutiable items or prohibited items brought in before coming through the Green Channel. On being enquired by the officers, as to whether they were carrying any gold/contraband/dutiable goods from Sri Lanka and declared to the Customs, the said passengers replied in the negative. Thereafter, upon the search of their person undeclared quantity of crushed gold ornaments/gold chains/gold jewellery in crude unfinished form/silver coloured metal chains suspected to be of gold from the possession of the passengers either concealed in their person or in their hand baggage. The certified gold valuer examined and certified the gold to be of 22 carat and 24 carat as mentioned above. The officers enquired the passengers whether they were having any document for the possession of the said gold found from them for which all the passengers replied in negative. In her statement dated 15.10.2017, recorded under Section 108 of the Customs Act, 1962, the Applicant, inter-alia, stated that she came to Coimbatore on a business visit; that though she had come to Coimbatore, her ultimate destination is Chennai; that to a specific query for whom the gold jewellery was intended for, she wished to state that it was not intended for anyone and she just brought it in her hand bag; that she would take it back when she ultimately leave for Sri Lanka from Chennai; that approximately, she has been travelling this way 3 times in a month from

Colombo to India via Coimbatore/ Chennai/Calcutta airports for the past five years; that she had been carrying gold jewellery sometimes in the past; that the gold that she carried with her, she sometimes sold if she got a good bidder and she used the money for purchases; that she knew that smuggling of gold into India is an offence under the provisions of the Customs Act, 1962. The matter was adjudicated by the original authority who ordered absolute confiscation of the above-mentioned gold items. Aggrieved, the Applicant filed an appeal before the Commissioner (Appeals), which was rejected as above.

3. The revision application has been filed, mainly, on the grounds that ownership of the gold is not disputed and there is no ingenious concealment; that she was not apprised of Section 102 of the Customs Act, 1962 by the Customs officers; that she was wearing the gold jewellery and the question of declaration does not arise; that she is not a frequent traveller; and that gold is dutiable and not prohibited. It is prayed that the impugned order be set aside and gold be permitted to her for re-export.

4. Personal hearing in the matter was fixed on 23.08.2023, 04.09.2023 & 25.09.2023. None appeared for either side in all the hearings except for the last one. In the hearing held on 25.09.2023, in virtual mode, Smt. P. Kamalamalar, the Advocate for the Applicant submitted that the Applicant is a Sri Lankan national who wore 1 chain and 3 bangles amounting to around 188 grams and were of 24 and 22 carat purity. The ownership was not disputed, there was no concealment and being a foreigner she was not aware of the rules. There is no previous offence either. Option to redeem the impugned gold should be allowed. None appeared for 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. The Applicant has stated that she was not apprised of the provisions of Section 102 of the Customs Act, 1962. However, the Government finds that the entire proceedings were covered under a Mahazar dated 15.10.2017, in the presence of two independent witnesses, which also corroborates the sequence of events as is clear from the OIO. As such, the claim that the Applicant was not made aware of Section 102 of the Customs Act, 1962 and made her statement unknowingly is not sustainable.

6. As per Section 123 of Customs Act 1962, 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 were produced at the time of interception. In fact, it is evident from records that the Applicant was part of a group of passengers who were smuggling gold, as carriers, for monetary benefits. The Applicant has, thus, failed to discharge the burden placed on her,

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 her 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 the penalty was imposable on the Applicant.

7. The Applicant has contended that the gold jewellery was worn by her and there was no ingenious concealment, she is not a frequent traveller and ownership of the gold is not disputed. However, these contentions fall flat when in the statement tendered by her before Customs officers, she has clearly admitted that over the past five years she used to travel 3 times in a month from Colombo to Coimbatore/Chennai/Calcutta and that she used to sell the smuggled gold if she found a good bidder. Therefore, she herself has admitted her role in smuggling of gold for monetary benefit. Hence, these contentions hold no ground. Further, a statement dated 15.10.2017 has been made by the Applicant wherein she had admitted her offence that she used to sell the smuggled in gold to good bidder if she found one and this statement of her's has not been retracted.

8.1 The Government observes that import of gold and articles thereof in baggage is allowed subject to fulfillment of certain conditions. In the present case, it is not even contended that these conditions were fulfilled by the Applicant herein. It is settled by several judgments of Hon'ble Supreme Court that goods, in respect of which conditions subject to which their import/export is allowed are not fulfilled, are to be treated as 'prohibited goods'. [Ref: Sheikh Mohd. Omer {1983 (13) ELT 1439 (SC), Om Prakash Bhatia {2003 (155) ELT 423 (SC)} & Raj Grow Impex LLP {2021 (377) ELT 145 (SC)}]. Further, the Hon'ble Madras High Court (i.e. the Hon'ble jurisdictional High Court) has, in the cases of Malabar Diamond Gallery P. Ltd. {2016 (341) ELT 465 (Mad.)} and P. Sinnasamy {2016 (344) ELT 1154 (Mad.)}, taken this view specifically in respect of import of gold in baggage. Hence, there is no doubt that the goods seized in the present case are to be held to be 'prohibited goods'.

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

9. The Government observes that the original authority had 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.*" Now in the latest

judgment 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". In the present case, the original authority has ordered absolute confiscation of the gold items, for relevant and reasonable considerations recorded in paras 74 to 80 of his Order. Therefore, keeping in view the judicial pronouncements above and the facts of the case, the Commissioner (Appeals) has correctly refused to interfere with the discretion exercised by the original authority.

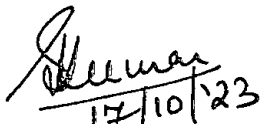
10.1 As far as re-export of offending goods is concerned, the Government observes that a specific provision regarding re-export of baggage articles has been made under Section 80 of the Customs Act, 1962. On a plain reading of Section 80, it is apparent that a declaration under Section 77 is a pre-requisite 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 denied carrying the subject goods even when asked specifically by customs. 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."

10.2 Hence, the request for re-export cannot be acceded to.

11. Further, it is noticed that the penalty imposed upon the Applicant is approximately 10.5% of the value of the offending goods and as such, the quantum of penalty imposed is neither harsh nor excessive.

12. The case laws relied upon by the Applicant, in support of her various contentions, are not applicable in view of the judgments quoted above of Hon'ble Supreme Court and Hon'ble High Courts.

13. In view of the above, the revision application is rejected.


17/10/23
(Shubhagata Kumar)

Additional Secretary to the Government of India

Smt. Hajara Umma
32 B, Dehiyangi, Muruthalaw
Kandy, Sri Lanka

Order No. 240/23-Cus dated 17-10-2023

Copy to:

1. The Commissioner of GST, Service Tax & Central Excise (Appeals), No.1, Williams Road, Cantonment, Tiruchirapalli-620001.
2. The Commissioner of Customs (P), No. 1, Williams Road, Cantonment, Tiruchirapalli-620001.
3. Smt. P. Kamalamalar, Advocate, No. 10, Sunkrama Street, 2nd Floor, Chennai-600001.
4. PPS to AS(RA)
5. Guard File
6. Spare Copy
7. Notice Board

Shailendra
18/11/23
ATTESTED (शैलेन्द्र कुमार मीना)
(Shailendra Kumar Meena)
अनुभाग अधिकारी / Section Officer
वित्त मंत्रालय (राजस्व विभाग)
Ministry of Finance (Deptt. of Rev.)
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नई दिल्ली / New Delhi