

SPEED POST



F. No. 373/56/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...18/10/23

Order No. 243/23-Cus dated 18-10-2023 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-023-19 dated 27.02.2019, passed by the Commissioner of CGST, Service Tax & Central Excise (Appeals), Tiruchirappalli.

Applicant : Shri Md. Asarudeen, Chennai

Respondent : The Commissioner of Customs (Preventive), Tiruchirappalli

.....

ORDER

A Revision Application, bearing No. 373/56/B/SZ/2019-RA dated 15.03.2019, has been filed by Shri Md. Asarudeen, Chennai (hereinafter referred to as the Applicant), against the Order-in-Appeal No. TCP-CUS-000-APP-023-19 dated 27.02.2019, passed by the Commissioner of CGST, Service Tax & Central Excise (Appeals), Tiruchirappalli vide which the Commissioner (Appeals) has upheld the Order-in-Original No. 133/2018 dated 24.08.2018, passed by the Assistant Commissioner of Customs (Airport), Tiruchirappalli. The adjudicating authority vide the aforementioned Order-in-Original had ordered as below:

- (i) Absolute confiscation of 01 no. of unfinished unjoined gold chain of 24 carat purity weighing 79.500 gms, valued at Rs. 2,42,634/- and 12 Nos. of Gudang Garam Cigarette cartons valued at Rs. 14,400/- totally valued at Rs. 2,57,034/- 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 alongwith cigarettes and other tobacco products (P & L) Rules, 2008;
- (ii) confiscation of two nos. of Black label liquor bottles valued at Rs. 4,480/- 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, but allowed the Applicant with an option to redeem the same, on fine of Rs. 5,000/- in lieu of confiscation under Section 125 of the Customs Act, 1962 within 7 days from the date of receipt of the said impugned order;
- (iii) imposition of Personal Penalty of Rs. 30,400/- on the Applicant under Section 112(a) and 112(b) of the Customs Act, 1962.

2. Brief facts of the case are that, the Applicant arrived from 05.08.2018, at Trichy International Airport. He was intercepted by the Customs officers and one unfinished unjoined gold chain of 24 carat purity weighing 79.500 gms valued at Rs. 2,42,634/-, two Black label liquor bottles of one litre each valued at Rs. 4,480/- and twelve cartons of Gudang Garam Cigarette valued at Rs. 14,400/-, totally valued at Rs. 2,61,514/-, were recovered from him. He attempted to clear the above items without opting to declare the same to Customs. He admitted that he brought the above said items for sale in India for monetary benefit. He also admitted that he went to Dubai on 03.08.2018 from Chennai

and returned to Trichy on 05.08.2018. He did not produce any purchase bills for the above said items and in his statement he admitted his role in this case as above. Thereafter, the aforesaid Order-in-Original bearing no. 133/2018 dated 24.08.2018 was adjudicated by the Assistant Commissioner of Customs (Airport), Tiruchirappalli vide which the gold item and cigarettes were absolutely confiscated, whereas seized liquor was confiscated with an option to redeem the same, besides imposition of Personal Penalty of Rs. 30,400/- on the Applicant. 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 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 in 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 hearings in the matter was fixed on 18.08.2023 but none appeared. In the personal hearing held on 11.09.2023, Smt. P. Kamala Malar, Advocate, appeared on behalf of the Applicant and submitted that her client has no previous offence; there was no concealment; that from among the impugned goods, her client has abandoned the Cigarettes, but that absolute confiscation of the gold chain was not warranted and that they should have got an option to either re-export the gold item or redeem it against redemption fine etc. She accepted that no declaration under section 77 was made and that her client was a frequent flier and aware of all rules & regulations. As such, she requested for a lenient view in the matter. No one appeared from the Respondents' side and no request for adjournment etc. has been received, as such, it is presumed that the respondent has nothing to add in the matter.

5. The Government has carefully examined the matter. It is observed that the Applicant was intercepted with unfinished unjoined gold chain of 24 carat in respect of which no

declaration was made to Customs. He had not declared the import of gold items voluntarily to the Customs officers, as required under Section 77 of the Customs Act, 1962.

6. On the issue of foreign origin cigarettes recovered from the Applicant, it is on record that the Applicant had not made any declaration in respect of the offending goods carried by him, as required under Section 77 of the Customs Act, 1962. As per the cigarettes and other tobacco products (Packaging & Labelling) Rules, 2008, cigarettes without pictorial warnings are prohibited for import into India.

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 item was liable to confiscation under Section 111 *ibid* and that the penalty was imposable on the Applicant.

8.1 The Applicant has contended is 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 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."*

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 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 the impugned 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 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

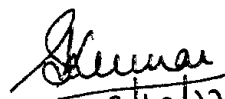
pronouncements above, the Commissioner (Appeals) has correctly refused to interfere with the discretion exercised by the original authority.

10.1 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.

10.2 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.

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

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


18/10/23

(Shubhagata Kumar)

Additional Secretary to the Government of India

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

Order No. 243/23-Cus dated 18-10-2023

Copy to:

1. The Commissioner of CGST, 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. 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

प्रवीण नेगी / Praveen Negi
अधीक्षक / Superintendent (R.A. Unit)
वित्त मंत्रालय / Ministry of Finance
राजस्व विभाग / Department of Revenue
Room No. 605, 6th floor, B-Wing
14, Hudco Vishala Building, Bhikaji Cama Place
New Delhi-110066

