

SPEED POST



F.No. 373/197/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 20/10/23

Order No. 249/23-Cus dated 20-10-2023 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-052-19 dated 28.05.2019, passed by the Commissioner of CGST, Service Tax & Central Excise (Appeals), Tiruchirappalli.

Applicant : Shri Kaja Mohamed, Tiruchirappalli

Respondent : The Commissioner of Customs (Preventive), Tiruchirappalli

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ORDER

Revision Application No. 373/197/B/SZ/2019-RA dated 10.06.2019 has been filed by Shri Kaja Mohamed, Tiruchirappalli (hereinafter referred to as the Applicant) against the Order-in-Appeal No. TCP-CUS-000-APP-052-19 dated 28.05.2019, 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. 131/2018 dated 23.08.2018 vide which the following have been ordered:

- (i) Absolute confiscation of three cut pieces of gold biscuits of 24 carat purity weighing 31.400 grams valued at Rs. 83,934 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
- (ii) Confiscation of other miscellaneous items valued at Rs.46,120/- with an option to redeem the same on payment of appropriate duty and redemption fine of Rs. 12,000/-;
- (iii) Imposition of penalty of Rs. 15,000/- on the appellant under section 112(a) and 112(b) of the Customs Act, 1962.

2. Brief facts of the case are that, the Applicant arrived from Kuala Lumpur on 16.08.2018, at Tiruchirappalli International Airport. He was intercepted by Customs officers and three cut pieces of gold biscuits of 24 carat purity weighing 31.400 grams valued at Rs. 83,934 and other miscellaneous items viz. liquor bottles, soaps, deodorant spray, Alshifa honey bottles etc., totally valued at Rs. 46,120/- were recovered from him. He attempted to clear the above gold and miscellaneous goods of commercial nature 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 personal monetary benefit but could not produce any documents to establish ownership of the gold; that he departed for Malaysia on 14.08.2018 and returned to Tiruchirappalli on 16.08.2018. 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. 131/2018 dated 23.08.2018. 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 cosmetics and toiletry items of baggage goods valued at Rs. 46,120/- brought by him is not in commercial quantity. They were intended for personal use and for presenting to friends and relatives. He has not brought the goods for making monetary benefit. The Applicant went to Malaysia on 14.08.2018 and returned to India on 16.08.2018 and hence he is eligible for free baggage allowance. There was no such allegation that the Applicant went through green channel. He was not given any Customs declaration form by the Airlines to be filled up, however he verbally declared the possession of three cut pieces of gold to the officers at the entry point to the baggage hall. There is no allegation in the impugned order that the gold pieces were concealed in any manner and also there is no allegation that the impugned gold did not belong to him or that he brought it as a carrier. Gold is not a prohibited item. He prayed that the order of absolute confiscation in respect of the impugned gold should be modified to allow redemption; that free allowance should be given in respect of miscellaneous goods and the redemption fine of Rs. 12,000/- should be reduced and pass any other order as deemed fit.

4. In the personal hearing held on 18.10.2023, in virtual mode, Sh. A. Manickam, Advocate, appeared on behalf of the Applicant and reiterated that the applicant did not attempt to cross green channel; that he was apprehended even before he could enter the baggage hall; that the miscellaneous goods brought were intended as gifts for family members and not for sale; that ownership has not been disputed; that free allowance ought to have been given and that the redemption fine imposed is too high; that gold is not a prohibited item. 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. are not acceptable as the same had not been contested before the Customs authorities when the charges were explained to him. 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 impugned gold items but he has failed to produce any purchase documents or evidence in support of his claim. As such, the contentions of the Applicant in this regard are unacceptable. As per Board's circular no. 29/2000-Cus. dated 11.04.2000 (F.No. 495/19/99-Cus.VI) and circular no. 09/2001-Cus dated 22.02.2021 (F.No. 520/67/2000-Cus.VI), the benefit of free allowance is available only to bonafide passengers. It is also on record that the Applicant was previously involved in one case against registered vide O.S. No. 151 dated 07.03.2018.

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----."

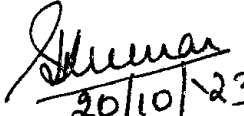
7.3 In view of the above, the contention of the Applicant that the offending goods are not 'prohibited goods', cannot be accepted.

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. 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.

10. The revision application is, accordingly, rejected.


20/10/23
(Shubhagata Kumar)

Additional Secretary to the Government of India

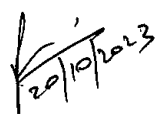
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Order No. 248/23-Cus dated 20-10-2023

Copy to:

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2. The Commissioner of Customs (Preventive), No.1, Williams Road, Cantonment, Tiruchirappalli-620001
3. Sh. N. Manickam, Advocate, No.37, 8th Cross, 3rd Main Road, Renga Nagar, K.K. Nagar Post, Tiruchirappalli-620021
4. PPS to AS (RA).
5. Guard file.
- ✓ 6. Spare Copy
7. Notice Board

ATTESTED


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