

SPEED POST



F. No. 373/107/B/2018-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.. 06/11/23

Order No. 263 /23-Cus dated 03.11. 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-069-18 dated 10.04.2018, passed by the Commissioner of GST, Service Tax & Central Excise (Appeals), Tiruchirappalli.

Applicant : Smt. Shanmugha Priya, Tiruchirappalli

Respondent : The Commissioner of Customs (P), Tiruchirappalli

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ORDER

A Revision Application, bearing No. 373/107/B/2018-RA dated 23.04.2018, has been filed by Smt. Shanmugha Priya, Tiruchirappalli (hereinafter referred to as the Applicant), against the Order-in-Appeal No. TCP-CUS-000-APP-069-18 dated 10.04.2018, passed by the Commissioner of GST, Service Tax & Central Excise (Appeals), Tiruchirappalli, whereby the Commissioner (Appeals) has upheld the Order-in-Original No. TCP-CUS-PRV-JTC-007-17 dated 28.09.2017 as amended [vide Corrigendum to the Order-in-Original dated 12.10.2017, passed by the Joint Commissioner of Customs (CCO)], Tiruchirappalli except to the extent of reducing the penalty from Rs. 7,20,000/- to Rs. 3,50,000/- imposed upon the Applicant under Section 112 (a) & (b) of the Customs Act, 1962. Vide the aforementioned Order-in-Original, assorted gold jewellery of 22 & 24 carat, weighing 1147.2 grams, valued at Rs. 35,48,652/-, which was recovered from the Applicant, 1791.8 grams of 24 carat gold in bars/cut pieces, valued at Rs. 56,17,293/- recovered from other 6 passengers & 1047.9 grams abandoned gold bars/cut pieces of 24 carat purity, valued at Rs. 32,85,167/- which were recovered from the rummaging of the aircraft have been absolutely confiscated under Section 111(d) & 111(i) of the Customs Act, 1962. Besides, penalty of Rs. 7,20,000/- was also imposed on the Applicant, under Section 112(a) & (b) of the Act, ibid along with separate penalties imposed upon 11 other people.

2. Brief facts of the case are that officers of Directorate of Revenue Intelligence, Zonal Unit, Chennai, (DRI-CZU) based on specific intelligence, identified and intercepted a group of passengers including Smt. Shanmugha Priya, the Applicant in this RA, upon their arrival at Tiruchirappalli International Airport from Kuala Lumpur on 18.08.2016. Upon enquiry as to whether they were carrying any foreign origin gold bars/cut gold bars in their baggage or on their person, all the passengers replied in the negative. Upon the rummaging of the aircraft, another team of officers found six packets containing gold covered with black adhesive tapes abandoned in the flight. Further, upon persistent enquiry from all 7 passengers as to whether they were carrying any gold bars in their person or in their hand/checked in baggage, all the 7 passengers accepted carrying foreign origin gold bars/cut gold bars on their person and produced the packets containing the gold items to

the officers. Upon enquiry by the officers all the 6 passengers except the Applicant, informed the officers that some unknown person handed over the black self-adhesive taped packets containing foreign origin gold bars/cut gold bars outside the Kuala Lumpur Airport at Malaysia, to be handed over to some unknown persons outside the airport at Tiruchirappalli. The passengers also informed the officers that they were smuggling gold by carrying for others and used to smuggle them by concealing in their person; that they used to receive a monetary consideration for carrying and smuggling the gold into India; that their photographs would also be given to the person at Tiruchirappalli airport for easy identification; and that they would be given Rs. 5,000/- to Rs. 10,000/- as monetary consideration for each trip. The Applicant informed the officers that the gold jewellery was given to her by one Mani and his uncle Shanmugam and the said jewellery was to be handed over to Mani's mother at Tiruchirappalli, for which the Applicant would receive Rs. 30,000/- as monetary consideration. Further, all the above persons admitted to smuggling the gold bars/jewellery for monetary consideration and that they were not the actual owners of the foreign origin gold recovered from them.

The passengers, denied having any valid documents for the legal import/purchase of the said recovered foreign marked gold bars/cut gold bars/ gold jewellery and stated that they were only carrying the gold for monetary consideration.

In her statement dated 18.08.2016, recorded under Section 108 of the Customs Act, 1962, the Applicant, stated inter-alia that due to her family situation, family problems and to meet her children's educational expenses, she got involved in smuggling activity; that she knew one Mani and his uncle Sh. Shanmugam, who are residents of Malaysia, and involved in smuggling of gold into India by engaging carriers and also in person. She also came to know that they are paying commissions to carriers for smuggling gold; that she accepted to smuggle the gold; that Mani contacted her and sent her the air tickets for Tiruchirappalli to Kuala Lumpur; that as soon as she reached Kuala Lumpur, Mani handed her over 1147.2 grams of gold jewellery and asked her to hand it over to his mother at Trichy and promised a commission of Rs. 30,000/-; that she accepted the gold and carried it in her hand bag.

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 modified as above. Thereafter, the

Applicant filed revision application which was also rejected vide Order No. 838/2018-CUS(SZ)/ASRA/MUMBAI dated 24.09.2018. Thereafter, the Applicant filed Writ Petition W.P (MD) No. 198/2020 before Hon'ble Madras High Court which vide order dated 27.01.2023 set aside the impugned order and remanded the matter back for re-adjudication.

3. The revision application has been filed, mainly, on the grounds that part of jewellery was worn by her at the time of interception; that she brought the gold jewellery for her family and not for anybody else and she purchased the same out of her own funds; that she was all along at the Red Channel and did not pass through the Green Channel; that her statement was obtained through coercion; that she made a verbal declaration to Customs; that gold is a restricted item and not prohibited; and that the gold should be permitted for re-export or release upon redemption fine and that personal penalty be set aside or reduced.

4. Personal hearing in the matter was fixed on 25.09.2023, in virtual mode. Sh. Arvind Kumar, Superintendent appeared for the Respondents. Smt. Kamalamalar Palanikumar, Advocate of the Applicant, sought a week's time to prepare her arguments for the case and therefore as requested, the Personal Hearing was adjourned by a week. In the personal hearing held on 04.10.2023, Smt. Kamalamalar submitted that the Applicant was intercepted by Customs at the aerobridge itself, even before coming to the baggage hall; that the Applicant was wearing her 22 carat jewellery on her person; that although no purchase papers could be produced, the gold was hers; that the statement under section 108 was made under pressure and later retracted; that the Applicant's case was complicated on account of being clubbed with some other passengers on the same flight. She quoted judgments such as the one in Hargovind Das K Joshi Vs. Collector of Customs (1992 (61) E.L.T. 172 (S.C.) etc. wherein the Hon'ble Supreme Court has held that "*We therefore direct that the matter be remitted to the Collector of Customs for this limited purpose to this limited extent as to whether or not to give an option to the importers (appellants) to redeem the confiscated goods on payment of such fine as may be considered appropriate by him in lieu of confiscation. It will be open to the concerned officer to take a decision one way or the other in accordance with law as is considered*

appropriate in the circumstances of the case after hearing the appellants. We have no doubt that the concerned officer will take into consideration all the relevant circumstances including the submission urged on behalf of counsel for the appellants that the goods in question, zip fasteners can at present be imported freely, for whatever it is worth." and stated that giving an option to redeem the gold is mandatory for adjudicating authorities since it is not a prohibited item.

5. The Government has carefully examined the matter. It is observed that several allegations, such as that the statement of Applicant was recorded under threat/coercion and that she retracted her statement; that she did not pass through the Green Channel etc. have been made. However, the Government finds that the entire proceedings were covered under a Mahazar dated 18.08.2016, in the presence of two independent witnesses, which corroborates the sequence of events. As such, the claims that the statement of Applicant was taken under duress or coercion; that she did not conceal the gold and declared the same when enquired by the officers or that she did not pass through the Green Channel are not sustainable. Further, it is claimed that the Applicant had retracted her statement however, no such retraction is available in the records. Moreover, the Hon'ble Supreme Court has, in the case of Surjeet Singh Chhabra vs. U.O.I {1997 (89) ELT 646 (SC)}, held that a confession statement made before the Customs Officer, though retracted within six days, is an admission and binding since Customs Officers are not Police Officers. In the case of K.I. Pavunny {1997 (90) ELT 241 (SC)}, the Hon'ble Supreme Court has held that the confessional statement of an accused if found voluntary, can form the sole basis for conviction. In the present case, the Applicant has admitted her involvement in the case of smuggling. The admissions made are corroborated by other material on record, as discussed hereinabove. Therefore, the contention that the statement was tendered under coercion is not borne out by facts.

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 such goods are recovered. The Applicant did not declare the gold articles, 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 articles were liable to confiscation under Section 111 *ibid* and the penalty was imposable on the Applicant.

7.1 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'.

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

8. The Government observes that the original authority had denied the release of seized gold article 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

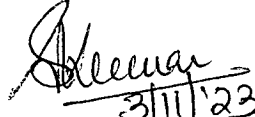
latest judgment the Hon'ble Delhi High Court in its order dated 21.08.2023 in W.P. (C) Nos. 8902/2021; 9561/2021; 13131/2022; 531/2022; & 8083/2023 held that "*.....an infraction of a condition for import of goods would also fall within the ambit of Section 2(33) of the Act and thus their redemption and release would become subject to the discretionary power of the Adjudging Officer*". In the present case, the original authority has ordered for absolute confiscation of the gold article, for relevant and reasonable considerations recorded in paras 77 to 84 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.

9. 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 orally. 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." Hence, the question of re-export does not arise.

10. Further, it is noticed that the penalty amount as reduced by the appellate authority is approximately 10% of the value of the offending goods and as such, the quantum of penalty imposed is neither harsh nor excessive.

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

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


3/11/23
(Shubhagata Kumar)

Additional Secretary to the Government of India

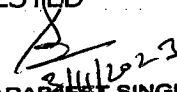
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Order No. 263 /23-Cus dated 03.11.2023

Copy to:

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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

ATTESTED


2/11/23
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