

SPEED POST



F. No. 373/261/B/SZ/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...6/11/23

Order No. 264/23-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-151-18 dated 08.08.2018, passed by the Commissioner of GST, Service Tax & Central Excise (Appeals), Tiruchirappalli.

Applicant : Smt. Jegatheeswari, Madurai

Respondent : The Commissioner of Customs (P), Tiruchirappalli

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ORDER

A Revision Application, bearing No. 373/261/B/SZ/2018-RA dated 26.09.2018, has been filed by Smt. Jegatheeswari, Tamil Nadu (hereinafter referred to as the Applicant), against the Order-in-Appeal No. TCP-CUS-000-APP-151-18 dated 08.08.2018, 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-020-18 dated 21.02.2018, passed by the Joint Commissioner of Customs (Airport), Tiruchirappalli. Vide the aforementioned Order-in-Original, three unfinished gold chains and six unfinished gold bangles, all of 22 carat purity, totally weighing 492.00 grams and collectively valued at Rs. 13,20,036/-, recovered from the Applicant, had been absolutely confiscated under Section 111(d), 111(i), 111(l) & 111(m) of the Customs Act, 1962. Besides, penalty of Rs. 66,000/- was also imposed on the Applicant, under Section 112(a) & 112 (b) of the Act, *ibid*.

2. Brief facts of the case are that the Customs Officers intercepted the Applicant upon her arrival at Tiruchirappalli Airport, from Kuala Lumpur, on 20.07.2017 while she was crossing the Green Channel in a suspicious manner. It was found that she did not submit the Customs Declaration Form and she did not declare any dutiable items to the Customs Baggage Officers. Upon enquiry as to whether she had brought any valuables or gold in any form with her either in her person or in her baggage, she replied in the negative. Upon the her baggage being rescanned, nothing incriminating was found. Thereafter, she was made to walk through the Door Frame Metal Detector (DFMD) after removing all metal items, upon which the DFMD gave an alarm indicating the presence of metal items on her person. Thereafter, she was again asked as to whether she had brought any gold items with her, she again replied in the negative. Then she was subjected to personal search, upon which, the lady officer found one small yellow coloured purse which contained three numbers of unfinished gold chains and six numbers of unfinished gold bangles concealed inside her innerwear under the blouse worn by her and recovered the same. Thereafter, The Government approved appraiser appraised the said three unfinished gold chains and six numbers of unfinished gold bangles and certified them to be of 22 carat purity as mentioned in Para 1 above. In her statement dated 20.07.2017,

recorded under Section 108 of the Customs Act, 1962, she stated inter-alia that she along with her husband were running a jewellery shop at Madurai; that through that business they would earn around Rs. 15,000/- per month; that her relatives were living in Malaysia; that she went to Malaysia on 17.07.2017 to attend 70th marriage anniversary of her Grandfather; that on 20.07.2017 while she came to Airport to board flight for India, inside the airport an unknown person approached her and requested her to carry the impugned items which she concealed in her upper innerwear (inside the blouse) to evade detection by customs and evasion of duty and hand over the same to his friend who would be waiting outside the airport who would give her a commission of Rs. 10,000/- in exchange of the gold items; that lured by money she accepted to carry the gold items and she did not know the actual weight and value of the gold items, that the unknown person had taken her photo in his mobile and informed her that he would send it to his friend who would be waiting outside the Trichy Airport through "Whatsapp" and he would identify her once she comes out of Trichy Airport; and that the unknown person gave the said gold items and she received the same and concealed inside the innerwear worn by her. The matter was adjudicated by the original authority, vide aforesaid Order-in-Original dated 21.02.2018. Aggrieved, the Applicant filed an appeal before the Commissioner (Appeals), which was rejected.

3. The revision application has been filed mainly on the grounds that Customs officers fabricated the facts, distorted the same and concocted claims that no declaration of gold ornaments was made; that gold jewellery is not a prohibited item for import; that the Applicant is the owner of gold jewellery and there was no ingenious way of concealment of gold jewellery; that her statement was retracted as the earlier statement was taken by coercion; that she kept the impugned goods in her innerwear for safety purpose and she orally declared them. It is prayed that the order of appellate authority may be set aside and gold articles be released to the Applicant or allowed to re-export on payment of appropriate duty and fine and reduced penalty.

4. Personal hearing in the matter was fixed on 07.08.2023 which was adjourned on the request of Applicant. In the hearing held on 04.09.2023, the Applicant along with one translator and Sh. Selvaraj, Advocate physically appeared for PH and stated that the

Applicant travelled to Malaysia for her grandfather's 70th wedding anniversary. I have seen her aadhaar card and she is 47 years old, hence the fact of grandfather's age is to be determined. Also, since no one had appeared on behalf of respondents, P.H was refixed after submission of copy of passports of the Applicant, her father and grandfather. Additional submissions made by the Applicant were taken on record. The PH was again held on 25.09.2023 wherein Sh. Selvaraj, Advocate reiterated the submissions made in the RA; that the Applicant went to Malaysia to attend a social function; that the impugned gold was gifted by her grandfather as a help for her daughter's impending marriage; that the statement recorded under section 108 was incorrect; that the retraction was not considered by the Appellate Authority. He accepted that the purchase invoices were not produced before Customs but given later. He stated that gold is not a prohibited item, hence the option to redeem against applicable duty, fine & penalty should be given, in case the option to re-export cannot be given. Sh. Arvind, Superintendent appeared for the department and sought that the OIA be upheld as it is legal and proper.

5. The Government has carefully examined the matter. It is observed that the impugned items were recovered from the Applicant only when she was intercepted by Customs as she did not declare the same to Customs despite being pointedly asked. The Applicant's contention that customs officers fabricated the facts, distorted the same and concocted claims that no declaration of gold ornaments were made is not borne out by facts on record in the OIO and OIA. Moreover, she has herself stated that these items were brought into India for monetary consideration of Rs. 10,000/- and she could not produce any proof of purchase. Further, as far as the copies of invoices furnished at this stage are concerned, it is noticed that the adjudicating authority has clearly brought out that the copies of invoices submitted by the Applicant do not match with the description of the impugned gold items and that the dates of purchase do not coincide with travel dates of the Applicant as discussed in para 16 of the OIO. Therefore the said invoices cannot be taken into consideration at this stage.

6. As regards, the retraction filed by the Applicant, it is evident that the Applicant was apprehended after she had crossed the green channel and gold was recovered from her after a body search. Therefore, the relevant sequence of events recorded in the

Panchnama also substantiate the acts of Applicant in an attempt to smuggle the confiscated goods.

As far as the retraction of statement is concerned, 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 presence case, the Applicant has admitted her involvement in the case of smuggling by concealing the same. The admissions made are corroborated by other material on record, as discussed hereinabove. Therefore, there is no doubt that the statement tendered were voluntary. As such the culpability of the Applicant is well established.

7. 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. 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 is in agreement with the lower authorities that the seized gold items were liable to confiscation under Section 111 *ibid* and, consequently, penalty was imposable on the Applicant.

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, the stipulated conditions have not been fulfilled by the Applicant herein. Hon'ble Supreme Court has repeatedly held 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 treated as 'prohibited goods', within the meaning assigned to it under Section 2(33) of the Act, *ibid*.

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

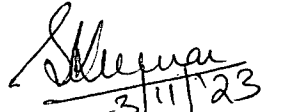
9. The Government observes that the original authority had denied the release of seized gold items on payment of redemption fine under Section 125 of Customs Act, 1962. It is settled by the judgment of the Hon'ble Supreme Court in the case of Garg Woollen Mills (P) Ltd vs. Additional Collector of Customs, New Delhi [1998 (104) E.L.T. 306 (S.C.)], that 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.*" Further, in the case of P. Sinnasamy (*supra*), the Hon'ble Madras High Court has held that "*when discretion is exercised under Section 125 of the Customs Act, 1962, ----- the twin test to be satisfied is "relevance and reason".*" 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.*" 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. Further, 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, it is apparent that a declaration under Section 77 is a pre-requisite for allowing re-export in terms of Section 80 *ibid*. 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. In this case, the Applicant had made no written declaration in respect of the subject goods. 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 option of re-export also cannot be given.

11. Keeping in view the facts and circumstances of the case the Adjudicating Authority has been rather lenient in imposing penalty as the penalty is approximately 5% of the value of the goods.

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. 264/23-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. Sh. A. Selvaraj, Superintendent of Customs (Retd.), 68, Krishnamurthynagar, Tiruchirappally-620021.
4. PPS to AS(RA)
5. Guard File
6. Spare Copy
7. Notice Board

ATTESTED


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