

SPEED POST



F.No. 373/185/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...10/11/23

Order No. 268 /23-Cus dated 10-11-2023 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 Applications under Section 129 DD of the Customs Act, 1962, against the Order-in-Appeal No. TCP-CUS-000-APP-049-19 dated 28.05.2019, passed by the Commissioner of CGST, Service Tax & Central Excise (Appeals), Tiruchirappalli.

Applicant : Shri John Assan, Ilayangudi, Sivangangai

Respondent : The Commissioner of Customs (Preventive), Tiruchirappalli

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ORDER

Revision Application No. 373/185/B/SZ/2019-RA dated 21.06.2019 has been filed by Shri John Assan, Ilayangudi, Sivangangai, Tamil Nadu (hereinafter referred to as the Applicant) against the Order-in-Appeal No. TCP-CUS-000-APP-049-19 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 against the Order-in-Original passed by the Assistant Commissioner of Customs, Madurai Airport, Perungudi, Madurai, bearing no. 09/2018 dated 24.12.2018, vide which two gold bar cut pieces of 24 carat purity totally weighing 41.150 grams and valued at Rs. 1,31,803/- under Section 111(d), 111(i), 111(l) and 111(m) of the Customs Act, 1962 were seized from the Applicant and confiscated absolutely. Besides, penalty of Rs. 14,000/- 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 Applicant arrived, on 19.02.2018, at Madurai Airport, Perungudi, Madurai. He was intercepted by the officers of AIU, Airport, Madurai and two gold bar cut pieces of 24 carat purity totally weighing 41.150 grams and valued at Rs. 1,31,803/- were recovered from him. Despite being a frequent traveller, he attempted to clear the gold items without opting to declare the same to the Customs officials and in contravention of the provisions of the Customs Act, 1962. The Applicant in his voluntary statement dated 19.02.2018 recorded under Section 108 of the Customs Act, 1962, has stated *inter-alia* that he brought the above said items from Colombo to India; that he had not stayed abroad for a period of more than six months; he had intentionally hidden the impugned gold items in his pant ticket pocket; he had neither declared the dutiable goods in his declaration form nor had any license to import gold into India; he did not have any convertible foreign currency for paying customs duty for the said gold item; he was the owner of the impugned gold seized under the mahazar and he accepted his offence. The impugned goods were seized by the Customs officers and the matter was adjudicated by the Assistant Commissioner of Customs, Madurai Airport, Perungudi, Madurai vide aforesaid Order-in-Original. Aggrieved, the Applicant filed an appeal before the Commissioner of CGST & Central Excise (Appeals), Tiruchirappalli, which has been rejected.

3. The instant revision application has been filed mainly on the grounds that the order of respondent is against law, weight of evidence and circumstances and probabilities of the case; he was all along the control of the officers of Customs and he was at the red channel and had not passed through the green channel; no declaration card was provided by neither by the customs authority nor by other authority and hence question of filling up the declaration card does not arise; that he is the owner of the gold recovered and has not brought the same for third party or monetary consideration; that gold is a restricted item and not a prohibited goods; that ownership of the goods is not disputed; that import of gold is not prohibited; Applicant may be given free allowance; he may be permitted to re-export the gold and the penalty may be set aside/ reduced.

4. None appeared for the Personal hearing on 18.10.2023 from either the Applicant or the Respondent's side. However, Smt. P. Kamala Malar, Advocate vide her letter dated 17.10.2023 informed that she was unable to attend the personal hearing on 18.10.2023 due to some other case at Egmore court on the same day and requested to pass an order on the basis of available records, taking a lenient view. No one appeared from the department's side nor anything has been heard from them regarding adjournment, hence 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 stated before the Customs authorities when the charges were explained to him and his statement under section 108 of the Customs Act, 1962 was recorded and that statement has not been retracted. Further, it has also been noticed that the Applicant was involved in another offence in carrying of gold cut pieces totally weighing 352.00 grams valued at Rs. 10,93,228/- which were seized by the officers of AIU, Airport, Tiruchirappalli and an order for absolute confiscation of the same and imposition of penalty was given by the Joint Commissioner of Customs, Tiruchirappalli vide Order-in-Original No. TCP-CUS-PRV-JTC-135-18 dated 20.12.2018 and was further upheld vide Order-in-Appeal No. TCP-CUS-

000-APP-050-19 dated 28.05.2019 by the Commissioner of GST, Service Tax & Central Excise (Appeals), Tiruchirappalli. Thus, the Applicant is a habitual offender.

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 Customs Act, 1962. The Applicant also could not produce any document evidencing legal import of the said gold items. 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 applicant was liable for imposition of penalty.

7.1 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."

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 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.

9.1 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-

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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.

9.2 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.

10. 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.

11. The revision application is, accordingly, rejected.

Shubhagata Kumar
10/11/23

(Shubhagata Kumar)

Additional Secretary to the Government of India

Shri John Assan,
S/o Shri Hassan Maideen Batcha,
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Order No. 268/23-Cus dated 10-11-2023

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. Kamalamalar, Advocates, No. 10, Sunkurama Street, 2nd Floor, Chennai-600001.
4. PPS to AS (RA).
5. Guard file.
6. Spare Copy
7. Notice Board

ATTESTED

10/11/23
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