

SPEED POST



F. No. 373/353/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. 25/01/24

Order No. 27/24-Cus dated 25-01-2024 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. 182 & 183/2018 dated 11.10.2018, passed by the Commissioner of Customs & Central Excise (Appeals), Tiruchirappalli.

Applicant : Smt. Sharmila Banu, Thanjavur

Respondent : The Commissioner of Customs (P), Tiruchirappalli

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ORDER

A Revision Application, bearing No. 373/353/B/2018-RA dated 24.12.2018, has been filed by Smt. Sharmila Banu, Thanjavur (hereinafter referred to as the Applicant), against the Order-in-Appeal No. 182 & 183/2018 dated 11.10.2018, passed by the Commissioner of Customs & Central Excise (Appeals), Tiruchirappalli, vide which the Commissioner (Appeals) has rejected the appeal of the Applicant filed against Order-in-Original No. TCP-CUS-PRV-JTC-048-18 dated 26.04.2018, passed by the Joint Commissioner of Customs (Airport), Tiruchirappalli vide which twelve unfinished gold bangles of 24 carat purity, of foreign origin, collectively weighing 1199.000 grams and valued at Rs. 35,77,816/-, recovered from the Applicant, had been absolutely confiscated under Section 111(d), 111(i), 111(l) & 111(m) of the Customs Act, 1962. Besides, penalties of Rs. 3,00,000/- each were also imposed on the Applicant and one other person named Abdul Rahman, under Section 112(a) & 112 (b) of the Act, *ibid*.

2. Brief facts of the case are that the Customs Officers intercepted the Applicant when an alarm was raised by the Door Frame Metal Detector (DFMD) while she was crossing it upon her arrival at Tiruchirappalli Airport, from Kuala Lumpur, on 30.09.2017. When she was asked whether she had any dutiable item or gold to declare and whether she wishes to submit her Indian Customs Declaration Form to which she replied that she had nothing to declare and hence did not find it necessary to submit her Indian Customs Declaration Form. She was again asked to pass through the DFMD upon which again the alarm was raised. She was again asked whether she had any gold or metal items in her possession to which she replied in the negative. Thereafter she was subjected to personal search upon which six unfinished gold bangles in each hand covered with Burka were found and thus twelve unfinished gold bangles were recovered from her. The Government Approved Assayer appraised the above said twelve unfinished gold bangles being of foreign origin, 24 carat purity and weighing 1199.000 grams collectively.

In her voluntary statement dated 30.09.2017, recorded under Section 108 of the Customs Act, 1962, the Applicant stated *inter-alia* that she went to Malaysia to visit her husband on 12.09.2017; that her elder brother Abdul Rahman gave the above said twelve unfinished gold bangles to be handed over to his mother. When she was asked as to why

she did not declare the gold items in the Indian Customs Declaration Form, she replied that her elder brother Abdul Rahman, who was working in a restaurant at Kuala Lumpur gave the above said unfinished gold bangles to hand over the same to his mother; that her brother also told her to clear the said unfinished gold bangles without declaring to Customs and without paying Customs Duty by concealing the same on her person; that hence she intended to clear the same without declaring, without payment of Customs duty and without knowledge of Customs. She did not declare the bangles despite being questioned by the officers after she crossed the Door Frame Metal Detector (DFMD). To the query as to whether she had any convertible foreign currency to pay the Customs duty, she replied that she did not bring any money to pay the Customs duty. The matter was adjudicated by the original authority, vide aforesaid Order-in-Original dated 26.04.2018. 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 the Applicant had retracted her statement vide letter dated 08.10.2017 and her earlier statement was recorded under coercion; that she had made oral declaration; that she was wearing the gold ornaments; that the bangles were not concealed; and that gold bangles are dutiable and not prohibited.

4. Personal hearing in the matter was fixed on 26.05.2023. Sh. Arvind Kumar, Superintendent appeared for the Respondent, however, no one appeared for the Applicant as such next hearing was fixed on 10.08.2023 which was postponed to 04.09.2023 on the request of Sh. A. Selvaraj, Consultant for the Applicant. In the hearing held on 04.09.2023, Superintendent (legal), Tiruchirappalli appeared for the Respondent and stated that the OIA is legal and proper and therefore the RA merits rejection. Sh. A. Selvaraj appeared in person after the appointed time and sought adjournment of personal hearing as one final opportunity. In the hearing held on 25.09.2023, Sh. A. Selvaraj stated that the applicant came to India to meet her daughter; that the impugned 12 gold bangles in unfinished form of 24 carat purity were worn by her on her wrist; that she did not declare this to Customs as it was the duty of the Customs officers to obtain a declaration; that though this was not her first visit as she has travelled before, she gave a statement

under section 108 as she was scared and wanted to leave the airport quickly as she was alone. He further stated that the statement was retracted within 8 days; that the impugned gold should be allowed to be re-exported failing which option to redeem on payment of duty, fine & penalty should be given.

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. The Applicant's contention that she had verbally declared the items to Customs is not borne out by facts on record in the OIO and OIA. Moreover, she has herself stated that these items were concealed in her clothing/Burka, as she intended to clear them without declaring the same and without detection by Customs. Moreover, it is common knowledge that bonafide gold jewellery is usually less than 24 carat purity and never in an unfinished form. Thus, the bangles do not appear to be bonafide baggage for personal use. Further, she did not have any convertible foreign currency to pay the Customs duty. Hence, the contentions of the Applicant that she had made an oral declaration in respect of gold and the gold was not concealed are not sustainable.

6. As regards the retraction filed by the Applicant is concerned it is evident that the Applicant was intercepted as she was passing through the DFMD and gold was recovered from her which was concealed inside the Burka. Therefore, the relevant sequence of events recorded in the Panchnama also substantiate the acts of Applicant and her attempt to smuggle in the confiscated goods. Further, 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 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 was voluntary and the retraction is an afterthought.

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, the Applicant was liable to penalty.

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. 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. Moreover, the Hon'ble High Court of Delhi in its order dated 23.11.2023 in Writ Petition No. 8976 of 2020 in the matter of Kiran Juneja Vs. Union of India & Ors. has held that "*A fortiori and in terms of the plain language and intent of Section 2(33), an import which is effected in violation of a restrictive or regulatory condition would also fall within the net of "prohibited goods"*". 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.*" 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.*" 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*".

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

Shubhagata Kumar
25/1/24

(Shubhagata Kumar)

Additional Secretary to the Government of India

Smt. Sharmila Banu
W/o Mohamed Gani
No. 21, Railway Line East Street
Peravurani, Thanjavur-614804

Order No. 27 /24-Cus dated 25-01-2024

Copy to:

1. The Commissioner of Customs & Central Excise (Appeals), No.1, Williams Road, Cantonment, Tiruchirapalli-620001.
2. The Commissioner of Customs (P), No. 1, Williams Road, Cantonment, Tiruchirapalli-620001.
3. Sh. A. Selvaraj, Superintendent of Customs (Retd.), 68, Krishnamurthynagar, Tiruchirappalli.
4. PPS to AS(RA)
5. Guard File
6. Spare Copy
7. Notice Board

Shailendra Kumar Meena
25/01/24

ATTESTED

(शैलेन्द्र कुमार मीना)
(Shailendra Kumar Meena)
अनुभाग अधिकारी / Section Officer
वित्त मंत्रालय (राजस्व विभाग)
Ministry of Finance (Deptt. of Rev.)
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