

SPEED POST



F. No. 380/21/B/SZ/2020-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.. 15/11/2023

Order No. 270/23-Cus dated 15-11-2023 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 AIRPORT Cus. I No. 103/2020 dated 17.03.2020 passed by the Commissioner of Customs (Appeals-I), Chennai.

Applicant : Pr. Commissioner of Customs, Chennai-I

Respondent : Smt. Juvairiya Fathima Nachiar Shahul Hameed, Chennai

ORDER

A Revision Application No. 380/21/B/SZ/2020-RA dated 22.07.2020, has been filed by the Pr. Commissioner of Customs, Chennai (hereinafter referred to as the Applicant Department), against the Order-in-Appeal No. AIRPORT Cus. I No. 103/2020 dated 17.03.2020, passed by the Commissioner of Customs (Appeals-I), Chennai. The Commissioner (Appeals) has partially allowed the appeal filed by Smt. Juvairiya Fathima Nachiar Shahul Hameed, Chennai (hereinafter referred to as the Respondent) against the Order-in-Original, passed by the Joint Commissioner of Customs, Chennai Airport, bearing No. 206/2019-20-Commissionerate-1 dated 10.10.2019, by allowing redemption of the confiscated goods on payment of fine of Rs. 3,00,000/- and reducing the penalty imposed upon the Respondent from Rs. 2,00,000/- to Rs. 1,50,000/- under Section 112(a) of the Customs Act, 1962. Vide the aforementioned Order-in-Original, two gold chains and four gold bars, totally weighing 689 gms and collectively valued at Rs. 21,80,685/-, recovered from the Respondent were confiscated absolutely. Besides, a penalty of Rs. 2,00,000/- was also imposed on the Respondent under Section 112(a) of the Customs Act, 1962.

2. Brief facts of the case are that the Respondent arrived on 25.11.2018 at Chennai Airport, from Singapore. She was intercepted by the Customs officers near the exit gate after she had crossed the Customs green channel. On being asked whether she was carrying any gold/dutiable/contraband items, either in her baggage or on her person, she replied in the negative. As the Respondent looked nervous and the reply was not satisfactory, she was taken to the AIU Room along with her baggage for the search of her person and the detailed examination of her baggage. Before the commencement of the examination of her baggage and search of her person, she was again asked whether she was in possession of any gold/gold jewellery/dutiable goods either in her baggage or on her person, she again replied in the negative. Thereafter, on persistent and sustained questioning about any gold item being secreted inside her body, the Respondent admitted to concealing gold in her rectum and volunteered to eject the same through normal course. Thereafter, in the ladies toilet nearby the Respondent ejected three bundles which were wrapped with a black coloured adhesive tape. Thereafter on cutting open the said bundles in the presence of the Respondent and witnesses and on removing the black

adhesive tape and carbon paper, two yellow-coloured metal chains and four yellow-coloured metal bars were recovered by the officers. The Government of India approved Gold Appraiser examined and certified the quantity, quality and value of the offending goods and certified them to be made of gold of 24 carat purity, totally weighing 689 grams and appraised the total value at Rs. 21,80,685/-. Applicant was thereafter questioned whether she had any valid permit/license/document for the legal import of the two gold chains and four gold bars recovered from her to which she replied in the negative. She further stated that the above said two gold chains and four gold bars were handed over to her by an unknown individual outside the Singapore Airport with instruction that on her arrival in Chennai, she should hand over the said gold items to a person outside Chennai International Airport who would contact her over phone and, receive the said gold from her and give her Rs. 20,000/- for carrying the same; that she did not have any contact details of the said receiver of the gold. She further admitted that she was well aware that smuggling of gold by way of concealing and non-declaration to Customs was an offence and she committed this offence for monetary benefit.

The original authority, vide the aforesaid Order-in-Original dated 10.10.2019, absolutely confiscated the seized gold bars under Section 111(d) & 111(l) of the Customs Act, 1962 and imposed a penalty of Rs. 2,00,000/- on the Respondent under Section 112(a) of the Act, *ibid*. Aggrieved, the Respondent filed an appeal before the Commissioner (Appeals), which has been modified as above. Further, it is informed vide letter dated 10.11.2023 that the gold has been disposed of in terms of Section 110 (1A) of the Customs Act, 1962 and the Respondent was informed about the same vide letter dated 28.02.2019.

3. The instant revision application has been filed, mainly, on the grounds that the Respondent had attempted to smuggle the gold by way of non-declaration to Customs as required under Section 77 of the Customs Act, 1962; that the gold was concealed in her rectum; that the appellate authority had considered the retraction letter dated 29.11.2018 of the Respondent but did not consider the rebuttal of the department dated 02.01.2019; and that the sale invoices of the impugned gold produced before the adjudicating authority are contradictory and not credible.

4. Personal hearing was held on 06.11.2023, in which Sh. Ramesh, Assistant Commissioner appeared for the Applicant department and reiterated the submissions made in their application; that Commissioner (Appeals) has reached erroneous conclusions especially since the seizure is elaborately discussed in the OIO, that statements were retracted much later as an afterthought, that statements clearly demonstrate that the Respondent carried goods not belonging to her for a sum of Rs. 20,000/-; that the invoices and affidavits were submitted later and have discrepancies; that notices were sent to the Respondent regarding the disposal proceedings; that OIO ought to be restored. Sh. Satish Sundar, Advocate appeared for the Respondent and stated that the concealment was not in the rectum but in her innerwear; that there are several case laws in support of the fact that gold is not a prohibited item but restricted; that option to redeem is mandatory; that if gold is disposed off before confiscation then Respondent should be refunded the sale proceeds deducting applicable fine & penalty. Sh. Ramesh countered that disposal was as per law.

5. The Government has carefully examined the matter. It is observed that the Respondent indeed did not declare the gold items to the Customs authorities, as required under Section 77 of Customs Act, 1962. Further, the Respondent has admitted to the concealment and recovery of the confiscated goods from her person as well as to the fact of non-declaration in her statement dated 25.11.2018. The Respondent in her statement also admitted to being a carrier for some other person. She intentionally concealed the gold to evade payment of duty and failed to produce any licit documents for valid possession of the confiscated goods. As regards the contention that the concealment was not in the rectum but inside her innerwear, the fact of ingenious concealment is obvious & undisputed and hence the submission that the gold was not concealed in her rectum but in her innerwear does not in any way dilute the contravention of the Customs Act through the attempt to smuggle the said gold into India by ingenious concealment. The concealment has even been admitted to by the Respondent.

6. In terms of 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. In the present case, the Respondent has failed to produce

any evidence that the gold chains and gold bars recovered from her were not smuggled. The gold items were ingeniously concealed by her and were not declared to Customs, as required under Section 77 of Customs Act, 1962. The Respondent has also failed to produce any document evidencing licit possession of the recovered gold. The Applicant has, thus, failed to discharge the burden placed on her, in terms of Section 123, *ibid*.

7. As regards the retraction filed by the Respondent, it is a fact on record that the Respondent was apprehended after she had crossed the green channel and the impugned gold was recovered from her body inside the ladies toilet. Further, the relevant sequence of events recorded in the Panchnama also substantiate the acts of Respondent in an attempt to smuggle the confiscated goods. 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 confessional 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 Respondent has admitted her involvement in the case of smuggling by ingenious concealment. The admissions made are corroborated by other material on record, as discussed hereinabove. Therefore, there is no doubt that the statement tendered were voluntary and the culpability of the Respondent is well established.

8.1 It is contended on behalf of the Respondent that the import of gold is not 'prohibited'. However, the Government observes that this contention of the Respondent is not acceptable in view of several judgments of Hon'ble Supreme Court. {Ref. *Sheikh Mohd. Omer vs Collector of Customs, Calcutta & Ors* 1983(13)ELT 1439(SC)}, *M/s. Om Prakash Bhatia vs Commissioner of Customs, Delhi* {2003(155) ELT 423(SC)}. In the recent 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."

8.2 In the case of Malabar Diamond Gallery P. Ltd. Vs ADG, DRI, Chennai [2016(341) ELT65(Mad.)], the Hon'ble Madras 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-----."

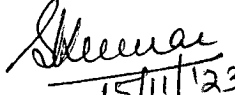
8.3 Gold is not allowed to be imported freely in baggage and it is permitted to be imported by a passenger subject to fulfillment of certain conditions. In this case, since the conditions, subject to which gold could have been legally imported, have not been fulfilled, there is no doubt that the subject goods are 'prohibited goods'.

9. The original authority has denied the release of impugned goods on redemption fine under Section 125 of Customs Act, 1962. The Government observes that, in terms of Section 125 of the Customs Act, 1962, the option to release 'prohibited goods', on redemption fine, is discretionary, as held by 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.)]. 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 Commissioner of Customs (Air), Chennai-I Vs P. Sinnasamy {2016(344)ELT1154 (Mad.)}, the Hon'ble Madras High Court has held that *"non-consideration or non-application of mind to the relevant factors, renders exercise of discretion manifestly erroneous and it causes for judicial interference."* Further, *"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)], relying upon the judgment of Apex Court in Mangalam Organics Ltd. [2017 (349) ELT 369 (SC)], 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*". In the present case, the Order of the original authority does not suffer from any of these vices. Rather, the original authority has, after due application of mind, ordered absolute confiscation of the impugned goods citing relevant and reasonable considerations, brought out in para 16 of the Order-in-Original. The Commissioner (Appeals) has held that the Respondent is not a carrier but carrying her own gold ('streedhan') converted into gold bars and that the jewellery was given to her by her relatives in exchange for 52 sovereigns that she had given earlier to her aunt. The Government observes however that this is a mere assertion without any shred of evidence and is not a fact on record. It is also not clear whether these gold sovereigns were declared to Customs when the aunt took them with her out of India as no paperwork endorsement of the same has been submitted as proof. Therefore, Commissioner (Appeals) has taken cognizance of assertions without the backing of any evidence. It is also noted that the fact of purchase invoices/affidavits etc. was not even made in the retraction letter dated 30.11.2018. They were only made in the submission dated 26.12.2018 i.e., a month later and as such it appears that these are an afterthought. Even if it is believed to be true that the impugned gold indeed belong to her then also it does not take away the fact that the gold was concealed ingeniously and therefore the intent to smuggle is crystal clear. Therefore, in view of the judicial pronouncements above the original adjudicating authority was correct in denying the option of redemption to the Respondent keeping in view the nature of the offence.

10. It is also observed that the penalty imposed by the original authority is neither harsh nor excessive in view of the facts and circumstances of the case.

11. In view of the above, the impugned Order of the Commissioner (Appeals) is set aside and the Order-in-Original is restored.


15/11/23
(Shubhagata Kumar)

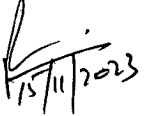
Additional Secretary to the Government of India

The Pr. Commissioner of Customs,
Anna International Airport,
Meenambakkam, Chennai-600027.

Order No. 270 /23-Cus dated 15-11-2023

Copy to:

1. The Commissioner of Customs (Appeals-I), Chennai Airport & Chennai Air Cargo, 3rd Floor, New Custom House, GST Road, Meenambakkam, Chennai-600016.
2. Smt. Juvairiya Fathima Nachiar Shahul Hameed, D/o Sh.Kader Oli Maricar, No. 26, Malaiyuappan Street, Mannady, Chennai-600001.
3. Smt. Juvairiya Fathima Nachiar, D/o. Sh. Oli Maricar, #46, First Cross Road, Beach Road, Bharathi Nagar, Karaikal-609602.
4. M/s. B. Satish Sundar & M.M.K Atifuddin, No. 42, 6th Main Road, R.A Puram, Chennai-600028.
5. PPS to AS(RA).
6. Guard File.
- ✓ 7. Spare Copy.
8. Notice Board.


15/11/2023
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