

SPEED POST



F.No. 373/161/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..15/11/23..

Order No. 271/23-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 Applications under Section 129 DD of the Customs Act, 1962, against the Order-in-Appeal No. HYD-CUS-000-APP-097-18-19 dated 25.03.2019, passed by the Commissioner of Customs & Central Tax (Appeals-I), Hyderabad.

Applicant : Shri Mohammed Yousuf Shahzeb, Nizamabad

Respondent : The Principal Commissioner of Customs, Hyderabad

ORDER

Revision Application No. 373/161/B/SZ/2019-RA dated 09.05.2019 has been filed by Shri Mohammed Yousuf Shahzeb, Nizamabad (hereinafter referred to as the Applicant) against the Order-in-Appeal No. HYD-CUS-000-APP-097-18-19 dated 25.03.2019, passed by the Commissioner of Customs & Central Tax (Appeals-I), Hyderabad. The Commissioner (Appeals-I) has rejected the appeal filed by the Applicant herein against the Order-in-Original passed by the Assistant Commissioner of Customs, Rajiv Gandhi International Airport, Hyderabad, bearing no. 121/2018 dated 14.12.2018, wherein one gold bar weighing 247.100 grams and valued at Rs. 7,78,365/-, recovered from Applicant, were confiscated absolutely under Section 111(l) and 111(m) of the Customs Act, 1962, besides penalty of Rs. 78,000/- was also imposed on the Applicant under Section 112 (a)(i) of the Act, *ibid*.

2. Brief facts of the case are that, the Applicant arrived, on 14.12.2018, at RGI Airport, Hyderabad from Jeddah by flight No.AI966. He was intercepted by the Customs officers at the international arrival hall of RGI Airport, Hyderabad after he had opted to walk through the green channel and upon search, one gold bar weighing 247.100 grams and valued at Rs. 7,78,365/-, was recovered from the sock worn by him on his right leg. He had attempted to clear the above item without opting to declare the same to the Customs officials. He admitted in his statement made under Section 108 of the Customs Act, 1962 that he had been handed over the gold bar by one Rahaan at Jeddah to be carried and handed over to another person on his arrival in Hyderabad for a consideration of Rs. 30,000/-. As it appeared that the goods were sought to be smuggled into India without payment of duty, they were seized under a panchanama dated 14.12.2018 in terms of the provisions of Customs Act, 1962. After due process of law and on waiver of issue of show cause notice as requested by the Applicant, the original authority found that the gold bar did not belong to the Applicant; that he was a carrier of gold; that the passenger had attempted to smuggle gold by not declaring to Customs; that by his acts of commission he had contravened the provisions of Section 77 of the Customs Act, 1962 read with the provisions of Section 7 of the Foreign Trade (Development & Regulation) Act, 1992 and Rule 12 of the Foreign Trade (Regulations) Rules, 1993 and that the gold

imported by the Applicant could not be treated as *bona fide* baggage since he was not eligible to import gold and since it had not been declared to Customs and since he was acting as a carrier of smuggled gold. Accordingly, the original adjudicating authority absolutely confiscated the impugned gold besides imposing penalty on the Applicant vide the above Order-in-Original. Aggrieved, the Applicant filed an appeal before the Commissioner of Customs & Central Tax (Appeals-I), Hyderabad, which has been rejected.

3. The instant revision application has been filed mainly on the grounds that the impugned order is not a speaking order since the adjudicating authority has not considered the submissions made by the applicant during personal hearing and without any substantive finding assumed that the applicant is a carrier, the applicant during the hearing has submitted the invoice No. 6313 issued by Al-Ragi Est, Jeddah; that the Department has concocted a story that Mr. Rahaan at Jeddah was the actual owner of the gold and that he had asked appellant to handover gold to some unknown person at Hyderabad for consideration of Rs. 30,000/-; that the gold is not prohibited; that the impugned authority's findings are based on assumption and presumption without substantiating the claims. The Applicant prayed that the Order-in-Appeal may be set aside as far as rejecting the redemption is concerned; reduce penalty and/or set aside penalty under Section 112(a) of the Act.

4. None appeared for the Personal hearing fixed on 25.08.2023, 20.09.2023 and 11.10.2023 from either the Applicant's or the Respondent's side. Therefore, the matter is taken up for decision based on the available records.

5. The Government has carefully examined the matter. It is undisputed that the impugned gold was recovered from the applicant's sock where it was ingeniously concealed. Further, in his voluntary statement dated 14.12.2018 under section 108 of the Customs Act, 1962, he has accepted all the facts that he is now seeking to disown. Further, the entire proceedings have been covered under panchanama dated 14.12.2018, in the presence of independent witnesses and the proceedings have not been disputed with any evidence. Therefore, the sequence of events recorded in the panchanama have to be relied upon and it is not open to the Applicant to dispute the facts at this stage. As

such, the subject contentions of the Applicant are sans merit. Moreover, there is no dispute that the impugned gold item was attempted to be smuggled and, thus, there is no legal infirmity with the confiscation of the impugned gold ordered by the original authority under Section 111(l) and 111(m) of the Customs Act, 1962.

6. As per Section 123 of the 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*. The Applicant had failed to produce any document showing 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 concurs with the lower authorities that the seized gold item was liable to confiscation under Section 111 and that the penalty was imposable on the Applicant.

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 fulfilment 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:

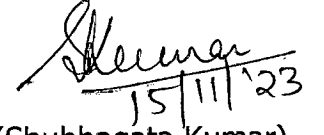
"64. Dictum of the Hon'ble Supreme Court and High Courts makes it clear that gold, may not be one of the enumerated goods, as prohibited goods, still, if the conditions for such import are not complied with, then import of gold, would squarely fall under the definition "prohibited goods", in Section 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. 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.

10. The revision application is, accordingly, rejected.


15/11/23

(Shubhagata Kumar)

Additional Secretary to the Government of India

Shri Mohammed Yousuf Shahzeb,
S/o Shri Yakhoob Mohammed,
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Order No. 271 /23-Cus dated 15-11-2023

Copy to:

1. The Commissioner of Customs & Central Tax (Appeals-I), 7th Floor, GST Bhavan, L.B Stadium Road, Basheerbagh, Hyderabad-500004
2. The Principal Commissioner of Customs, GST Bhavan, L.B Stadium Road, Hyderabad-500004.
3. Shri Shaik Aleem Shaik Akthar, Advocate, H.No. 17-2-1202/A/18, Wahed Colony, Rein Bazar, Hyderabad – 500023.
4. PPS to AS (RA).
5. Guard file.
6. ✓ Spare Copy
7. Notice Board

ATTESTED


15/11/23

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