

SPEED POST



F. No. 373/164/B/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. 273/23-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 No. TCP-CUS-000-APP-039-19 dated 26.04.2019, passed by the Commissioner of GST, Service Tax & Central Excise (Appeals), Tiruchirappalli.

Applicant : Sh. Rabik Nohaned, Pudukkottai

Respondent : The Commissioner of Customs (P), Tiruchirappalli

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ORDER

A Revision Application, bearing No. 373/164/B/2019-RA dated 13.05.2019, has been filed by Sh. Rabik Nohaned, Pudukkottai (hereinafter referred to as the Applicant), against the Order-in-Appeal No. TCP-CUS-000-APP-039-19 dated 26.04.2019, passed by the Commissioner of GST, Service Tax & Central Excise (Appeals), Tiruchirappalli, whereby the Commissioner (Appeals) has upheld the Order-in-Original No. TCP-CUS-PRV-JTC-115-18 dated 11.10.2018, passed by the Joint Commissioner of Customs (Airport), Tiruchirappalli. Vide the aforementioned Order-in-Original, three gold chains of 22 carat purity, weighing 176.500 grams, collectively valued at Rs. 5,04,437/-, recovered from the Applicant, had been absolutely confiscated under Section 111(d), 111(i), 111(l) and 111(m) of the Customs Act, 1962. Besides, penalty of Rs. 50,000/- 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 his arrival from Kuala Lumpur at Tiruchirappalli Airport, on 08.02.2016 while he was crossing the Green Channel. He brought three gold chains as mentioned above which he did not declare to Customs officers. Upon enquiry as to whether he had brought any valuable or gold in any form with him either in person or in his baggage, he replied in the negative. Before proceeding for his personal search, he was again asked whether any gold articles were brought by him to which he again replied in the negative. Thereafter he was subjected to personal search upon which three gold chains were recovered, which were concealed in his innerwear. The Government approved Assayer examined and certified them as mentioned in para above. Upon enquiry by the officers as to why he did not declare the gold chains in his Customs Declaration Form, he replied that the gold chains do not belong to him; that he wanted to clear them without payment of Customs Duty and so did not file and submit the Indian Customs Declaration Form to the baggage officers; that when he came to the airport to board the flight for India, an unknown person approached him outside the Kuala Lumpur Airport, who requested him to carry the said gold chains, clear the same without payment of the Customs duty and hand over the same to his accomplice, who would be waiting outside the Trichy airport; that he was promised a monetary benefit of Rs. 3,000/-; and that the unknown person took his photo and

informed him that he would send it to his accomplice through "Whatsapp"; that his accomplice would identify him once he comes out of Trichy Airport.

3. The revision application has been filed mainly on the grounds that the appellant is eligible to import gold and gold ornaments; that appellant had enough foreign exchange to pay for customs duty; that gold ornaments belonged to him; that oral declaration under Section 77 of the Customs Act, 1962 was made; that the gold items were not concealed; that there is no prohibition on import of gold jewellery; that statement was extracted from him through coercion and under duress; and that he retracted his statement.

4. A personal hearing in the matter was fixed on 25.08.2023 but on the request of Sh. A. Selvaraj, consultant for the applicant, who vide email letter dated 24.08.2023 requested adjournment of the said hearing. In the hearing held on 20.09.2023, Sh. A. Selvaraj, on behalf of the Applicant submitted that the applicant worked as an assistant in Malaysia; that he is an NRI and visited India for his brother's wedding. The impugned gold was purchased by him although no invoice could be produced. He insisted that there was no concealment; that the statement recorded was wrong. He accepted however that the statement was duly signed by the Applicant and has not been retracted. He further submitted that the impugned gold is not a prohibited item and should be released upon payment of appropriate fine and penalty. None appeared from the side of Respondent. As such, it is presumed that the Respondent have nothing to add in the matter.

5. The Government has carefully examined the matter. It is observed that the impugned items were recovered from the Applicant only when he was intercepted by Customs as he did not declare the same to Customs. The Applicant's contention that he had verbally declared the items to Customs is not borne out by facts on record in the OIO and OIA. Moreover, he has himself stated that these items were brought into India for sale and monetary gain and he could not produce any proof of purchase. Hence, the contentions of the Applicant that he had enough foreign exchange to pay the customs duty, that gold ornaments belonged to him, that gold items were not concealed, that he made oral declaration under Section 77 of the Customs Act, 1962 in respect of gold are not sustainable.

6. 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 him, in terms of Section 123, *ibid*. Moreover, the gold chains were ingeniously concealed by him in his innerwear and thus the intent to smuggle is obvious. Keeping in view the facts and circumstances of the case and since the Applicant has failed to discharge the onus placed on him 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.

7. Further, as per Notification No. 12/2012 dated 17.03.2012, as amended, the term 'eligible passenger' is defined as a passenger of Indian origin or a passenger holding a valid passport, issued under the Passports Act, 1967 (15 of 1967), who is coming to India after a period of not less than six months of stay abroad; and short visits, if any, made by the 'eligible passenger' during the aforesaid period of six months shall be ignored if the total duration of stay on such visits does not exceed thirty days and such passenger has not availed of the exemption under this notification or under the notification being superseded at any time of such short visits. The original authority has correctly observed in para 26 of the aforesaid Order-in-Original that one of the conditions of the aforesaid notification is that duty has to be paid in convertible foreign currency and as no foreign currency was found on the Applicant, the benefit of notification could not have been granted to him. Further, as per proviso to condition 35, the Applicant was also required to make a declaration in this regard, which has also not been done in this case. Hence, the contention of the Applicant that he was an eligible passenger cannot be accepted.

8. As regards, the retraction filed by the Applicant, it is evident that the Applicant was apprehended after he had crossed the green channel and gold was recovered from his innerwear. Therefore, the relevant sequence of events recorded in the Panchnama also substantiate the acts of Applicant in an attempt to smuggle 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 his involvement in the case of smuggling by concealing the same in his innerwear. 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 *mens rea* is established.

9.1 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*.

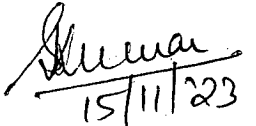
9.2 In view of the above, the contention of the Applicant that the impugned gold items are not 'prohibited goods', cannot be accepted.

10. 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.

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


15/11/23

(Shubhagata Kumar)

Additional Secretary to the Government of India

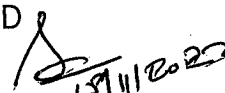
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Order No. 273 /23-Cus dated 15-11-2023

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, Tiruchirappalli-620021
4. PPS to AS(RA)
5. Guard File
6. Spare Copy
7. Notice Board

ATTESTED


15/11/2023
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