

F. No. 373/147/B/2019-RA  
F. No. 373/148/B/2019-RA  
F. No. 373/149/B/2019-RA  
F. No. 373/150/B/2019-RA

**SPEED POST**



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GOVERNMENT OF INDIA  
MINISTRY OF FINANCE  
(DEPARTMENT OF REVENUE)

14, HUDCO VISHALA BLDG., B WING  
6<sup>th</sup> FLOOR, BHIKAJI CAMA PLACE,  
NEW DELHI-110 066

Date of Issue 24/11/23

Order No. 279-282/23-Cus dated 24-11-2023 of the Government of India passed by Smt. Shubhagata Kumar, Additional Secretary to the Government of India, under section 129DD of the Custom Act, 1962.

- Subject : Revision Applications, filed under Section 129 DD of the Customs Act 1962 against the Order-in-Appeal No. TVM-EXCUS-000-APP-140-143-2019 dated 22.03.2019, passed by the Commissioner of Central Tax, Central Excise & Customs (Appeals), Kochi.
- Applicants : Sh. Mohammed Susan Akbar, Sri Lanka  
Sh. Mohammed Fasran, Sri Lanka  
Sh. Faisal Mohammed, Sri Lanka  
Sh. Faseel Mohammed, Sri Lanka
- Respondent : The Commissioner of Customs, (Preventive), Cochin.
- .....

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### **ORDER**

Revision Application Nos. 373/147/B/2019-RA, 373/148/B/2019-RA, 373/149/B/2019-RA & 373/150/B/2019-RA all dated 06.05.2019, have been filed by, Sh. Mohammed Susan Akbar, Sri Lanka, Sh. Mohammed Fasran, Sri Lanka, Sh. Faisal Mohammed, Sri Lanka & Sh. Faseel Mohammed, Sri Lanka (hereinafter referred to as Applicant-1, Applicant-2, Applicant-3 & Applicant-4 respectively) against the Order-in-Appeal No. TVM-EXCUS-000-APP-140-143-2019 dated 22.03.2019, passed by the Commissioner of Central Tax, Central Excise & Customs (Appeals), Kochi. Vide the above mentioned O-I-A, the Commissioner (Appeals) has upheld the Order-in-Original No. 05/2013 CUS (ADC) dated 27.12.2013 passed by the Additional Commissioner of Customs, Thiruvananthapuram except to the extent of reducing the penalties imposed upon Applicant-1, Applicant-2, Applicant-3 & Applicant-4 to Rs. 3,95,000/-, 2,36,000/-, 4,10,000/- & 2,30,000/- respectively under Section 112 of the Customs Act, 1962. Vide the above mentioned OIO, the original authority had ordered absolute confiscation of [(Six foreign marked gold biscuits, totally weighing 600 grams, recovered from Applicant-3), (One foreign marked gold biscuit of 100 grams, white coated crude gold bracelet weighing 132 grams and a white coated gold chain weighing 110 grams, totally weighing 342 grams, recovered from Applicant-4), (Three foreign marked gold biscuits weighing 300 grams and a white coated gold ring weighing 46 grams, totally weighing 346 grams, recovered from Applicant-2) & (Six gold bangles, one white coated crude gold bracelet, Two white coated gold rings and four white coated small rods, totally weighing 579.500 grams, recovered from Applicant-1)] under Section 111(d), 111(l) & 111(m) of the Act *ibid*. The total gold items weighed 1867.500 grams and were collectively valued at Rs. 42,41,092/-. Besides, penalties of Rs. 6,00,000/-, Rs. 4,00,000/-, Rs. 6,00,000/- & Rs. 4,00,000/- were imposed upon Applicant-1, Applicant-2, Applicant-3 & Applicant-4, respectively under Section 112 of the Customs Act, 1962.

2. Brief facts of the case are that on specific intelligence that four Sri Lankan Nationals who had arrived from Sri Lanka to Thiruvananthapuram on 21.06.2011 and travelled from Thiruvananthapuram to Chennai in the morning of 22.06.2011 and checked into Room Nos 108 to 111 of Hotel Green Palace, Mannady, Chennai were in possession of gold biscuits/gold jewellery of foreign origin smuggled into India by concealing the same in their person/baggage without declaring to the Customs authorities, the officers of the DRI, Chennai Zonal Unit on 22.06.2011 done a surprise check at the above said rooms. All of them were found present in Room No. 108. On enquiry by the officers whether they were in possession of gold biscuits/gold jewellery of foreign origin, all of them replied in the negative. Thereafter, the officers conducted search of their person and baggage and noticed two black coloured insulation tape wrapped packets kept concealed in socks kept

in the shoes of Applicant-3. On examination, the said packets were found to contain six foreign marked gold biscuits totally weighing 600 grams. On personal search of Applicant-4, one black coloured insulation tape wrapped packet containing one foreign marked gold biscuit of 100 grams and a white coated crude gold bracelet weighing 110 grams and a white coated gold chain weighing 132 grams, totally weighing 342 grams were found. On personal search of Applicant-2, three black coloured insulation tape wrapped packets containing three foreign marked gold biscuits weighing 300 grams and a white coated gold ring weighing 46 grams, both totally weighing 346 grams were found. On personal search of Applicant-1, six gold bangles, one white coated crude gold bracelet, two white coated gold rings and four white coated small rods, totally weighing 579.500 grams were found. Thereafter, a certified gold smith assayed the above said gold items and certified them as of 24 carat purity.

**Applicant-3**, in his voluntary statement dated 22.06.2011, given under Section 108 of the Customs Act, 1962, stated inter-alia that on five earlier occasions he had carried gold bracelets which were given by one Sh. Rilwan, when both of them came to India for the business of procuring textiles in India and selling the same in Sri Lanka; that he used to get Sri Lankan Rs. 250 per 8 grams of gold; that he used to hand over the gold to Sh. Rilwan in Chennai; that he came into contact with one Sh. Ameen running a pawn broker shop in Kandy and in March 2011, he received two gold bars from Sh. Ameen and brought them through Bangalore Airport without the knowledge of the Customs officers and came to Chennai by bus and handed over to the person indicated by Sh. Ameen and received Sri Lankan Rs. 400 per 8 grams of gold from Sh. Ameen; that likewise in the last three months, he had brought gold bars to Chennai through Thiruvananthapuram, Cochin and Bangalore Airports and handed over to the persons indicated by Sh. Ameen; that a person used to meet him and receive the gold bits informing the secret code number informed by Sh. Ameen and that on 21.06.2011, he travelled from Sri Lanka carrying 3 gold bars received from Sh. Ameen and arrived at Thiruvananthapuram airport, outside the Thiruvananthapuram airport he received another 3 gold bars from an Indian passenger and along with the 6 gold bars he reached Nagercoil by train and then Chennai by bus.

**Applicant-4**, in his voluntary statement dated 22.06.2011, given under Section 108 of the Customs Act, 1962, stated inter-alia that since 2006, he had been carrying textiles and readymade garments between India and Sri Lanka and used to stay in hotels in Chennai along with a group of persons engaged in such business; that in the instant occasion, he came by flight on the previous day from Colombo to Thiruvananthapuram; that along with textiles, he brought one gold biscuit of about 100 grams, one bangle of

about 100 grams, and one gold chain of about 100 grams which were given by one Sh. Ameen of Sri Lanka as requested by him; that without coming directly to Chennai by flight, he came to Thiruvananthapuram by flight and then by train, bus and taxi he reached Chennai; that that was the first time he had smuggled gold jewellery/biscuit; that Sh. Ameen had asked him to hand over the seized gold items to the person about whom he would inform him on his cellphone after his reaching Chennai.

**Applicant-2**, in his voluntary statement dated 22.06.2011, given under Section 108 of the Customs Act, 1962, stated inter-alia that he used to bring liquor bottles, pants and soap from Sri Lanka, handed them over in Chennai and on return used to carry textiles, dish antenna, fancy goods to Sri Lanka and sold them there; that on the suggestion of his friend Sh. Basil in Sri Lanka, he started bringing gold to India which were received from Sh. Ameen for a monetary consideration of Sri Lankan Rs. 8,000/- and Indian Rs. 8,00/- for expenses; that on 30.03.2011, he brought 3 gold biscuits given by Sh. Ameen Nana through Cochin Airport without declaration to the Customs authorities and keeping the same concealed in his socks that after his coming out of the airport, Sh. Ameen Nana contacted him on phone and asked him to proceed to Chennai; that whenever he came to Chennai, he used to stay at Green Palace Hotel; that upon his reaching the hotel, Sh. Ameen Nana rang up and took note of the room number and the name of the hotel and informed that a person would meet him and to whom he had to hand over the gold; that after a few hours, a person came to his hotel room, introduced himself and rang up to Sh. Ameen from his mobile and gave the phone to him; that Sh. Ameen asked him to hand over the gold to the said person and accordingly he handed over the gold to the said person; that after his reaching Kandy, Sh. Ameen gave him Sri Lankan Rs. 8,000/- for this work; that that was the first time he smuggled gold into India and continued with the same as he was getting good money; that on the next occasion, similarly he brought 3 gold biscuits through Thiruvananthapuram airport on 05.06.2011 and handed over the gold at Chennai and received Sri Lankan Rs. 8,000/- from Sh. Ameen nana; that again on the third occasion on 10.06.2011, he received three gold biscuits from Sh. Ameen nana and keeping the same concealed in his socks, travelled to Thiruvananthapuram airport, brought the gold without declaration to the Customs authorities and handed over the same at Chennai; on the fourth occasion, on 20.06.2011, he received three gold biscuits and one white colour coated finger ring from Sh. Ameen Nana and as instructed by him travelled in a flight and arrived at Thiruvananthapuram airport in the morning of 21.06.2011; that as in the earlier occasions, he kept the gold biscuits concealed in his socks and had worn the finger ring and brought them out of the airport without the knowledge of the Customs authorities; that then he came by train from Thiruvananthapuram to Nagercoil and then to Chennai by bus.

**Applicant-1**, in his voluntary statement dated 22.06.2011, given under Section 108 of the Customs Act, 1962, stated inter-alia that he used to visit India, Singapore, Dubai, meeting some traders there, received the goods given by them and brought them to Sri Lanka by flight; that so far he had done so on 16 occasions; that he used to get money in this; that on 21.06.2011, he arrived at Thiruvananthapuram airport at around 8:45 a.m, then from there reached Nagercoil by train and thereafter reached Chennai by bus on 22.06.2011 at around 6 a.m; that one Sh. Abdulla asked him to carry the above gold items to Chennai; that he used to get his mobile number but would not give his mobile number; that further he asked him to go through Thiruvananthapuram; that he gave Sri Lankan Rs. 22,000/- at the rate of Rs. 300 per sovereign; that Sh. Abdulla also informed that upon his reaching Chennai, Sh. Ameen would meet him in the lodge where he stayed and receive the gold jewellery; that he brought them without the knowledge of Customs Department and by concealment.

The matter was adjudicated vide aforesaid OIO dated 27.12.2013. Aggrieved, the Applicants preferred appeal before the Commissioner (Appeals) which was modified as above.

3. The revision applications have been filed mainly on the grounds that the Applicants are the owners of the goods; that they did not bring it for third party or monetary consideration; that import of gold is restricted and not prohibited. It is prayed that OIA be set aside, gold be allowed to re-export and penalties be reduced.

4. Personal hearing in the matter was held on 24.08.2023 in which Ms. R. Latha, Assistant Commissioner, appeared for the department and submitted that in the 373/147-373/150 RAs, four passengers, all Sri Lankan nationals were apprehended by DRI after they had brought the impugned gold concealed on their body, and recovered the same from them. She further submitted that the plea that this gold was not brought from outside but bought in India, is not tenable as the timeline of events do not match, that most of the gold had foreign markings and the rest was covered in white coating to avoid detection. She said the Commissioner (appeals) has already reduced the penalty in the OIA and that the same was accepted by the department. She submitted that the Applicant's case does not stand up to scrutiny. Since the applicants did not appear, another opportunity given to the Applicants in keeping with the principles of natural justice. On 25.09.2023, Ms. Kamala Malar, advocate for the Applicants appeared and stated that the applicants are Sri Lankan nationals and brought only 600 grams of gold, and for which she sought release on redemption fine. She quoted the Vighneswara Sethuraman judgement of the Hon'ble High Court in support of her case.

5. The Government has carefully examined the matter. It is observed that the impugned gold was recovered from the possession of the Applicants by DRI officers after raid on the basis of specific information, it is further observed that the gold had foreign markings and the rest of the gold was covered in white coating in order to avoid detection indicating a clear intent to evade detection by Customs. The original authority has noted in his order that a large part of it was concealed inside socks and shoes and total 1867.500 grams of gold was recovered from the possession of all the Applicants. Further, in their respective statements, under section of the Customs Act, 1962 all the applicants have accepted that they were part of the modus operandi to smuggle gold into India and that they did this for monetary consideration. These proceedings were conducted under a Mahazar dated 22.06.2011 signed by two independent witnesses. In light of the facts of the case, it is clear that the applicants pre-planned the concealment and smuggled the gold into India in a coordinated manner. It is noticed that all the applicants were found in the same room, therefore it is an inescapable conclusion that they knew each other. Further, their statements under Section 108 of the Customs Act, 1962 given to Customs bring out the fact that all of them worked under the instruction of one Ameen & thus pointing to the fact that they were working as a team under a common coordinator with a pre-planned modus operandi. Had DRI not raided on specific intelligence, they would have succeeded in evading the duty. Therefore, the contention that there was only 600 grams of gold does not appear correct as a total of 1867.500 grams of gold has been recovered.

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 Applicants 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 manner of concealment, i.e., keeping the gold in socks and shoes & white coating on gold, makes the intention to smuggle manifest. The Applicants have, thus, failed to discharge the burden placed on them, in terms of Section 123, *ibid*. Keeping in view the facts and circumstances of the case and as the Applicants have failed to discharge the onus placed on them in terms of Section 123, the Government agrees with the lower authorities that the seized gold items were liable to confiscation under Section 111 *ibid* and they were liable to penalties.

7.1 The Government observes that import of gold and articles thereof in baggage is allowed subject to fulfillment of certain conditions. In the present case, it is not even contended that these conditions were fulfilled by the Applicants herein. It is settled by a catena of judgments of Hon'ble Supreme Court 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 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 held to be 'prohibited goods'.

7.2 In view of the above, the contention of the Applicants that the offending gold items are not 'prohibited goods', cannot be accepted.

8. 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.*" Further, in the case of P. Sinnasamy (supra), the Hon'ble Madras High Court has held that "*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)], 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.*" In the present case, the original authority has ordered for absolute confiscation of the gold item, for relevant and reasonable considerations. 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.

9.1 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 of Section 80, it is apparent that a declaration under Section 77 is a pre-requisite for allowing re-export. 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 of the Act, *ibid*. In this case, the Applicants had made no written declaration in respect of the subject goods and made a false declaration when asked to do so orally. Further, the Hon'ble Delhi High Court has, in the case of Jasvir Kaur vs. UOI

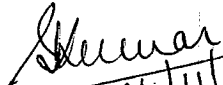
{2019 (241) ELT 521 (Del.)}, held that re-export "cannot be asked for as of right-----". The passenger cannot be given a chance to try his luck and smuggle Gold into the country and if caught he should be given permission to re-export."

9.2 Hence, the question of allowing re-export also does not arise.

10. In the facts and circumstances of the case, the quantum of penalty imposed is just and fair.

11. The case laws relied upon by the Applicants, in support of their various contentions, are not applicable in view of the dictum of the Hon'ble Supreme Court and Hon'ble High Courts, as mentioned in paras 7.1 to 8 above.

12. The revision application is, rejected for the reasons aforesaid.

  
24/11/23  
(Shubhagata Kumar)

Additional Secretary to the Government of India

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Order No. 279-282/23-Cus dated 24-11-2023

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2. The Commissioner of Customs (Appeals), 4<sup>th</sup> Floor, C.R Building, I.S Press Road, Cochin-18.
3. Ms. Kamala Malar Palanikumar, Advocate, No. 10, Sunkram Street Second Floor, Chennai-600001.
4. PPS to AS(RA):
5. Guard File.
- ✓ 6. Spare Copy.
7. Notice Board.

ATTESTED

  
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