

SPEED POST



F. No. 373/152/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. 20/12/23

Order No. 295 /23-Cus dated 19-12 - 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-006-19 dated 31.01.2019, passed by the Commissioner of Customs (Appeals), Tiruchirappalli.

Applicant : Sh. Abdul Kareem, Malappuram

Respondent : The Commissioner of Customs (P), Tiruchirappalli

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ORDER

A Revision Application, bearing No. 373/152/B/2019-RA dated 06.05.2019, has been filed by Sh. Abdul Kareem, Malappuram (hereinafter referred to as the Applicant), against the Order-in-Appeal No. TCP-CUS-000-APP-006-19 dated 31.01.2019, passed by the Commissioner of Customs (Appeals), Tiruchirappalli, whereby the Commissioner (Appeals) has upheld the Order-in-Original No. TCP-CUS-PRV-JTC-096-18 dated 24.07.2018, passed by the Joint Commissioner of Customs (Preventive), Tiruchirappalli. Vide the aforementioned Order-in-Original, one no. of crude gold and one no. of sample gold piece all of 24 carat purity, totally weighing 878.200 grams, valued at Rs. 26,34,600/-, recovered from the Applicant, had been absolutely confiscated under Section 111(d), 111(i), 111(l) & 111(m) of the Customs Act, 1962. Besides, a penalty of Rs. 2,50,000/- 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 at Coimbatore, from Sharjah, on 06.11.2017, while he was hurriedly passing through the Green Channel. Upon being asked as to whether he had anything to declare to Customs, he replied in the negative. Upon the search of his baggage nothing incriminating was found. Thereafter, the Applicant was subjected to personal search. The body search with the hand-held metal detector gave an alarm near his ankles which indicated presence of some metal items on his person. He was again asked whether any gold was brought by him to which he replied in the negative. Upon sustained questioning the applicant conceded that he was carrying four packets of a mixture of gold with some unknown material on his leg and wrapped in packing around his ankles, near his socks. Thereafter, he removed the said four packets from both his legs. Upon cutting open the said four packets, it was found that the packets contained the mixture of gold and other substances. The applicant informed that the above said metallic material contained an unknown quantity of gold to avoid the detection of gold by the officers and also evade the payment of Customs duty. Thereafter the officers weighed the said metallic material mixture which was found to be weighing 2239 grams. Since the gold was in the form of a mixture, it was taken for examination at Gold Lab of Sh. Suresh at Edayar Street, Coimbatore. Sh. Suresh examined the above said mixture and retrieved around 878.20

grams of gold in a single piece. This was found to be of 99.39% purity upon testing at M/s. Emerald Testing (India) Pvt. Ltd. In his statement dated 06.11.2017, recorded under Section 108 of the Customs Act, 1962, the Applicant stated inter-alia that for the past three years he was the owner of a cleaning service firm in Dubai; that his permanent residence is at Nilambur, his wife and his children are staying at Nilambur; that he is living in Dubai since 2010; that he used to visit Nilambur once in three or four months only; that after running his business successfully for the past three years, he started experiencing financial difficulties; that he was worried that his cleaning business would get close down; that he had savings of about 1.39 lakh Dirhams left with him; that he read news reports that there was a great demand for gold in India and thought that if he purchased gold in Dubai and sold it in India it would fetch him more profit; that he purchased eight gold bars, totally weighing 80 tolas, from Dubai Gold Souk; that he paid one lakh thirty nine thousand Dirham for the said gold; that on his request the gold dealer helped him to powder the gold bars and mix with a semi-solid chemical paste and made that into two packets of the same; that by tying the said two packets of semi sold chemical mixture to his legs/ankles and covering them with bandages, he intended to give the impression that they were medical dressing for pain in his feet/ ankle so that he could carry the gold safely without detection by Indian Customs and prevent the bandages from arousing suspicion; that this was done with a view to evade Customs Duty.

The matter was adjudicated by the original authority, vide aforesaid Order-in-Original dated 24.07.2018. 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 charge that the Applicant attempted to go through the Green Channel is a fabrication; that he was not provided with a fair opportunity of declaration; that the interception of applicant was not in the presence of any independent witnesses; that the mahazar and statement were fabricated; that gold is a freely importable commodity; that gold ought to have been released on payment of duty; that the gold was purchased by the Applicant; and that penalty imposed is highly excessive and should be reduced.

4. In the personal hearing which was held on 28.08.2023, Sh. Zahir, Advocate on behalf of the Applicant stated that gold is not a prohibited item but a restricted one, under the rules as amended in 2017, regarding import/ export trade policy. He also stated that the ownership of the impugned gold is that of his client, for which he shall submit documentary evidence along with Mahazar & statements made before Customs etc. He fairly stated that there has been ingenious concealment and an attempt to evade the Customs duties, but emphasized the submission that his client ought to be given an option to redeem the same upon payment of RF and PP as applicable. None appeared from the side of department. As such, it is presumed that the department has nothing to add in the matter.

5. The Government has carefully examined the matter. It is observed that the impugned items were not declared by the applicant, but recovered from the Applicant only when he was intercepted by Customs on suspicion. Further, the gold was brought in as a mixture to evade detection and was thus ingeniously concealed by wrapping it as a fake bandage on his ankles to avoid detection. Thus the intent to smuggle is obvious. Moreover, he has himself stated in his signed statement, recorded under section 108 of the Customs Act, 1962, that the gold piece was brought into India for sale and monetary gain and he could not produce any proof of purchase. He has not retracted his statement. Further, the entire sequence of events has been recorded under a Mahazar dated 06.11.2017 signed by two independent witnesses. Therefore the contentions of the Applicant that he was not provided with a fair opportunity of declaration, that the interception of applicant was not in the presence of any independent witnesses and that the mahazar and statement were fabricated, 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 such 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 have been produced. 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 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 piece was liable to confiscation under Section 111 *ibid* and, consequently, penalty was imposable on the Applicant.

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, 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 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*.

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

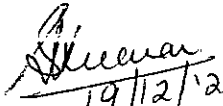
8. The Government observes that the original authority had denied the release of seized gold items on payment of redemption fine under Section 125 of Customs Act, 1962. It is settled by the judgment of the Hon'ble Supreme Court in the case of Garg Woollen Mills (P) Ltd vs. Additional Collector of Customs, 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."* 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.

9. In view of the facts of the case and the fact that there was ingenious concealment the penalty imposed is neither harsh nor excessive.

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


19/12/23

(Shubhagata Kumar)

Additional Secretary to the Government of India

Sh. Abdul Kareem
S/o Sh. Hussain Chemmala,
Chemmala, Edamala (PO)
Chungathara, Malappuram
Kerala-679334.


Order No. 295 /23-Cus dated 19-12-2023

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. Mohd. Zahir, Advocate, 3/57-A, Nedungadi Gardens, West Nadakkavu, Calicut-673011.

4. PPS to AS(RA)
5. Guard File
6. ~~Spare Copy~~
7. Notice Board

ATTESTED


19/12/2023

सरबजीत सिंह / SARABJEET SINGH
अधीक्षक / Superintendent (R.A. Unit)
वित्त मंत्रालय / Ministry of Finance
राजस्व विभाग / Department of Revenue
Room No. 605, 6th Floor., B-Wing
14, Hudco Vishala Building, Bhubaneswar Place,
New Delhi

MINISTER OF FINANCE
GOVERNMENT OF INDIA
NEW DELHI