

SPEED POST



F.No. 373/237/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. 28/12/23

Order No. 297/23-Cus dated 28-12-2023 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 Applications under Section 129 DD of the Customs Act, 1962, against the Order-in-Appeal No. TCP-CUS-000-APP-056-19 dated 01.07.2019, passed by the Commissioner of CGST, Service Tax & Central Excise (Appeals), Tiruchirappalli.

Applicant : Shri S. Imran Khan, Tiruchirappalli.

Respondent : The Commissioner of Customs (Preventive), Tiruchirappalli

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ORDER

Revision Application No. 373/237/B/SZ/2019-RA dated 19.07.2019 has been filed by Shri S. Imran Khan, Chennai (hereinafter referred to as the Applicant) against the Order-in-Appeal No. TCP-CUS-000-APP-056-19 dated 01.07.2019, passed by the Commissioner of CGST, Service Tax & Central Excise (Appeals), Tiruchirappalli. The Commissioner (Appeals) has rejected the appeal filed by the Applicant against the Order-in-Original passed by the Assistant Commissioner of Customs, Madurai Airport, Madurai, bearing no. 06/2018 dated 15.12.2018.

2. Brief facts of the case are that, the Applicant arrived, on 29.07.2017, at Madurai Airport, Madurai from Singapore via Colombo by Srilankan Airlines. He was intercepted by the officers of AIU, Airport, Madurai and a gold rod weighing 200 grams, valued at Rs. 5,74,600/-, which was kept concealed inside a screw driver was recovered from him. He attempted to clear the above item without opting to declare the same to the Customs officials. He admitted his offence and stated that the screw driver with gold concealed inside was handed over to him by one unknown person at Singapore. On the reasonable belief that the Applicant attempted to import the impugned gold item in contravention to the provisions of the Customs Act, 1962, the Customs officers seized the same for taking further action in the matter. The matter was adjudicated by the Assistant Commissioner of Customs, Madurai Airport, Madurai vide aforesaid Order-in-Original bearing no. 06/2018 dated 15.12.2018, vide which gold rod weighing 200 grams valued at Rs. 5,74,600/- was confiscated absolutely under section 111(d), 111(i), 111(l) and 111(m) of the Customs Act, 1962, as also the material object used to conceal the said seized gold rod i.e. the screw driver having no commercial value, was confiscated under section 119 of the Customs Act, 1962. A penalty of Rs. 58,000/- imposed on the Applicant under section 112(a) and 112(b) of the Customs Act, 1962.

Aggrieved, the Applicant filed an appeal before the Commissioner of CGST, Service Tax & Central Excise (Appeals), Tiruchirappalli, which has been rejected.

3. The instant revision application has been filed mainly on the grounds that the order of the lower adjudicating authority is against law, weight of evidence, circumstances and probabilities of the case; that gold is not a prohibited item; that the appellant was all along the control of the officers at the red channel; and did not pass through or cross the Green Channel and submitted that no declaration card was provided by the Customs; He prayed that the impugned Order-in-Appeal be set aside, the impugned gold items be permitted for re-export/released and that the personal penalty be set aside/ reduced.

4. Personal hearing in the matter was fixed on 29.11.2023. Smt. P. Kamala Malar, Advocate, appeared on behalf of the Applicant and reiterated the submissions made in the revision application and stated that this is a case of concealment and prayed for a lenient view. No one appeared from the Respondent side nor has any request for adjournment been made. Therefore, it is presumed that the Respondent has nothing to add in the matter.

5. The Government has carefully examined the matter. The contentions of the Applicant that he had not crossed the Green Channel and had verbally declared the gold articles in his possession to the Customs officer etc. are not acceptable as the same had not been contested before the Customs authorities when the charges were explained to him and his statements were recorded under section 108 of the Customs Act, 1962 in which he had admitted his offence and stated that the screw driver with gold concealed inside was handed over to him by one unknown person at Singapore. Further, though the Applicant claimed that he was the owner of the offending goods, he failed to produce any documents or evidence in support of his claim. As such, the contentions of the Applicant in this regard are not tenable.

6. As per 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. 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 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 for confiscation under Section 111 *ibid* and that the Applicant was liable for imposition of penalty.

7. The contention of the Applicant is that he is an 'eligible passenger'. The Government observes that this contention was also raised before the Appellate authority who has dealt with the matter in para 07 of the impugned OIA. Nothing has been placed on record to controvert the findings of the Commissioner (Appeals) on this aspect. Hence, there is no merit in the subject contention of the Applicant.

8.1 The Applicant has contended 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."

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 (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----."

8.3 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 of assigned to it under Section 2(33) of the Act, *ibid.*

8.4 In view of the above, the contention of the Applicant that the offending goods are not 'prohibited goods', cannot be accepted.

9. The Government observes that the original authority had denied the release of 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 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*

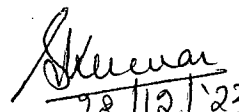
discretionary power of the Adjudging Officer”. Therefore, keeping in view the judicial pronouncements above, the Commissioner (Appeals) has correctly refused to interfere with the discretion exercised by the original authority.

10.1 As regards the prayer for permitting re-export of the offending goods, the Government observes that a specific provision regarding re-export of articles imported in baggage is made in Chapter-XI of the Customs Act, 1962, by way of Section 80. 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 vs Commissioner of Customs (P), Lucknow*{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 Applicant had not made a true declaration under Section 77.

10.2 Further, the Hon’ble Delhi High Court has, in the case of *Jasvir Kaur vs. UOI* {2009 (241) ELT 621 (Del.)}, held that re-export is not permissible when article is recovered from the passenger while attempting to smuggle it. Hence, the question of allowing re-export does not arise.

11. 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.

12. The revision application is, accordingly, rejected.


28/12/23
(Shubhagata Kumar)

Additional Secretary to the Government of India


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Order No. 297 /23-Cus dated 28-12-2023

Copy to:

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2. The Commissioner of Customs (Preventive), No.1, Williams Road, Cantonment, Tiruchirappalli-620001
3. Sh. S. Palanikumar, Kameshwaran & P. Kamala Malar, Advocates, No. 10, Sunkurama Street, 2nd Floor, Chennai-600001.
4. PPS to AS (RA).
5. ✓ Guard file.
6. Spare Copy
7. Notice Board

ATTESTED


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