

SPEED POST



F.No. 373/238/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. 29/12/23

Order No. 301/23-Cus dated 29-12-2023 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-057-19 dated 01.07.2019, passed by the Commissioner of CGST, Service Tax & Central Excise (Appeals), Tiruchirappalli.

Applicant : Shri Hyderali, Perambur, Chennai.

Respondent : The Commissioner of Customs (Preventive), Tiruchirappalli

ORDER

Revision Application No. 373/238/B/SZ/2019-RA dated 19.07.2019 has been filed by Shri Hyderali, Perambur, Chennai (hereinafter referred to as the Applicant) against the Order-in-Appeal No. TCP-CUS-000-APP-057-19 dated 01.07.2019, passed by the Commissioner of CGST, Service Tax & Central Excise (Appeals), Tiruchirappalli. The Commissioner (Appeals) has accepted the appeal filed by the Respondent and upheld the Order-in-Original bearing no. TCP-CUS-PRV-JTC-102-18 dated 25.09.2018, passed by the Joint Commissioner of Customs (Preventive), Tiruchirappalli modified to the extent that the penalty on the Applicant has been enhanced from Rs. 4,00,000/- to Rs. 6,00,000/-.

2. Brief facts of the case are that the Applicant arrived on 04.03.2018 at Trichy Airport from Kuala Lumpur by Air Asia Flight. He was intercepted by the officers of Air Intelligence Unit, Airport, Trichy. When the officers enquired from him as to whether he had brought gold in any form, he ran away from the arrival hall of the Airport. The officers with the help of the trolley personnel of the Airport, nabbed him and brought him back inside the Airport. The Applicant was found to have brought five numbers of cuboid shaped gold pieces and two square shaped gold pieces, certified by Shri M. Sudhakar, a Central Government approved gold assayer and the same was found to be of 24 carat purity weighing 1331.500 grams and valued at Rs. 40,85,042/-. The above gold items were fastened with black colour insulation tapes and concealed inside a laptop charger. The impugned goods were seized by the Customs officers under Customs Act, 1962. It is also on record that the Applicant was placed under arrest on 04.03.2018 at Trichy under Section 104 of the Customs Act, 1962 and released on the same day on execution of Surety/bail bond dated 04.03.2018 for value of Rs. 2,00,000/- deposited vide Cash Deposit Memo No. 53610 dated 04.03.2018, as per the Guidelines for Arrest and Bail in relation to offences punishable under the Customs Act, 1962 issued vide Circular No. 38/2013-Customs dated 17.09.2013 by the Ministry of Finance. Further, the matter was adjudicated by the Joint Commissioner of Customs (Preventive), Tiruchirappalli vide aforesaid Order-in-Original bearing no. TCP-CUS-PRV-JTC-102-18 dated 25.09.2018 and the following have been ordered for:

- (i) absolute confiscation of five numbers of cuboid shaped gold pieces and two square shaped gold pieces certified to be of 24 carat purity weighing 1331.500 grams and valued at Rs. 40,85,042/- under section under section 111(d), 111(i), 111(l) and 111(m) of the Customs Act, 1962;
- (ii) confiscation of the laptop charger (NCV) and the black color insulation tapes (NCV) which were used for concealing and wrapping the above said gold pieces under section 119 of the Customs Act, 1962;
- (iii) imposition of personal penalty of Rs. 4,00,000/- on the Applicant under section 112(a) and 112(b) of the Customs Act, 1962; and,
- (iv) appropriation of Rs. 2,00,000/- paid by Shri Hyderali as cash security at the Air Customs, Trichy International Airport.

The impugned order of the lower adjudicating authority was reviewed by the Commissioner of Customs, Trichy who found that the penalty imposed on the Applicant to be very low considering the total value of the goods and role played by the Applicant in smuggling of the impugned goods. Hence, the Commissioner of Customs in exercise of powers vested on him under Section 129D(2) of the Customs Act, 1962 directed the Respondent to file an appeal before the appellate authority. Subsequently, the Respondent had filed an appeal before the Commissioner of CGST, Service Tax & Central Excise (Appeals), Tiruchirappalli, which has been accepted and the above Order-in-Original dated 25.09.2018 is upheld with enhancement of penalty from Rs. 4,00,000/- to Rs. 6,00,000/- on the Applicant keeping the nature of violation committed by the Applicant and the modus operandi adopted by him to avoid checks and detection by the officers of Customs. Aggrieved, the Applicant filed this Revision Application.

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 the seized gold belongs to him and he had brought the same to India to make jewellery for his family; that the Applicant 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; that gold is not a prohibited item and 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 the appropriation of the bail bond amount was not a part of the SCN and hence is ultra-vires the law; she admitted that there was concealment of gold in the laptop charger and prays for a lenient view. No one appeared from the Respondent's side nor has any request for adjournment been made. Therefore, it is presumed that the department 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 and other items in his possession to the Customs officer etc., are not acceptable as the same had not been stated before the Customs authorities when the charges were explained to him and his statement under section 108 of the Customs Act, 1962 was recorded in which he has admitted his role in this case and that this statement has not been retracted. It is noted that when the officers enquired whether he was carrying any gold, the Applicant tried to run away from the arrival hall of the Airport and the officers had to chase him and nab him with the help of other Airport staff. In his statement recorded under section 108 of the Customs Act, 1962, the Applicant has admitted that the impugned goods was handed over to him by one unknown person at Kuala Lumpur Airport to be handed over a person waiting outside the Trichy Airport and accepted his role in this illegal activity lured by a monetary benefit of Rs. 15,000/-. Further, though the Applicant claimed that he was the owner of the impugned goods. He has signed this voluntary statement in the presence of independent witnesses as recorded in the Mahazar dated 04.03.2018. Thus, it is not open to the Applicant to dispute the facts on record at this stage. Another contention of the Applicant is that the appropriation of bail bond amount was not proper since it is not a part of the SCN. However, the same appears to be incorrect, as the same is mentioned in para 07 of the said SCN dated 18.06.2018.

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 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. Also, the 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 to avail benefit of the said notification cannot be accepted.

8.1 Another contention of the Applicant 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. The Commissioner (Appeals) observed that the LAA has rightly confiscated the impugned gold absolutely, however the penalty imposed on the Applicant is not commensurate with the offence committed and the value of the goods confiscated. Hence,

considering the nature of violation committed by the Applicant and the modus operandi adopted by him to avoid checks and detection by the officers, the appellate authority has enhanced the penalty to Rs. 6,00,000/- under section 112 of the Customs Act, 1962. The Government observes that the said enhancement of penalty on the Applicant is just and fair, in the facts and circumstances of the case and there is no ground to interfere with order of Commissioner (Appeals).

12. In view of the above, the revision application is, accordingly, rejected.

Shubhagata Kumar
29/12/23

(Shubhagata Kumar)

Additional Secretary to the Government of India

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Order No. 301/23-Cus dated 29-12-2023

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

Sarabjeet Singh
29/12/2023

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