

SPEED POST



F. No. 373/173/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...05/02/24.

Order No. 31 /24-Cus dated 05-02-2024 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-042-19 dated 26.04.2019, passed by the Commissioner of Customs & Central Excise (Appeals), Tiruchirappalli.

Applicant : Sh. Selvaganesan, Pudukottai

Respondent : The Commissioner of Customs (P), Tiruchirappalli

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ORDER

A Revision Application, bearing No. 373/173/B/2019-RA dated 22.05.2019, has been filed by Sh. Selvaganesan, Pudukottai (hereinafter referred to as the Applicant), against the Order-in-Appeal No. TCP-CUS-000-APP-042-19 dated 26.04.2019, passed by the Commissioner of Customs & Central Excise (Appeals), Tiruchirappalli, vide which the Commissioner (Appeals) has modified the Order-in-Original No. 89/2018 dated 04.08.2018, passed by the Assistant Commissioner of Customs (Airport), Madurai by increasing the penalty of Rs. 5,000/- to Rs. 10,000/- under Section 112 of the Customs Act, 1962. Vide the aforementioned Order-in-Original, one unfinished unjoined gold chain, weighing 50 grams and valued at Rs. 1,48,650/- recovered from the Applicant, had been absolutely confiscated under Section 111(d), 111(i), 111(l) & 111(m) of the Customs Act, 1962. Besides, penalty of Rs. 5,000/- was also imposed on the Applicant, under Section 112(a) of the Act, *ibid*.

2. Brief facts of the case are that Customs Officers intercepted the Applicant upon his arrival at Madurai International Airport on 04.08.2018. He was found to be carrying one unfinished unjoined gold chain concealed in his pant ticket pocket, which weighed 50 grams and was valued at Rs. 1,48,650/-. He did not declare the goods and attempted to clear the said gold chain without detection by Customs. The matter was adjudicated by the original authority, vide the aforesaid Order-in-Original dated 04.08.2018. Aggrieved, the Respondent department filed an appeal before the Commissioner (Appeals), which was allowed. Aggrieved by this, the Applicant has filed this revision application.

3. The revision application has been filed mainly on the grounds that the Applicant is eligible to import gold and gold ornaments; that he had enough foreign exchange to pay the Customs duty; that he is the owner of the gold ornaments; that he made an oral declaration; that the said chain was not concealed; and that import of gold jewellery is not prohibited. It is prayed that the gold be allowed for release on payment of appropriate duty and fine or be allowed for re-export and the appellate authority's order increasing the penalty be set aside.

4. Personal hearings in the matter were fixed on 16.10.2023 & 07.11.2023. No one appeared on any of the dates. It is presumed therefore that neither the Applicant nor the

Respondent has anything to state in the matter. Hence the matter is taken up for disposal based on available records.

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 contentions that he had verbally declared the items to Customs and he had enough foreign exchange to pay the Customs duty are not borne out by facts on record in the OIO and OIA. Moreover, 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 he is the owner of the gold ornaments, that he made an oral declaration; that the said chain was not concealed are not sustainable.

6. Another contention made by the Applicant is that he was eligible to import gold and gold ornaments. The eligibility only permits the import of gold at concessional rate of duty. The eligibility to import gold does not absolve the passenger from the requirement of declaring the goods under Section 77 of the Customs Act, 1962. However, the Applicant did not fulfill the condition of declaration. Hence, even if he was eligible to import gold, it does not have a bearing in the matter.

7. 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 have been produced by the Applicant. 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 is in agreement with the lower authorities that the seized gold items were liable to confiscation under Section 111 *ibid* and, consequently, the Applicant is liable to penalty.

8.1 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. Hon'ble Supreme Court has repeatedly

held that if conditions for import of goods are not fulfilled, they 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. 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*.

8.2 In view of the above, the contention of the Applicant that the impugned gold item is not 'prohibited goods', cannot be accepted.

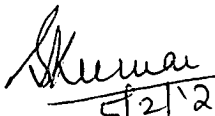
9. The Government observes that the original authority had denied the release of seized gold items on payment of redemption fine under Section 125 of Customs Act, 1962. It is settled by the judgment of the Hon'ble Supreme Court in the case of Garg Woollen Mills (P) Ltd vs. Additional Collector of Customs, 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". Hence denial of option to redeem the impugned goods by both the lower authorities is correct.

10. 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, it is apparent that a declaration under Section 77 is a pre-requisite for allowing re-export in terms of Section 80 *ibid*. 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. In this case, the Applicant had made no written declaration in respect of the subject goods. 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." Hence the option of re-export also cannot be given.

11. In view of the facts of the case, the penalty imposed is neither harsh nor excessive.

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


5/2/24
(Shubhagata Kumar)

Additional Secretary to the Government of India

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Order No. 31/24-Cus dated 05-02-2024

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. 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

Shailendra
05/02/24

ATTESTED

(शैलेन्द्र कुमार मीना)
(Shailendra Kumar Meena)
अनुभाग अधिकारी / Section Officer
वित्त मंत्रालय (राजस्व विभाग)
Ministry of Finance (Deptt. of Rev.)
भारत सरकार / Govt. of India
नई दिल्ली / New Delhi