SPEED POST

F.No. 373/379/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 06/02/24

Order No. 40 /24-Cus dated 06-02-2024 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 Applications under Section 129 DD of the Customs Act, 1962, against the Order-in-Appeal C.Cus. I. No. 162/2019 dated 04.09.2019, passed by the Commissioner of Customs (Appeals-I), Chennai.
Applicant	:	Shri Mohammed Riyaz, Chennai
Respondent	:	The Principal Commissioner of Customs, Chennai-I

ORDER

Revision Application No. 373/379/B/SZ/2019-RA dated 17.09.2019 has been filed by Shri Mohammed Riyaz, Chennai (hereinafter referred to as the Applicant) against the Order-in-Appeal C.Cus. I. No. 162/2019 dated 04.09.2019, passed by the Commissioner of Customs (Appeals-I), Chennai. The Commissioner (Appeals) has rejected the appeal filed by the Applicant against the Order-in-Original passed by the Assistant Commissioner of Customs (Airport), Anna International Airport, Chennai, bearing OS No. 202/2019- Batch-D dated 15.03.2019, vide which a gold cut bit weighing 37 grams value at Rs. 1,11,910/- and 1400 sticks of "555" Cigarettes in 07 cartons valued at Rs. 21,000/-, totally valued at Rs. 1,32,910/-, recovered from the Applicant, were confiscated absolutely under Section 111(d), 111(l), 111(m) & 111(o) of the Customs Act, 1962 read with Section 3(3) of the Foreign Trade (Development & Regulation) Act, 1992 along with Cigarettes and other Tobacco products (P & L) Rules, 2008. Besides this a Personal Penalty of Rs. 14,000/- was also imposed on the Applicant under Section 112 (a) of the Act, ibid.

2. Brief facts of the case are that, the Applicant after stay of two days abroad arrived, on 15.03.2019, at Anna International Airport, Chennai. He was intercepted in exit of arrival hall by the Customs officers. Then the Applicant was questioned as to whether he was carrying any gold /prohibited/contraband items either in his baggage or on his person, to which he replied in the negative. He was then subjected to detailed examination after complying with the provisions of Section 102 of the Customs Act, 1962. During the examination, gold cut bit weighing 37 grams value at Rs. 1,11,910/- and 1400 sticks of "555" Cigarettes in 07 cartons valued at Rs. 21,000/-, totally valued at Rs. 1,32,910/- were recovered from him. He attempted to clear the above items without opting to declare the same to the Customs officials. It was noticed that the Applicant is a frequent traveller and had brought goods in commercial quantity and non-bonafide in nature. He admitted that he is not the owner of the impugned gold and cigarettes and had carried the same for a consideration. The impugned goods were seized by the Customs officers and the matter was adjudicated by the adjudicating authority vide aforesaid Order-in-Original bearing OS No. 202/2019-Batch-D dated 15.03.2019. Aggrieved, the Applicant filed an appeal before the Commissioner of Customs (Appeals-I), Chennai, which has been rejected.

3. The instant revision application has been filed mainly on the grounds that order of adjudicating authority is against law, weight of evidence and circumstances and probabilities of the case; he was all along under the control of the officers of customs and he was at the red channel; gold is restricted item not prohibited goods; option ought to have been given for the release of impugned gold under Section 125 of the Customs Act, 1962 on payment of redemption fine. It is prayed to set aside the impugned order and to permit the Applicant to re-export or release the gold and also penalty may be set aside/ reduced.

4. Personal hearing in the matter was fixed on 19.01.2024. Smt. Kamalamalar Palanikumar on behalf of the Applicant vide her letter dated 19.01.2024 informed her inability to attend the hearing and requested to pass an order with the available records and show leniency while passing the order. None appeared from the Respondent's side nor anything has been heard from them regarding adjournment, hence 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 Applicant was intercepted at the exit point of the arrival hall after passing through the Customs Green Channel. The Applicant admitted the recovery of gold item from his baggage and also that he intended to clear the gold items by way of concealment, without declaring to the Customs, without payment of Customs duty and for a monetary consideration; that the Applicant was a short visit passenger, not in possession of any valid permit/license/document for the legal import of gold. The Applicant was not an eligible passenger to import gold as part of baggage.

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 to confiscation under Section 111 ibid and that the penalty was imposable on the Applicant.

7.1 Another contention of the Applicant is 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 in this case did not fulfil 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."*

7.2 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----."*

7.3 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.

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

8. 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.

9.1 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.

9.2 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.

10. On the issue of foreign origin cigarettes recovered from the Applicant, it is on record that the Applicant had not made any declaration in respect of the offending goods carried by him, as required under Section 77 of the Customs Act, 1962. As per the cigarettes and other tobacco products (Packaging & Labelling) Rules, 2008, cigarettes without pictorial warnings are prohibited for import into India.

11. In the facts and circumstances of the case, the Government finds that the order for absolute confiscation of the impugned goods by the original authority need not required any interference. However, the penalty imposed on the Applicant under Section 112 (a) reduces to Rs. 10,000/-.

12. The revision application is disposed of on the above terms.

6/2/24

(Shubhagata Kumar)
Additional Secretary to the Government of India

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Order No. 40 /24-Cus dated 06-02-2024

Copy to:

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2. The Principal Commissioner of Customs, Commissionerate-I, Chennai-I (Airport), New Custom House, Meenambakkam, Chennai-600027
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

6/2024

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