

SPEED POST



F. No. 373/371/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...19/2/24

Order No. 50/24-Cus dated 16.02.2024 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. 181/2019 dated 30.08.2019, passed by the Commissioner of Customs (Appeals-I), Chennai.

Applicant : Shri Sathik Batsha Pakrudeen, Chennai

Respondent : The Principal Commissioner of Customs, Chennai-I

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ORDER

Revision Application No. 373/371/B/SZ/2019-RA dated 17.09.2019 has been filed by Shri Sathik Batsha Pakrudeen, Chennai (hereinafter referred to as the Applicant) against the Order-in-Appeal C.Cus. I. No. 181/2019 dated 30.08.2019, passed by the Commissioner of Customs (Appeals-I), Chennai. The Commissioner (Appeals-I) has rejected the appeal filed by the Applicant against the Order-in-Original passed by the Joint Commissioner of Customs (Adjudication-AIR), New Custom House, Chennai, bearing No. 223/2018-19-Commissionerate-I dated 07.01.2019, vide which two gold ingots and a gold cut bit of 24 carat purity, totally weighing 335 grams and valued at Rs. 10,58,935/-, recovered from the Applicant, were confiscated absolutely under Section 111(d) and 111(l) of the Customs Act, 1962 read with Section 3(3) of the Foreign Trade (Development & Regulation) Act, 1992. Also, material objects used to conceal the impugned gold viz. yellow colour purse and black colour adhesive tape etc. were confiscated absolutely under Section 119 of the Customs Act, 1962. Besides, a penalty of Rs. 1,00,000/- was also imposed on the Applicant under Section 112 (a) of the Customs Act, 1962.

2. Brief facts of the case are that, the Applicant, an Indian passport holder, while arriving into India at Anna International Terminal of Chennai Airport, Meenambakkam, Chennai from Kuala Lumpur by Batik Air Flight No. ID 6018 dated 11.09.2018, was intercepted by the customs officers while walking towards the exit of arrival hall after passing through green channel, on reasonable suspicion that he might be carrying gold/contraband goods either in his baggage or on his person. During the search of his person, one gold cut bit weighing 20.2 grams wrapped with black colour adhesive tape was recovered from his shirt pocket. Further, from one of his checked-in-baggage, two numbers of gold ingots wrapped with black colour adhesive tape weighing 341.8 grams kept concealed inside a yellow colour purse were recovered. It was also noticed that the Applicant was a frequent traveller and used to travel from Trichy Airport; that his last visit for Kuala Lumpur was on 10.09.2018 from Chennai. As he attempted to smuggle the impugned gold by way of concealment and non-declaration of the same to the customs at Chennai airport and as he was not in possession of any valid document/permit/licence for the legal import of impugned gold into India, the impugned gold totally weighing 335

● grams and of 24 carat purity, valued at Rs. 10,58,935/- was seized under a mahazar under section 110 of the Customs Act, 1962 in presence of independent witnesses. A voluntary statement was recorded from him under Section 108 of the Customs Act, 1962, in which he stated that the seized gold items were handed over to him by one 'Syed Khan' outside Kuala Lumpur airport who had instructed him to hand over the same to an unknown person outside the Chennai airport, who would give him Rs. 5,000/- for carrying the same. Vide letter dated 12.09.2018, the Applicant requested for adjudication of the case without issue of Show Cause Notice. The adjudicating authority adjudicated the matter vide Order-in-Original No. 223/2018-19-Commissionerate-I dated 07.01.2019. Aggrieved, the Applicant filed an appeal before the Commissioner of Customs (Appeals-I), Chennai, which has been rejected.

3. The revision application has been filed, mainly, on the grounds that order of the respondent is against law, weight of evidence and circumstances and probabilities of the case; that gold is not a prohibited item; that he is the owner of the impugned gold and that the impugned order should be set aside, the gold item be permitted for re-export/released and that the penalty be reduced. The Applicant also quoted several case laws in support of their case.

4. Personal hearing in the matter was fixed on 10.01.2024 and 12.02.2024 in virtual mode. On 10.01.2024, Shri S. Ramesh, Assistant Commissioner (Legal), Chennai appeared on behalf of Respondent and submitted that the Applicant was intercepted by Customs and found to be carrying 335 grams of impugned gold in a concealed manner which is in violation of the Customs Act. He stated that goods in respect of which the conditions/restrictions subject to which their import is allowed are to be treated as prohibited goods if those conditions are violated and that the Order-in-Appeal is proper and should be upheld. Smt. Kamalamalar Palanikumar, Advocate on behalf of the Applicant appeared on 12.02.2024 and reiterated the written submissions; stated that the Applicant brought only 20 grams gold in his shirt pocket and the rest of the gold was in his checked in baggage. She prayed for release/re-export of the impugned gold upon payment of R.F. and P.P. as applicable.

5. The Government has carefully examined the matter. It is observed that the Applicant was intercepted with the above said impugned gold concealed in his baggage and his shirt pocket using black adhesive tape etc. He had not declared the import of gold items voluntarily to the Customs officers, as required under Section 77 of the Customs Act, 1962; rather he admitted to having brought these impugned items for monetary gain. The Applicant had appeared before the original authority for hearing after waiving the requirement of Show Cause Notice. Further, though the Applicant claimed that he was the owner of the offending goods, he failed to produce any valid document or evidence in support of his claim. Further, the entire proceedings have been covered under mahazar in the presence of independent witnesses and the proceedings have not been disputed with any evidence. Therefore, the sequence of events recorded under the mahazar has to be relied upon and it is not open to the Applicant to dispute the facts at this stage. As such, the contentions of the Applicant are not sustainable.

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 Customs Act, 1962. 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 agrees with the lower authorities that the seized gold items were liable to confiscation under Section 111 *ibid* and that the penalty was imposable on the Applicant.

7.1 The Applicant has contended that the import of gold is not 'prohibited'. However, the Government observes that this contention of the Applicant is in the teeth of 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. The Applicant has requested to be allowed to re-export the offending goods. The Government observes that a specific provision regarding re-export of baggage articles has been made under Section 80 of the Act, *ibid*. 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 {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 made no 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 request for re-export cannot be allowed.

10. The case laws relied upon by the Applicant, in support of his various contentions, are not applicable in view of the dictum of Hon'ble Supreme Court and Hon'ble High Courts, as above.

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.

Shubhagata Kumar
16/2/24

(Shubhagata Kumar)

Additional Secretary to the Government of India

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Order No. 50/24-Cus dated 16.02.2024

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

Sarabjeet Singh
16/2/24

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