

**SPEED POST**



F. No. 373/374/B/SZ/2019-RA  
GOVERNMENT OF INDIA  
MINISTRY OF FINANCE  
(DEPARTMENT OF REVENUE)

14, HUDCO VISHALA BLDG., B WING  
6<sup>th</sup> FLOOR, BHIKAJI CAMA PLACE,  
NEW DELHI-110 066

Date of Issue..19/2/24

Order No. 5/124-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 Application filed, under Section 129 DD of the Customs Act 1962 against the Order-in-Appeal C.Cus. I. No. 169/2019 dated 30.08.2019, passed by the Commissioner of Customs (Appeals-I), Chennai.

Applicant : Shri Meltin Sebastianraj, Chennai

Respondent : The Principal Commissioner of Customs, Chennai-I.

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**ORDER**

A Revision Application, bearing No. 373/374/B/SZ/2019-RA dated 17.09.2019, has been filed by Shri Meltin Sebastianraj, Chennai (hereinafter referred to as the Applicant), against the Order-in-Appeal C.Cus. I. No. 169/2019 dated 30.08.2019, passed by the Commissioner of Customs (Appeals-I), Chennai. The Commissioner (Appeals) vide the aforesaid Order-in-Appeal, has upheld the Order-in-Original of the Joint Commissioner of Customs (Adjudication – AIR), Chennai-I, bearing no. 102/2018-19-Commissionerate-I dated 03.10.2018 vide which four gold bits weighing 315 grams and one gold chain weighing 75 grams of 24 carat purity, totally weighing 390 grams and totally valued at Rs. 12,28,890/-, recovered from 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. Besides, a penalty of Rs. 1,00,000/- was also imposed on the Applicant under Section 112 (a) of the Act, *ibid*.

2. Brief facts of the case are that, the Applicant arrived from Bangkok on 22.04.2018, at Anna International Terminal of Chennai Airport, Meenambakkam, Chennai. He was intercepted by the customs officers when he was about to exit the 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. On examination of his person one gold chain weighing 75 grams concealed inside his closed collar shirt was recovered and on persistent questioning by the officer, the Applicant admitted that he had also concealed four numbers of gold cut bits in his rectum which he volunteered to eject in normal course. Further, four gold bits of 24 carat purity along with material objects used for concealment of said gold bits were recovered from the Applicant. The recovered gold chain and gold bits totally weighing 390 grams and valued at Rs. 12,28,890/- were seized under section 110 of the Customs Act, 1962 under mahazar dated 22.04.2018 as he attempted to smuggle the gold by way of concealment and non-declaration of the same to the customs at Chennai airport and was not an eligible passenger to bring gold into India, and was also not in possession of any valid document/permit/licence for the legal import of impugned gold into India. A voluntary statement was recorded from Applicant under

Section 108 of the Customs Act, 1962, in which he stated inter-alia that he owned a mobile repairing shop in Annanagar and the above said gold did not belong to him, the same was given to him by an unknown person at Bangkok airport with instructions to conceal inside his rectum and to be handed over to an unknown person who would come and collect the same from his home and will pay him Rs. 8,000/- and that hence instructed, he wore the said gold chain around his neck and concealed it beneath his closed collar shirt and carried the said four gold cut bits of 24 carat purity concealed in his rectum. The Applicant stated that he was well aware that smuggling gold by way of concealing and non-declaring to Customs is an offence and he committed the offence for monetary benefit. The Applicant vide his letter dated 22.04.2018, requested that the case might be adjudicated without the issue of the Show Cause Notice. The adjudicating authority adjudicated the matter vide above said Order-in-Original No. 102/2018-19-Commissionerate-I dated 03.10.2018. 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 he was all along under the control of the officers of customs and he was at the red channels and he has not passed through the green channel; that he is the owner of the impugned gold; that gold is not a prohibited item 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 19.01.2024. Smt. Kamalamalar Palanikumar on behalf of the Applicant vide her letter dated 19.01.2024 requested that an order be passed based on the available records and to 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 has not declared the possession of impugned gold in his Customs declaration form and it was only through persistent enquiry and examination of the Applicant, that the body concealment of the impugned gold came to light. Subsequently, the Applicant in his voluntary statement 22.04.2018 under Section 108 of the Customs Act, 1962 admitted his guilt. Thus, he was aware that smuggling of the impugned gold items in the aforesaid manner and without declaring the same to Customs, without possession of any valid permit/license/document, is an offence. The impugned goods smuggled into India via ingenious body concealment cannot be considered as bonafide baggage. The entire proceedings have also been covered under a Mahazar in presence of independent witnesses which also corroborates the sequence of events.

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 impugned goods, 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 adjudicating & appellate authorities that the impugned goods 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 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. 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 Government finds that the order for absolute confiscation of the impugned goods as upheld by Commissioner (Appeals) need not required any interference. Also, the quantum of penalty imposed on the Applicant is neither harsh nor excessive.

12. The revision application is rejected for the reasons aforesaid.

  
16/2/24

(Shubhagata Kumar)  
Additional Secretary to the Government of India

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S/o Shri Arockiasamy,  
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Order No. 57/24-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, 2<sup>nd</sup> Floor, Chennai-600001.
4. PPS to AS (RA).
5. Guard file.
6. Spare Copy
7. Notice Board

ATTESTED

  
16/2/24  
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