

SPEED POST



F. No. 373/389/B/SZ/2019-RA
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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. 29/02/24

Order No. 61-62/24-Cus dated 29-02-2024 of the Government of India passed by Smt. Shubhagata Kumar, Additional Secretary to the Government of India, under section 129DD of the Custom Act, 1962.

Subject: Revision Application filed, under Section 129DD of the Customs Act 1962, against the Order-in-Appeal No. TCP-CUS-000-APP-72 & 73-19 dated 16.09.2019 passed by the Commissioner of GST, Service Tax & Central Excise (Appeals), Tiruchirappalli.

Applicants : Shri M. Mohammed Abdulla, Pudukottai
Shri S. Mohammed Eliyas, Chennai

Respondent : The Commissioner of Customs (Preventive), Tiruchirappalli

.....

ORDER

Revision Applications, bearing Nos. 373/389/B/SZ/2019-RA and 373/390/B/SZ/2019-RA both dated 30.09.2019, have been filed by Shri M. Mohammed Abdulla, Pudukottai and Shri S. Mohammed Eliyas, Chennai (hereinafter referred to as the Applicant-1 & Applicant-2 respectively) against the Order-in-Appeal No. TCP-CUS-000-APP-72&73-19 dated 16.09.2019, passed by the Commissioner of GST, Service Tax & Central Excise (Appeals), Tiruchirappalli. The Commissioner (Appeals) has upheld the Order-in-Original of the Joint Commissioner of Customs (Preventive), Tiruchirappalli, bearing no. TCP-CUS-PRV-JTC-021-19 dated 05.03.2019, ordering absolute confiscation of gold bracelets 04 numbers (268 grams; valued at Rs. 8,65,640/-) and 9 Bracelets (618 grams; valued at Rs. 19,96,140/-), recovered from the Applicant-1 & Applicant-2 respectively. Besides, penalties of Rs. 90,000/- Rs. 2,00,000/- were also imposed on Applicant-1 & Applicant-2 respectively under Section 112(a) & (b) of the Customs Act, 1962.

2. Brief facts of the case is that, on 10.05.2018, the officers of DRI, Regional Unit, Coimbatore, working on a specific intelligence that seven passengers arriving from Srilanka/Malaysia to Coimbatore Airport were smuggling gold items in various forms and intercepted the following persons after they passed through the green channel. The officers took the passengers inside the arrival hall of the Airport and conducted a search of their person. Each of the seven passengers were found to have concealed one packet each, tightly wrapped with black colour adhesive tape and kept concealed in the secret pockets of their pants. The officers opened the seven packets and recovered the following gold items from each of the seven passengers, the details of which are tabulated below:-

Sl. No.	Name	Form of Gold	Nos.	Quantity (in gms.)	Value (in Rs.)
1	S. Mohammed Eliyas	Bracelet	9	618	1996140
2	F. Prem Nazeer	Bracelet	7	359	1159570
3	M. Mohammed Abdulla	Bracelet	4	268	865640
4	M. Shahul Hameed	Chain	1	80	258400
		Bracelet	1	50	161500
		Button type crude	2	80	258400
5	J. Musthafa Mydeen	Bracelet	1	60	193800

		Ring	1	25	80750
		Chain	1	90	290700
6	M. Sahabudhin	Chain	2	200	646000
		Bracelet	1	60	193800
7	I. Shajakhan	Chain	2	150	484500
GRAND TOTAL				2040	6589200

Since, the above passengers who were Indian passport holders, brought the above mentioned gold items in contravention to the provisions of existing laws, the Customs officers seized the same for taking further action under the Customs Act, 1962.

3. After due process of law, the Joint Commissioner of Customs (Preventive), Tiruchirappalli vide Order-in-Original No. TCP-CUS-PRV-JTC-021-19 dated 05.03.2019 ordered for:

- (i) Absolute confiscation of gold items of foreign origin having 24 carat purity totally weighing 2040 grams and valued at Rs. 65,89,200/- under Section 111(d), 111(i) and 111(m) of the Customs Act, 1962;
- (ii) confiscation of the items which were used for concealment viz. packing materials of NCV under Section 119 of the Customs Act, 1962;; and,
- (iii) imposition of penalty under Section 112(a) and 112(b) of the Customs Act, 1962 on the seven passengers as tabulated below:-

Sl. No.	Name	Amount of penalty (in Rs.)
1	S. Mohammed Eliyas	2,00,000
2	F. Prem Nazeer	1,20,000
3	M. Mohammed Abdulla	90,000
4	M. Shahul Hameed	70,000
5	J. Musthafa Mydeen	60,000
6	M. Sahabudhin	85,000
7	I. Shajakhan	50,000

4. Aggrieved by the order of the adjudicating authority, the Applicants 1 & 2 (Shri M. Mohamed Abdulla and Shri. S. Mohamed Eliyas) mentioned at Sl. No. 3 and 1 of the above tabulationse respectively filed appeals with Commissioner (Appeals) against this order, both of which were rejected by the appellate authority vide Order-in-Appeal No. TCP-CUS-

000-APP-72&73-19 dated 16.09.2019 passed by the Commissioner of GST, Service Tax & Central Excise (Appeals), Tiruchirappalli. The Commissioner (Appeals) found that that lower authority has rightly confiscated the impugned gold items absolutely to the Government and also the penalties imposed on the appellants were reasonable.

5. The above revision applications have been filed mainly on the grounds that order of adjudicating authority is against law, weight of evidence and circumstances and probabilities of the case; gold is a restricted and 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 Applicants to re-export or release the gold and also penalty may be set aside/reduced.

6. Personal hearings in the matter were fixed on 19.02.2024. Smt. Kamalamalar Palanikumar on behalf of the Applicants vide her letters both dated 19.02.2024 requested that an order be passed based on with the available records and to show leniency while passing the order. None appeared from the Respondents' side nor has anything been heard from them regarding adjournment, hence it is presumed that the department has nothing to add in the matter.

7. The Government has carefully examined the matter. Since, the above mentioned two Revision Applications arise out the same Order-in-Appeal and are of similar nature, both the appeals are taken up for a common decision. It is observed that both the Applicants brought the above unfinished gold bracelets by concealing them in their pant ticket pockets. They were intercepted alongwith five other accomplices, outside the arrival hall of the Airport after they had cleared through the green channel without declaring the gold items with without paying the Customs duty. The Applicants-1 & 2 were not eligible to import gold as part of baggage, in terms of Section 77 of the Customs Act, 1962 and as per Notification No. 12/2012 dated 17.03.2012, as amended. Both the Applicants in their respective statements given under Section 108 of the Customs Act, 1962 have admitted to their offence. They stated that they are frequent travelers/traders and brought the

impugned gold items in a concealed way for making monetary profit, and not in possession of any valid permit/license/document for the legal import of gold.

8. 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 Applicants-1 & 2 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.

9.1 Another contention of the Applicants are that the import of gold is not 'prohibited'. However, the Government observes that this contention of the Applicants are 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 Applicants-1 & 2 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."

9.2 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----."

9.3 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.*

9.4 In view of the above, the contentions of the Applicants-1 & 2 that the offending goods are not 'prohibited goods', cannot be accepted.

10. 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.

11.1 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 Applicants-1 &2 had not made a true declaration under Section 77.

11.2 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.

12. In the facts and circumstances of the case, the penalties imposed are just and fair.

13. In view of the above, the revision applications are rejected.


29/2/24
(Shubhagata Kumar)

Additional Secretary to the Government of India

1. Shri M. Mohammed Abdulla,
S/o Shri M. Ibramsha,
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Avudaiyar Koil Taluk, Pudukottai District

2. Sh. S. Mohammed Eliyas
S/o Sheik Mohideen,
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V.G.P. Salai, West Saidapet,
Chennai-60015

Order No. 61-62/24-Cus dated 29-02-2024

Copy to:

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2. The Commissioner of Customs (Preventive), No.1, Williams Road, Cantonment, Tiruchirappalli-620001
3. Shri S. Palanikumar, Kameshwaran & P. Kamalamalar, Advocates, No. 10, Sunkurama Street, 2nd Floor, Chennai-600001
4. PPS to AS (RA).
5. Guard file.
6. Spare Copy
7. Notice Board

ATTESTED



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