

**SPEED POST**



F. No. 373/388/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...08/03/24

Order No. 63 /24-Cus dated 08-03-2024 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-078-19 dated 16.09.2019, passed by the Commissioner of GST, Service Tax & Central Excise (Appeals), Tiruchirappalli.

Applicant : Shri Sahabudeen, Thanjavur

Respondent : The Commissioner of Customs (Preventive), Tiruchirappalli

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**ORDER**

Revision Application No. 373/388/B/SZ/2019-RA dated 30.09.2019 has been filed by Shri Sahabudeen, Thanjavur (hereinafter referred to as the Applicant) against the Order-in-Appeal No. TCP-CUS-000-APP-078-19 dated 16.09.2019, passed by the Commissioner of GST, Service Tax & Central Excise (Appeals), Tiruchirappalli. The Commissioner (Appeals) has rejected the appeal filed by the Applicant against the Order-in-Original No. 20/2019 dated 06.02.2019, passed by the Assistant Commissioner of Customs (Airport), Tiruchirappalli vide which four small unjoined and unfinished gold chains of 24 carat purity of foreign origin totally weighing 99.800 grams and valued at Rs. 2,93,113/-, recovered from the Applicant, were confiscated absolutely under Section 111(d), 111(i), 111(l) and 111(m) of the Customs Act, 1962 along with material objects used to conceal the impugned gold, i.e. polythene cover under Section 119 of the Customs Act, 1962. Besides, a penalty of Rs. 29,400/- was also imposed on the Applicant under Section 112 (a) and 112(b) of the Act, *ibid*.

2. Brief facts of the case are that, the Applicant arrived from Singapore on 01.12.2017, at Trichy International Airport. He was intercepted by the officers of AIU, Airport, Trichy, who were keeping surveillance over the passengers arriving from Singapore, when he was attempting to exit through the green channel in a suspicious manner. The AIU officers verified with the baggage officers and found that the Applicant had not declared any dutiable goods. On suspicion, he was subjected to the search of his person which resulted in recovery of four small unjoined and unfinished gold chains of 24 karat purity of foreign origin totally weighing 99.800 grams and valued at Rs. 2,93,113/-, which were kept in a polythene cover in his pant ticket pocket. Since, he attempted to smuggle the impugned gold chains by way of concealment and non-declaration of the same to Customs at Trichy airport; was not an eligible passenger to bring gold into India and was not in possession of any valid document/permit/licence for the legal import of impugned goods into India, the impugned goods were seized under Section 110 of Customs Act, 1962 under mahazar dated 01.12.2017.

3. In his voluntary statement 01.12.2017 recorded under Section 108 of the Customs Act, 1962, in which he stated inter-alia that he is a frequent flier; as per his friend's advice

he bought the above said gold with his own money from an unknown broker at Singapore and brought the said gold by concealment on his person for sale and profit. He attempted to clear the same without declaration to customs and without payment of customs duty; he had not filled customs declaration form; he did not have any valid permit/license to import the gold into India; did not have any convertible foreign currency for paying customs duty for the said gold; was aware that not declaring the possession of gold in the Customs Declaration form and attempting to clear the same without payment of duty by concealment was an offence and accepted his offence. The adjudicating authority adjudicated the matter vide above said Order-in-Original No. 20/2019 dated 06.02.2019. Aggrieved, the Applicant filed an appeal before the Commissioner of GST, Service Tax & Central Excise (Appeals), Tiruchirappalli, which has been rejected.

4. 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 has also quoted case laws in support of their case.

5. Personal hearing in the matter were fixed on 16.02.2024 and 04.03.2024. No one appeared from the Applicant's side nor has any request for adjournment been received. Hence, it is presumed that the Applicant has nothing to add in the matter. Shri Vivek Kumar Rohilla, Superintendent (Legal) appeared on behalf of the Respondent and submitted that the O-I-A is legal and proper and should therefore be upheld.

6. The Government has examined the matter. It is observed that the Applicant was intercepted with the above said impugned gold of 24 carat purity which was unfinished and unjoined, was concealed in his pant pocket and no declaration was made to Customs. He did not declare the gold items voluntarily to the Customs officers, as required under Section 77 of the Customs Act, 1962 rather he has admitted in his statement under Section 108 of the Customs Act, 1962 to having brought these impugned items for monetary gain. No proof of licit ownership has been put forth by the Applicant.

7. 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.

8.1 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."

8.2 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----."*

8.3 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.*

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

9. 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*

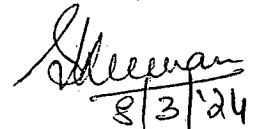
*discretionary power of the Adjudging Officer*". Therefore, keeping in view the judicial pronouncements above, the Commissioner (Appeals) has correctly refused to interfere with the discretion exercised by the original authority.

10. 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.

11. The case laws relied upon by the Applicant, in support of his various contentions do not come to his rescue in view of the dictum of Hon'ble Supreme Court and Hon'ble High Courts, as above.

12. In view of 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.

13. The revision application is, accordingly, rejected.



(Shubhagata Kumar)

Additional Secretary to the Government of India

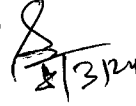
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No. 1A/7, Melathenpurakeelpakkam,  
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Order No. 63 /24-Cus dated 08-03-2024

Copy to:

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2. The Commissioner of Customs (Preventive), No.1, Williams Road, Cantonment, Tiruchirappalli-620001
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



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