

SPEED POST



F.No. 373/393/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...13/3/24

Order No. 64/24-Cus dated 12-03-2024 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 Applications under Section 129 DD of the Customs Act, 1962, against the Order-in-Appeal C. Cus. I. No. 205/2019 dated 18.09.2019, passed by the Commissioner of Customs (Appeals-I), Chennai.

Applicant : Shri Mohamed Shariff, Chennai

Respondent : The Principal Commissioner of Customs, Chennai-I

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ORDER

Revision Application No. 373/393/B/SZ/2019-RA dated 30.09.2019 has been filed by Shri Mohamed Shariff, Chennai (hereinafter referred to as the Applicant) against the Order-in-Appeal C. Cus. I. No. 205/2019 dated 18.09.2019, 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 No. 34/2019-20-Commissionerate-I dated 30.04.2019 passed by the Assistant Commissioner of Customs (Adjudication-AIR), Chennai Airport and Air Cargo Complex, Chennai-I vide which 22 nos of crude gold bits totally weighing 125 grams and valued at Rs. 4,12,250/-, 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 and also absolute confiscation of the material objects viz. handkerchief, chocolate wrapper, adhesive tape and carbon paper used to conceal gold under Section 119 of the Customs Act, 1962. Besides, penalty of Rs. 40,000/- was also imposed on the Applicant under Section 112 (a) of the Act, *ibid*.

2. Brief facts of the case are that, the Applicant, an Indian passport holder, who arrived into India at Anna International Terminal of Chennai Airport, Meenambakkam, Chennai from Dubai by Emirates Flight No. EK 542/13.11.2018, was intercepted by the customs officers at the exit of the arrival hall of the Airport on the reasonable suspicion that he might be carrying prohibited/restricted items. During the search of the Applicant's person a heavy object wrapped with adhesive tape (which was kept inside a handkerchief) was found examination of which led to the recovery of nineteen gold bits. The examination of his hand baggage led to the recovery of three heavy objects wrapped with adhesive tape and carbon paper kept concealed in a chocolate wrapper. On cutting open the same, three gold bits were recovered. Therefore a total of 22 nos of gold bits weighing 125 grams and valued at Rs. 4,12,250/-, were recovered from the Applicant. The Applicant was not eligible to import gold into India, nor was he in possession of any valid document/permit/license for the legal import of the impugned gold into India. He also did not declare the same to Customs. The impugned gold along with the material objects used to conceal the recovered gold bits were seized under a mahazar dated 27.10.2018 under

Section 110 of the Customs Act, 1962 read with Section 3(3) of the Foreign Trade (Development & Regulation) Act, 1992.

3. In his voluntary statement recorded under Section of 108 of the Customs Act, 1962 immediately after the seizure of the impugned gold, the Applicant stated inter-alia that he does textile business and earns about Rs. 15,000/-; that the said gold bits were handed over to him by an unknown person in Kuala Lumpur, and the same had to be delivered to another unknown person outside Anna International Airport, Chennai for the monetary benefit of Rs. 5,000/- and he intended to smuggle the same by concealing it in his hand baggage and on his person so as to evade detection by Customs; that he was not in possession of any valid document/permit/license from the competent authority for the legal import of the said gold and had attempted to smuggle the same by way of concealment and not declaring the same to Customs; that he was aware that smuggling of gold is an offence and he committed this offence for monetary benefit. The Applicant vide his letter dated 27.10.2018 requested for waiver of Show Cause Notice. The adjudicating authority adjudicated the matter vide aforesaid Order-in-Original No. 34/2019-20-Commissionerate-I dated 30.04.2019. Aggrieved, the Applicant filed an appeal before the Commissioner of Customs (Appeals-I), Chennai, which has been rejected.

4. 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 a restricted item 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 Applicant to re-export or release the gold, as also to set aside/reduce the penalty.

5. Personal hearing in the matter was fixed on 21.02.2024 and 04.03.2024 respectively. But, none appeared either from Applicant's or from the Respondents' side nor has any request for adjournment has been made. Therefore, the matter is taken up for decision based on the available records.

6. The Government has examined the matter. It is observed that the Applicant brought gold bits in primary form concealed in chocolate wrappers and would have walked out undetected but for the interception by Customs. The only purpose to import the same is monetary benefit through non-declaration and by evading Customs duty. He was not in possession of any valid permit/license/document for the legal import of gold. Moreover, he has in his own statement denied ownership of the impugned gold and accepted that he was only carrying it for monetary benefit. The fact that he did not declare the gold bits is a fact on record, as also the fact that he did not possess any document or evidence of purchase of the gold nor was he eligible for the legal import of gold as per Notification No. 12/2012 dated 17.03.2012.

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 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 impugned gold bits were liable to confiscation under Section 111 *ibid* and that the Applicant was liable for penalty.

8.1 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 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."*

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.

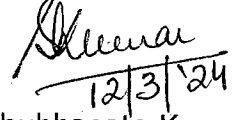
10.1 The Applicant has requested for permitting re-export for the offending goods. The Government observes that a specific provision regarding re-export of articles imported in baggage is made in Chapter-XI of the Customs Act, 1962, by way of Section 80. On a plain reading of Section 80, it is apparent 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.

10.2 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.

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. Keeping in view the facts and circumstances of the case, the penalty imposed is just and fair.

13. In view of the above, the revision application is rejected.


12/3/24

(Shubhagata Kumar)

Additional Secretary to the Government of India

Shri Mohamed Shariff,
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Order No. 64/24-Cus dated 12-03-2024

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


12/3/24

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