

**SPEED POST**



F.No. 373/355/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 14/03/24

Order No. 66/24-Cus dated 14-03-2024 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. 134/2019 dated 21.08.2019, passed by the Commissioner of Customs (Appeals-I), Chennai.

Applicant : Shri Kabeer, Ramnad

Respondent : The Principal Commissioner of Customs, Chennai-I

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**ORDER**

Revision Application No. 373/355/B/SZ/2019-RA dated 09.09.2019 has been filed by Shri Kabeer, S/o Shri Vapu, Tamil Nadu (hereinafter referred to as the Applicant) against the Order-in-Appeal C. Cus. I. No. 134/2019 dated 21.08.2019, passed by the Commissioner of Customs (Appeals-I), Chennai. The Commissioner (Appeals) has rejected the appeal filed by the Applicant and upheld the Order-in-Original bearing no. 133/2018-19 dated 29.10.2018, passed by the Joint Commissioner of Customs (Adjudication-AIR), Chennai-I.

2. Brief facts of the case are that the Applicant, an Indian National, arrived on 06.05.2018 at Kamraj Domestic Terminal of Chennai Airport by Spice Jet Flight No. SG 608 on domestic leg, aircraft bearing registration no. VT-SZM which landed in Kochi from Dubai on the same day i.e. on 06.05.2018. He was intercepted by Customs officers at Chennai Airport. Upon the search of his person, five gold bars with markings "AL-ETIHAD DUBAI-UAE 10 TOLA 999.0 and one gold cut bit all of 24 carat purity, totally weighing 604 grams and collectively valued at Rs. 18,92,936/-, which were wrapped with black colour adhesive tape in three packets with a black colour rope attached to it, were recovered from his pant pocket. Since the Spice Jet flight no. SG 608 had previous sector connections from Dubai, on reasonable belief that the impugned gold was attempted to be smuggled into India by way of concealment and to evade payment of Customs duty, the said gold items were seized under mahazar under section 110 of Customs Act, 1962. In his voluntary statement dated 06.05.2018, the Applicant had stated inter-alia that he runs a textile business and is a frequent flyer. He then narrated the sequence of the events leading to the seizure of impugned gold and stated that he is not the owner of the said gold and that he was carrying the same on the instructions of a person named Hussain who instructed him to retrieve the gold kept underneath his seat cushion in the said aircraft and keep it in his pants pocket and hand it over to a person outside the domestic terminal of Chennai Airport, who would identify him on his own. He stated that he did this for a monetary benefit of Rs. 10,000/- and that he was provided with the train ticket for journey from Chennai to Kochi and a return ticket for the journey from Kochi to Chennai

for the said flight no. SG 608/06.05.2018 which were booked by Hussain on his behalf. He also stated that he was well aware of the fact that smuggling gold by way of concealment and non-declaration to Customs was an offence. Vide letter dated 06.05.2018, the Applicant requested for waiver of show cause notice. The matter was adjudicated by the Joint Commissioner of Customs (Adjudication-AIR), Commissionerate-I, Chennai vide aforesaid Order-in-Original bearing no. 133/2018-19-Commissionerate-I dated 29.10.2018 and it was ordered as follows:

- (i) absolute confiscation of five numbers of gold bars, and one gold cut bit, all of 24 carat purity, totally weighing 604 grams and collectively valued at Rs. 18,92,936/- under Section 111(d) and (l) of the Customs Act, 1962 read with Section 3(3) of the Foreign Trade (Development & Regulation) Act, 1992;
- (ii) imposition of penalty of Rs. 1,50,000/- on the Applicant under section 112(a) of the Customs Act, 1962.

3. The instant revision application has been filed mainly on the grounds that the order of the lower adjudicating authority is against law, weight of evidence, circumstances and probabilities of the case; that the seized gold belong to him; that he is not a carrier; that the Applicant was all along the control of the officers at the red channel; and did not pass through or cross the Green Channel; and that gold is not a prohibited item. The prayer is for the impugned Order-in-Appeal to be set aside, for the impugned gold items to be permitted for re-export/release and that the personal penalty be set aside/ reduced. The Applicant has also quoted case laws in support of their case.

4. Personal hearing in the matter was fixed on 13.12.2023 and 05.01.2024. But, none appeared either from Applicant's or from the Respondents' side and no request for adjournment has been made. Therefore, the matter is taken up for decision based on the available records.

5.1 The Government has carefully examined the matter. The contentions of the Applicant that he had not crossed the Green Channel; that the seized gold belongs to him

and that he is not a carrier etc., are not acceptable as he has stated to the contrary in his statement recorded under section 108 of the Customs Act, 1962 which he has signed. This statement has not been retracted. It is on record that he was intercepted on the basis of specific intelligence that he would come by a domestic aircraft as well as the fact that the impugned gold was seized from him. He has also admitted that he removed the gold from underneath the seat of the aircraft. Though the Applicant subsequently claimed that he was the owner of the impugned goods, he has signed the voluntary statement dated 06.05.2018 in the presence of independent witnesses as recorded in the Mahazar dated 04.03.2018 which states to the contrary. The appellate authority has also noted that the fact of gold smuggling by the Applicant has also been accepted by the advocate of the Applicant during the personal hearing. Thus, these contentions appear to be only an afterthought.

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 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 for confiscation under Section 111 *ibid* and that he was liable to penalty.

7.1 Another contention of the Applicant 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 herein had not fulfilled 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.*

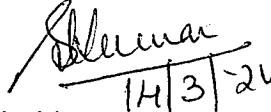
7.4 In view of the above, the contention of the Applicant that the offending goods are not 'prohibited goods', cannot be accepted.

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 regard permission to re-export the impugned goods as prayed in the above Revision Application by the Applicant, the same is contrary to the confession made by the Applicant in his statement in which he has stated inter-alia that he is not the owner of the said gold and that he was carrying the same on the instruction of one Hussain to hand it over to a person outside the domestic terminal of Chennai Airport, who would identify him on his own. He has also stated that he did this for a monetary benefit of Rs. 10,000/- and that he was in return provided with the train ticket for his journey from Chennai to Kochi and a return ticket for the journey from Kochi to Chennai for the said flight no. SG 608/06.05.2018. Therefore, the Applicant is to be treated as domestic passenger who travelled from Kochi to Chennai on 06.05.2018. Hence, the question of allowing re-export of the impugned gold 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 view of the above, the revision application is rejected.

  
14/3/24  
(Shubhagata Kumar)

Additional Secretary to the Government of India

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S/o Shri Vapu, Machyur Village,  
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Order No. 66/24-Cus dated 14-03-2024

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, 2<sup>nd</sup> Floor, Chennai-600001.
4. PPS to AS (RA).
5. Guard file.
6. ✓ Spare Copy
7. ✓ Notice Board

ATTESTED

  
14/3/2024  
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