SPEED POST

F. No. 373/392/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 18/03/24.

Order No. 69 /24-Cus dated 18-03-2024 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. 194/2019 dated 09.09.2019, passed by the Commissioner of Customs (Appeals-I), Chennai.
Applicant	:	Shri Abdul Rakheeb, Chennai
Respondent	:	The Principal Commissioner of Customs, Chennai-I

ORDER

Revision Application No. 373/392/B/SZ/2019-RA dated 30.09.2019 has been filed by Shri Abdul Rakheeb, Chennai (hereinafter referred to as the Applicant) against the Order-in-Appeal C. Cus. I. No. 194/2019 dated 09.09.2019, 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. 14/2019-20-COMMISSIONERATE-I dated 12.04.2019, passed by the Assistant Commissioner of Customs (Adjudication), Chennai-I, Chennai Airport and Air Cargo Complex, Chennai vide which three nos. of gold chains of 24 carat purity, totally weighing 248 grams and valued at Rs. 7,92,360/-, 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 along with material objects used to conceal the impugned gold i.e. black colour adhesive tape under Section 119 of the Customs Act, 1962. Besides, a penalty of Rs. 80,000/- 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, while arriving 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 Customs officers while walking towards the exit of the arrival hall after passing through green channel, on reasonable suspicion that he might be carrying dutiable / contraband goods or gold or gold jewellery either in his baggage or on his person. On examination of his checked-in baggage, two packets wrapped with black adhesive tape were recovered upon the search of his person, another small packet wrapped with black adhesive tape was recovered. On cutting open the three packets, three gold chains were recovered. The Government approved Assayer examined and certified the impugned gold to be of 24 carat purity, weighing 248 grams and appraised the value to be Rs. 7,92,360/-. The Applicant was asked whether he had valid documents pertaining to the impugned gold to which he replied in the negative. The impugned gold along with black adhesive tape used to conceal the recovered gold chains was seized under Section 110 of the Customs Act, 1962 read with Section 3(3) of the Foreign Trade (Development & Regulation) Act, 1992 vide Mahazar dated 14.11.2019.

3. In his voluntary statement recorded under Section of 108 of the Customs Act, 1962 immediately after seizure of the impugned gold, the Applicant stated inter-alia that he worked in a shop and earned Rs. 7,000/- per month; that the recovered gold chains belonged to him; that he was not in possession of any valid document for the legal import of the said gold chains and that he had not stayed abroad for the required period which would render him eligible to import gold as per notification no. 12/2012-Cus dated 17.03.2012. He admitted that he was well aware that smuggling of gold by way of concealment and without declaration is an offence and also accepted that he had smuggled the gold. The Applicant vide his letter dated 14.11.2018 requested for waiver of Show Cause Notice and the adjudicating authority adjudicated the matter vide aforesaid Order-in-Original No. 14/2019-20-COMMISSIONERATE-I dated 12.04.2019. Aggrieved, the Applicant filed an appeal before the Commissioner of Customs (Appeals-I), Chennai, which has been rejected.

4. The 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 gold is not a prohibited item; that there was no ingenious concealment; that the appellant was all along in control of the officers at the red channel; and did not pass through or cross the Green Channel and submitted that no declaration card was provided by the Customs. The prayer is that the impugned Order-in-Appeal be set aside, the impugned gold items be permitted for re-export/released and that the penalty be set aside/ reduced.

5. Personal hearings in the matter were fixed on 21.02.2024 and 04.03.2024 respectively. But, no one appeared from either the Applicant's side 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.

6. The Government has examined the matter. It is observed that the Applicant did not declare the impugned gold and it was recovered from the Applicant only after he was intercepted by Customs. Thus the condition of Section 77 of the Customs Act, 1962 to declare the goods was not met. It is observed that the applicant did not fulfill the

requirements of Notification No. 12/2012-Cus dated 17.03.2012 and was therefore not eligible to import gold on concessional rate of duty. He has admitted to smuggling the said gold in his own statement recorded under Section 108 of the Custom Act, 1962. He could not produce any valid document of ownership.

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. 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, are not applicable in view of the dictum of Hon'ble Supreme Court and Hon'ble High Courts, as above.

12. In 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.

18/3/24

(Shubhagata Kumar)
Additional Secretary to the Government of India

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Order No. 69 /24-Cus dated 18-03-2024

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

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