

SPEED POST



F.No. 373/395/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...21/03/24

Order No. 79/24-Cus dated 21-03-2024 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. 172/2019 dated 30.08.2019, passed by the Commissioner of Customs (Appeals-I), Chennai.

Applicant : Shri Tappa Shaiksha Vali, Cuddapah (A.P.)

Respondent : The Principal Commissioner of Customs, Chennai-I

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ORDER

Revision Application No. 373/395/B/SZ/2019-RA dated 30.09.2019 has been filed by Shri Tappa Shaiksha Vali, Cuddapah (A.P.) (hereinafter referred to as the Applicant) against the Order-in-Appeal C. Cus. I. No. 172/2019 dated 30.08.2019, 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. 173/2018-19-Commissionerate-I dated 30.11.2018 passed by the Joint Commissioner of Customs (Adjudication-AIR), Chennai Airport and Air Cargo Complex, Chennai-I vide which two gold bits and two gold bars, totally weighing 348 grams of 24 carat purity and valued at Rs. 10,81,584/-, 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 the material objects used to conceal the said gold viz. one pressure cooker, spanner, gas regulator and airtel set top box were also confiscated absolutely under Section 119 of the Customs Act, 1962. Besides, penalty of Rs. 1,00,000/- 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 in India on 03.09.2018 at Chennai Airport from Riyadh via Bahrain by Gulf Air Flight No. GF68/30.09.2018, 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 gold/contraband goods either in his baggage or on his person. On examination of his checked-in baggage, one gold bar weighing 116 grams with marking "Suisse 10 tolas fine gold 999.9" was found concealed in a pressure cooker; one gold bar weighing 116 grams with marking "HBTM Suisse 10 tolas fine gold 999.9" was concealed inside airtel set top box, one gold metal bit weighing 64 grams with marking "HBTM Suisse" was concealed in spanner, and one gold metal bit weighing 52 grams with marking "HBTM fine gold 999.9 HTBM SA 199" was found concealed in gas regulator. The Government approved gold appraiser examined and certified the aforementioned gold items to be of 24 carat purity, collectively weighing 348 grams and valued at Rs. 10,81,584/-. The Applicant was not in possession of any valid document/permit/license for the legal import of the impugned gold into India. Also, he did not declare the same to Customs and tried to evade customs duty.

The impugned gold along with the material objects used to conceal the recovered gold bits were seized under a mahazar 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 was working in the construction business and earned around Rs. 50,000/- and that the seized gold belonged to him and he did not have the foreign currency required to pay duty upon the same. He also admitted that he was well aware that smuggling of gold by way of concealment without declaration was an offence and also accepted that he had smuggled the impugned gold. The Applicant vide his letter dated 03.09.2018 requested for waiver of Show Cause Notice and the adjudicating authority adjudicated the matter vide the aforesaid Order-in-Original No. 173/2018-19-Commissionerate-I dated 30.11.2018. 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 side or from the Respondents' side nor has any request for adjournment has been made. Therefore, the matter is taken up based on the available records.

6. The Government has examined the matter. It is observed that the Applicant brought gold bits and bars which were recovered from his baggage ingeniously concealed inside

different objects. He has admitted in his own statement that he was not in possession of foreign currency to pay the duty on the impugned gold items. The Applicant was also not an eligible passenger to import gold as part of baggage as he did not fulfil the conditions stipulated in the Notification No. 12/2012-Cus dated 17.03.2012 vide which he was required to have stayed abroad for not less than six months and should have had sufficient foreign currency to pay the duty which was not the case. No documents evidencing ownership and licit purchase were produced at the time of interception. Furthermore, he did not declare the gold to Customs as required under Section 77 of the Customs Act, 1962. Hence the impugned goods have been brought in violation of the provisions of the Customs Act & Baggage Rules.

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*. 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.

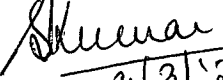
10.1 The Applicant has requested for permitting re-export for the offending goods. The Government observes that a specific provision regarding re-export of articles imported in baggage is made in Chapter-XI of the Customs Act, 1962, by way of Section 80. On a plain reading of Section 80, it is apparent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

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


21/3/24
(Shubhagata Kumar)

Additional Secretary to the Government of India


Shri Tappa Shaiksha Vali,
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Order No. 79/24-Cus dated 21-03-2024

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


21/03/2024

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