

SPEED POST



F. No. 373/382/B/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. 22/3/24

Order No. 89/24-Cus dated 22-03-2024 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. COC-CUSTOM-000-APP-21/2019-20 dated 11.06.2019, passed by the Commissioner of Customs (Appeals), Cochin.

Applicant : Sh. Hameed Mudathi Pilakkool, Kozhikode

Respondent : The Commissioner of Customs, Cochin

ORDER

A Revision Application, bearing No. 373/382/B/2019-RA dated 20.09.2019, has been filed by Sh. Hameed Mudathi Pilakool, Kozhikode (hereinafter referred to as the Applicant), against the Order-in-Appeal No. COC-CUSTM-000-APP-21/2019-20 dated 11.06.2019, passed by the Commissioner of Customs (Appeals), Cochin, vide which the Commissioner (Appeals) has upheld the Order-in-Original of the Additional Commissioner of Customs, Customs House, Cochin, bearing no. 116/2017 dated 31.10.2017. Vide the aforementioned Order-in-Original, five gold bars, recovered from the Applicant, totally weighing 583.170 grams and valued at Rs. 15,10,410/- (Market Value), had been absolutely confiscated under Section 111(d), (i), (j), (l) & (m) of the Customs Act, 1962. Besides, a penalty of Rs. 1,00,000/- was also imposed on the Applicant under Section 112(a) of the Customs Act, 1962.

2. Brief facts of the case are that the applicant was intercepted by Customs officers upon his arrival at the Cochin International Airport from Dubai on 05.12.2015 at the exit gate of the Customs Arrival. Upon enquiry as to whether he was carrying any dutiable/contraband goods in the baggage or in his person he replied in the negative and said that the contents of the said baggage are personal items and food items. It was seen that his Customs Disembarkation Card had a 'NIL' declaration. Upon the examination of his baggage, five yellow coloured metal bars were found concealed inside five dates boxes. The gold assayer examined and certified that they were of gold of 24 carat purity, totally weighing 583.170 grams and valued at Rs. 15,10,410/- (marked value). The applicant could not produce any document to prove the licit acquisition, purchase or import of the gold.

In his statement dated 05.12.2015, recorded under Section 108 of the Customs Act, 1962, the Applicant stated inter-alia that he had been running a company namely, Poonam General Land Transports in Dubai for the past ten years; that his monthly income was 15,000 UAE Dirhams; that he had bought the seized gold from Dubai on 04.12.2015; that he had taken 75,000 Dirhams from his company's account on 01.12.2015; that he knew that smuggling of gold was an offence; and that he had done that due to his financial problems and that he did not have any documents for the purchase of the gold.

The matter was adjudicated by the original authority, vide aforesaid Order-in-Original dated 31.10.2017. Aggrieved, the Applicant filed an appeal before the Commissioner (Appeals), which was rejected as mentioned above.

3. The revision application was filed mainly on the grounds that the applicant purchased the gold by drawing 75,000 Dirhams from his company's account; that witnesses were not present at the point of interception and the interception was from near the conveyor belt; that he had revealed the import of five gold biscuits and his intention to pay duty; that the statement of applicant is not voluntary; that the gold was kept in the

dates box for cohesive holding; that the searching and seizing officer did not mention the possession of US \$ 4000 and UAE Dirhams 780 which were kept inside the purse in the pants pocket of the applicant; that the penalty imposed is highly excessive, disproportionate and liable to be reduced; and that the lower authorities should have permitted re-export of the gold bars.

4. Personal hearing in the matter was held on 16.02.2024. Sh. Zahir, Advocate appeared for the applicant and submitted that the applicant was prevented from making a declaration to Customs as he was intercepted at the baggage belt itself; that the witnesses who have signed the Mahazar did not actually witness the proceedings/interception of the applicant; that Customs has relied upon a disembarkation card that does not exist; that though the impugned gold bars were kept in Dates Box, it did not amount to ingenious concealment. He quoted previous RA orders in support of his case and submitted that he shall be sending the Mahazar over email. Sh. Roy Verghese, Assistant Commissioner appeared for the Respondent and stated that applicant was intercepted at the exit gate; that applicant denied possession of the gold when asked and that no foreign currency was recovered from the applicant. Sh. Zahir stated that the Mahazar states that 'no contraband other than specified was recovered and that the currency was in the applicant's trouser pocket.

5. The Government has examined the matter. The applicant has contended that the witnesses who have signed the Mahazar did not actually witness the proceedings and the interception of the applicant. However, a scrutiny of the Mahazar makes it apparent that this contention is not correct. The Mahazar states that:-

"The officers of customs asked the said passenger in our presence whether he was carrying any dutiable/contraband goods in his baggages or person for which he replied in negative. We were told by the said officers that they had reasonable belief that the said passenger was carrying dutiable/contraband goods which are liable for confiscation under the provisions of Customs Act, 1962. In our presence and in the presence of the said passenger, the hand baggages and checked-in baggages of the said passenger were X-rayed at the X-ray machine kept near to the exit gate. On scanning of his one of the checked-in baggage bearing tab No. XH 903242 it was found that the passenger was concealing 5 metal bars in the said checked-in baggage. Thereafter, in our presence the said passenger was requested to proceed with his baggages to the office room of Air Intelligence Unit situated in the said arrival hall. The passenger obliged to the said request and we as well as the passenger along with his baggage came to the said office room."

It is further stated in the Mahazar that:-

"we remained present throughout the entire aforesaid proceedings. The Mahazar was drawn on the spot by one of the said officers as per our dictation, which was explained in detail to the said passenger in vernacular and we affirm that the same is drawn correctly. The whole proceedings completed at 11:30 AM on 05.12.2015."

The above extracts establish that the proceedings were conducted in the presence of the witnesses. The fact that the Mahazar is signed on each page by all parties including the applicant makes it clear that the applicant's contentions do not hold merit.

6. The applicant has further contended that the impugned gold bars kept inside a box of Kimia dates does not amount to ingenious concealment and that this was done merely for "cohesive holding". In this regard, the government is in agreement with Commissioner Appeals' observation that *"The contention of the passenger that the gold was kept concealed in dates boxes by him because of its high value and to secure it, is clearly an afterthought considering the fact that a person who is worried about the safety of gold in such situation would normally prefer to carry it in person or in hand baggage instead of checked-in baggage as happened."*

Therefore this is clearly a case of ingenious concealment as upon observation by the naked eye, the boxes would appear to contain Kimia dates and the gold bars concealed therein would not have been recovered but for the detection by Customs.

7. As regards the contention about the declaration card, it is observed that the Mahazar clearly states that the applicant was asked if he was carrying anything dutiable and he replied in the negative. Given his own statement under Section 108 of the Customs Act where he has admitted to having bought the gold bars from his company account for sale owing to his financial condition, it is amply clear that not only did he not declare the impugned gold to Customs of his own volition, he denied its possession when asked in the presence of witnesses. Hence the argument that Customs has relied upon a non-existent document is also sans merit.

Moreover, the Hon'ble Supreme Court has, in the case of Surjeet Singh Chhabra vs. U.O.I {1997 (89) ELT 646 (SC)}, held that a confession statement made before the Customs Officer, though retracted within six days, is an admission and binding since Customs Officers are not Police Officers. In the case of K.I. Pavunny {1997 (90) ELT 241 (SC)}, the Hon'ble Supreme Court has held that the confessional statement of an accused if found voluntary, can form the sole basis for conviction. Hence, his contention that his statement was not voluntary is not sustainable.

8. As per Section 123 of Customs Act 1962, 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*. Further the gold was ingeniously concealed i.e. concealed in the dates box. Hence, the intent to smuggle is obvious. 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 is in

agreement with the lower authorities that the seized gold items were liable to confiscation under Section 111 *ibid* and, consequently, the applicant is liable to penalty.

9. The Government observes that import of gold and articles thereof in baggage is allowed subject to fulfillment of certain conditions. In the present case, the stipulated conditions have not been fulfilled by the Applicant. Hon'ble Supreme Court has repeatedly held that goods, in respect of which conditions subject to which their import/export is allowed are not fulfilled, are to be treated as 'prohibited goods'. [Ref: Sheikh Mohd. Omer {1983 (13) ELT 1439 (SC), Om Prakash Bhatia {2003 (155) ELT 423 (SC)} & Raj Grow Impex LLP {2021 (377) ELT 145 (SC)}]. Further, the Hon'ble Madras High Court (i.e. the Hon'ble jurisdictional High Court) has, in the cases of Malabar Diamond Gallery P. Ltd. {2016 (341) ELT 465 (Mad.)} and P. Sinnasamy {2016 (344) ELT 1154 (Mad.)}, taken this view specifically in respect of import of gold in baggage. 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 assigned to it under Section 2(33) of the Act, *ibid*.

10. The Government observes that the original authority had denied the release of seized 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 option to release 'prohibited goods' on redemption fine is discretionary. In the case of Raj Grow Impex (*supra*), the Hon'ble Supreme Court has held "*that when it comes to discretion, the exercise thereof has to be guided by law; has to be according to the rules of reason and justice; has to be based on relevant considerations.*" Further, in the case of P. Sinnasamy (*supra*), the Hon'ble Madras High Court has held that "*when discretion is exercised under Section 125 of the Customs Act, 1962, ----- the twin test to be satisfied is "relevance and reason".*" 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.*" Now in the latest judgment 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 and the facts of the case, the Order-in-Appeal is proper in that it upholds the discretion exercised by the original authority.

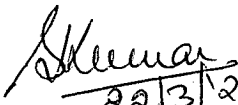
11.1 As regards the prayer for permitting re-export of the offending goods, the Government observes that a specific provision regarding re-export of articles imported in baggage is made in Chapter-XI of the Customs Act, 1962, by way of Section 80. On a plain reading of Section 80, it is apparent that 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 as he replied in negative to the question whether he was in possession of any foreign origin gold, when asked specifically. It is also observed that 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.

11.2 Hence, the question of allowing re-export in the present case does not arise.

12. The case laws relied upon by the Applicant in support of his various contentions are either not relevant in the facts of this case or are not applicable in view of the dictum of Hon'ble Supreme Court and Hon'ble High Courts, as above.

13. In view of the facts and circumstances of the case, the penalty imposed is neither harsh nor excessive.

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


22/3/24
(Shubhagata Kumar)

Additional Secretary to the Government of India


Sh. Hameed Mudathi Pilakkool
S/o Sh. Mudathi Pilakkool Ali
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Order No. 89/24-Cus dated 22-03-2024
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2. The Commissioner of Customs, Custom House, Willingdon Island, Cochin-682009
3. Sh. Mohammed Zahir, Advocate, 3/57-A, Nedungadi Gardens, West Nadakkavu, Calicut-673011
4. PPS to AS(RA).
5. Guard File.
6. Spare Copy.
7. Notice Board.

ATTESTED



22/3/24

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