

SPEED POST



F. No. 373/441/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...5/4/24

Order No. 9/24-Cus dated 4-4-2024 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.TCP-CUS-000-APP-071-19 dated 16.09.2019, passed by the Commissioner of GST, Service Tax & Central Excise (Appeals), Tiruchirappalli.

Applicant : Shri Syed Abthageer, Subramaniyapuram, Trichy

Respondent : The Commissioner of Customs (Preventive), Tiruchirappalli

.....

ORDER

Revision Application No. 373/441/B/SZ/2019-RA dated 31.10.2019 has been filed by Shri Syed Abthageer, Subramaniyapuram, Trichy (hereinafter referred to as the Applicant) against the Order-in-Appeal No.TCP-CUS-000-APP-071-19 dated 16.09.2019, passed by the Commissioner of GST, Service Tax & Central Excise (Appeals), Tiruchirappalli. The Commissioner (Appeals) has rejected the appeal filed by the Applicant against the Order-in-Original No. 33/2019 dated 27.02.2019, passed by the Assistant Commissioner of Customs (Airport), Tiruchirappalli vide which one square shaped gold piece and two rectangular shaped gold pieces, of 24 carat purity, totally weighing 239 grams and valued at Rs. 7,37,315/-, recovered from the Applicant, were confiscated absolutely under Section 111(d), 111(i), 111(l) and 111(m) of the Customs Act, 1962 along with material objects used to conceal the impugned gold, i.e. black colour insulation tape (NCV) and chappals (NCV) under Section 119 of the Customs Act, 1962. Besides, a penalty of Rs. 1,10,000/- was also imposed on the Applicant under Section 112 (a) and 112(b) of the Act, *ibid*.

2. Brief facts of the case are that, the Applicant, an Indian passport holder, arrived from Kuala Lumpur on 03.04.2018, at Trichy International Airport. He was intercepted by the officers of AIU, Airport, Trichy, who were keeping surveillance over the passengers arriving from Kuala Lumpur, when he was attempting to exit through the green channel in a suspicious manner. The AIU officers verified with the baggage officers and found that the Applicant had not made a declaration to customs regarding any dutiable goods. On suspicion, he was subjected to the search of his person, which resulted in the recovery of one square shaped gold piece (39.900 grams) concealed inside his pant ticket pocket and upon further search, the officers recovered one rectangular shaped gold piece each of his chappals (total weight – 199.10 grams) which were wrapped with black colour insulation tape and concealed inside the sole of his chappals. He was not an eligible passenger for exemption in terms of Notification No. 12/2012-Customs dated 17.03.2012, as amended and was not in possession of any valid document/permit/license for the legal import of impugned goods into India and since he attempted to smuggle the impugned gold by way of ingenious concealment and non-declaration of the same to Customs at Trichy airport, the impugned goods were seized under Section 110 of Customs Act, 1962 under mahazar dated 04.04.2018.

3. In his voluntary statement dated 04.04.2018 recorded under Section 108 of the Customs Act, 1962, the Applicant stated inter-alia that he is a frequent flier; that he was working in Manseer restaurant at Malaysia; that he earned 1500 Malaysian Ringgits per month as income through that work; that while he was returning from Kuala Lumpur to Trichy on 03.04.2018, he brought the above said impugned gold kept concealed with intention to clear the same without the knowledge of Customs and sell the same in India for fetching more profit; that the gold items under seizure belonged to him; that he did not have any convertible foreign currency for paying customs duty for the said gold; that he was aware that bringing gold from abroad, not declaring the possession of gold in the Customs Declaration form and attempting to clear the same without payment of duty by way of concealment for evading duty is an offence. Thus he accepted his offence and the adjudicating authority adjudicated the matter vide above said Order-in-Original No. 33/2019 dated 27.02.2019. Aggrieved, the Applicant filed an appeal before the Commissioner of GST, Service Tax & Central Excise (Appeals), Tiruchirappalli, which has been rejected.

4. The revision application has been filed, mainly, on the grounds that the Applicant had kept the gold pieces in his pant pocket and chappals for safety purpose only and not for concealment; he had declared the possession of gold orally which was not taken cognizance of by the officers; the gold brought by him is his own and it is not disputed in the impugned order; that the adjudicating authority ought to have allowed redemption of the seized gold; that gold is not a prohibited item; and that the impugned order should be set aside, the gold item be permitted for release and the penalty be reduced. The Applicant has also quoted case laws in support of their case.

5. Personal hearing in the matter was fixed on 18.03.2024 and 01.04.2024. On 18.03.2024, Sh. N. Manickam, Advocate on behalf of the Applicant appeared and submitted that the Applicant was employed as a cook in Malaysia and brought 239 gms of gold which was concealed in his trousers and the soles of his shoes/chappals for safety purposes as his residence was far from the Kuala Lumpur airport. Upon being asked why the gold was not declared to Customs, he stated that the passenger was intercepted when

the DFMD beeped due to the concealed metal and the passenger/applicant got no opportunity to do so. Upon being asked how he intended to pay duty since he was not carrying the requisite foreign exchange, he stated that the applicant had asked for a dentention for getting time to arrange payment of duty. He stated that the gold is not a prohibited item; the applicant is not a habitual offender and though he has no proof of ownership or purchase, the gold belonged to him and therefore he should be given the option to redeem alongwith reduction in penalty. He also cited a case of Sh. Mahesh Bali Vs. Commissioner of CE in support of his case. No one appeared from the Respondent's side nor has any request for adjournment been received. Hence, it is presumed that the Respondent has nothing to add in the matter.

6. The Government has examined the matter. It is apparent that the Applicant did not declare the gold brought by him, as required under Section 77 of Customs Act, 1962, to the Customs Authorities at the airport. The Applicant admitted to the recovery of gold from him as well as to the fact of non-declaration in his statement, tendered under Section 108 of Customs Act, 1962. It is also observed that the Applicant chose not to declare the impugned goods which were ingeniously concealed. The argument that the gold was kept concealed ingeniously in his pant pocket and in his chappals for safety purpose only, is not tenable, as the Applicant did not declare the goods to Customs, which points to the intent to conceal and evade customs duty.

7. As per rule 3(b) of the Baggage Rules read with Annexure-I, gold or silver ornaments only upto a value of Rs. 50,000/- (Rupees Fifty Thousand only) can be imported if worn in person or carried on person. In this case, the imported gold was not in jewellery form, was not worn nor carried on the person and was of a much higher value than prescribed. Moreover in the OIO, it is recorded that the Applicant in this case was not an eligible passenger for exemption as per rules. Further, it was incumbent on the part of the Respondent to have made a proper declaration under Section 77 of the Customs Act, 1962. Also, it is on record that he did not have any convertible foreign currency for paying customs duty for the said gold.

8. 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. 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 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.

9.1 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.*"

9.2 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----."

9.3 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.*

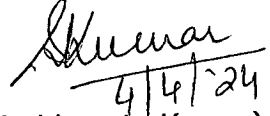
9.4 In view of the above, the contention of the Applicant that the offending goods are not 'prohibited goods', cannot be accepted.

10. 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.

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. In view of 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.


4/4/24
(Shubhagata Kumar)

Additional Secretary to the Government of India

Shri Syed Abthageer,
S/o Shri Pattani Meera,
No. 18, 1, Alagar Street,
Subramaniyapuram,
Trichy Urban, Trichy -620020
Tamil Nadu

Order No. 91/24-Cus dated 4-4-2024

Copy to:

1. The Commissioner of GST, Service Tax & Central Excise (Appeals), Tiruchirappalli, No. 1, Williams Road, Cantonment, Tiruchirappalli-620001
2. The Commissioner of Customs (Preventive), No.1, Williams Road, Cantonment, Tiruchirappalli-620001
3. Sh. N. Manickam, Advocate, No.37, 8th Cross, 3rd Main Road, Renga Nagar, K.K. Nagar Post, Tiruchirappalli-620021.
4. PPS to AS(RA).
5. Guard file.
- ✓ 6. Spare Copy
7. Notice Board

ATTESTED


4/4/24
सरबजीत सिंह / SARABJEET SINGH
अधीक्षक / Superintendent (R.A. Unit)
वित्त मंत्रालय / Ministry of Finance
राजस्व विभाग / Department of Revenue
Room No. 605, 6th Floor., B-Wing
14, Hudco Vishala Building, Bhikaji Cama Place,
New Delhi-110066

2

THE UNIVERSITY OF CHICAGO
LIBRARY
540 EAST 57TH STREET
CHICAGO, ILL. 60637
TEL: 773-936-3000