

SPEED POST



F. No. 373/508/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 23/04/24

Order No. 95/24-Cus dated 22-04-2024 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-094-19 dated 08.11.2019, passed by the Commissioner of GST, Service Tax & Central Excise (Appeals), Tiruchirappalli.

Applicant : Shri Jagathis Kumar, Tiruchirappalli

Respondent : The Commissioner of Customs (Preventive), Tiruchirappalli

ORDER

Revision Application No. 373/508/B/SZ/2019-RA dated 22.11.2019 has been filed by Shri Jagathis Kumar (hereinafter referred to as the Applicant) of Tiruchirappalli against the Order-in-Appeal No.TCP-CUS-000-APP-094-19 dated 08.11.2019, 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. 147/2019 dated 30.04.2019, passed by the Assistant Commissioner of Customs (Preventive), Tiruchirappalli vide which two rectangular shaped cut pieces of gold both of 24 carat purity, totally weighing 87.00 grams valued at Rs. 2,71,788/-, recovered from the Applicant, were confiscated absolutely under Section 111(d), 111(i), 111(l) and 111(m) of the Customs Act, 1962 read with Section 3(3) of the Foreign Trade (Development and Regulation) Act, 1992 and a penalty of Rs. 27,000/- 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 19.11.2018, at Tiruchirappalli Airport. He was intercepted by the officers of Air Intelligence Unit (AIU), Tiruchirappalli, 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 Customs baggage officers and found that the Applicant had neither filed a Customs declaration form nor made any oral declaration of any dutiable goods to them. When the officers asked him whether he had brought any valuable or gold in any form with him either in person or in his baggage, he replied in the negative. Not satisfied with his reply, the officers conducted a search on the Applicant and recovered two rectangular shaped cut pieces of gold both of 24 carat purity, totally weighing 87.00 grams and valued at Rs. 2,71,788/-. The said gold items were wrapped with transparent polythene cover and kept concealed in his pant ticket pocket. On the reasonable belief that the gold items were attempted to be smuggled into India, the officers seized the same under a Mahazar dated 19.11.2018 for taking further action under the Customs Act, 1962.

3. In his voluntary statement dated 19.11.2018 recorded under Section 108 of the Customs Act, 1962, the Applicant stated inter-alia that that when he came to board the

flight to India, an unknown person approached him to carry the gold and to clear the same without the knowledge of Customs officers, without payment of customs duty and to hand over the same to his accomplice, who would be waiting outside the Tiruchirappalli Airport, for which he would be given Rs. 5,000/- as a commission; that he accepted the gold items for the monetary benefit which would cover his travel expenses; that he received the gold item, concealed it in his pant ticket pocket and reached Tiruchirappalli Airport on 19.11.2018. After crossing immigration, he opted for Customs green channel and Customs officers searched and recovered the gold items under the mahazar; that the officers explained the rules and regulations of Customs act to him; that he understood that he had committed an offence; that he did this for monetary benefit; that the officers explained to him the provision of baggage rules; that he did not mentioned the possession of gold in the Customs declaration form; that he did not inform the possession of gold to the Customs; that he did not possess either a license or permit to import gold; that he had no objection to the seizure and confiscation of the gold; that he accepted that concealment of gold is an offence; that he had committed the offence; that the details furnished in the Mahazar were correct. The adjudicating authority adjudicated the matter vide above said Order-in-Original No. 147/2019 dated 30.04.2019. Aggrieved, the Applicant filed an appeal before the Commissioner of GST, Service Tax & Central Excise (Appeals), Tiruchirappalli, which has been rejected.

4. The above revision applications have been filed mainly on the grounds that order of adjudicating authority is against law, weight of evidence and circumstances and probabilities of the case; no declaration card was provided either by the customs authority or by any other authority and hence the question of filling up the declaration card did not arise; he was all along at the red channel at the arrival hall of airport; he was the owner of the gold item and the same was not disputed; gold is not a prohibited goods but restricted; 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 Applicants to re-export or release the gold and also reduce/set aside the penalty. The Applicant has also quoted case laws in support of their case.

5. Personal hearing in the matter was fixed on 05.04.2024. Smt. P. Kamalamalar, Advocate on behalf of the Applicant appeared and submitted that the Applicant brought around 87 grams of cut gold pieces but there is no case of ingenious concealment. The goods were verbally declared to Customs; the statement that the gold was not his, was retracted by the applicant, gold belongs to him, though he has no documentary proof. She seeks release or re-export of the impugned gold. Sh. Manimaran, Superintendent appeared on behalf of Respondent and submitted that the Applicant could not produce any documents in support of his claims; that Applicant has in his own statement under Section 108 of Customs Act, 1962, admitted that the gold was not his and that the OIA is legal and proper and should be upheld.

6. The Government has examined the matter. It is observed that the Applicant chose not to declare the impugned goods which were concealed inside his pant ticket pocket. It has been also mentioned by the adjudicating authority that the entire proceedings were covered under a Mahazar in presence of independent witnesses which also corroborates the sequence of events. Furthermore, it is on record that the Applicant on being questioned about possession of gold/gold jewellery on his person, replied in the negative, instead of making a truthful declaration as required under Section 77 of the Customs Act, 1962. The contention of the Applicant that he was at the red channel is contradictory to the fact on record that when asked by Customs if he was carrying anything dutiable, he replied in the negative. In his voluntary statement given under Section 108 of the Customs Act, 1962, the Applicant has admitted that the impugned gold items did not belong to him and that he brought these for monetary gain. As regards the retraction mentioned by the Applicant during Personal Hearing, it is seen that such a retraction is not on record. The adjudicating authority in para 16 of the O-I-O has also held it to be an afterthought. Also, the Applicant has not produced any valid documents in support of his claim. Therefore the government is inclined to concur with the findings of Commissioner (Appeals).

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. 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 Applicant was liable for imposition of penalty.

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.

10.1 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.

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. 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.



(Shubhagata Kumar)

Additional Secretary to the Government of India

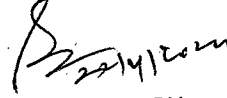
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Order No. 95/24-Cus dated 22-04-2024

Copy to:

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2. The Commissioner of Customs (Preventive), No.1, Williams Road, Cantonment, Tiruchirappalli-620001
3. Sh. S. Palanikumar, Kameshwaran & P. Kamalamalar, 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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