

**SPEED POST**



F.No. 373/407/B/SZ/2019-RA  
GOVERNMENT OF INDIA  
MINISTRY OF FINANCE  
(DEPARTMENT OF REVENUE)

14, HUDCO VISHALA BLDG., B WING  
6<sup>th</sup> FLOOR, BHIKAJI CAMA PLACE,  
NEW DELHI-110 066

Date of Issue. 26/04/24

Order No. 98/24-Cus dated 26-04-2024 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 Applications under Section 129 DD of the Customs Act, 1962, against the Order-in-Appeal C.Cus. I. No. 191/2019 dated 05.09.2019, passed by the Commissioner of Customs (Appeals-I), Chennai.

Applicant : Shri Khalid, Kasaragod, Kerala.

Respondent : The Principal Commissioner of Customs, Chennai-I

**ORDER**

Revision Application No. 373/407/B/SZ/2019-RA dated 04.10.2019 has been filed by Shri Khalid of Kasaragod, Kerala (hereinafter referred to as the Applicant) against the Order-in-Appeal C.Cus. I. No. 191/2019 dated 05.09.2019, 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 passed by the Assistant Commissioner of Customs (Airport), Anna International Airport, Chennai, bearing OS No. 243/2019- Batch-D dated 24.03.2019, vide which two gold cut bits weighing 30 grams valued at Rs. 87,570/- & 50 cartons of "Benson Hedges Cigarettes (10,000 sticks) valued at Rs. 1,50,000/-, and collectively valued at Rs. 2,37,570/-, recovered from the Applicant, were confiscated absolutely under Section 111(d), 111(l), 111(m) & 111(o) of the Customs Act, 1962 read with Section 3(3) of the Foreign Trade (Development & Regulation) Act, 1992 along with Cigarettes and other Tobacco products (P & L) Rules, 2008. Besides, a Personal Penalty of Rs. 24,000/- was also imposed on the Applicant under Section 112 (a) of the Act, *ibid*.

2. Brief facts of the case are that, the Applicant, after a stay of two days abroad arrived on 24.03.2019, at Anna International Airport, Chennai. He was intercepted at the exit of the arrival hall by Customs officers. The Applicant was then questioned as to whether he was carrying any gold /prohibited/contraband items either in his baggage or on his person, to which he replied in the negative. He was then subjected to a detailed examination after complying with the provisions of Section 102 of the Customs Act, 1962. During the examination, two gold cut bits weighing 30 grams valued at Rs. 87,570/- & 50 cartons of Benson Hedges Cigarettes (10,000 sticks) valued at Rs. 1,50,000/-, totally valued at Rs. 2,37,570/- were recovered from him. He attempted to clear the above items without opting to declare the same to the Customs officials. It was noticed that the Applicant is a frequent traveller and had brought goods in commercial quantity which were not bonafide baggage. He admitted that he had brought the impugned gold and cigarettes and that the goods were given to him by one of his friends, and these were to be handed over at Chennai for a consideration. He also requested for lenient view to be taken. The impugned goods were seized by the Customs officers and the matter was adjudicated by the adjudicating authority after the applicant requested for waiver of Show Cause Notice

vide aforesaid Order-in-Original bearing OS No. 243/2019- Batch-D dated 24.03.2019. Aggrieved, the Applicant filed an appeal before the Commissioner of Customs (Appeals-I), Chennai, which has been rejected.

3. 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; that he had bought the aforesaid gold jewellery in Dubai to be given as gift for his grand daughter's wedding and he was the owner of the same. It is prayed to set aside the impugned order and to permit the Applicant to re-export or release the gold and also penalty may be set aside.

4. Personal hearings in the matter were fixed on 23.02.2024, 18.03.2024, 01.04.2024 and 08.04.2024. On 08.04.2024, Sh. Abdul Nasar, Advocate appeared on behalf of the Applicant and submitted that the applicant arrived in March, 2019 with 80 gms of gold which was for his own use and there was no concealment; that instead of allowing release/re-export on duty, fine and penalty, the gold was absolutely confiscated; that gold is not a prohibited item but it is a restricted item and under Section 125 of the Customs Act, 1962, the option to redeem the goods is mandatory unless the goods are prohibited. As regards the ownership of goods he stated that even if the Applicant is not the owner, then he is the person from whom the impugned goods were seized and therefore he ought to have been given option to release or re-export the goods. He has also quoted the cases of Kannathasan Vs. Commissioner of Customs & Nidhi Kapoor Vs. Principal Commissioner in their support. Sh. S. Ramesh, Assistant Commissioner who appeared on behalf of Respondent, submitted that the Applicant was a frequent traveller; was not eligible to import gold; that he was not the owner of the gold; that he was caught/intercepted at the exit gate of the arrival hall as he failed to declare the gold. He emphasized the ratio of the OIA wherein the Commissioner (Appeals) has held that absolute confiscation of gold is legally proper and correct. He submitted several case laws in defence of his cases namely the case of Chennai Air Customs V/s P. Sinnasamy {2016 (344) ELT 1154 (Mad.)} wherein 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"*" and also the decision of the Revisionary

Authority in the case of Vikas Rathi [2018(364) ELT 1187 (GOI)] that re-export cannot be claimed as a matter of right etc. He prayed that the OIA be upheld.

5. The Government has examined the matter. It is observed that the Applicant was intercepted at the exit point of the arrival hall after passing through the Customs Green Channel. The Applicant admitted the recovery of the impugned gold item from his baggage and also that he intended to clear the gold items by way of concealment, without declaring to the Customs, without payment of Customs duty and for a monetary consideration; that the Applicant was a short visit passenger, not in possession of any valid document for the legal import of gold. The Applicant was not an eligible passenger to import gold as part of baggage.

6. 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*. 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 concurs with the lower authorities that the seized gold item was liable to confiscation under Section 111 *ibid* and that the penalty was imposable on the Applicant.

7.1 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 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."*

7.2 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----."*

7.3 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.*

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

8. 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 the case of Nidhi Kapoor Vs. Pr. Commissioner and Additional Secretary to the Government of India & Ors. took up 5 Writ Petitions in one bunch and settled the matter on discretion. 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, in light of the judicial pronouncements above, the discretion exercised by the original authority has been rightly upheld by Commissioner (Appeals).

9. Another case law cited by the advocate of the applicant is R. Kannathasan Vs. The Commissioner of Customs wherein the Hon'ble Madras High Court observed as follows "*The learned counsel for the petitioner submits that the petitioner is working in Singapore for the past 5 ½ years. He is having a valid Work Permit Card issued by the Republic of Singapore and is also having a Bank Account in Singapore and his salaries were paid by the Company through the Bank Account. The petitioner had purchased three Gold Bangles, totally weighing 150 grams in Singapore as per the invoice, for the marriage in his family..... Immediately, on his arrival, he had declared before the Trichy Airport Custom Officers about the possession of three gold bangles, totally weighing 150 grams.*" From the above, it is clear that this case is distinguished from the instant case, as in the instant case, unlike the case quoted, the applicant did not declare the possession of impugned goods under Section 77 of the Customs Act, 1962 and he also did not produce any of the documents mentioned in the above case.

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

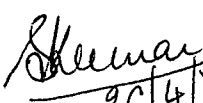
plain reading, it is apparent that a declaration under Section 77 is a pre-requisite for allowing re-export in terms of Section 80 *ibid*. Hon'ble Allahabad High Court has, in the case of Deepak Bajaj {2019 (365) ELT 695 (All.)}, held that a declaration under Section 77 is a *sine qua non* for allowing re-export under Section 80. In this case, the Applicant had made no written declaration in respect of the subject goods.

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. On the issue of foreign origin cigarettes recovered from the Applicant, it is on record that the Applicant had not made any declaration in respect of the offending goods carried by him, as required under Section 77 of the Customs Act, 1962. As per the cigarettes and other tobacco products (Packaging & Labelling) Rules, 2008, cigarettes without pictorial warnings are prohibited for import into India.

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.

  
26/4/24  
(Shubhagata Kumar)

Additional Secretary to the Government of India

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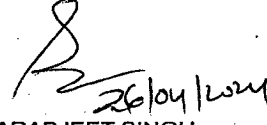
Order No. 98/24-Cus dated 26-04-2024

Copy to:

1. The Commissioner of Customs (Appeals-I), Chennai Airport & Air Cargo, 3<sup>rd</sup> floor, New Custom House, GST Road, Meenambakkam, Chennai - 600016

2. The Principal Commissioner of Customs, Commissionerate-I, Chennai-I (Airport), New Custom House, Meenambakkam, Chennai-600027
3. Sh. Shajid Kammadam, Advocate, Virtus Juris, Sandal City Building, Vidya Nagar, Kasargod District, Kerala -671123.
4. PPS to AS (RA)
5. ✓ Guard file
6. Spare Copy
7. Notice Board

ATTESTED

  
26/04/2024

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