

SPEED POST



F. No. 373/458/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. 07/05/24

Order No. 101/24-Cus dated 07-05-2024 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. 253/2019 dated 15.10.2019, passed by the Commissioner of Customs (Appeals-I), Chennai.

Applicant : Shri Mohamed Kishore Khan, Chennai

Respondent : The Principal Commissioner of Customs, Chennai-I

ORDER

Revision Application No. 373/458/B/SZ/2019-RA dated 11.11.2019 has been filed by Shri Mohamed Kishore Khan, Chennai (hereinafter referred to as the Applicant) against the Order-in-Appeal C. Cus. I. No. 253/2019 dated 15.10.2019, 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. 46/2019-20-Commissionerate-I dated 17.05.2019, passed by the Joint Commissioner of Customs (Adjudication-Air), Chennai-I, Chennai Airport and Air Cargo Complex, Chennai vide which seven nos. of gold pieces totally weighing 385 grams and valued at Rs. 13,27,095/-, 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 along with material objects used to conceal the impugned gold i.e. SONY home theatre system (NCV) under Section 119 of the Customs Act, 1962. Besides, a penalty of Rs. 1,30,000/- was also imposed on the Applicant under Section 112 (a) of the Act, *ibid*.

2. Brief facts of the case are that, on 24.02.2019, the Applicant, an Indian passport holder, while arriving into India at Anna International Terminal of Chennai Airport, Meenambakkam, Chennai from Bangkok, was intercepted by Customs officers while he was about to exit the arrival hall after passing through green channel, on reasonable suspicion that he might be carrying gold / contraband goods either in his baggage or on his person. On examination of one of the checked in baggage of the passenger viz., one carton box with marking 'Sony home theatre', 5 nos. of gold pieces totally 128 grams and one big round gold piece weighing 227 grams were found concealed in the home theatre system. During personal search of the Applicant, one round gold metal piece weighing 30 grams kept in the pocket of the shirt worn by him was recovered. Thus a total of 385 grams of gold of 24 carat purity, collectively valued at Rs. 13,27,095/- was recovered. As he attempted to smuggle the gold by way of concealment and non-declaration to Customs at Chennai airport and since he was not an eligible passenger to bring gold into India and was not in possession of any valid documents for the legal import of impugned gold into

India, the same 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 seizure of the impugned gold, the Applicant stated inter-alia that he was working in a mobile shop and earned Rs. 12,000/- per month; that said SONY home theatre which had gold concealed inside was handed over to him by an unknown person at Bangkok airport with instructions to hand over the same to an unknown person who would identify himself and collect the same from him outside Chennai airport for a payment of Rs. 5,000/-; that he was well aware that smuggling gold by way of concealment and non-declaration was an offence and he committed this offence for monetary benefit. The Applicant, vide letter dated 25.02.2019, requested for adjudication of the case without issue of show cause notice. The adjudicating authority adjudicated the matter vide aforesaid Order-in-Original No. 46/2019-20-Commissionerate-I dated 17.05.2019. Aggrieved, the Applicant filed an appeal before the Commissioner of Customs (Appeals-I), Chennai, which has been rejected.

4. The revision application has been filed mainly on the grounds that the order of the lower adjudicating authority is against law, weight of evidence, circumstances and probabilities of the case; that gold is a restricted item and not a prohibited good; that the appellant was all along in control of the officers at the red channel; and did not pass through or cross the Green Channel. The prayer is for the impugned Order-in-Appeal be set aside; that the impugned gold items be permitted for re-export/released and that the penalty be set aside/ reduced.

5. Personal hearing in the matter was fixed on 03.04.2024. Smt. P. Kamalamalar, Advocate appeared on behalf of the Applicant and reiterated the written submissions made in the Revision Application. Sh. S. Ramesh, Assistant Commissioner of Customs (Legal & Review), Chennai-I vide letter dated 03.04.2024 submitted that the Applicant did not declare the gold and opted for Green Channel; he was intercepted at exit point on reasonable suspicion; the recovered gold was found concealed in Sony Home Theatre system; that re-export of gold may not be allowed in light of case of M/s. Om Prakash

Bhatia Vs. commissioner of Customs, Delhi, {2003(155)ELT423(SC)} and it has been prayed that the appeal filed by the Applicant be set aside.

6. The Government has examined the matter. It is observed that the impugned gold which was ingeniously concealed inside a home theatre system and the same was recovered from him only through detection by Customs. Thus the condition of Section 77 of the Customs Act, 1962 to declare the goods was not met. It is on record that in his own statement recorded under Section 108 of the Custom Act, 1962, the Applicant has admitted to smuggling the said gold, which did not belong to him and which he carried for monetary benefit. The original adjudicating authority has also noted that intent to smuggle on part of the Applicant, was lucidly established as he ignored the legal requirement of Section 77, did not file the Customs Baggage Declaration form and attempted to smuggle the ingeniously concealed impugned gold through the green channel.

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. Not only did the Applicant not declare the gold items, as stipulated under Section 77 of the Customs Act, 1962, but ingeniously concealed the same inside a Sony home theatre system. Further he admitted that the gold was not his and that he carried it for monetary gain. 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.

8.1 The Applicant has contended that the import of gold is not 'prohibited'. However, the Government observes that this contention flies 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----."

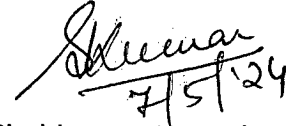
8.3 Moreover, the Hon'ble High Court of Delhi in its order dated 23.11.2023 in Writ Petition No. 8976 of 2020 in the matter of *Kiran Juneja Vs. Union of India & Ors.* has held that "*A fortiori and in terms of the plain language and intent of Section 2(33), an import which is effected in violation of 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 rightly refused to interfere with the discretion exercised by the original authority.

10. The Applicant has requested to be allowed to re-export the offending goods. The Government observes that a specific provision regarding re-export of baggage articles has been made under Section 80 of the Act, *ibid* and upon a plain reading of the same, 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 {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 not only did not make any declaration in respect of the subject goods, but rather went in for ingenious concealment of the gold with an intent to evade customs duty and smuggle the same. Further, the Hon'ble Delhi High Court has, in the case of *Jasvir Kaur vs. UOI {2019 (241) ELT 521 (Del.)}*, held that re-export "*cannot be asked for as of right-----*. *The passenger cannot be given a chance to try his luck and smuggle Gold into the country and if caught he should be given permission to re-export.*" Hence, the request for re-export cannot be allowed.

11. The case laws relied upon by the Applicant, in support of his various contentions, are not applicable in view of the dictum of Hon'ble Supreme Court and Hon'ble High Courts, as above.
12. In 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. 10/24-Cus dated 07-05-2024

Copy to:

1. The Commissioner of Customs (Appeals-I), Chennai Airport & Air Cargo, 3rd 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. 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



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