

SPEED POST



F. No. 373/266/B/SZ/2020-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. 28/11/24....

Order No. 238 /24-Cus dated 28-11-2024 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 Airport. Cus. I. No. 258/2020 dated 03.11.2020, passed by the Commissioner of Customs (Appeals-I), Chennai.

Applicant : Shri Rahim, Chennai

Respondent : The Principal Commissioner of Customs, Chennai-I

ORDER

Revision Application No. 373/266/B/SZ/2020-RA dated 07.12.2020 has been filed by Shri Rahim, Chennai (hereinafter referred to as the Applicant) against the Order-in-Appeal Airport. Cus. I. No. 258/2020 dated 03.11.2020, 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. 218/2020 (AIU)-AIRPORT-ADMIN-COMMISSIONERATE-I dated 26.09.2020, passed by the Assistant Commissioner of Customs (Airport), Chennai-I, Chennai Airport and Air Cargo Complex, Chennai vide which one 24 carat gold cut bit weighing 48 grams and eight 24 carat gold strips weighing 174 grams, totally weighing 222 grams and valued at Rs. 8,03,640/-, 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. four numbers of dismantled hair straighteners (NCV) under Section 119 of the Customs Act, 1962. Besides, a penalty of Rs. 80,000/- was also imposed on the Applicant under Section 112 (a) of the Act, *ibid*.

2. Brief facts of the case are that, on 17.02.2020, the Applicant, an Indian passport holder, while arriving into India at Anna International Terminal of Chennai Airport, Meenambakkam, Chennai from Kuala Lumpur, was intercepted by officers of Air Intelligence Unit, Air Customs at the exit of the Arrival Hall of Airport at Chennai on the reasonable suspicion that he might be carrying gold / contraband goods either in his baggage or on his person. During search of his person in the presence of independent witnesses, a gold bit weighing 48 grams was recovered from his pant pocket. On examination of his checked-in baggage, 8 gold strips, weighing 174 grams were recovered on cutting open and dismantling the heating strip portion of both sides of 4 hair straighteners, kept in their original boxes, among his personal effects. Thus in all, 222 grams of gold of 24 carat purity valued at Rs. 8,03,640/- was recovered. As the passenger attempted to smuggle the gold by way of concealment and not declaring to Customs, and since he was not an eligible passenger under Notification No. 12/2012-Customs dated 17.03.2012, as

amended, to bring gold into India; and was also not in possession of any valid document for the legal import of impugned gold into India, the impugned gold was seized under a Mahazar dated 18.02.2020 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 dated 18.02.2018, recorded under Section of 108 of the Customs Act, 1962 immediately after seizure of the impugned gold, the Applicant stated inter-alia that the impugned gold bit and gold strips concealed inside the hair straighteners were handed over to him by an unknown person near the entrance of Kuala Lumpur Airport with instructions to hand over them to an unknown person who would identify him and collect the gold from him outside the Chennai Airport and would pay him Rs. 5,000/- for bringing it; that he was well aware that smuggling gold by way of concealing and not declaring to Customs is an offence. He further requested for adjudication of the case without a Show Cause Notice, vide his letter dated 18.02.2020. The adjudicating authority adjudicated the matter vide aforesaid Order-in-Original No. 218/2020 (AIU)-AIRPORT-ADMIN-COMMISSIONERATE-I dated 26.09.2020. 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 appellate 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 adjudicating authority ought to have allowed redemption of the seized gold. The prayer is for the impugned Order-in-Appeal to be set aside; and that the impugned gold items be permitted for re-export/released and that the penalty be reduced.

5. Personal hearings in the matter were fixed on 16.10.2024 and 25.10.2024. But, none appeared from the Applicant's side. However, on behalf of the Applicant, Smt. P. Kamalamalar, Advocate, vide letter dated 25.10.2024 reiterated the written submission and requested that the orders be passed accordingly. Sh. P. Saravanan, Deputy Commissioner of Customs (AIU, Chennai Airport) appeared on 16.10.2024 and reiterated the written submissions and prayed for the O-I-A be upheld.

6. The Government has examined the matter. It is observed that the Applicant did not declare the impugned gold which was concealed ingeniously and the same was recovered from him only after he was intercepted by the Customs. Thus the requirement of Section 77 of the Customs Act, 1962 to declare the goods was not met. He admitted in his own statement recorded under Section 108 of the Custom Act, 1962 to the smuggling of the said gold, which did not belong to him and which he carried for monetary benefit. The appellate authority in para (6) of the said O-I-A, has noted the same and observed that but for the timely interception by the proper officers of Customs, this act would have gone unnoticed. Para (7) of the O-I-A states that the applicant has made a voluntary statement under Section 108 of the Customs Act, 1962 which is admissible evidence. Reliance is placed on the judgement of Hon'ble Supreme Court, in the case of Surjeet Singh Chhabra vs. U.O.I {1997 (89) ELT 646 (SC)}, wherein Hon'ble Supreme Court 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.*" In the present case, the Applicant's statement makes it clear that he was involved in smuggling due to lure of money. The Government concurs with the findings of the appellate authority.

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 hair straighteners which makes the intent to smuggle evident. He has admitted in his statement 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 since the Applicant 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 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 this is a case of smuggling by ingenious concealment and the original authority 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.

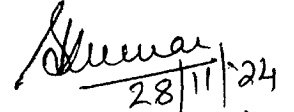
10. The Applicant has requested to be allowed to re-export the offending goods. The Government observes that a specific provision regarding re-export of baggage articles has been made under Section 80 of the Act, *ibid* and upon a plain reading of the same, it is apparent that a declaration under Section 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 had made no declaration in

respect of the subject goods. 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)

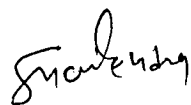
Additional Secretary to the Government of India

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Order No. 238 /24-Cus dated 28-11-2024

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 (शैलेन्द्र कुमार मीना)
(Shailendra Kumar Meena)
अनुभाग अधिकारी (Section Officer)
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Ministry of Revenue, Government of India

