

SPEED POST



F. No. 373/265/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... 13/12/2024

Order No. 244 /24-Cus dated 13/12/ 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 under Section 129 DD of the Customs Act, 1962, against the Order-in-Appeal Airport. Cus. I. No. 245/2020 dated 22.10.2020, passed by the Commissioner of Customs (Appeals-I), Chennai.

Applicant : Shri Noor Mohammed Lakdawala, Mumbai

Respondent : The Principal Commissioner of Customs, Chennai-I

ORDER

A Revision Application, bearing No. 373/265/B/SZ/2020-RA dated 07.12.2020, has been filed by Shri Noor Mohammed Lakdawala, Mumbai (hereinafter referred to as the Applicant), against the Order-in-Appeal Airport. Cus. I. No. 245/2020 dated 22.10.2020, passed by the Commissioner of Customs (Appeals-I), Chennai. The Commissioner (Appeals) vide the aforesaid Order-in-Appeal, has upheld the Order-in-Original of the Joint Commissioner of Customs (Adjudication-AIR), Chennai Airport and Air Cargo Complex, Chennai-I, bearing No. 34/2020-21-Commissionerate-I dated 23.05.2020 vide which 2.49 kgs of foreign origin gold of 24 carat, valued at Rs. 82,69,290/-, recovered from Applicant, was confiscated absolutely under Section 111(a) and 111(d) of the Customs Act, 1962 read with Section 3(3) of the Foreign Trade (Development & Regulation) Act, 1992 and a penalty of Rs. 10,00,000/- was imposed on the Applicant under Sections 112(a) of the Customs Act, 1962. Also, the material objects which were used to conceal the impugned gold, viz. pair of Bata brand shoes and adhesive tape (NCV), were confiscated under the provisions of Section 119 of the Customs Act, 1962.

2. Brief facts of the case are that, acting on specific intelligence to the effect that one Noor Mohammed (the Applicant) arriving at Chennai Airport from Guwahati and travelling in seat 7D of Indigo Flight No. 6E 905 would be carrying the retrieved foreign origin gold which was concealed in the flight by one of his gang members during the said flight's previous international leg, the officer of the CZU-DRI identified and intercepted him in the presence of independent witnesses by verifying the boarding pass of seat no.7D of Indigo flight 6E905 from Guwahati to Chennai on 12.01.2019. He was taken to AIU room at the arrival hall of Anna International Airport, Chennai for detailed investigation. During search, travel documents for the journey from Guwahati to Delhi on 12.10.2019 by Indigo flight No.6E885 from his pant pocket was recovered and 18 cut pieces of foreign origin gold of 99.9% purity weighing 2490 grams of valued Rs.82,69,290/- were recovered from his pair of shoes (9 pieces from each shoe). Hence, on a reasonable belief that the impugned gold bars were smuggled into India in contravention of the provisions of the Customs Act, 1962, thereby rendering them liable for confiscation under the ibid Act, the impugned gold was seized by DRI officers under a Mahazar dated 12.01.2019.

3. In his voluntary statement dated 12.01.2019, the Applicant stated inter-alia that from the year 2017 onwards, he was selling new and old Mobile phones from the premises

of his elder brother who was in the business of selling new and old laptops and he used to get orders from places like Delhi, Guwahati, Baroda and Surat; that around 3 months back, he came into contact with one Richard at Guwahati. He further stated that when he visited Guwahati where he used to buy mobiles for sale, he met Richard; that one day prior to 12.01.2019, Richard told him that if he does the jobs assigned to him, he would bear the ticket fare and also pay him Rs. 10,000/- as consideration; that Richard further told him that gold bits covered with black tapes as 3 individual strips were kept tucked/stuck with grey tapes under the life jackets under seat No.6D & 7D in flight No.6E 905 departing from Guwahati at 07:20 hours/12.02.2019; that if he travelled to Chennai and retrieved the gold during the flight and take the concealed gold to Chennai and hand it over to a person who would identify him outside Chennai Airport, collect the gold from him and pay him ticket fare and his consideration; that Richard took his photograph and told him that he would send it along with other details to the receiver at Chennai. He admitted that Richard paid him Rs. 5,000/- as advance and told that the receiver would give him the balance alongwith ticket fare. He further stated that he cancelled his ticket booked originally to Delhi and boarded the said flight to Chennai; took a boarding pass for seat 7D, retrieved the gold and concealed it in the bottom of his shoes. He also admitted that he did not have any documents to prove the licit possession of gold nor he had paid any duty and he was not the owner of the impugned gold. He also stated that he knew possessing, transporting or handling foreign and evading Customs duty was an offence. The adjudicating authority adjudicated the matter vide aforesaid Order-in-Original No. 34/2020-21-Commissionerate-I dated 23.05.2020. Aggrieved, the Applicant filed an appeal before the Commissioner of Customs (Appeals-I), Chennai, which has been rejected. Hence, this revision application has been filed.

4. The revision application has been filed mainly on the grounds that order of the respondent is against law, weight of evidence and circumstances and probabilities of the case; that the gold is not a prohibited item and according to the liberalized policy, the gold can be released on payment of redemption fine and baggage duty; that no declaration card was provided and he orally declared that he brought the gold for his family use; that department has not made any efforts to find out who is supposed to receive the gold outside the airport and no enquiry was conducted by the officers of Customs nor was there any finding by the adjudicating authority; no efforts taken to locate the receiver of

gold outside the airport at the time of interception/seizure; 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; and that the impugned order should be set aside, the gold item be permitted for re-export/released and that the penalty be set aside/reduced.

5. Personal hearings in the matter were fixed on 16.10.2024 and 25.10.2024. No one 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 on that basis. Shri P. Saravanan, Deputy Commissioner (AIU), Chennai Airport Commissionerate appeared on 16.10.2024 and reiterated his detailed written submissions stating that though the gold was recovered from an aircraft on the domestic sector, the gold had foreign markings which are discussed clearly in the O-I-A. The onus or burden of proof is on the Applicant. In view of the CBIC circular of 2013, the gold is rendered prohibited in the instant case and the O-I-A being proper, should 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, stating that it did not belong to him and he had carried the same for monetary benefit. 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. The Applicant chose to ingeniously conceal the gold in his body and brought it in violation of the provision of Sections 77 and 123 of the Customs Act, 1962. The manner of concealment and the facts of the case make it clear that the gold was neither legitimately acquired nor was it brought in accordance with provisions 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*. Therefore, the Government concurs with the adjudicating & appellate authorities that the impugned gold was 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 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.

9.1 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"*.

9.2 Further, the Division Bench of Hon'ble Madras High Court in the decision reported in 2009(247) E.L.T. 21 (Mad) (*Commissioner of Customs Vs. Samynathan Murugesan*) which held that if the manner of Import of Gold is by ingenious concealment and patently fraudulent, then, the adjudicating authority may direct absolute confiscation of the goods instead of exercising his discretion under Section 125 of the Act. Therefore, keeping in

view the judicial pronouncements above, the Commissioner (Appeals) has correctly refused to interfere with the discretion exercised by the original authority.

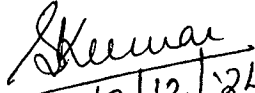
10.1 As regards the prayer for permitting re-export of the offending goods, the Government observes that a specific provision regarding re-export of articles imported in baggage is made in Chapter-XI of the Customs Act, 1962, by way of Section 80. On a plain reading of Section 80, it is apparent that 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, 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 Government finds that the order for absolute confiscation of the impugned goods as upheld by Commissioner (Appeals) is proper and does not merit any interference and the quantum of penalty imposed on the Applicant is neither harsh nor excessive.

13. The revision application is rejected for the reasons aforesaid.


13/12/24
(Shubhagata Kumar)

Additional Secretary to the Government of India

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S/o Shri Mohammed Rafiq Lakdawala,
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Order No. 244 /24-Cus dated 13/12/2024

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

Shailendra
ATTESTED

(शैलेंद्र कुमार मीना)
(Shailendra Kumar Meena)
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