

**SPEED POST**



F. No. 373/179/B/2018-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. 6/4/23

Order No. 145 /23-Cus dated 05.04.2023 of the Government of India passed by Sh. Sandeep Prakash, 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 SEAPORT. C.Cus.II. No.99 & 100/2018 dated 26.03.2018 passed by the Commissioner of Customs (Appeals-II), Chennai.

Applicant : Sh. A. Krishnan, Chennai

Respondent : Pr. Commissioner of Customs, Chennai-III

.....

**ORDER**

A Revision Application, bearing No. 373/179/B/2018-RA dated 27.04.2018, has been filed by Sh. A. Krishnan, Chennai (hereinafter referred to as the Applicant), against the Order-in-Appeal SEAPORT. C.Cus.II. No. 99 & 100/2018 dated 26.03.2018, passed by the Commissioner of Customs (Appeals-II), Chennai, whereby the Commissioner (Appeals) has upheld the Order-in-Original of the Additional Commissioner of Customs, Chennai-III, Chennai, bearing no. 59652/2017 dated 10.11.2017. Vide the aforementioned Order-in-Original, 35 nos of gold bars, recovered from the Applicant, totally weighing 5810 grams and totally valued at Rs. 1,76,56,590/-, had been absolutely confiscated under Section 111(a) & 111(d) of the Customs Act, 1962. Besides, penalty of Rs. 5,00,000/- was also imposed on the Applicant along with different penalties imposed on two other persons, under Section 112 of the Act, *ibid*.

2. Brief facts of the case are that the officers of the Directorate of Revenue Intelligence intercepted 3 passengers based on specific intelligence, including the Applicant herein, on 12.06.2016, at Central Railway Station, Chennai who had arrived via Howrah-Chennai Mail. On enquiry, the Applicant introduced himself and two other lady passengers, namely, Smt. K. Rajeswari, his wife and Smt. R. Sarala Devi, his niece. Upon being enquired from all the passengers whether they were in possession of any foreign marked gold bars on their person or in their luggage, they replied in negative. On persistent enquiry by the officers, the Applicant admitted to be carrying foreign marked gold bars in their luggage. During the search of trolley suitcase carried by the Applicant, packets were found stuffed, which were wrapped in Burmese newspapers and transparent adhesive tapes in the cavity in the inner side of both the pull rods of the handle portion of the trolley suitcase. On removing, 01 packet each was found in each arm of the pull rod of the trolley handle. On opening the packets, it was seen that each packet had four biscuits of yellow metal appearing to be gold having Burmese markings. Thereafter, another packet wrapped in Burmese newspapers and transparent adhesive tapes was found concealed in the padding of the suitcase's upper frame just beneath the handle. This packet also contained 04 biscuits of yellow metal appearing to be gold having Burmese markings. In total 12 biscuits of yellow metal, with Burmese markings, were recovered from the pull rods of the trolley handle. In the search of trolley suitcases of Smt. K.

Rajeswari and Smt. R. Sarala Devi, three packets each were recovered in the same manner as that of the Applicant's trolley bag in the above described cavities. On opening of all these 06 packets, the officers found they were also wrapped in newspapers which appeared to be in Bengali script and further wrapped in transparent adhesive tapes as described in the Applicant's case. In total 23 biscuits of yellow metal were recovered from the trolley suitcases of Smt. K Rajeswari (12 gold biscuits) and Smt. R. Sarala Devi (11 gold biscuits). Earlier the officers of DRI had intercepted one Sh. Mohammed Hussain, on 11.06.2016, while he arrived at Chennai on his return journey from Kolkata on the reasonable belief that he had some knowledge of gold being smuggled from the Myanmar Border to Chennai by train. During the proceedings, the Applicant identified Sh. Mohammed Hussain, as the person from whom he had obtained the said 03 trolley suitcases in which gold was kept concealed. Further, the Applicant also informed that all those trolley suitcases had to be handed over at Chennai to Sh. Mohammed Hussain by the Applicant himself and that Smt. K. Rajeswari and Smt. R. Sarala Devi did not have knowledge about the gold pieces concealed therein. During the enquiry by the officers, the Applicant had stated that Sh. Mohammed Hussain was known to him for long and also was his neighbour; that since Smt. R. Sarala Devi was having a huge bag which was inconvenient to be brought in the train, Sh. Mohammed Hussain offered to carry her bag in the flight along with him from Kolkata to Chennai in return for bringing his 03 trolley suitcases with gold concealed inside the trolleys in the trains and also offered monetary benefit of Rs. 20,000/- after reaching Chennai; that he had agreed to Sh. Mohammed Hussain's offer but however did not disclose these facts to Smt. K. Rajeswari and Smt. R. Sarala Devi and accepted and convinced other two for carrying the 03 trolleys in the guise of friendly exchange of trolleys for convenience; that Sh. Mohammed Hussain had taken the passports and identity cards of Smt. Sarala Devi as collateral security and that the Applicant would pay a visit to his home (Mohammed Hussain) to handover the 03 trolley suitcases and collect the bag of his niece. On being questioned whether all three of them were in possession of any legal documents establishing licit possession of the foreign marked gold carried by them for which they replied in negative. The approved gold assayer/appraiser, assayed the foreign marked gold bars and certified that all the 35 gold bars were of foreign origin of 24 carat and had purity of 999.9 with marking of foreign

language inscribed (appeared to be Burmese language) on the bars, each weighing 166.000 grams, totally weighing 5.810 Kg, collectively valued at Rs. 1,76,56,590/-.

3. The revision application has been filed, mainly, on the grounds that original authority after rejecting the request of cross examination of witnesses had neither given further opportunity of submitting the oral arguments nor waited for the order of Hon'ble High Court in "Writ Petition No..... of 2017" filed by the Applicant against the rejection of cross examination by the original authority; that the original authority never gave any finding with regard to the contention of the Applicant; that the seizure was effected at near Visakhapatnam and not at Central Railway Station, Chennai; that the statements of the Applicant and all other persons are not voluntary; that the Applicant had retracted his statement; that the Applicant was not aware of the concealment of the gold and is neither the owner of the gold nor the claimant of the gold; and that the personal penalty be set aside or reduced substantially. A written reply dated 10.03.2023 has been filed by the Respondent department.

4. Personal hearing was fixed on 06.03.2023 which was adjourned to 17.03.2023 at the request of the Advocate of the Applicant. In the hearing held on 17.03.2023, Ms. Shruti, Advocate appeared for the Applicant. After proceeding with the hearing for sometime, she requested for short adjournment to seek instructions. Last and final opportunity was, therefore, granted on 27.03.2023. In the hearing held on 27.03.2023, no one appeared for the Applicant despite Passover being granted as per request. Sh. P. K. Sarvanan, Deputy Commissioner, appeared for the department and reiterated the submissions dated 10.03.2023. He requested for making additional submissions, which have been received on 27.03.2023 itself by email.

5. The Government has carefully examined the matter. It is observed that the Applicant was intercepted along with 02 other persons based on specific intelligence at Central Railway Station, Chennai, who had arrived via Howrah-Chennai Mail. Entire proceeding have been recorded in the presence of two independent witnesses. The Applicant had also admitted the recovery of gold bars from him and that he intended to clear the gold by way of concealment for monetary benefit of Rs. 20,000/-. Therefore, the claims that seizure

was effected at near Visakhapatnam and not at Central Railway Station, Chennai and that he was not aware of the concealment of the gold are not sustainable. Further, no material has been placed on record to support the allegation that his statement and other persons' statements were recorded under threat or coercion. A copy of retraction said to have been filed has also not been placed on records. As such, the claim to this effect is not tenable. Further, as correctly observed by the Commissioner (Appeals), the Hon'ble Supreme Court has, in the case of Surjeet Singh Chhabra vs. U.O.I {1997 (89) ELT 646 (SC)}, 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. As such the culpability of the Applicant is well established.

6. Further, as regards the contentions of the Applicant that he was not given further opportunity of submitting the oral arguments nor did the original authority wait for the orders of Hon'ble High Court with respect to the Writ petition filed are not acceptable. It is observed that the Applicant filed a W.P No. 28723 of 2017 before the Hon'ble Madras High Court, inter-alia, seeking directions for cross examination of several persons, including DRI officers. A WMP No. 30902 of 2017 was also filed in the matter. Hon'ble High Court, in its Order dated 10.11.2017, inter-alia, held that *"From the application dated 17.08.2017, it is seen that the petitioner wanted to cross examine the signatories to the mahazar numbering about 10, who are all officers of DRI. This is impermissible, as they discharged their duties in the official capacity by putting signatures in the seizure mahazar. Therefore, to that extent, the order rejecting request for cross examination is valid."* Further, the request for cross examination of Smt. Rajeswari and Smt. Sarala Devi was withdrawn by the Applicant before the Hon'ble Court. It is also observed that the Hon'ble High Court noted the rejection of request for cross examination of two more officers, who are mahazar witnesses but did not interfere with the same. At this stage, the Hon'ble High Court recorded that the issue of cross examination of 04 private persons will be decided in the writ petition. The Hon'ble Court also did not grant any stay in the matter though the same was prayed for. Therefore, no fault can be found with the original authority proceeding to decide the case during the pendency of Writ Petition. In fact, pursuant to the original authority deciding the case, vide Order dated 10.11.2017, the Applicant herein

himself withdraw the said WP and, consequently, the Hon'ble High Court dismissed the WP, vide Order dated 27.11.2017, as withdrawn.

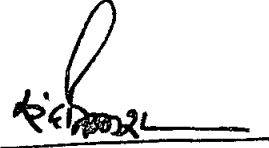
7. As per Section 123 of Customs Act 1962, in respect of the gold and manufactures thereof, the burden of proof that such goods are not smuggled is on the person from whom goods are recovered. No documents evidencing ownership and licit purchase have been placed on record. The gold bars with foreign markings were concealed in an ingenious manner. Hence, the intention to smuggle is manifest. The Applicant has, thus, failed to discharge the burden placed on him, in terms of Section 123, *ibid*. Keeping in view the facts of the case and as the Applicant has failed to discharge the onus placed on him in terms of Section 123, the Government holds that the lower authorities have correctly held the goods to be liable to confiscation under Section 111 of the Act, *ibid*. It has also been correctly held by the authorities below that offending gold has to be treated as 'prohibited goods', as the same is supported by the dictum of Apex Court in the cases of Sheik Mohd. Omer {AIR 1971 SC 293}, Om Prakash Bhatia {2003 (155) ELT 423 (SC)} and Raj Grow Impex {2021 (377) ELT 145 (SC)}.

8. The original authority has denied the release of offending goods on redemption fine under Section 125 of Customs Act, 1962. The Government observes that, in terms of Section 125 of the Customs Act, 1962, the option to release 'prohibited goods', on redemption fine, is discretionary, as held by 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.)]. In the case of Raj Grow Impex (*supra*), the Hon'ble Supreme Court has held "*that when it comes to discretion, the exercise thereof has to be guided by law; has to be according to the rules of reason and justice; has to be based on relevant considerations.*" Further, in the case of P. Sinnasamy {2016-TIOL-2544-HC-MAD-CUS}, 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".*" Hon'ble Delhi High Court has, in the case of Raju Sharma [2020 (372) ELT 249 (Del)], relying upon the judgment of Apex Court in Mangalam Organics Ltd. [2017 (349) ELT 369 (SC)], 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."* Such a case is not made out. Hence, the order of absolute confiscation could not have been interfered with. In any case, the Applicant is, at this stage, neither claiming ownership nor release thereof.

9. In the facts and circumstances of the case, the quantum of penalty imposed is neither harsh nor excessive. In fact, keeping in view the quantity & value of gold and ingenious nature of concealment, the original authority has been rather lenient in imposition of penalty, which works out to just 2.83% of the value of the contraband.

10. In view of the above, the revision application is rejected.



(Sandeep Prakash)

Additional Secretary to the Government of India

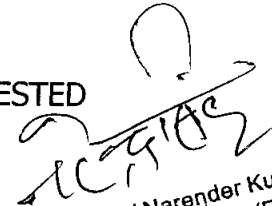
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Order No. 145 /23-Cus dated 05.04.2023

Copy to:

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2. The Commissioner of Customs, Commissionerate-III, Custom House, 60, Rajaji Salai, Chennai-600001.
3. Sh. B. Dhanasekaran, Advocate, No. 21, Kubera Building, Sunkurama Street, Chennai-600001.
4. PPS to AS(RA).
5. Guard File.
6. Spare Copy.
7. Notice Board.

ATTESTED



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