

SPEED POST



F. No. 373/204/B/SZ/2018-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.. 6/4/23

Order No. 146 /23-Cus dated 06-4-2023 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 AIRPORT. C. Cus. I. No. 17/2018 dated 05.02.2018, passed by the Commissioner of Customs (Appeals-I), Chennai.

Applicant : Sh. Mohamed Thanseel, Colombo

Respondent : Pr. Commissioner of Customs, Chennai-I

ORDER

A Revision Application, bearing No. 373/204/B/SZ/2018-RA dated 06.08.2018, has been filed by Sh. Mohamed Thanseel, Colombo (hereinafter referred to as the Applicant), against the Order-in-Appeal AIRPORT. C. Cus. I. No. 17/2018 dated 05.02.2018, passed by the Commissioner of Customs (Appeals-I), Chennai, whereby the Commissioner (Appeals) has upheld the Order-in-Original of the Joint Commissioner of Customs (Adjudication-Air), Chennai, bearing no. 170/2017-18-Airport, dated 07.12.2017, except to the extent of setting aside the penalty of Rs. 5,000/-, imposed under Section 114AA of the Customs Act, 1962. Vide the aforementioned Order-in-Original, 04 nos of gold rings and 01 no. of gold cut bit, totally weighing 209.5 grams and collectively valued at Rs. 6,10,064/-, recovered from the Applicant, had been absolutely confiscated under Section 111(d) & 111(l) of the Customs Act, 1962. Besides, penalties of Rs. 60,000/- & Rs. 5,000/- were also imposed on the Applicant, under Sections 112(a) & 114AA, respectively, of the Act, *ibid*.

2. Brief facts of the case are that the Customs Officers intercepted the Applicant who had arrived at Chennai Airport, from Colombo, on 17.08.2017, at the exit of the arrival hall after the he had passed through the Customs Green Channel. Upon being questioned whether he was in possession of any dutiable/prohibited goods, he replied in negative. Upon examination of his person, one square shaped black colour adhesive tape wrapped object was found in his pant pocket. Further search of his person resulted into the recovery of one irregular shaped yellow colour metal bit from his mouth. On cutting open the square shaped black colour adhesive tape wrapped object, 04 nos of yellow coloured metal rings covered with yellow colour paper were recovered. The Government of India approved gold appraiser certified the yellow coloured metals as 04 nos of gold rings totally weighing 172.2 grams and 01 no. of irregular shaped gold bit of 37.3 grams, all of 24 carat purity, totally weighing 209.5 grams and appraised the total value of the same at Rs. 6,10,064/-. Upon questioning whether the Applicant was in possession of any valid permit/licence issued by a competent authority for legal import of the recovered gold, he replied in negative. The Applicant, in his statement recorded immediately after seizure, under Section 108 of the Customs Act, 1962, *inter-alia*, stated that the gold rings and cut bit, totally weighing 209.5 grams, were given to him by an unknown person outside

Colombo International Airport; that he was instructed to hand it over to a person who would identify him on his arrival at Chennai International Airport outside the arrival terminal; that he was promised a monetary payment of Rs. 8,000/- for carrying the said gold; that he accepted the offer and wrapped 04 nos of gold rings in a yellow colour paper and then wrapped it with black colour adhesive tape and concealed it in his trouser pocket and concealed the irregular shaped gold bit underneath his tongue; that he did not have any Indian or Foreign currency to pay customs duty for the same; and that he committed this offence out of his greed for money.

3. The revision application has been filed, mainly, on the grounds that the Applicant did not cross the customs barrier; that he is an eligible passenger to bring gold; that he declared the goods under Section 77 of the Customs Act when it was visible to naked eye; that the gold was not concealed; that import of gold is not prohibited; that gold ought to have been permitted for re-export; and that penalty be reduced.

4. In the personal hearing held on 05.04.2023, in virtual mode, Sh. A. Ganesh, Advocate appeared for the Applicant and reiterated the contents of RA. He requested that gold may either be allowed to be re-exported or cleared on merit rate of duty and fine. No one appeared for the department nor any request for adjournment has been received. Hence, it is presumed that the department has nothing to add in the matter. As such, the matter is taken up for disposal.

5. The RA has been filed on 06.08.2018 while the date of receipt of Order-in-Appeal by the Applicant is 10.02.2018. Thus, there is a delay of 2 months and 25 days in filing the appeal. Delay is attributed to illness of the Applicant. However, grounds pleaded for condonation are not supported by any medical certificate etc. Hence, the request for condonation is liable to be rejected as unsubstantiated.

6. On merits, it is observed that the Applicant was intercepted at the exit of the arrival hall after he had passed through the Customs Green Channel. The Applicant admitted the recovery of gold items from him and that he intended to clear the gold by way of concealment for monetary benefit of Rs. 8,000/-. The gold bit was kept concealed in his

mouth, below the tongue, by the Applicant. Further, the entire proceedings have been covered under Mahazar, in the presence of two independent witnesses, which also corroborate the sequence of events. Hence, the contentions of the Applicant that he did not cross the customs barrier or that he declared the goods under Section 77 of the Customs Act, 1962 and that the gold was not concealed are not sustainable.

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 bit was concealed underneath his tongue. 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*.

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 in the teeth of law settled by a catena of judgments of Hon'ble Supreme Court. 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 fulfillment of certain conditions. In the present case, it is not even contended that the Applicant herein had fulfilled 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----."

Hon'ble Madras High Court has taken an identical view in the case of P. Sinnasamy {2016-TIOL-2544-HC-MAD-CUS}.

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

9. 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. This position has been confirmed 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 (supra), 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.

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. The said Section 80 reads as follows:

"Temporary detention of baggage. - Where the baggage of a passenger contains any article which is dutiable or the import of which is prohibited and in respect of which a true declaration has been made under Section 77, the proper officer may, at the request of the passenger, detain such article for the purpose of being returned to him on his leaving India and if for any reason, the passenger is not able to collect the article at the time of his leaving India, the article may be returned to him through any other passenger authorised by him and leaving India or as cargo consigned in his name"

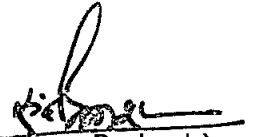
On a plain reading of Section 80, it is apparent that a declaration under Section 77 is a pre-requisite for allowing re-export. Hon'ble Allahabad High Court has, in the case of Deepak Bajaj vs Commissioner of Customs (P), Lucknow {2019(365) ELT 695(All.)}, held that a declaration under Section 77 is 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 It is also to be observed that 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.

10.3 Hence, the question of allowing re-export does not arise.

11. In the facts and circumstances of the case, the quantum of penalty imposed is just and fair. At this stage, the Government also records its disapproval of dropping of the penalty, under Section 114AA, by the Commissioner (Appeals), as the reasons cited in support are without any legal basis. However, as the department has not been aggrieved, the Government refrains from interfering in the matter.

12. The revision application is rejected for reasons aforesaid.


(Sandeep Prakash)

Additional Secretary to the Government of India

Sh. Mohamed Thanseel
S/o Sh. Abdul Hassan
No. 511/5, Mullawatha,
Gothatowa, Colombo, Sri Lanka

Order No. 146 /23-Cus dated 6-4-2023

Copy to:

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2. The Pr. Commissioner of Customs, Commissionerate-I, Chennai Airport and Air Cargo Complex, New Custom House, Meenambakkam, Chennai-600027.
3. Sh. A. Ganesh, Advocate, F Block 179, IV Street, Annanagar, Chennai-600102.
4. PPS to AS(RA).
5. Guard File.
6. ☒ Spare Copy.
7. Notice Board.

ATTESTED


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