

SPEED POST



F. No. 373/210/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...06/04/23

Order No. 147 /23-Cus dated 06-04-2023 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 AIRPORT. C. Cus. I. No. 07/2018 dated 30.01.2018, passed by the Commissioner of Customs (Appeals-I), Chennai.

Applicant : Sh. Shabbir Shaik, Cuddapah

Respondent : Pr. Commissioner of Customs, Chennai-I

ORDER

A Revision Application, bearing No. 373/210/B/SZ/2018-RA dated 06.08.2018, has been filed by Sh. Shabbir Shaik, Cuddapah (hereinafter referred to as the Applicant), against the Order-in-Appeal AIRPORT. C. Cus. I. No. 07/2018 dated 30.01.2018, 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. 89/2017-18-Airport, dated 28.08.2017, except to the extent of setting aside the penalty of Rs. 70,000/-, imposed under Section 114AA of the Customs Act, 1962. Vide the aforementioned Order-in-Original, 01 no of gold chain, weighing 481.50 grams and valued at Rs. 14,02,128/-, recovered from the Applicant, had been absolutely confiscated under Sections 111(d) & 111(l) of the Customs Act, 1962. Besides, penalties of Rs. 1,40,000/- & Rs. 70,000/- were also imposed on the Applicant, under Section 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 Dubai, on 25.06.2017, at the exit of the arrival hall. Upon being questioned whether he was in possession of any dutiable/prohibited goods, he replied in negative. Upon examination of his person, nothing incriminating was found. Upon examination of one of his бага i.e. brown colour carton box, it was found to contain 01 pink colour ladies handbag among other personal household goods and it was observed that the said handbag had a yellow colour metal chain as its handle, which was unusually heavy. The Government of India approved gold appraiser certified the chain to be semi-finished crude gold chain of 24 carat purity, weighing 481.50 grams and valued at Rs. 14,02,128/-. The Applicant in his statement recorded immediately after seizure, under Section 108 of the Customs Act, 1962, *inter-alia*, stated that he works as an officeboy in a company in Kuwait and earned around 150 Dinars per month; that the said gold chain does not belong to him; that his friend named Sh. Ghouse Pir gave him the abovementioned pink colour ladies handbag with gold concealed in the handle at Kuwait airport and requested him to carry the same and hand it over to a unknown person who would contact him at Kadapa; that he was offered Rs. 10,000/- for smuggling the said gold chain; and that he has committed the offence out of his greed for quick money and requested to be pardoned.

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 as per Notification 12/2012-Cus; that he was not allowed to declare the goods under Section 77 of the Customs Act when it was visible to naked eye as it was tied as a handbag hook; 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. Sh. Ganesh highlighted that the Applicant was an eligible passenger and the chain was not concealed. Hence, absolute confiscation is not merited. Further, the Ld. Advocate has submitted additional submissions vide email dated 04.04.2023 which have been taken on record. No one appeared for the Respondent 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 06.02.2018. Thus, there is a delay of 2 months and 29 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. The Government has carefully examined the matter. It is observed that the Applicant was intercepted at the exit of the arrival hall. The Applicant admitted the recovery of gold items from him; that it did not belong to him; and that he intended to clear the gold by way of concealment for monetary benefit of Rs. 10,000/-. Further, the entire proceedings have been covered under Mahazar, in the presence of two independent witnesses, which also corroborate the sequence of events. It is also incorrect of the Applicant to contend that there was no concealment and the gold was visible to the naked eye. The gold chain was attached to a ladies handbag which was kept inside a carton box. Therefore, unless the Customs officers had searched the baggage of the Applicant, it would not have been

possible to detect the contraband. Hence, the contentions of the Applicant to the contrary 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. The gold chain was ingeniously tied to ladies handbag to give it a look of hook of handbag. Hence, the intention to smuggle is manifest. It has also been admitted that the Applicant acted as a carrier for monetary consideration. 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. Further, as per Notification No. 12/2012 dated 17.03.2012, as amended, the term 'eligible passenger' is defined as a passenger of Indian origin or a passenger holding a valid passport, issued under the Passports Act, 1967 (15 of 1967), who is coming to India after a period of not less than six months of stay abroad; and short visits, if any, made by the 'eligible passenger' during the aforesaid period of six months shall be ignored if the total duration of stay on such visits does not exceed thirty days and such passenger has not availed of the exemption under this notification or under the notification being superseded at any time of such short visits. The original authority has correctly observed in para 10 of the aforesaid Order-in-Original that one of the conditions of the aforesaid notification is that duty has to be paid in convertible foreign currency and as no foreign currency was found on the Applicant, the benefit of notification could not have been granted to him. Further, as per proviso to condition 35, the Applicant was also required to make a declaration in this regard, which has also not been done in this case. Hence, the contention of the Applicant that he was an eligible passenger to avail benefit of the said notification cannot be accepted.

9.1 Another contention of the Applicant is 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 wherein 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 fulfillment of certain conditions. In the present case, as correctly brought out by the lower authorities, the Applicant herein had not 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."*

9.2 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----."

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

10. 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."* In the present case, the original authority has, for reasonable and relevant considerations, recorded in paras 9-10 of his order, ordered absolute confiscation. Hence, the Commissioner (Appeals) has correctly refused to interfere in the matter.

11.1 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.

11.2 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.

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

12. In the facts and circumstances of the case, the quantum of penalty imposed is just and fair. 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.

13. The revision application is rejected for reasons aforesaid.



(Sandeep Prakash)

Additional Secretary to the Government of India

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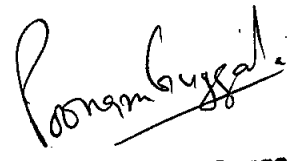
Order No. 147/23-Cus dated 06-04-2023

Copy to:

1. The Commissioner of Customs (Appeals-I), Chennai Airport & Chennai Air Cargo, 3rd Floor, New Custom House, GST Road, Meenambakkam, Chennai-600016.

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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