

**SPEED POST**



F. No. 373/302/B/SZ/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...11/5/23...

Order No. 177/23-Cus dated 11-05-2023 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 No. 199/2018-TRY(CUS) dated 31.10.2018, passed by the Commissioner of Customs & Central Excise (Appeals), Tiruchirappalli.

Applicant : Sh. Sikkender, Sivagangai

Respondent : The Commissioner of Customs (P), Tiruchirappalli

**ORDER**

A Revision Application, bearing No. 373/302/B/SZ/2018-RA dated 12.11.2018, has been filed by Sh. Sikkender, Sivaganga (hereinafter referred to as the Applicant), against the Order-in-Appeal No. 199/2018-TRY (CUS) dated 31.10.2018, passed by the Commissioner of GST, Service Tax & Central Excise (Appeals), Tiruchirappalli, whereby the Commissioner (Appeals) has upheld the Order-in-Original No. TCP-CUS-PRV-JTC-054-18 dated 03.05.2018, passed by the Joint Commissioner of Customs (Airport), Tiruchirappalli. Vide the aforementioned Order-in-Original, 06 nos of round shaped gold pieces and 01 no. of cylindrical shaped gold piece of 24 carat purity, totally weighing 170.500 grams and collectively valued at Rs. 5,23,094/-, recovered from the Applicant, had been absolutely confiscated under Section 111(d), 111(i), 111(l) & 111(m) of the Customs Act, 1962. Besides, penalty of Rs. 50,000/- was also imposed on the Applicant, under Section 112(a) & 112 (b) of the Act, *ibid*.

2. Brief facts of the case are that the Customs Officers intercepted the Applicant upon his arrival at Tiruchirappalli Airport, from Kuala Lumpur, on 29.01.2018. On verification from Customs Baggage Officers, it was found that he had not submitted any Customs Declaration Form and did not declare any dutiable items to them. Upon the search of his person, one polythene cover wrapped with black colour carbon paper and with black colour insulation tape on top of the carbon paper was found concealed inside his underwear which was found to contain 06 nos of round shaped gold pieces and 01 cylindrical shaped gold piece. The Government approved appraiser certified them to be of 24 carat purity, totally weighing 170.500 grams and collectively valued at Rs. 5,23,094/-. Upon being asked as to why did he not declare the gold in his Customs Declaration Form, he replied that the gold items did not belong to him and he wanted to clear without payment of Customs duty, hence, he did not file the Indian Customs Declaration Form to the Customs Baggage Officers and he did not go through the Customs Red Channel. The Applicant, in his statement dated 29.01.2018, recorded under Section 108 of the Customs Act, 1962, *inter-alia*, stated that he used to carry textiles from India to Malaysia and while returning to India he used to bring courier goods; that he was earning monthly income of Rs. 20,000/- through that business; that he went to Malaysia on 27.01.2018; that on

28.01.2018, when he came to airport to board flight for India, an unknown person met him and requested him to carry a small carry bag which contained 06 nos of round shaped gold pieces and 01 cylindrical shaped gold piece; that the unknown person also requested to hand it over to his accomplice who will be waiting outside the Trichy airport and that his friend would give him a commission of Rs. 7,000/-; that lured over money he accepted the unknown person's request and received the packet which contained the above said gold pieces; that the unknown person took his photo and told him that he would send his photograph and cell number to his friend through "Whatsapp"; that the unknown person also told him to clear the above said gold pieces without payment of Customs duty and without knowledge of Customs; and that he concealed the packet which contains gold pieces in his underwear.

3. The revision application has been filed, mainly, on the grounds that the appellate authority simply glossed over all the judgments and points raised in the appeal ground; that he had declared orally that he had brought gold; that he was all along under the control of the officers of customs and was at the Red Channel and did not pass through the Green Channel; that import of gold is restricted and not prohibited; and that impugned order be set aside and re-export of the gold pieces may be permitted and personal penalty imposed upon him be set aside or reduced.

4. Personal hearing in the matter was fixed on 10.05.2023, in virtual mode. No one appeared for either side nor any request for adjournment has been recieved. However, subsequently, Smt. Kamalamalar Palanikumar, Advocate of the Applicant, vide email dated 10.05.2023, requested to pass an order with the available records as she could not join the hearing. Hence, the matter is taken up for disposal based on available records.

5. The Government has carefully examined the matter. It is observed that the Applicant was intercepted while crossing Customs Green Channel without making any declaration in respect of gold carried by him. He declined the possession of gold even when inquired orally. In his statement also, the Applicant had admitted the recovery of 06 nos of round shaped gold cut pieces and 01 no. cylindrical shaped gold piece and that he intended to clear these goods without payment of Customs duty. Further, the entire proceedings have

been covered under Mahazar dated 29.01.2018, in the presence of two independent witnesses, which also corroborates the sequence of events. Hence, the contentions of the Applicant that he did not pass through the Green Channel and that he was all along in the Red Channel or that he had declared orally that he had brought gold are not sustainable.

6. 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 Applicant did not declare the gold items, as stipulated under Section 77 of the Act, *ibid*. No documents evidencing ownership and licit purchase were produced at the time of interception. The manner of concealment, i.e., in the underwear, makes the intention to smuggle manifest. 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 as the Applicant has 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 the penalty was imposable on the Applicant.

7.1 The Government observes that import of gold and articles thereof in baggage is allowed subject to fulfillment of certain conditions. In the present case, it is not even contended that these conditions were fulfilled by the Applicant herein. It is settled by a catena of judgments of Hon'ble Supreme Court that goods, in respect of which conditions subject to which their import/export is allowed are not fulfilled, are to be treated as 'prohibited goods'. [Ref: Sheikh Mohd. Omer {1983 (13) ELT 1439 (SC)}, Om Prakash Bhatia {2003 (155) ELT 423 (SC)} & Raj Grow Impex LLP {2021 (377) ELT 145 (SC)}]. Further, the Hon'ble Madras High Court (i.e. the Hon'ble jurisdictional High Court) has, in the cases of Malabar Diamond Gallery P. Ltd. {2016 (341) ELT 465 (Mad.)} and P. Sinnasamy {2016 (344) ELT 1154 (Mad.)}, taken this view specifically in respect of import of gold in baggage. Hence, there is no doubt that the goods seized in the present case are to be held to be 'prohibited goods'.

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

8.1 The Government observes that the original authority had denied the release of seized 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 option to release 'prohibited goods' on redemption fine is discretionary. 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)], 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 ordered for absolute confiscation of the gold item, for relevant and reasonable considerations recorded in paras 29 to 34 of his Order. Therefore, keeping in view the judicial pronouncements above and the facts of the case, the Commissioner (Appeals) has correctly refused to interfere with the discretion exercised by the original authority.

8.2.1 Further, as far as re-export of offending goods is concerned, the Government observes that a specific provision regarding re-export of baggage articles has been made under Section 80 of the Customs Act, 1962, which 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 authorized by him and leaving India or as cargo consigned in his name."*

8.2.2 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 {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 written declaration in respect of the subject goods and made a false declaration when asked to do so orally. 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."

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

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

10. 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.

11. The revision application is, rejected for the reasons aforesaid.



(Sandeep Prakash)

Additional Secretary to the Government of India

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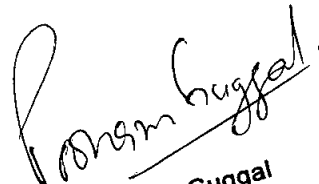
Order No. 177 /23-Cus dated 11-05-2023

Copy to:

1. The Commissioner of GST, Service Tax & Central Excise (Appeals), No.1, Williams Road, Cantonment, Tiruchirapalli-620001.
2. The Commissioner of Customs (P), No. 1, Williams Road, Cantonment, Tiruchirapalli-620001.
3. Smt. P. Kamalamalar, Advocate, No. 10, Sunkrama Street, 2<sup>nd</sup> Floor, Chennai-600001.

4. PPS to AS(RA)
5. Guard File
6. Spare Copy
7. Notice Board

ATTESTED

  
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