

SPEED POST



F. No. 373/291/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...15/5/23

Order No. 188/23-Cus dated 15.05.2023 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 TCP-CUS-000-APP-178-18 dated 26.09.2018, passed by the Commissioner of GST, Service Tax & Central Excise (Appeals), Tiruchirappalli.

Applicant : Sh. Mohammed Abdullah, Chennai

Respondent : The Commissioner of Customs (P), Tiruchirappalli

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ORDER

A Revision Application, bearing No. 373/291/B/SZ/2018-RA dated 08.10.2018, has been filed by Sh. Mohammed Abdullah, Chennai (hereinafter referred to as the Applicant), against the Order-in-Appeal TCP-CUS-000-APP-178-18 dated 26.09.2018, 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-057-18 dated 08.05.2018, passed by the Joint Commissioner of Customs (Airport), Tiruchirappalli. Vide the aforementioned Order-in-Original, 01 no. of cylindrical shaped gold piece and 05 nos of button shaped gold pieces, all of 24 carat purity, totally weighing 357.000 grams and collectively valued at Rs. 10,20,306/-, 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. 1,00,000/- 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 who had arrived at Tiruchirappalli Airport, from Bangkok via Colombo, on 11.12.2017, when he was crossing the Customs Green Channel. On enquiry, it was found that he had not submitted any Customs Declaration Form. Upon being questioned as to whether he had brought gold in any form with him either in person or in his baggage, he replied in negative. However, upon the examination of Sony Home Theatre carried by him, 01 cylindrical shaped gold piece and 05 nos of button shaped gold pieces were found inside the speakers. The Central Government approved gold assayer appraised the gold pieces to be of 24 carat purity, totally weighing 357.00 grams and collectively valued at Rs. 10,20,306/-. Upon being questioned as to why he did not declare the gold in the Customs Declaration Form, he replied that he purchased the above said gold in Bangkok, Thailand and concealed the same inside the speakers of the Home Theatre with an intention to avoid detection by Customs and with the intention to evade payment of duty. Upon being further asked whether he had any convertible foreign currency to pay the customs duty, he replied that he did not have any money to pay customs duty and also replied that he intended to clear the above said gold without payment of Customs duty by concealing the same inside the said Sony Home Theatre box. The Applicant, in his statement dated 11.12.2017, recorded under Section 108 of the Customs Act, 1962, *inter-alia*, stated that

he was doing trading business by way of purchasing and selling goods between India and Bangkok; that he purchased chappals and went to Bangkok via Colombo on 08.12.2017; that he handed over the same to the Bangkok traders and purchased gold; and that he concealed the said gold inside the speakers of the Sony Home Theatre after melting and reshaping. He further stated that as he did not get enough profit in his business so he thought of smuggling gold to sell it in India which would fetch more profit to him. The original authority ordered absolute confiscation of the above-mentioned gold items and imposed penalty. Aggrieved, the Applicant filed an appeal before the Commissioner (Appeals), which has been rejected.

3. The revision application has been filed, mainly, on the grounds that the Applicant had declared orally the gold items; that he did not pass through the Green Channel and he was all along in the red channel; that import of gold is not prohibited and it can be released on payment of duty for re-export or released; and that penalty may be reduced.

4. Personal hearing in the matter was fixed on 03.05.2023 and 12.05.2023, in virtual mode. Sh. Ramakrishnan, AC, appeared for the department. No one appeared for the Applicant. Smt. Kamalamalar Palanikumar, Advocate of the Applicant, vide email dated 11.05.2023, 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, in the presence of two independent witnesses, 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 has admitted the recovery of 01 no. of cylindrical shaped gold piece and 05 nos of button shaped gold pieces and that he intended to clear these goods without payment of Customs duty. Further, the entire proceedings have been covered under a Mahazar. Hence, the contentions of the Applicant that he did not pass through the Green Channel; and that he had made an oral declaration appear to be nothing but afterthought and are rejected, accordingly.

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 ingenious manner of concealment, i.e., concealment of gold pieces in the speakers of Sony Home Theatre, makes it apparent that the Applicant intended to smuggle these gold items in a pre-meditated manner. 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, consequently, the penalty was imposable on the Applicant.

7.1 It is observed that import of gold and articles thereof, in baggage, is allowed subject to fulfillment of certain conditions. In the present case, these conditions have not been 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. The Government observes that the original authority has denied the release of seized gold item 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, after detailed consideration, ordered for absolute confiscation of the gold items, for relevant and reasonable considerations recorded in paras 31 to 37 of his Order. Therefore, keeping in view the judicial pronouncements above, no fault can be found with the Commissioner (Appeals)' decision to not interfere with the discretion exercised by the original authority.

9.1 A plea for re-export of offending goods has been raised. The Government observes that a specific provision regarding re-export of baggage articles has been made under Section 80 of the Act, *ibid*, 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."

9.2 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."

9.3 Hence, the request for allowing re-export cannot be considered.

10. In the facts and circumstances of the case, and specially keeping in view the ingenious manner of concealment, the original authority appears to have been rather lenient in imposing penalty, which is a shade less than 10% of the value of the offending goods. Hence, any reduction in penalty is not merited.

11. The revision application is, accordingly, rejected.



(Sandeep Prakash)

Additional Secretary to the Government of India

Sh. Mohammed Abdullah
No. 41/85, Angappan Naicken Street,
Mannady, Chennai-600001.

Order No. 188 /23-Cus dated 15.05.2023

Copy to:

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2. The Commissioner of Customs (P), No. 1, Williams Road, Cantonment, Tiruchirapalli-620001.
3. Smt. P. Kamalamalar, Advocate, No. 10, Sunkrama Street, 2nd Floor, Chennai-600001.
4. PPS to AS(RA)
5. Guard File
6. Spare Copy
7. Notice Board

ATTESTED


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