

SPEED POST



F. No. 373/300/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. 15/05/23...

Order No. 133/23-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 No. TCP-CUS-000-APP-202-18 dated 31.10.2018, passed by the Commissioner of GST, Service Tax & Central Excise (Appeals), Tiruchirappalli.

Applicant : Smt. Fathimuthu Zahara, Chennai

Respondent : The Commissioner of Customs (P), Tiruchirappalli

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ORDER

A Revision Application, bearing No. 373/300/B/SZ/2018-RA dated 12.11.2018, has been filed by Smt. Fathimuthu Zahara, Chennai (hereinafter referred to as the Applicant), against the Order-in-Appeal No. TCP-CUS-000-APP-202-18 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. 82/2018-Batch A dated 16.06.2018, passed by the Assistant Commissioner of Customs (Airport), Madurai. Vide the aforementioned Order-in-Original, 02 nos. of gold kada (in crude form), totally weighing 91.3 grams and 01 no. of gold chain (in crude form), weighing 60.8 grams, collectively weighing 152.10 grams and collectively valued at Rs. 4,70,749/-, recovered from the Applicant, had been absolutely confiscated under Section 111(d), 111(l), 111(m) & 111(o) of the Customs Act, 1962. Besides, penalty of Rs. 20,000/- was also imposed on the Applicant, under Section 112(a) of the Act, *ibid*.

2. Brief facts of the case are that the Customs Officers intercepted the Applicant upon her arrival at Madurai Airport, from Bangkok, on 16.06.2018. The aforementioned gold items were recovered from the Applicant. The matter was adjudicated, vide the aforementioned Order-in-Original dated 16.06.2018, and the gold items were absolutely confiscated. Aggrieved, the Applicant filed appeal before the Commissioner (Appeals), which was rejected.

3. The revision application has been filed, mainly, on the grounds that gold is not a prohibited item; that the Applicant did not pass through or cross the Green Channel; that she was wearing the gold jewellery and question of declaration does not arise; and that the impugned order be set aside, the gold items be permitted for re-export and that the penalty be reduced.

4. Personal hearing in the matter was fixed on 08.05.2023 & 15.05.2023, in virtual mode. In the hearing held on 15.05.2023, Sh. Arvind Kumar, Superintendent, appeared for the department. No one appeared for the Applicant on any of the dates fixed for hearing nor any request for adjournment was received. However, subsequently, Smt.

Kamalamalar Palanikumar, Advocate of the Applicant, vide email dated 15.05.2023, 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 with gold jewellery in crude form, without making any declaration in respect thereof. She had not declared the import of gold items voluntarily to the Customs officers, as required under Section 77 of the Customs Act, 1962. The Applicant herein had, after waiving the Show Cause Notice, appeared before the original authority for hearing wherein she never raised any of the factual contentions, as raised in the revision application. Hence, there is no doubt that these contentions are nothing but afterthought and, as such, cannot be accepted. Further, the gold items were in crude form. Hence, it is apparent that these were not for personal use.

6. As per Section 123 of the Act, *ibid*, 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 have been produced. Further, the gold items were in crude form. The Applicant has, thus, failed to discharge the burden placed on her, 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 her 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 that 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 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."* Such a case is not made out. Therefore, keeping in view the judicial pronouncements above, the Commissioner (Appeals) has correctly refused to interfere with the discretion exercised by the original authority.

9.1 The Applicant has requested to be allowed to re-export the offending goods. 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

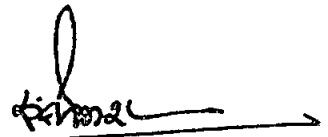
proper officer may, at the request of the passenger, detain such article for the purpose of being returned to him on his leaving India and if for any reason, the passenger is not able to collect the article at the time of his leaving India, the article may be returned to him through any other passenger 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 declaration in respect of the subject goods. 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 re-export cannot be allowed.

10. In the facts and circumstances of the case, the quantum of penalty imposed is neither harsh nor excessive.

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



(Sandeep Prakash)

Additional Secretary to the Government of India

Smt. Fathimuthu Zahara
D/o Sh. Mohamed Hassan,
34 Kandappaachari Street,
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Order No. 193 /23-Cus dated 15-05-2023

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, 2nd Floor, Chennai-600001.
4. PPS to AS(RA).

5. Guard File
- ✓ 6. Spare Copy
7. Notice Board

ATTESTED



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