

SPEED POST



F. No. 373/226/B/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..16/05/23.

Order No. 194/23-Cus dated 16-05-2023 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-121-18 dated 31.07.2018, passed by the Commissioner of GST, Service Tax & Central Excise (Appeals), Tiruchirappalli.

Applicant : Sh. Asik Mohamed, Chennai

Respondent : The Commissioner of Customs (P), Tiruchirappalli

ORDER

A Revision Application, bearing No. 373/226/B/2018-RA dated 27.08.2018, has been filed by Sh. Asik Mohamed, Chennai (hereinafter referred to as the Applicant), against the Order-in-Appeal No. TCP-CUS-000-APP-121-18 dated 31.07.2018, passed by the Commissioner of GST, Service Tax & Central Excise (Appeals), Tiruchirappalli, whereby the Commissioner (Appeals) has upheld the Order-in-Original No. 122/2017 dated 27.09.2017, passed by the Assistant Commissioner of Customs (Airport), Tiruchirappalli. Vide the aforementioned Order-in-Original, gold jewellery of 22 carat purity, weighing 96.800 grams and valued at Rs. 2,72,854/- and 08 nos. of cartons of Marlboro gold cigarettes, valued at Rs. 9600/-, recovered from the Applicant, had been absolutely confiscated, under Section 111(d), 111(e), 111(l), 111(m) & 111(o) of the Customs Act, 1962. Besides, 04 nos. of refurbished Hitachi Projectors valued at Rs. 46,800/-, 10 nos. of Casio calculators (JS-40B) valued at Rs. 32,000/-, 05 nos. Sony voice recorders (LCD-PX 3730) valued at Rs. 25,000/-, 07 bottles of Jack Daniels Whiskey valued at Rs. 14,700/- were also held liable to confiscation but were allowed to be redeemed on payment of a fine of Rs. 30,000/- and applicable Customs duties. Besides, penalty of Rs. 40,000/- 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 Singapore, on 27.09.2017. The aforementioned gold jewellery, Marlboro Gold cigarettes and other items were recovered from the Applicant. The Applicant stated in the personal hearing held before the original authority that he had not declared the quantity and value of the above mentioned items in Customs Declaration Form and admitted that the said gold chain and other items were brought in India for monetary gain. The matter was adjudicated, vide the aforementioned Order-in-Original dated 27.09.2017, and the gold items along with cigarettes 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 value of the electronic goods has been assessed on a higher side; that the gold items be permitted for release or for re-export on payment of redemption fine; and that redemption fine of Rs. 30,000/- and penalty be reduced.

4. Personal hearings in the matter were fixed on 08.05.2023 & 15.05.2023. No one appeared for either side nor any request for adjournment has been 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, Marlboro Gold cigarettes and other items, without making the requisite declaration, in terms of Section 77 of the Act, *ibid*, in respect thereof. The Applicant had, after waiving the Show Cause Notice, appeared before the original authority for hearing wherein he never raised any issue with reference to valuation of electronic goods. Even now, the valuation is being challenged without furnishing any justification. Therefore, the subject contention cannot be accepted.

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 item, as required in terms of Section 77 *ibid*. No documents evidencing ownership and licit purchase were produced at the time of interception. 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 item was liable to confiscation under Section 111 *ibid* and, consequently, 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 item is not 'prohibited goods', cannot be accepted.

8. The Government observes that the original authority had 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."* Such a case is not made out, rather redemption has been sought merely on a legally erroneous ground of the subject goods not being 'prohibited goods'. 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.

9.1 A request for allowing re-export of offending gold items has been made. 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:

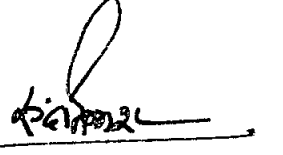
"Temporary detention of baggage.- Where the baggage of a passenger contains any article which is dutiable or the import of which is prohibited and in respect of which a true declaration has been made under Section 77, the proper officer may, at the request of the passenger, detain such article for the 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."

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 question of allowing re-export does not arise.

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

11. The revision application is, accordingly, rejected.



(Sandeep Prakash)

Additional Secretary to the Government of India

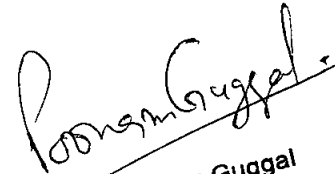
Sh. Asik Mohamed
No. 1 Chinnathambi Street,
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Order No. 194 /23-Cus dated 16-05-2023

Copy to:

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2. The Commissioner of Customs (P), No. 1, Williams Road, Cantonment, Trichy-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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