

SPEED POST



F. No. 373/350/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...19/5/23

Order No. 198 /23-Cus dated 19-05-2023 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-206-18 dated 13.11.2018, passed by the Commissioner of GST, Service Tax & Central Excise (Appeals), Tiruchirappalli.

Applicant : Sh. Abdul Rahman, Chennai

Respondent : The Commissioner of Customs (P), Tiruchirappalli

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ORDER

A Revision Application, bearing No. 373/350/B/2018-RA dated 05.12.2018, has been filed by Sh. Abdul Rahman, Chennai (hereinafter referred to as the Applicant), against the Order-in-Appeal No. TCP-CUS-000-APP-206-18 dated 13.11.2018, 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-075-18 dated 31.05.2018, passed by the Joint Commissioner of Customs (Airport), Tiruchirappalli. Vide the aforementioned Order-in-Original, 02 nos. of cube shaped gold cut pieces and 01 no. of gold cut piece of 24 carat purity, totally weighing 424.000 grams and collectively valued at Rs. 12,50,376/-, 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 upon his arrival at Tiruchirappalli Airport, from Kuala Lumpur, on 22.11.2017, while he was attempting to pass through the Green Channel in a suspicious manner. Upon being enquired by the Customs Baggage officers as to whether he had submitted his Indian Customs Declaration Form, the Applicant informed that he had not submitted the same. Upon being further asked whether he had brought any valuables or gold in any form with him either in person or in his baggage, he replied in negative. However, upon search of his baggage, 02 nos. of cube shaped gold cut pieces were found concealed in two nos. of Denn Portable Radio Boom Boxes (DVD/CD/MP3 Radio Players) in his checked in baggage and 01 no. of gold cut piece was found concealed inside his hand baggage. The Central Government approved Gold Assayer appraised the said 02 nos. of cube shaped gold cut pieces and 01 no. of gold cut piece to be of 24 carat purity, totally weighing 424.000 grams and collectively valued at Rs. 12,50,376/-. The Applicant, in his statement dated 22.11.2017, recorded under Section 108 of the Customs Act, 1962, *inter-alia*, stated that he used to carry courier goods from India to Malaysia and back; that on the 20.11.2017 he carried the courier goods and went to Kuala Lumpur from Trichy and handed over the same to concerned persons; that after he received courier goods from Kuala Lumpur he

purchased 30 grams of gold cut piece from his own money and reached Kuala Lumpur airport for returning to Trichy; that when he came to airport to board flight for India, an unknown person approached him and told that he was having a carton box consisting of house hold articles; that he requested him to carry the same and hand over to his friend who will be waiting outside the Trichy airport; that his friend who will be waiting outside the airport would give him a commission of Rs. 8,000/- in exchange of the carton box; that lured over money, he accepted the unknown person's request; that the unknown person took his photo and informed him, he would send his photograph to his friend through 'Whatsapp'; and that his friend would identify him once he comes out of Trichy airport. The matter was adjudicated by the original authority, vide aforesaid Order-in-Original dated 31.05.2018. Aggrieved, the Applicant filed an appeal before the Commissioner (Appeals), which was rejected.

3. The revision application has been filed, mainly, on the grounds that the Applicant 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; that release or re-export of the gold pieces may be permitted; and that personal penalty imposed upon him be set aside or reduced.

4. Personal hearing in the matter was fixed on 17.05.2023, in virtual mode. No one appeared for PH nor any request for adjournment has been received. However, subsequently, Smt. Kamalamalar Palanikumar, Advocate of the Applicant, vide email dated 19.05.2023, 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 02 nos. of cube shaped gold cut pieces and 01 no. gold cut piece and that he intended to clear these goods without payment of Customs duty. Further, the entire proceedings have been

covered under Mahazar dated 22.11.2017, 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 made an oral declaration in respect of 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 Denn Portable Radio Boom Boxes (DVD/CD/MP3 Radio Players), 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 is in agreement with the lower authorities that the seized gold items were 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, the stipulated conditions have not been fulfilled by the Applicant herein. Hon'ble Supreme Court has repeatedly held 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 treated as 'prohibited goods', within the meaning assigned to it under Section 2(33) of the Act, *ibid*.

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 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 items, for relevant and reasonable considerations recorded in paras 35 to 41 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.

9.1 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

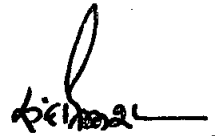
leaving India, the article may be returned to him through any other passenger authorized by him and leaving India or as cargo consigned in his name."

9.2 On a plain reading, it is apparent that a declaration under Section 77 is a pre-requisite for allowing re-export in terms of Section 80 *ibid*. 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. 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 question of allowing re-export also does not arise.

10. A penalty of Rs. 1,00,000/- has been imposed on the Applicant, which is just about 8% of the value of offending goods. The Government considers that, keeping in view of the ingenious nature of concealment, the original authority has been rather too lenient while imposing penalty. Therefore, there is no merit in the plea for reduction in penalty.

11. In view of the above, the revision application is rejected.



(Sandeep Prakash)

Additional Secretary to the Government of India

Sh. Abdul Rahman
S/o Sh. Abdul Bari
No. 22/13, Muktharunisa Begum Street,
6th lane, Ellis Road, Chennai-600002.

Order No. 198/23-Cus dated 19-05-2023

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



अश्वनी कुमार लौ / Ashwani Kumar Lau
अधीक्षक / Superintendent (R.A. Unit)
राजस्व विभाग / Department of Revenue
वित्त मंत्रालय / Ministry of Finance
Room No. 606, 6th Floor, B-Wing
14, Hudco Vishala Building, New Delhi-110066

श्री अश्वनी कुमार (R.A. Unit)
अधीनस्थ विभाग, वित्त विभाग
Room No. 808, 8th Floor, B-Wing
1A, Indira Nagar Building, New Delhi-110028