

SPEED POST



F. No. 373/29/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. 15/3/23

Order No. 98/23-Cus dated 15-3-2023 of the Government of India passed by Shri Sandeep Prakash, Additional Secretary to the Government of India, under section 129DD of the Custom Act, 1962.

Subject : Revision Application filed, under Section 129 DD of the Customs Act, 1962, against the Order-in-Appeal Airport. C. Cus. I. No. 141/2017 dated 28.07.2017, passed by the Commissioner of Customs (Appeals-I), Chennai.

Applicant : Sh. Haja Mohideen Abdul Jaleel, Chennai.
Respondent : The Pr. Commissioner of Customs, Chennai-I.

ORDER

A Revision Application No. 373/29/B/SZ/2018-RA dated 07.02.2018 has been filed by Sh. Haja Mohideen Abdul Jaleel, Chennai (hereinafter referred to as the Applicant), against the Order-in-Appeal Airport.C.Cus.I. No. 141/2017 dated 28.07.2017, passed by the Commissioner of Customs (Appeals-I), Chennai. The Commissioner (Appeals) has, vide impugned Order-in-Appeal, upheld the Order-in-Original No. 03/2012 dated 08.02.2012, passed by the Additional Commissioner of Customs, Chennai Airport.

2. Briefly stated, the Applicant herein arrived at Chennai airport from Singapore, on 26.09.2011, and was intercepted by the customs officers who upon search recovered assorted electronic items valued at Rs. 59,760/- and two gold bars and one gold coin, totally weighing 217 gms. valued at Rs. 5,74,725/- from Applicant. The original authority, vide Order-in-Original dated 08.02.2012, ordered absolute confiscation of the two gold bars and one gold coin, under Section 111 (d), (l) & (m) of the Customs Act, 1962, but ordered release of the assorted electronic goods on payment of appropriate duties after deducting the baggage allowance as per passenger's eligibility. A penalty of Rs. 55,000/- was also imposed on the Applicant under Section 112 (a) of the Customs Act, 1962. In the second round of litigation arising out of Hon'ble Madras High Court's Order dated 01.12.2016 in WP No. 32059 of 2016, the appeal filed by the Applicant herein has been rejected by the Commissioner (Appeals), vide the impugned Order-in-Appeal.

3. The revision application has been filed, mainly, on the grounds that the order of Commissioner (Appeals) is contrary to law, weight of evidence and violates the principles of natural justice; that the Applicant proceeded towards the red channel but was not allowed to declare the goods under Section 77 of the Customs Act, 1962; that the Applicant had purchased the gold only to make jewellery for his wife and children; that he had not crossed the customs barrier and was intercepted at metal scanner itself and was not allowed to go to any channel; that the gold is not a prohibited item and can be released on payment of redemption fine, duty and penalty; that the lower authority ought to have granted option to re-export; and that the penalty ought not have been imposed under Section 112 (a) *ibid*.

4. Personal hearing in the matter was fixed on 22.12.2022, which was adjourned to 01.03.2023 at the request of the learned Advocate for the Applicant. In the personal hearing fixed on 01.03.2023, no one appeared for either side nor any request for adjournment was received. Therefore, last and final opportunity was granted on 15.03.2023. Another request for adjournment was received on 14.03.2023 from the learned Advocate for the Applicant on health grounds. However, the grounds urged were not supported by any medical certificate. Further, hearing fixed on 15.03.2023 was granted as a last and final opportunity due to non-appearance/request for adjournment by the Applicant on previous occasions. Therefore, the request for adjournment was not accepted. Hence, the case is taken up for decision based on records.

5. The Order-in-Appeal impugned herein was received by the Applicant on 10.08.2017 whereas the revision application has been filed on 07.02.2018, i.e., with a delay of about

02 months and 27 days. An application for condonation of delay has been filed on the grounds of illness of the Applicant. However, even in this case, the grounds urged are not supported by any medical certificate etc. Hence, the request for condonation of delay is liable to be rejected and, consequently, the revision application is liable to be dismissed as time barred.

6. On merits, it is the contention of the Applicant that he had been apprehended at the metal scanner itself and was not allowed to proceed to any channel. Simultaneously, it is also submitted that the Applicant proceeded towards red channel but was not allowed to declare the goods. It is, thus, apparent that the Applicant is making contradictory claims on the same issue. Further, it is observed from the orders of the authorities below that the Applicant was apprehended while he was proceeding through the green channel and no evidence has been placed on record to contradict this position. Therefore, it has to be held that the Applicant was intercepted with contraband after he had opted from the green channel and had not made any declaration in respect of goods found on him.

7. In terms of Section 123 of the Customs Act, 1962, in respect of gold and manufactures thereof the burden of proof that such goods are not smuggled is on the person from whom such goods are recovered. In the present case, the Applicant has failed to produce any evidence that the gold items recovered from him were not smuggled. Further, the Applicant had concealed the gold bars and gold coin in the internal pocket of his trousers. A copy of Tax Invoice No. 45775 dated 19.09.2011, purportedly covering the gold items, has been enclosed to the revision application. However, it is observed that such a claim was not made before the authorities below. Therefore, the said document appears to have been procured as an afterthought and cannot be relied upon. As such, it is held that, the Applicant has failed to discharge the burden placed on him in terms of Section 123 *ibid*.

8.1 It is claimed that the gold is not a prohibited item. The Government observes that, in the case of *Sheikh Mohd. Omer vs Collector of Customs, Calcutta & Ors* {1971 AIR 293}, the Apex Court has held that for the purpose of Section 111(d) of the Customs Act, 1962, the term *"Any prohibition" means every prohibition. In other words, all types of prohibition. Restriction is one type of prohibition*". Gold is not allowed to be imported freely in baggage and it is permitted to be imported by a passenger subject to fulfillment of certain conditions. In the case of *M/s Om Prakash Bhatia Vs. Commissioner of Customs, Delhi* {2003(155) ELT423(SC)}, the Hon'ble Supreme Court has held that *"if the conditions prescribed for import or export of goods are not complied with, it would be considered to be prohibited goods"*. Further, in the case of *UOI & Ors vs. M/s Raj Grow Impex LLP & Ors* (2021-TIOL-187-SC-CUS-LB), the Hon'ble Supreme Court has followed the judgments in *Sheikh Mohd. Omer* (supra) and *Om Prakash Bhatia* (supra) to hold that *"any restriction on import or export is to an extent a prohibition; and the expression "any prohibition" in Section 111(d) of the Customs Act includes restrictions."*

8.2 In the case of *Malabar Diamond Gallery P. Ltd. Vs ADG, DRI, Chennai* [2016(341) ELT 65 (Mad.)], the Hon'ble Madras High Court (i.e. the Hon'ble jurisdictional High Court) has summarized the position on the issue, specifically in respect of gold, as under:

"64. Dictum of the Hon'ble Supreme Court and High Courts makes it clear that gold, may not be one of the enumerated goods, as prohibited goods, still, if the conditions for such import are not complied with, then import of gold, would squarely fall under the definition "prohibited goods", in Section 2 (33) of the Customs Act, 1962----."

Similar view has been taken by the Hon'ble Madras High Court in the case of P. Sinnasamy {2016 (344) ELT 1154 (Mad.)}.

8.3 In this case, the conditions, subject to which gold could have been legally imported by the Applicant in baggage, have not been fulfilled. Thus, following the ratio of the aforesaid judgments, there is no doubt that the subject goods are 'prohibited goods'.

9. The original authority has denied the release of seized goods on redemption fine under Section 125 of the Customs Act, 1962 which has been upheld in appeal. In terms of Section 125, the option to release 'prohibited goods', on redemption fine, is discretionary, as held by 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.)]. 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. Sinnasammy (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 reasons'"*. Hon'ble Delhi High Court has, in the case of Raju Sharma Vs. UOI {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 motives."* In holding so, the Hon'ble High Court has relied upon the judgment of Apex Court in the case of Mangalam Organics Ltd. {2017 (349) ELT 369 (SC)}. Thus, the Commissioner (Appeals) could have interfered with the discretion exercised by the original authority only if it would have been tainted by any of vices highlighted by the Hon'ble Courts. In the present case, the original authority has after careful consideration, and for relevant and reasonable considerations, recorded in para 15 to para 18 of the Order-in-Original, denied the option of redemption. Therefore, the Commissioner (Appeals) has correctly refused to interfere in the matter.

10.1 The original authority has also denied the request for re-export of the goods, which has been assailed in the present revision application. 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."

10.2 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.)} that also involved smuggling of gold, 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, it is undisputed that 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."

10.3 Hence, the re-export of offending goods could also not have been permitted.

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

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



(Sandeep Prakash)

Additional Secretary to the Government of India

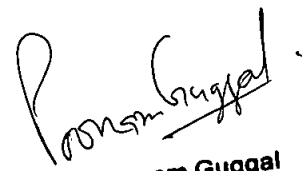
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Order No. 98/23-Cus dated 15.3.2023

Copy to:

1. The Pr. Commissioner of Customs, Chennai-I, New Customs House, Air Cargo Complex, Meenambakkam, Chennai-600016.
2. The Commissioner of Customs (Appeals-I), New Customs House, Chennai-600016.
3. Sh. A. Ganesh, Advocate, "F Block, 179, IV Street, Anna Nagar, Chennai-600102.
4. PPS to AS (RA).
5. Guard file.
6. Spare Copy.
7. Notice Board.

ATTESTED



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