

SPEED POST



F.No. 375/18/B/2019-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... 28.9.21..

Order No. 195/21-Cus dated 28-9-2021 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. CC(A)Cus/D-1/Air/580/2018 dated
07.12.2018 passed by the Commissioner of
Customs (Appeals), New Delhi.

Applicant : Ms. Komal Rani, Bassi Pathana, Punjab.

Respondent : The Commissioner of Customs, IGI Airport,
New Delhi.

ORDER

A Revision Application No. 375/18/B/2019-RA dated 15.03.2019 has been filed by Ms. Komal Rani, Bassi Pathana, Punjab (hereinafter referred to as the Applicant) against the Order-in-Appeal No. CC(A)Cus/D-1/Air/580/2018 dated 07.12.2018 passed by the Commissioner of Customs (Appeals), New Delhi. Commissioner (Appeals) has upheld the Order-in-Original No. 327/AS/JC/2017 dated 14.10.2017, passed by the Joint Commissioner of Customs, IGI Airport, New Delhi, wherein, 02 pieces of white coated gold Chains, collectively weighing 500 gms and valued at Rs. 13,55,745/-, were confiscated absolutely under Section 111(d), 111(i), 111(j), 111(l), and 111(m) of the Customs Act, 1962. A penalty of Rs. 2.5 Lakhs was also imposed on the Applicant under Section 112 and 114AA of the Customs Act, 1962.

2. Brief facts of the case are that the Applicant arrived, on 06.04.2016, at IGI Airport, New Delhi, from Bangkok. She was intercepted by the officers of Customs near the exit gate of arrival hall after she had crossed the green channel. On search of her person, 02 pieces of gold Chains of 995.0 purity, coated with white metal, collectively weighing 500 gms and valued at Rs. 13,55,745/-, were recovered. The same were confiscated absolutely by the original authority and a penalty of Rs. 2.5 Lakhs was also imposed on the Applicant. Aggrieved, the Applicant filed an appeal before the Commissioner (Appeals), who, vide the impugned Order-in-Appeal, rejected the appeal.

3. The instant revision application has been filed, mainly, on the grounds that the gold chains, in question, were imported by the Applicant for her own use and were bought by herself; that the gold chains were not concealed by her and there was no malafide intention on her part as she was not aware of the Customs rules; that gold is not a prohibited item and hence, the gold recovered from her should be released and the penalty imposed be waived.

4. Personal hearing was held on 27.09.2021. Ms. Komal Rani, Applicant, appeared in person. She explained that the contraband was given to her by her cousin at Bangkok who exploited her personal difficulties to make her do so. Her family's condition is very poor and she is unemployed. Hence, her case may be decided leniently. None appeared for the Respondent department and no request for adjournment has also been received. Hence, the matter is being taken up for disposal on the basis of records available.

5. The Government has carefully examined the matter. It is observed that the Applicant has not produced any evidence to show that she had declared the subject gold items to the Customs on her arrival from Bangkok. In her statement dated 07.04.2016, tendered under Section 108 of Customs Act, 1962, the Applicant had stated that the gold chains were handed over to her by her cousin named Vicky at Bangkok which were to be handed over to someone at Delhi. She also stated that she was to share the profit earned after selling these gold items in India. She agreed to the recovery of the gold items from her and the fact of intentional non-declaration. The Applicant has

not been able to produce any documentary evidence to show licit possession of the gold chains in question.

6. Section 123 of Customs Act 1962 reads as follows:

"123. Burden of proof in certain cases.

(1) Where any goods to which this section applies are seized under this Act in the reasonable belief that they are smuggled goods, the burden of proving that they are not smuggled goods shall be—

(a) in a case where such seizure is made from the possession of any person,—

(i) on the person from whose possession the goods were seized; and

(ii) if any person, other than the person from whose possession the goods were seized, claims to be the owner thereof, also on such other person;

(b) in any other case, on the person, if any, who claims to be the owner of the goods so seized.

(2) This section shall apply to gold and manufactures thereof watches, and any other class of goods which the Central Government may by notification in the Official Gazette, specify."

Hence, 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. In the present case, the Applicant failed to produce any evidence that the gold chains recovered from her was not smuggled. The gold chains were white coated to disguise them. These were also not

declared by the Applicant to the custom officers, as required under Section 77 of Customs Act, 1962. She admitted that she had intentionally not declared the gold items at the red channel to evade customs duty. The Applicant has, thus, failed to discharge the burden placed on her, in terms of Section 123, *ibid*.

7. It is also observed that there is contradiction in the facts averred by the Applicant in the revision application and those which have been pleaded in her detailed request submitted on 13.09.2021, in line with her submissions during personal hearing. She has categorically stated that the gold chains were given to her by her cousin but in the revision application it has been stressed that the gold items were bought by her for her own use and should have been released.

8.1 In the revision application, it has been contended that the import of gold is not 'prohibited'. The Government observes that Hon'ble Supreme Court, in the case of Sheikh Mohd. Omer vs Collector of Customs, Calcutta & Ors [1971 AIR 293], 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 Apex 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) ELT65(Mad.)], the Hon'ble Madras 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----."


8.3 The original authority has correctly brought out, in paras 3.3 and 3.4 of the Order-in-Original, that gold is allowed to be imported subject to certain conditions and that, in this case, the conditions, subject to which gold could have been legally imported, have not been fulfilled. Thus, following the ratio of the aforesaid judgments, there is no doubt that the subject goods are 'prohibited goods'. As such, the Order absolutely confiscating the seized gold is sustainable in law.

9. The original adjudicating authority has denied the release of impugned goods on redemption fine under Section 125 of

Customs Act, 1962. The Government observes that 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; and has to be according to the rules of reason and justice; has to be based on relevant considerations*". In the case of Commissioner of Customs (Air), Chennai-I Vs P. Sinnasamy {2016(344) ELT1154 (Mad.)}, the Hon'ble Madras High Court, after extensive application of several judgments of the Apex Court, has held that "*non-consideration or non-application of mind to the relevant factors, renders exercise of discretion manifestly erroneous and it causes for judicial interference*". Further, "*when discretion is exercised under Section 125 of the Customs Act, 1962, the twin test to be satisfied is 'relevance and reason'*". It is observed that the original authority has, in the instant case, after appropriate consideration, passed a reasoned order refusing to allow redemption in the background of attempted smuggling by concealment and in the context of Government's policy objectives in the matter. Thus, the discretion exercised by the original authority could not have been interfered with.

10. The Applicant has pleaded for reduction in penalty on the basis of her personal and family condition as well as on the ground that she was exploited by her cousin to indulge in these activities. Keeping in view the extenuating circumstances pleaded, the penalty imposed on her is reduced to Rs. 1 Lakh.

11. The revision application is allowed partly to the extent of reduction in penalty only, as above.


(Sandeep Prakash)

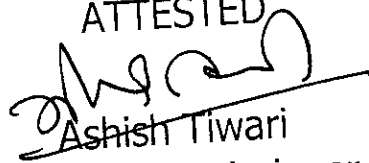
Additional Secretary to the Government of India
Ms. Komal Rani, R/o H. No. 149, Mohalla Guru Nanak Pura,
Bassi Pathana, Fatehgarh Saheb, Punjab-140 412

Order No. 195721-Cus dated 28-9-2021

Copy to:

1. The Commissioner of Customs, IGI Airport, New Delhi.
2. The Commissioner of Customs (Appeals), IGIA, New Delhi.
3. PA to AS(RA).
4. Guard File.
5. Spare Copy.

ATTESTED



Ashish Tiwari
Assistant Commissioner (RA)