

SPEED POST



F.No. 375/42/B/2018-RA  
F.NO. 375/43/B/2018-RA  
GOVERNMENT OF INDIA  
MINISTRY OF FINANCE  
(DEPARTMENT OF REVENUE)

14, HUDCO VISHALA BLDG., B WING  
6<sup>th</sup> FLOOR, BHIKAJI CAMA PLACE,  
NEW DELHI-110 066

Date of Issue.....09/02/21

Order No. 36-37/21-Cus dated 09-02-2021 of the Government of India passed by Sh. 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 No.CC(A)Cus/D-I/Air/89-90/2018 dated 15.03.2018, passed by the Commissioner of Customs (Appeals), New Customs House, Near IGI Airport, Delhi-110037

Applicant : Mr. Anupreet Singh Bhar  
Mrs. Manjeet Kaur

Respondent : Commissioner of Customs (Airport & General), New Delhi

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**ORDER**

Revision Application Nos. 375/43/B/2018-RA and 375/42/B/2018-RA both dated 21.05.2018 have been filed by Mr. Anupreet Singh Bhar (hereinafter referred to as the Applicant-1) and Mrs. Manjeet Kaur w/o Mr. Anupreet Singh Bhar, (hereinafter referred to as the Applicant - 2), respectively, against the Order-in-Appeal No. CC(A)Cus/D-I/Air/89-90/2018 dated 15.03.2018 passed by the Commissioner of Customs (Appeals), New Customs House, Near IGI Airport, Delhi-110037. Commissioner (Appeals) has upheld the order of the Additional Commissioner of Customs, IGI Airport, Terminal-3, New Delhi bearing no. 91-Adj/2016 dated 20.07.2016, wherein two chains, weighing 500 gms, which were tied with black thread along the waist, recovered during the personal search of the Applicant -1, and two chains, weighing 498 gms, which were tied with black thread along the waist, recovered from Applicant-2, all the four chains collectively valued at Rs. 24,80,205/-, have been absolutely confiscated and free allowance has been denied to the Applicants. The adjudicating authority has imposed a penalty of Rs.2,50,000/- each on both the applicants under Section 112 & 114AA of the Customs Act, 1962, which has been maintained in appeal.

2. The brief facts of the case are that both the applicants arrived on 28.06.2015 at IGI Airport, from Dubai, and were intercepted near the exit gate after they had crossed the Customs Green Channel. After search of their person and of their baggage four gold chains were recovered from their possession. The gold articles, weighing 998 grams, were appraised at Rs.24,80,2050/- by the Jewellery Appraiser at IGI airport. The applicants in their statements, recorded under Section 108 of the

Customs Act, 1962, admitted the recovery of gold articles. It has been stated by Applicant 1 that all 04 chains were purchased by him from Dubai for sale in India to earn profit.

3. The revision applications have been filed canvassing that the seized gold articles are not a prohibited item and hence may be allowed to be released on payment of redemption fine and penalty or allowed to be re-exported. Gold articles imported by the applicants are bonafide as these were brought by them were for their personal use.

4. Personal hearing was held on 08.02.2021. Sh. R.S. Yadav, Advocate appeared on behalf of the applicant. He reiterated the grounds of revision already stated in the revision application and written submissions dated 07.02.2021. Sh. Yadav further stated that that gold jewellery is not prohibited items. Therefore, absolute confiscation is bad in law. He further highlighted that the Commissioner (Appeals) has recorded the goods to be "raw gold chains" whereas in the detention receipt and show cause notice the goods are recorded only as "gold chains" and thus, the Commissioner (Appeals) has improved the facts in favour of the department. Sh. R.P. Bairwah, Superintendent, appeared on behalf of the department and prayed that the revision applications may be rejected.

5. On examination of the relevant case records, the Commissioner (Appeals)'s order and the Revision applications, it is evident that the impugned gold items were recovered from the applicants. They did not declare the same under Section 77 of Customs Act, 1962 to the customs authorities at the airport. In the Customs Declaration slip, the applicants had not declared anything in Column 9 (Total value

of dutiable goods imported). Further, the applicants have admitted the fact of non-declaration in his statement tendered under Section 108 of Customs Act, 1962.

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

*"123. Burden of proof in certain cases.—1*

*(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, the burden of proof in respect of the gold and manufactures thereof, is on the PAX, from whom goods are recovered, to prove that such goods are not smuggled goods.

7. The question of law raised by the applicants is that the import of gold is not 'prohibited'. The Government observes that law on this issue is settled by the judgment of Hon'ble Supreme Court in the case of Sheikh Mohd. Omer vs Collection

of Customs, Calcutta & Ors {1971 AIR 293}. Hon'ble Supreme Court 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". The Additional Commissioner, in para 4, 4.1 and 4.2 of the O-I-O dated 20.07.2016, has brought out that the Gold is not allowed to be imported freely in baggage. 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". The original authority has correctly brought out that in this case the conditions subject to which gold could have been legally imported have not been fulfilled. Thus, following the law laid down by the Apex Court, there is no doubt that the subject goods are 'prohibited goods'.

8. Hon'ble Madras High Court in the case of Commissioner of Customs (Air) Chennai-I vs. Samynathan Murugesan [2009 (247) E.L.T. 21 (Mad.)] relied on the definition of 'prohibited goods' given by the Apex Court in case of Omprakash Bhatia Vs. Commissioner of Customs, Delhi (supra) and has held as under:-

*"In view of meaning of the word "prohibition" as construed laid down by the Supreme Court in Om Prakash Bhatia case we have to hold that the imported gold was 'prohibited goods' since the respondent is not an eligible passenger who did not satisfy the conditions".*

The Apex Court has affirmed this order of Madras High Court {2010(254)ELT A 15 (Supreme Court)}. The ratio of aforesaid judgment is squarely applicable to the facts of the present case.

9. The applicants have contended that the Commissioner (Appeals), in the above mentioned Order-in-Appeal, has mentioned the gold chains as "raw gold chains" to improve the case for the department. However, it is observed that the restrictions on import apply to gold ornament also. Thus, this contention of applicants has no merit.

10. 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 seized goods on redemption fine, in respect of "prohibited goods", 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 present case, the original authority has refused to grant redemption as the applicant attempted to smuggle the goods by concealment, for monetary gains, with intent to evade Customs Duty. 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 with intention to evade customs duty and for monetary gains. Thus, applying the ratio of P. Sinnasamy (supra), the discretion exercised by the original authority does not merit interference. The Government also notes that the decisions cited in support of the contention to allow redemption are decided in the facts relevant in those cases and are of a period prior to the detailed judgment in the case of P. Sinnasamy.

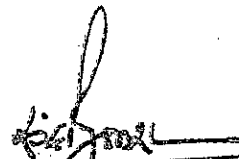
11. The applicants have also requested for the re-export of the gold chains seized from them. Section 80 of Customs Act, 1962 reads as follows:

*"80. 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 authorised by him and leaving India or as cargo consigned in his name."*

Section 80 of the Customs Act, 1962 provides that the detained imported goods can be re-exported on the request of the passenger where he/ she is returning from India to a foreign country. Thus, return of the passenger to the foreign country after a short visit to India as a tourist or otherwise is a crucial condition for re-export of impugned goods. Further, a pre-condition to allow re-export under Section 80 of Customs Act, 1962 is that "**a true declaration has**

**been made under section 77**", which is not the case here. As the conditions, subject to which re-export can be allowed under Section 80 of Customs Act 1962, are not fulfilled, re-export of the seized gold items cannot be permitted.

12. In view of the above, the Government upholds the impugned Order-in-Appeal. The revision applications are rejected.



(Sandeep Prakash)

Additional Secretary to the Government of India

1. Mr. Anupreet Singh Bhar, r/o D-210, Kedar Nagar, Shahganj, Agra, Uttar Pradesh.
2. Mrs. Manjeet Kaur, r/o D-210, Kedar Nagar, Shahganj, Agra, Uttar Pradesh.

Order No. 36-37/21-Cus dated 09-02-2021

Copy to:

1. The Commissioner of Customs (Airport & General), New Custom House, Delhi-110037
2. The Commissioner of Customs (Appeals), New Custom House, Delhi-110037
3. Additional Commissioner of Customs, IGI Airport, Terminal-3, Delhi-110037
4. Sh. R.S. Yadav, Advocate, House No. 36P, Sector -40, Gurugram-122003
5. PA to AS(RA)
6. Guard File.

ATTESTED



(Nirmala Devi)

Section Officer (Revision Application)