

SPEED POST



F.No. 375/50/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.. 22/2/21

Order No. 43/21-Cus dated 19-02-2021 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/118/2018 dated 28.03.2018, passed by the Commissioner of Customs (Appeals), New Customs House, Near IGI Airport, Delhi-110037

Applicant : Mrs. Afza Hanif Rathod

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

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ORDER

Revision Application No. 375/50/B/2018-RA dated 06.06.2018 has been filed by Mrs. Afza Hanif Rathod, (hereinafter referred to as the Applicant), against the Order-in-Appeal No. CC(A)Cus/D-I/Air/118/2018 dated 28.03.2018 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. 150/ADC/2016 dated 20.10.2016, vide which six gold bangles and one gold chain, collectively weighing 515 gms, recovered from the applicant, collectively valued at Rs. 12,28,766/-, have been absolutely confiscated and free allowance has been denied to the Applicant. The adjudicating authority has also imposed a penalty of Rs.2,50,000/- on the applicant under Section 112 & 114AA of the Customs Act, 1962, which has been maintained in appeal.

2. The brief facts of the case are that the applicant arrived on 13.04.2015 at IGI Airport, from Dubai, and was intercepted near the exit gate after she had crossed the Customs Green Channel. After search of her person and her baggage six gold bangles and one gold chain were recovered from her possession. The gold articles, weighing 515 grams, were appraised at Rs.12,28,766/- by the Jewellery Appraiser at IGI airport. The applicant in her statement, recorded under Section 108 of the Customs Act, 1962, admitted the recovery of gold articles from her and revealed that she had carried these gold articles for one Sh. Chaggan Lal, for a consideration of 800 Dirhams and to & fro air fairs, to be handed over to a person at a specified hotel in New Delhi.



3. The revision application has 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 else allowed to be re-exported. It is also contended that the Gold articles imported by the applicant are bonafide as these were brought by her for personal use.

4. Personal hearing was held on 18.02.2021. 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 14.02.2021. He stated that it is common for ladies to wear six bangles and a chain and that in this case the goods were purchased by her in Dubai on 29.03.2015, as per invoice presented alongwith the revision application. Upon being asked, Sh. Yadav confirmed that this invoice was not produced before the investigating officers during the entire course of investigation and that the statement dated 13.04.2015 has not been retracted by the applicant, till date. Sh. Yadav submitted that goods should either be allowed to be redeemed on payment of fine and duty or allowed to be re-exported, as prayed for in the revision application. In the alternate, i.e. if none of these prayers are granted, penalty may be reduced. Sh. R.P. Bairwa, Superintendent, appeared on behalf of the department and prayed that the revision application may be rejected.

5. The Government has examined the matter. On examination of the relevant case records, the Commissioner (Appeals)'s order and the Revision application, it is evident that the impugned gold items were recovered from the applicant. She 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 applicant had not

(3)

declared anything in Column 9 (Total value of dutiable goods imported). Further, the applicant has admitted the fact of non-declaration in her 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, 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 had failed to produce any evidence that goods were not smuggled and had revealed that the gold articles were carried by her for another person for a monetary consideration. A copy of invoice dated 29.03.2015

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has been produced to claim that she had actually purchased the goods in Dubai. The applicant was apprehended on 13.04.2015 when she could have easily produced this invoice. However, she failed to do so during entire course of investigation. As has been fairly admitted, her statement recorded on 13.04.2015 itself, which clearly contradicts the present stand of purchase of goods, has not been retracted. In the circumstances, the Government has no hesitation in holding that invoice produced cannot be relied upon, being an afterthought. The applicant has, thus, failed to discharge the burden placed on her, in terms of Section 123.

7. The question of law raised by the applicant 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 Collector 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 3.2 to 3.5 of the O-I-O dated 20.10.2016, 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. The applicant has contended that the gold articles were purchased by her in Dubai for personal use, on 29.03.2015. As brought out in para 6 hereinabove, the invoice produced to substantiate this claim can not be relied upon. It is also noted that only a photocopy has been produced and applicant failed to produce the original, even before the original authority. In view of these facts, Government considers that the contention of the applicant that gold articles were purchased by her for personal use can not be accepted.

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 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 correctly held that the applicant was not the owner of the goods and has refused to grant redemption. 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 were decided in the facts relevant in those cases. Further, these decision are of a period prior to the detailed judgment in the case of P. Sinnasamy (supra).

10.1. The applicant has also requested for the re-export of the gold articles seized from her. Section 80 of Customs Act, 1962 reads as follows:

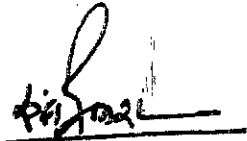
"80. Temporary detention of baggage.—Where the baggage of a passenger contains any article which is dutiable or the import of which is prohibited and in respect of which a true declaration has been made under section 77, the proper officer may, at the request of the passenger, detain such article for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

10.2 Section 80 of the Customs Act, 1962, thus, 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-

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.

11. Applicant has prayed that in case the redemption of goods is allowed on payment of fine or for re-export then only a token penalty may be imposed. The Government observes that applicant was, at the time of occurrence, working as a cabin crew for an airline. She was a well paid professional with comfortable family background and income. In these circumstances, the attempt to smuggle goods, as a carrier, for financial motive becomes an even more grave offence. As such, the applicant does not deserve any leniency.

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



(Sandeep Prakash)

Additional Secretary to the Government of India

ofc 19-02-2021

Mrs. Afza Hanif Rathod, R/o - 701,
Building 10 Green ways Gaothan,
Mira Road, East Thane District,
Maharashtra.

Order No. 43 /21-Cus dated 19-02-2021

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.

7. Spare Copy.



(Nirmala Devi)

Section Officer (Revision Application)