

SPEED POST



F. No. 372/53/B/2018-R.A.  
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. | 21/3/21 |

ORDER NO. 56/21-Cus dated 11-3-2021 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 129DD of the Customs Act, 1962 against the Order-in-Appeal No. KOL/CUS(Airport)/AA/996/2018 dated 01.06.2018, passed by the Commissioner of Customs (Appeals), Kolkata.

APPLICANT : Mrs. Neetu Jugnu Kithani.

RESPONDENT : Commissioner of Customs (Airport), Kolkata.

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**ORDER**

A Revision Application No. F. No. 372/53/B/2018-R.A. dated 27.08.2018 has been filed by Mrs. Neetu Jugnu Kithani, (hereinafter referred to as the applicant) against Order-in-Appeal No. KOL/CUS(Airport)/AA/996/2018 dated 01.06.2018, passed by the Commissioner of Customs (Appeals), Kolkata. The Commissioner (Appeals) has upheld the Joint Commissioner's Order-in-Original No. 116/2017 dated 31.10.2017 absolutely confiscating three cut pieces of gold bars and one small cut piece of gold collectively weighing 621.1 grams valued at Rs. 16,95,603/-, under Sections 111(d), 111(i) and 111(l) of Customs Act, 1962 as also imposing a penalty of Rs. 2 lakhs under Section 112(a) and 112(b) of the Act *ibid*.

2. The brief facts of the case are that the applicant arrived on 16.12.2014 at NSCBI Airport, Kolkata from Bangkok and was intercepted while she was walking through the green channel towards the exit gate. Her personal search and search of her baggage resulted in the recovery of 4 pieces of 24 karat gold, weighing 621.1 grams valued at Rs. 16,95,603/-, concealed in her handkerchief. The applicant, in her statement dated 16.12.2014 recorded under Section 108 of the Customs Act, 1962, admitted the concealment of the offending goods and revealed that the gold was not bought by her but was given to her. The Joint Commissioner of Customs, Kolkata, vide aforesaid OIO dated 31.10.2017, ordered absolute confiscation of the seized gold items and imposed penalty of Rs. 2 lakhs under Section 112 of the Customs Act, 1962. Aggrieved, the applicant filed an appeal before the Commissioner (Appeals) which was rejected. The Revision application has been filed on the ground that the order of the Commissioner (Appeals) is erroneous as the gold is not a prohibited item and should be allowed to be redeemed on payment of redemption fine in terms of Section 125 of the Customs Act, 1962.

3. Personal hearing in the matter was held on 10.03.2021 in virtual mode. Sh. Narendra Heera, Advocate, attended the hearing for the applicant and reiterated the contents of the revision application. He specifically submitted the following:

- (i) The gold was not concealed but kept in hand.
- (ii) The applicant was not a carrier.
- (iii) Even if the seized gold is treated to be prohibited goods, redemption should be allowed specifically relying upon the judgment of Apex Court in the case of Commissioner of Customs Vs. Atul Automations Pvt. Ltd. [2019(365)ELT 465(SC)].

Sh. Nirmal Sarkar, Superintendent, attended the hearing on behalf of the respondent and supported the orders of lower authorities. He stated that:

- (i) Gold is normally not carried in hand. Therefore, the passenger adopted an ingenious way of concealment by wrapping in handkerchief and keeping that in hand.
- (ii) As admitted by the applicant in his statement (which remains un-retracted), she was a carrier and had committed such acts in the past as well.
- (iii) Redemption would encourage smuggling.

4. The Government has examined the matter. The applicant has not disputed the fact that the recovered gold was not declared by her to the Customs on her arrival from Bangkok which clearly shows her malafide intention of smuggling the said gold. She admitted in her voluntary statement recorded under Section 108 of Customs Act, 1962 that she had brought the gold from Bangkok which was not bought by her but was given to her by some jewellers named "The Hange". As pointed out by the department, the gold in this form is normally not carried in hand. Therefore, the passenger adopted an ingenious way of concealment by covering gold in black coloured tape and carbon paper,

wrapping in handkerchief and keeping that in hand. In these facts and circumstances, it is a case of outright smuggling where the applicant tried to evade detection by way of concealment in an ingenious manner.

5. The question of law raised by the applicant is that the import of gold is not 'prohibited'. The law on this issue is settled by the judgement 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 Joint Commissioner, in Order-in-Original dated 31.10.2017, 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 imported have not been fulfilled. Thus, following the law laid down by the Apex Court, there is no doubt that the subject gold is 'prohibited goods'.

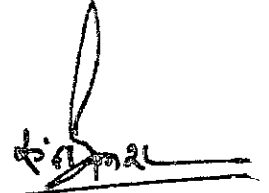
6.1 The original adjudicating authority has denied the release of impugned goods on redemption fine under Section 125 of Customs Act, 1962. The Government observes that the option to release seized goods on redemption fine, in respect of "prohibited goods", is discretionary, as held by the Hon'ble Supreme 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, with intent to evade Customs Duty by walking through the Green Channel and not declaring the goods. 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. Thus, applying the ratio of P. Sinnasamy (Supra), the discretion exercised by the original authority does not merit interference.

6.2 Reliance has been placed on the judgment of Apex Court in the case of Atul Automation Pvt. Ltd. (supra) to submit that even if seized gold is treated to be prohibited goods, redemption should be allowed. It is observed that Atul Automations relates to unauthorised import of used Multi-Function Devices (MFD), which are 'restricted goods' as per the relevant Foreign Trade policy. The Apex Court noted that Rule 17(2) of the Foreign Trade (Regulation) Rules, 1993, provides for confiscation of goods in the event of contravention of the Act, Rules or Orders but which may be released on payment of redemption charges equivalent to the market value of the goods. After similarly noting the other provisions of Foreign Trade Act and Section 125 of the Customs Act, the Apex Court held that "A harmonious reading of the statutory provisions of the Foreign Trade Act and Section 125 of the Customs Act will therefore not detract from the redemption of such restricted goods imported without authorisation upon payment of the market value." It is

thus apparent that Atul Automations has been decided in the light of the used MFDs finding a specific mention as 'restricted goods' as per the Foreign Trade Policy and a specific distinction made in the Policy by categorising some goods as 'restricted goods' and some as 'prohibited goods'. On the other hand, in Mohd. Omer and Om Prakash Bhatia, the Apex Court has held that for the purposes of Section 111(d) and 113(d) of the Customs Act, "Restriction is one type of prohibition" and therefore, the goods, in respect whereof conditions prescribed for import or export are not complied with, would be considered to be prohibited goods. Further, as brought out in Para 6.1 above, the redemption of prohibited goods is discretionary and once the authority concerned has exercised his discretion for relevant and reasonable considerations, such discretion cannot be interfered with. There is nothing in Atul Automations to suggest that even prohibited goods have to be mandatorily permitted to be redeemed. Thus, the reliance on Atul Automations is misplaced.

7. In view of the above, the Government upholds the impugned Order-in-Appeal. The revision application is rejected.



(Sandeep Prakash)

Additional Secretary to the Government of India

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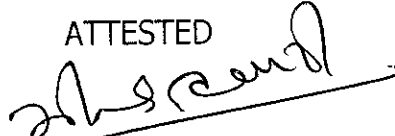
ORDER NO. 56 / 21-Cus dated 11-3-2021

**Copy to:-**

1. The Commissioner of Customs, Airport, Kolkata.
2. The Commissioner of Customs (Appeals), Kolkata.

3. M/s. Advani Sachwani & Heera Advocates, Nulwala Building, 41 Mint Road,  
Opp. G.P.O., Fort Mumbai- 400 001
4. Guard File.
5. Spare Copy.
6. PS to AS(CRA),

ATTESTED

  
(Ashish Tiwari)

Assistant Commissioner.