

SPEED POST



**F. No. 372/63/B/2018-R.A.
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... 8/4/21.....

Order No. 76 / 21-Cus dated 07-04-2021 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/1301/2018 dated 06.07.2018, passed by the Commissioner of Customs (Appeals), Kolkata.

APPLICANT: Mr. Ajay Kumar, Yamunanagar.

RESPONDENT: Commissioner of Customs (Airport & Admn.),
Kolkata.

ORDER

A Revision Application No. F. No. 372/63/B/2018-R.A. dated 08.10.2018 has been filed by Mr. Ajay Kumar, Yamunanagar (hereinafter referred to as the applicant) against Order-in-Appeal No. KOL/CUS (Airport)/AA/1301/2018 dated 06.07.2018, passed by the Commissioner of Customs (Appeals), Kolkata. The Commissioner (Appeals) has upheld the Order-in-Original No. 51/2018 JC dated 26.02.2018, passed by the Joint Commissioner of Customs, NSCBI Airport, Kolkata, absolutely confiscating one piece each of bangle and chain made of 24 carat gold collectively weighing 278.2 grams, totally valued at Rs. 8,77,721/-, under Sections 111(d), 111(i) and 111(l) of Customs Act, 1962 as also imposing a penalty of Rs. 1 lakh under Section 112(a) and 112(b) of the Act *ibid*.

2. The brief facts of the case are that the applicant arrived on 18.09.2016 at NSCBI Airport, Kolkata, from Bangkok and was intercepted while he was walking through the Green Channel. His personal search resulted in the recovery of one piece of bangle and one piece of chain, both of 24 karat gold, camouflaged with white colour metal plating, collectively weighing 278.2 grams, totally valued at Rs. 8,77,721/-. The applicant, in his statement dated 18.09.2016, recorded under Section 108 of the Customs Act, 1962, stated that the gold items were not his own but given to him by his brother and admitted his mistake as he did not know that carrying gold in that way was an offence. The Joint Commissioner of Customs, Kolkata, *vide*

aforesaid Order-in-Original dated 22.02.2018, ordered absolute confiscation of the seized gold items and imposed penalty of Rs. 1 lakh 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 there was no mis-declaration or concealment by the applicant. It was his first visit out of India and he immediately declared the platinum polished kada and chain on his arrival to the AIU officer. Commissioner (Appeals)'s order 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 05.04.2021, in virtual mode. Sh. S.S. Arora, Advocate, attended the hearing for the applicant and stated that:

- (i) As per ITC HS 7110.31, the gold with platinum polish is freely importable.
- (ii) GOI has previously, vide Order No.60/2018-Cus dated 09.04.2018 and 83/2018-Cus dated 01.08.2018, permitted redemption in similar cases.
- (iii) In the present case the applicant is a poor person who brought the gold articles for his sister's marriage. He was wearing these articles and there was no concealment. Hence, a lenient view may be taken.

Sh. Rana Dutta, Superintendent, attended the hearing on behalf of the respondent and reiterated the findings of the lower authorities. He highlighted that the articles were white coated for concealment purposes. These were not with platinum polish.

4. The Government has examined the matter. The applicant has admitted in his un-retracted voluntary statement dated 18.09.2016 that he had not declared the gold items to the Customs at the time of his arrival and accepted his mistake. No declaration was made in respect of these items to the Customs authorities, rather the items were camouflaged with white paint so as to hoodwink the customs authorities. Thus it is a clear violation of Section 77 of Customs Act, 1962. The submission that these items were with platinum polish is not borne out from records.

5. 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 articles were not smuggled and to the contrary, admitted his offence. The manner of concealment, i.e., camouflaging with white coating, also substantiates that this was, a premeditated attempt at smuggling.

6.1 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 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 Joint Commissioner, in Order-in-Original dated 22.02.2018, 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 fulfilment 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'.

6.2 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 judgment in the 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 {20109254}ELT A 15(Supreme Court)}. Similar view has been taken by the Hon'ble Madras High Court in the case of Malabar Diamond Gallery P. Ltd. Vs ADG, DRI, Chennai [2016(341)ELT65(Mad.)]. In Malabar Diamond (supra), the Hon'ble High Court has specifically held that "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----." The ratio of the aforesaid judgments is squarely applicable in the facts of the present case.

7. The original adjudicating authority has denied the release of impugned goods on redemption fine under Section 125 of Customs Act, 1962, which has been assailed in the instant revision application. 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 M/s 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. The case laws relied upon by the applicant are not applicable in as much as these have been issued prior to Sinnasamy (supra) and/or are issued without noticing the same.

8. It has been stated in the revision application that the penalty of Rs. 1 lakh imposed on the applicant is high and should be reduced. In the facts and circumstances of the case, specifically attempt to smuggle the camouflaged gold items without declaring them to Customs, the Government finds that the penalty imposed is just and fair.

9. 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

Mr. Ajay Kumar,
S/o Mr. Ravel Shah,
R/o H.No. 302/4, Ward no. 27,
Camp Yamuna Nagar, Haryana-135 001

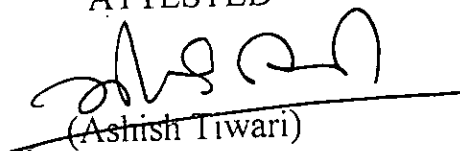
Order No. 76/21-Cus dated 7-4-2021

Copy to:-

1. The Commissioner of Customs, Airport & Admin., Kolkata.
2. The Commissioner of Customs (Appeals), Kolkata.
3. M/s. S.S. Arora & Associates, B1/71, Safdarjung Enclave, New Delhi-110029.
4. Guard File.

5. Spare Copy.
G. PA to AS (RA)

ATTESTED



(Ashish Tiwari)

Assistant Commissioner.