

REGISTERED

SPEED POST



F.No. . 372/12/B/18-RA
GOVERNMENT OF INDIA
MINISTRY OF FINANCE
(DEPARTMENT OF REVENUE)

14, HUDCO VISHALA BLDG., B WING
6th FLOOR, BHIKAJI CAMA PLACE,
NEW DELHI-110066

Date of Issue... 8/1/2020

Order No. 08/2020-Cus ~~19~~ Cus dated 02/01/2020 ~~2019~~ of the Government of India passed by Mrs. Mallika Arya, Principal Commissioner & 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.KOL/Cus/Airport)/AA/120/2018 dated 09.01.2018, passed by the Commissioner of Customs (Appeals), Custom House, 15/1, Strand Road, Kolkata-700001.

Applicant : Sh. Narju Rahman, Kolkata.

Respondent : Commissioner of Customs (Airport), Kolkata.

ORDER

A Revision Application No.372/12/B/18-RA dated 23.02.2018 has been filed by Sh. Narju Rahman (hereinafter referred to as the applicant) against the Order-in-Appeal No.KOL/Cus/Airport)/AA/120/2018 dated 09.01.2018 passed by the Commissioner of Customs (Appeals), Kolkata wherein the Order-in-Original No. 23/2017 dated 08.03.2017 of the Additional Commissioner of Customs, Kolkata confiscating absolutely 12 pieces of foreign origin gold cylinders weighing 1013 grams valued at Rs. 26,74,320/- (Rupees Twenty six lacs seventy four thousand three hundred and twenty) and imposing penalty of Rs.2,75,000/- (Rupees Two lacs seventy five thousand) under section 112 (a) and 112 (b) of the Customs Act, 1962, has been upheld. Aggrieved by the impugned order-in-appeal, the applicant has preferred this application.

2. The brief facts of the case are that the applicant arrived from Kuala Lumpur on 23.03.2015 at NSCBI Airport, Kolkata and was intercepted near the exit gate after he had crossed the customs green channel. On being asked by the Customs officers whether he was carrying any dutiable items, he replied in negative. Thereafter he was diverted for x-ray scanning. Upon scanning of his DVD home entertainment system of Samsung brand 12 pieces of gold cylinders were found concealed inside the speakers of the DVD player. The gold cylinders were examined by the Government approved valuer and the 12 gold cylinders were found to be of 24K purity cumulatively weighing 1013 grams and were valued at Rs. 26,74,320/-. The applicant in his statement recorded under Section 108 of the Customs Act, 1962 admitted the recovery of gold cylinders from his possession. He had confessed that the impugned DVD player was given to him by someone unknown to him at Kuala Lumpur airport for handing it over to a man outside Kolkata airport.

3. The revision application has been filed on the grounds that the import of gold is not prohibited and it should be released on redemption or re-export. He has also

requested that penalty under Section 112 of the Customs Act, 1962 should not exceed the duty amount wherein in the present case a penalty of Rs. 2,75,000/- has been imposed which is more than the duty amount. Accordingly he has requested for reduction of the penalty amount.

4. Personal hearings were granted to the applicant as well as the respondent on 20.11.2019, 05.12.2019 and 31.12.2019. Sh. Palani Kumar, Advocate appeared for personal hearing on 31.12.2019 and accepted that it was a case of concealment of 12 pieces of gold weighing 1,013 grams in a DVD Player. The seizure was made from the checked-in baggage of the applicant at the time of X-Ray of the impugned baggage. He requested for relief under Section 125 of Customs Act, 1962. He relied upon the GOI's orders in the cases of Sh. Aribu Thippu Sulthan & Sh. Abdulla Kader Gani [Order No. 402 to 403/09-CUS dated 10.12.2009] and Sh. P. Seeni Sahul Hameed [Order No. 152/2018-CUS(SZ)/ASRA/MUMBAI dated 28.03.2018] on similar issue. He also prayed for reduction in penalty under Section 112 of Customs Act, 1962.

No one appeared on behalf of the respondent nor any request for another date of personal hearing has been received. Hence the matter is being taken up for disposal on the basis of evidence available on record.

5. 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. He did not declare the same under Section 77 of Customs Act, 1962 to the customs authorities at the airport. Further the applicant has 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 is on the applicant to justify the bonafides of the import, from whom the impugned goods are recovered in terms of Section 123 of Customs Act, 1962.

7. 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 [2003(155) ELT 423 (SC)] 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 upheld this order of Madras High Court and dismissed the special leave to Appeal (Civil) no. 22072 of 2009 filed by Samynathan Murugesan.

The ratio of aforesaid judgment is squarely applicable to the facts of this case.

8. Reliance is placed on Madras High Court in the case of Commissioner of Customs (AIR) Chennai-I vs. Samynathan Murugesan [2009 (247) E.L.T. (Mad.)], wherein the Honourable High Court has considered that concealment as a relevant factor meriting absolute confiscation. The Honourable High Court has held as under: *"In the present case too, the concealment had weighed with the Commissioner to order absolute confiscation. He was right, the Tribunal erred."*

It is on record that the impugned gold items were not declared by the applicant on his own. The gold items were recovered during scanning through X-ray machine only. No declaration was given by the applicant in respect of these gold items either at the x-ray counter or at the red channel.

9. In the present case the adjudicating authority has denied the release of impugned goods on redemption fine under Section 125 of Customs Act, 1962 as he was a carrier.

The High Court of Bombay in the case of Union of India Vs. Aijaj Ahmad – 2009(244)ELT 49 (Bom), while deliberating on option to be given to whom to redeem the goods has held in para 3 of the judgment as follows:-

"3. In the instant case, according to the respondent himself the owner was Karimuddin as he had acted on behalf of Karimuddin. The question of the Tribunal exercising the jurisdiction u/s 125 of the Customs Act and remit the matter to give an option to the respondent herein to redeem the goods was clearly without jurisdiction."

Further, it is evident that the applicant had brought the gold items (12 nos.) totally weighing 1013 grams valued at Rs. 26,74,320 and did not declare the impugned goods to the customs authorities with an intention to evade customs duty. It is observed that he has accepted this fact in the statement tendered under Section 108 of Customs Act, 1962.

10. The applicant is not eligible for re-export of impugned goods under Section 80 of Customs Act, 1962 being a carrier.
11. In light of various judicial pronouncements discussed in the earlier paras, Government upholds the order of the lower authorities regarding absolute confiscation of the impugned gold items (12 nos.) totally weighing 1013 grams valued at Rs. 26,74,320/- (Rupees Twenty six lacs seventy four thousand three hundred twenty only) under Section 111 of Customs Act, 1962 as the same is legally sustainable.
 - (ii) Penalty of Rs. 2,75,000/- (Rupees Two lacs seventy five thousand only) which has been imposed on the applicant under Section 112 (a) and 112 (b) of the Customs Act, 1962 is also upheld keeping in view the gravity of offence.
12. Accordingly the order-in-appeal is upheld and revision application is rejected.


(MALLIKA ARYA)

ADDITIONAL SECRETARY TO THE GOVERNMENT OF INDIA

1. Mr. Narju Rahman, S/o Fida Huassain, Bangari Basant Garkha Saran, Bihar-841202.
2. Commissioner of Customs, (Airport & Administration), Custom House, 15/1, Strand Road, Kolkata.

Order No. 08/2020-Cus 02/01/2020
JFC dated 2019

Copy to:

1. Commissioner of Customs (Appeals) Custom House, 15/1, Strand Road, Kolkata.
2. PA to AS(RA)
- ✓ 3. Guard File.

ATTESTED

N Devi
6/1/2020

(Nirmala Devi)

S. O. (REVISION APPLICATION)