

SPEED POST



F.No. 375/77/B/2019-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. 05/01/2022

Order No. 08/22-Cus dated 05/01/2022 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.JNK-EXCUS-APP-149/2019-20 dated 14.08.2019, passed by the Commissioner (Appeals), CGST, Customs & Central Excise, Jammu.

Applicant : Sh. Abhishek Arora, Amritsar.

Respondent : Commissioner of Customs (Preventive), Amritsar.

ORDER

A Revision Application No. 375/77/B/2019-RA dated 12.12.2019, has been filed by Sh. Abhishek Arora, Amritsar (hereinafter referred to as the Applicant) against the Order-in-Appeal No. JNK- EXCUS-APP-149/2019-20 dated 14.08.2019, passed by the Commissioner (Appeals), CGST, Customs & Central Excise, Jammu. Commissioner (Appeals) has upheld the order of the Joint Commissioner of Customs (Preventive), Amritsar, bearing no. 33/JC/CUS/ASR/2017 dated 13.12.2017, wherein one gold kara, weighing 444.5 grams and valued at Rs. 12,89,050/-, which was recovered from the Applicant herein was absolutely confiscated. Besides, penalty of Rs.1,00,000/- was also imposed by the original authority on the Applicant, under Sections 112(a) of the Customs Act, 1962, which has been maintained in appeal.

2. Brief facts of the case are that the Applicant arrived on, 21.05.2017, at SGRDJ International Airport, Amritsar, from Dubai and was intercepted near the exit gate after he had crossed the Customs Green Channel. After search of his person and of his baggage, 01 piece of gold kara coated with Rhodium, which was concealed by wearing it in the ankle of his left leg under the trousers, was recovered from his possession. The value of seized gold, of 24 carat purity, weighing 444.500 grams, was appraised at Rs.12,89,050/- by the certified jeweller. The 01 piece of gold kara, recovered from the Applicant, was seized under Section 110 of the Customs Act, 1962, under panchanama dated 21.05.2017. The Applicant in his statement dated 21.05.2017, recorded under Section 108 of the Customs Act, 1962, admitted the recovery of 01 piece of gold kara and agreed with the contents of the panchanama dated 21.05.2017. He further stated that the gold was purchased by him in Dubai and also submitted the original bill No. 1669 dated 20.05.2017 evidencing the purchase of the impugned gold and that he was fully aware that the import of gold was liable to Customs duty; and that the smuggling of the same was a punishable offence.

3. The revision application has been filed canvassing that the Applicant was ready to pay duty but was coerced into admitting that he wanted to smuggle the gold item; that gold kara was for personal use; that import of gold is not prohibited;

that gold may be released on payment of redemption fine and appropriate duty; and that the penalty imposed may be set aside.

4. Personal hearing, in virtual mode, was held on 04.01.2022. Sh Surjeet Bhadu, Advocate, appeared on behalf of the Applicant and reiterated the contents of revision application. He also relied upon the case laws cited in the compendium emailed on 03.01.2022. Sh. Bhadu highlighted that the factum of gold being of foreign origin is not disputed but as the Applicant is the owner, same may be allowed to be redeemed on payment of fine, duty etc. None appeared for the Respondent department nor any request for the adjournment has been received. Therefore, the case is taken up for final decision based on records.

5. The Government has carefully examined the matter. It is observed that the Applicant did not declare the gold item brought by him under Section 77 of Customs Act, 1962 to the customs authorities at the airport. Further, the Applicant has admitted the recovery of gold from him and the fact of non-declaration in his statement tendered under Section 108 of Customs Act, 1962. It is also brought out that the Applicant had ingeniously concealed the gold kara coated with rhodium, i.e., by wearing it in the ankle of his left leg under the trousers. It is also observed that the seizure was made in the presence of independent witnesses. The Applicant did not seek cross-examination of the independent witnesses and the seizing officer to establish his present contentions that he intended to declare the goods. Thus, it is apparent that the Applicant had the intent to smuggle the gold kara without declaring the same before the customs authorities at the Airport and present contentions to the contrary are nothing but afterthought. The contention that the kara was for personal use also appears unacceptable in as much as the weight of the kara is 444.50 gms, i.e., the kara is too heavy for personal use that too for a male in the Indian context. Further, the kara is made of 24 kt. gold whereas ornaments of personal use are usually made of gold of purity 22 kt. or below.

6. 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 had failed to declare the gold item and pay duty on the same. It is also noted that the Applicant had produced the documentary evidence evidencing the ownership but the same is nullified by the fact that the Applicant had made an attempt to smuggle the gold kara, by clever concealment, without payment of Customs duties etc. The Applicant has, thus, failed to discharge the burden placed on him, in terms of Section 123.

7.1 The Government observes that the Hon'ble Supreme Court in the case of Sheikh Mohd. Omer vs Collector of Customs, Calcutta & Ors {1971 AIR 293} has 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 paras 25 to 31 of the O-I-O dated 13.12.2017, has brought out that the gold and gold ornaments 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*". In one of its latest judgment dated 17.06.2021, in the case of UOI & Ors vs. M/s Raj Grow Impex LLP & Ors (2021-TIOL-187-SC-CUS-LB), the Hon'ble Supreme Court has followed the judgments in Sheikh Mohd. Omer (supra) and Om Prakash Bhatia (supra) to hold that "*any restriction on import or export is to an extent a prohibition; and the expression "any prohibition" in Section 111(d) of the Customs Act includes restrictions.*"

7.2 In the case of Malabar Diamond Gallery P. Ltd. Vs ADG, DRI, Chennai [2016(341)ELT65(Mad.)], the Hon'ble Madras High Court has summarized the position on the issue, specifically in respect of gold, as under:

"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----."

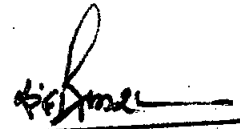
7.3 The original authority has correctly brought out that, in this case, the conditions subject to which gold could have been legally imported have not been fulfilled. Thus, following the ratio of the aforesaid judgments, there is no doubt that the subject goods are 'prohibited goods'. Accordingly, the contentions to the contrary cannot be accepted.

8. The original authority has denied the release of offending goods on redemption fine under Section 125 of Customs Act, 1962, which has been challenged in the instant RA. The Government observes that, in terms of Section 125 of the Customs Act, 1962, the option to release 'prohibited goods', on redemption fine, 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 case of UOI & Ors vs. M/s Raj Grow Impex LLP & Ors (supra), the Hon'ble Supreme Court has held "*that when it comes to discretion, the exercise thereof has to be guided by law; has to be according to the rules of reason and*

justice; and has to be based on the relevant considerations". In the case of Commissioner of Customs (Air), Chennai-I Vs P. Sinnasamy {2016(344)ELT1154 (Mad.)}, the Hon'ble Madras High Court has, relying upon several judgments of the Apex Court, 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".*" In the present case, the original authority has refused to grant redemption in the background of attempted smuggling by concealment with intent to evade Customs Duty. It has also been observed by the original authority that objects of public policy, restricting import of gold, shall be frustrated if the redemption was permitted. Thus, following the ratio of Raj Grow Impex (supra) and Sinnasamy (supra) the Order of the original authority, upheld by the Commissioner (Appeals), being a reasoned Order based on relevant considerations, does not merit interference. The judgments/decisions relied upon by the Applicant to support the case for redemption have been rendered in the facts of respective cases. Further, these have been rendered without noticing the judgments in Raj Grow Impex and Sinnasamy.

9. The Government finds that the penalty imposed is just and fair in the facts and circumstances of the case.

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



(Sandeep Prakash)

Additional Secretary to the Government of India

Sh. Abhishek Arora,
Gate Hakima, HM-6,
Aman Avenue, Amritsar -143001.

Order No. 08/22-Cus dated 05/01 2022

Copy to:-

1. The Commissioner of Customs (Preventive), Customs House, Central Revenue Building, The mall, Amritsar, Punjab-143001.
2. The Commissioner of Customs (Appeals), CGST, Central Excise and Customs, OB-32, Rail Head Complex, Jammu-180012.
3. Shri Surjeet Bhadu, Advocate (BSM Legal), 3015, Sector – 27D, Chandigarh – 160019.
4. PA to AS(RA).
5. ✓ Guard File.
6. Spare Copy.

ATTESTED



(लक्ष्मी राघवन)
(Lakshmi Raghavan)
अनुभाग अधिकारी / Section Officer
वित्त मंत्रालय (राजस्व विभाग)
Ministry of Finance (Deptt. of Rev.)
भारत सरकार / Govt. of India
नई दिल्ली / New Delhi