

SPEED POST



F.No. 375/19/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.. 8.1.2020

Order No. 11/2020-Cus dated 02/01/2020 of the Government of India passed by Smt. 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.CC(A)Cus/D-I/Air/46/2018 dated 26.02.2018 passed by the Commissioner of Customs (Appeals), New Customs House, Near IGI Airport, Delhi-110037

Applicant : Mrs. Nidhi Kapoor

Respondent : Commissioner of Customs, IGI- Airport, T-3, New Delhi

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ORDER

A Revision Application No. 375/19/B/2018-RA dated 13.03.2018 has been filed by Mrs. Nidhi Kapoor (hereinafter referred to as the applicant) against the Order-in-Appeal No. CC(A)Cus/D-I/Air/46/2018 dated 26.02.2018 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. 138/2016 dated 16.09.2016 regarding absolute confiscation of the gold bars (3 nos.) and two cut pieces of yellow metal bars weighing 3100 grams valued at Rs. 76,44,011/- (Rupees Seventy six lacs fourty four thousand and eleven only). A penalty of Rs. 15,00,000/- (Rupees Fifteen Lacs) has been imposed on the applicant under Section 112 read with Section 114AA of the Customs Act, 1962.

2. The brief facts of the case are that the applicant arrived from Dubai on 01.07.2015 at Terminal-3 IGI Airport, Delhi and was intercepted near the exit gate after she had crossed the customs green channel. On being asked by the Customs officers whether she was carrying any dutiable items, she replied in negative. Thereafter, she was directed to pass through the door frame metal detector (DFMD) and there a beep sound was emanated. After personal search 3 gold bars and two cut pieces of yellow metal bars were recovered from her possession in the pocket of her jeans which were further covered with cello tape. The gold bars cumulatively weighing 3100 grams valued at Rs. 76,44,011/ were examined by the Jewellery Appraiser at IGI airport. The applicant in her statement recorded under Section 108 of the Customs Act, 1962 admitted that the recovered gold bars did not belong to her and were handed over to her by Mr. Deepak Bajaj, her family friend, in Dubai. She had carried the impugned gold bars at the behest of Mr. Deepak Bajaj. She was well aware of the fact that the import of gold items attracts Customs duty and smuggling of the same is a punishable offence.

3. The revision application has been filed on the grounds that the applicant is the owner of the impugned gold bars and was carrying the same under bonafide belief that this activity is not prohibited. The Statement tendered under Section 108 of Customs Act, 1962 before the customs authorities was recorded under duress. Gold bars belonged to her as the same were gifted by Mr. Deepak Bajaj to her husband under a duly executed gift deed. Since she was not aware of this fact and that is why she made a statement that the gold bars belonged to Mr. Deepak Bajaj. Gold bars are not prohibited under Section 2 (33) of Customs Act, 1962. Further the gold bars were not concealed as the same were recovered from the pocket of her pants. Gold bars should be allowed to be released on redemption under Section 125 of Customs Act, 1962. She also requested that penalty under Section 114AA of Customs Act, 1962 is not imposable on her and also requested that penalty under Section 112 may also be reduced.

4. Personal hearing was fixed on 09.12.2019 and 30.12.2019 in this case. Neither the applicant nor the respondent appeared on either of the dates. However the applicant requested for another date of hearing without any satisfactory reasoning. Since the ample opportunities have already been granted to both applicant and respondent and no one has appeared, the case is being taken up for final disposal.

5. On examination of the relevant case records, the Commissioner (Appeals)'s order and the Revision application it is evident that the impugned gold bars 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. 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 2[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. No evidence has been put forth by the applicant to establish the ownership of the impugned goods before the lower authorities as well as in the revision application. The contention of the applicant that gold bars were given to her husband by Mr. Deepak Bajaj under a gift deed appears to be an afterthought and can not be relied upon . It is also on record that the applicant in her statement under Section 108 of Customs Act, 1962 had admitted that the impugned gold bars did not belong to her and the gold bars were handed over by Mr. Deepak Bajaj to her for carrying the same to India.

The applicant in the revision application contended that she had tendered the statement under duress. Therefore, the statement recorded under Section 108 of the Customs Act, 1962 is admissible in this case, even when it is retracted.

Reliance is placed on the judgment of Supreme Court of India in the case of Surjeet Singh Chhabra Vs. U.O.I. [1997 (89) E.L.T. 646 (S.C.)] wherein the Hon'ble court has held as follows:-

"Evidence - Confession statement made before Customs officer though retracted within six days is an admission and binding since Customs Officers are not Police Officers - Section 108 of the Customs Act and FERA."

"Natural Justice - Seized goods - Cross-examination of witnesses regarding the place at which recovery was made to be allowed but where Petitioner has confessed, non allowing of cross examination is not violative of principles of natural justice even if such confession was retracted within six days - Customs Officers are not Police Officers hence confession though retracted is binding - Sections 108 and 111 of the Customs Act, and FERA."

Therefore the statement recorded under Section 108 of the Customs Act, 1962 is admissible, even when it is retracted as per the aforesaid judgment of Apex Court.

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 bars were not declared by PAX on her own. The gold bars were recovered during her personal search by the Customs Officer from her pant pockets duly wrapped with cello tape. No declaration was given by the applicant in respect of these gold bars either at the x-ray counter or at the red channel. The concealment material was also seized as per the DR NO. 37621 dated 02.07.2015.

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 she 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 has held 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."

It is evident that the applicant had brought the gold bars (3 nos.) and two pieces of yellow metal bar as a carrier totally weighing 3100 grams valued at Rs. 76,44,011/- (Rupees Seventy six lacs fourty four thousand and eleven only) on behalf of someone else and did not declare the impugned goods to the customs authorities with an intention to evade customs duty.

10. 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 bars (3 nos.) and two pieces of yellow metal bar total weighing 3100 grams valued at Rs. 76,44,011/- (Rupees Seventy six lacs fourty four thousand and eleven only) under Section 111 of Customs Act, 1962.

(ii) Penalty of Rs. 15,00,000/- (Rupees Fifteen Lacs) has been imposed on the applicant under Section 112 read with Section 114AA of the Customs Act, 1962. As penalty is not imposable under Section 114AA of the Customs Act, 1962 a penalty of Rs. 15,00,000/- (Rupees Fifteen Lacs) is imposed under Section 112 (a) of the Customs Act, 1962; keeping in view the gravity of offence.

11. Accordingly the order-in-appeal is upheld and revision application is rejected.


(Mallika Arya)

Additional Secretary to the Government of India

1. Mrs. Nidhi Kapoor, B-II/245, Chhawani Mohalla Ludhiana, Punjab 141001.

Copy to: RO1 No- 11/2020-Les date - 02/01/2020

1. The Commissioner of Customs (Appeals), New Custom House, Delhi-110037.

2. The Commissioner of Customs, IGI Airport Terminal-3, New Delhi-110037.

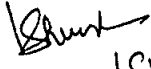
3. The Additional Commissioner of Customs, IGI Airport Terminal-3, New Delhi-110037

4. Sh. S. S. Arora; Advocate, B-1/71, Safdarjung Enclave, new Delhi 110029

5. PA to AS(RA)

6. ~~Guard File.~~

ATTESTED


(Rohit Mudgal) **ISHWER CHANDER**
Superintendent (R. A.)