

SPEED POST



F.No. 375/115/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...08/07/21

Order No. 122/21-Cus dated 08-07-2021 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 Applications under Section 129 DD of the Customs Act 1962 against the Order-in-Appeal No. 196 (SM)/ Cus/ JPR/ 2018 dated 18.07.2018 passed by the Commissioner (Appeals), CGST, Central Excise & Customs, Jaipur

Applicant : Smt. Mansi Narendra Mirchandani, Mumbai

Respondent : Commissioner of Customs (Prev.), Jodhpur

ORDER

A Revision Application No. 375/115/B/2018-RA dated 13.11.2018 has been filed by Smt. Mansi N. Mirchandani, Mumbai (hereinafter referred to as the Applicant) against the Order-in-Appeal No. 196 (SM)/ Cus/ JPR/ 2018 dated 24.07.2018, passed by the Commissioner (Appeals), CGST, Central Excise and Customs, Jaipur. Commissioner (Appeals) has upheld the order of the Joint Commissioner of Customs, Jaipur, bearing no. 30/2016 dated 30.09.2016, wherein six gold bars, concealed in vaginal cavity of the Applicant, weighing 699.6 grams and valued at Rs. 19,02,912/-, have been absolutely confiscated and free allowance has been denied to the applicant. Besides, penalty of Rs.2,00,000/- and Rs. 50,000/- was also imposed by the original authority on the applicant, under Section 112(a)(i) and Section 114AA, respectively, of the Customs Act, 1962, which has been maintained in appeal.

2. The brief facts of the case are that the Applicant arrived, on 26.05.2015, at Jaipur Airport from Sharjah and were intercepted near the exit gate after they had crossed the Customs Green Channel. After search of Applicant in person and of her baggage 06 pieces of gold bars, concealed in vaginal cavity, were recovered from her possession. The value of seized gold, of purity 99.9, was appraised at Rs.19,02,912/- by the Government valuer at the Jaipur airport. The 06 pieces of gold bars, recovered from the applicant, were seized under Section 110 of the Customs Act, 1962, under panchanama dated 26.05.2015. The Applicant in her statement dated 26.05.2015, recorded under Section 108 of the Customs Act, 1962,

admitted the recovery of 06 pieces of gold bars from her vaginal cavity and agreed with the contents of the panchanama dated 26.05.2015. She further stated that the gold bars were handed over to her at Dubai by one of her relatives, namely, Shri Sunil Bhatia for onward delivery to one Smt. Shobha Bhatia and in return she was to get Rs. 30,000/-. She further admitted that she attempted to smuggle the gold bars with the intent to evade customs duty. In her further statement dated 09.06.2015, Applicant reiterated the contents of her earlier statement dated 26.05.2015 and revealed that she used to visit abroad frequently and used to smuggle varied goods for financial motive.

3. The revision application has been filed canvassing that the absolute confiscation of gold is not justified as the Applicant had not contravened any provisions of the Customs Act, 1962 or any other allied law; that she had no malafide intention to hide anything from Customs; and that she was the owner of the gold and not a carrier. Hence, the gold may be released on payment of redemption fine. Further, the penalty imposed may be set aside or reduced. A detailed reply dated 06.03.2019 has been filed by the respondent department.

4. Personal hearing, in virtual mode, was held on 07.07.2021. Sh. Om Prakash Rohira, Advocate, appeared on behalf of the Applicant and reiterated the contents of the revision application. He submitted that the Applicant is not a frequent visitor and a lenient view may be taken. None appeared for the respondent department and no request for adjournment has been received. Hence, the matter is taken up for disposal based on records.

5. The Government has examined the matter. It is observed that the Applicant did not declare the gold brought by her under Section 77 of Customs Act, 1962 to the customs authorities at the airport. The Applicant had filed a Nil declaration. Further, the Applicant has admitted the recovery of gold from her and the fact of non-declaration in her statements 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) 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 has failed to produce any evidence that the gold bars were not smuggled. The manner of concealment, in vaginal cavity, clearly evidences that the Applicant had attempted to smuggle the seized gold in a systematic and a pre-meditated manner so as to avoid detection by the Customs authorities. Further, no other documentary evidence has been produced to establish bonafide ownership. The Applicant has, thus, failed to discharge the burden placed on her, 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 20 to 22 of the O-I-O dated 30.09.2016, 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"*. Further, the Hon'ble Madras High Court has, in the case of Malabar Diamond Gallery P. Ltd. Vs ADG, DRI, Chennai [2016(341)ELT65(Mad.)], 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----."


7.2 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'.

8. The original 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, in terms of Section 125 of the Customs Act, 1962, the option to release seized '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 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 very clever concealment with intent to evade Customs Duty. Thus, the

Order of the original authority, upheld by the Commissioner (Appeals), being a reasoned Order based on relevant considerations, does not merit interference.

10. The Government finds that this is a case where the offending goods were concealed by the Applicant in her vaginal cavity. Thus, the malafides are manifest in the facts and circumstances of the case. As such, no case is made out for reduction of penalty.

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



(Sandeep Prakash)

Additional Secretary to the Government of India

Mrs. Mansi N. Mirchandani,
Mata Sagar Apartment, Section 20,
1st floor/103
Ulhasnagar-3, Thane-421003.

Order No. 122/21-Cus dated 08-07-2021

Copy to:

1. The Commissioner of Customs
Jodhpur, Hqrtrs at New Central Revenue Building, Statue Circle, C Scheme, Jaipur-302 005.
2. The Commissioner of CGST & Customs (Appeals), New Central Revenue Building, Statue Circle, C Scheme, Jaipur-302 005.
3. Sh. O.M. Rohira, Advocate, 148/301 Uphaar, 10th Road, Khar (W), Mumbai- 400 052.
4. PA to AS(RA)
5. Guard File
6. Spare Copy.

ATTESTED


08/7/2021
GULSHAN BHATIA
Superintendent