

SPEED POST



F.No. 380/20/B/2018-RA  
GOVERNMENT OF INDIA  
MINISTRY OF FINANCE  
(DEPARTMENT OF REVENUE)

14, HUDCO VISHALA BLDG., B WING  
6<sup>th</sup> FLOOR, BHIKAJI CAMA PLACE,  
NEW DELHI-110 066

Date of Issue... 9/7/21

Order No. 126/21-Cus dated 9-7-2021 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 Application filed, under Section 129 DD of the Customs Act 1962 against the Order-in-Appeal No.CC(A)Cus/D-I/Air/197/2018 dated 17.07.2018 passed by the Commissioner of Customs (Appeals), New Customs House, Near IGI Airport, Delhi-110037

Applicant : Commissioner of Customs (Airport & General), New Delhi

Respondent : Ms. Supriya, Ludhiana

**ORDER**

A Revision Application No. 380/20/B/2018-RA dated 01.10.2018 has been filed by the Commissioner of Customs (Airport & General), New Custom House, New Delhi (hereinafter referred to as the Applicant) against the Order-in-Appeal No. CC(A)Cus/D-I/Air/197/2018 dated 17.07.2018 passed by the Commissioner of Customs (Appeals), New Customs House, Near IGI Airport, Delhi-110037. Commissioner (Appeals) has modified the order of the Joint Commissioner of Customs, IGI Airport, Terminal-3, New Delhi, bearing no. 267/AS/JC/2017 dated 15.11.2017, by allowing redemption of 04 pieces of yellow metal (made of gold), which were recovered from Ms. Supriya, Ludhiana (hereinafter referred to as the respondent), weighing 3000 grams and valued at Rs. 75,86,865/-, that had been absolutely confiscated by the original authority. Besides, the penalty of Rs.15,00,000/- under Section 112 & 114AA of the Customs Act, 1962, imposed by the original authority on the respondent has been reduced by the Commissioner (Appeals) to Rs. 8,00,000/-.

2. The brief facts of the case are that the respondent arrived on 15.05.2015 at IGI Airport from Dubai and was intercepted near the exit gate after she had crossed the Customs Green Channel. After search of her person and of her baggage, 04 pieces of yellow metal (made of gold), weighing 3000 gms were recovered from her possession. The value of seized gold was appraised at Rs.75,86,865/- by the Jewellery Appraiser at IGI airport. The 04 pieces of gold bars, recovered from the respondent, were seized under Section 110 of the Customs Act, 1962, under panchanama dated 15.05.2015. The respondent, in her statement dated

15.05.2015, recorded under Section 108 of the Customs Act, 1962, admitted the recovery of 04 pieces of gold bars and agreed with the contents of the panchnama dated 15.05.2015. She further stated that the impugned gold bars were not purchased by her; that she was not carrying any purchase bills evidencing licit possession/import of seized gold; that she had gone to Dubai alongwith her husband as tourist; that the said gold bars were handed over by one Mr. Rouki Jain in Dubai; that Mr. Rouki Jain had offered her a considerable amount to carry the impugned gold bars to India; that she 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 on the grounds that the respondent had attempted to clear the gold without payment of duty; that the gold bars did not belong to respondent as she was merely a carrier as admitted by her in statement dated 15.05.2015 and thus the import of gold is not bonafide; that the import of the gold is prohibited and, therefore, release of the gold bars on payment of redemption fine and penalty is not correct. A detailed reply dated 15.05.2021 has been filed on behalf of the respondent wherein it is, inter-alia, stated that the gold was purchased by her in Dubai on 13.05.2021, against Cash Receipt dated 13.05.2021, for UAE Dhs 421200/- and that this amount of UAE Dhs 421200/- was gifted to her by Sh. Ravinder Kumar vide Gift Deed dated 14.05.2015. Thus, she was the owner of the gold and the redemption had been correctly allowed.

4. Personal hearing was fixed on 19.05.2021, 14.06.2021 and 07.07.2021. Sh. Rajneesh Kumar, Superintendent, appeared on behalf of the Applicant in the hearing held on 14.06.2021 and stated that since respondent has sought adjournment, the matter may be heard on next date of hearing. Sh. Anil Kumar Meena, Superintendent, appeared on behalf of Applicant department in the hearing held , in virtual mode, on 07.07.2021 and stated that the respondent had attempted to smuggle gold by concealment. Thus, being prohibited goods, the goods should have been absolutely confiscated as ordered by the original authority and the Commissioner (Appeals) should not have interfered with the order. Sh. S. S. Arora, Advocate, appeared on behalf of the respondent and reiterated the submissions made in the written reply dated 15.05.2021.

5. The Government has examined the matter. It is observed that the respondent did not declare the gold brought by her under Section 77 of Customs Act, 1962 to the customs authorities at the airport. Further, the respondent has admitted the recovery of gold from her and the fact of non-declaration in her statement tendered under Section 108 of Customs Act, 1962. In her written submissions dated 15.05.2021 also, there is no denial in this respect.

6.1 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 respondent has failed to produce any evidence that the gold bars were not smuggled. The non declaration of the impugned gold bars brought by her to customs authorities, clearly evidences that the respondent had attempted to smuggle the seized gold.

6.2 Respondent's contention that she is the owner of the gold is also not tenable as she herself had admitted in her statement dated 15.05.2015 that the gold bars were handed over to her by someone else in Dubai and she had carried the gold bars to India for monetary considerations. It is only about 04 months after the

seizure that respondent, vide letter dated 22.09.2015, claimed that she was the owner of the goods. This claim was made on the basis of Cash Receipt dated 13.05.2015 and Gift Deed dated 14.05.2015. The Government observes that these documents are of a dubious nature and cannot be relied upon for the following reasons:

- (i) If she had indeed purchased the gold on 13.05.2015, as per the Cash Receipt produced subsequently, the Cash Receipt would have been available on her at the time of seizure on 15.05.2015.
- (ii) The Applicant was arrested in the matter on 15.05.2015. There is no contention that she made the aforesaid claim before the Court where she was produced after arrest.
- (iii) The Cash Receipt dated 13.05.2021 indicates that the gold was purchased by the Applicant and cash was paid by one Mr. Ravinder Kumar. Next day, i.e. on 14.05.2015, a Gift Deed is supposed to have been made by Mr. Ravinder Kumar to the effect that the cash had been gifted by him to the Applicant. It would, thus, appear that gold was purchased by Mr. Ravinder Kumar, on 13.05.2015, for the Applicant by paying UAE Dhs 421200/- towards it and next day, i.e. on 14.05.2021, instead of gifting the gold purchased on 13.05.2021, Mr. Kumar gifted a sum of UAE Dhs 421200/- to the Applicant.
- (iv) The Gift Deed indicates that the amount of UAE Dhs 421200/- (about Rs.75,00,000/- at the relevant time) was gifted by Mr. Ravinder Kumar to the Applicant out of natural love and affection as the Applicant is the wife

of his friend. The Applicant is not a blood relative of the donor. Hence, the question of natural love and affection does not arise. Further, a gift of such large sum of money to a non-relative is unusual.

Thus, the documents produced are riddled with contradictions and it is apparent that these were created as an afterthought to support the Applicant's case.

6.3 The respondent has, thus, failed to discharge the burden placed on her, in terms of Section 123.

7.1 The Commissioner (Appeals) has held that import of gold is not prohibited. The Government observes that this finding of the Commissioner (Appeals) is in the teeth of law settled by various judgments of Hon'ble Supreme Court. In the case of Sheikh Mohd. Omer vs Collector of Customs, Calcutta & Ors {1971 AIR 293} the Apex Court 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 3.3 to 3.8 of the O-I-O dated 15.11.22017, 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*". In its judgment dated 17.06.2021, in the case of UOI & Ors vs. M/s Raj Grow Impex LLP &

Ors (CA Nos. 2217-2218 of 2021), 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, 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'. As such, the Commissioner (Appeals) has erred in holding that the impugned gold is not a prohibited item.

8. The original authority has denied the release of impugned goods on redemption fine under Section 125 of Customs Act, 1962. 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 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 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, the Order of the original authority is a reasoned Order based on relevant considerations and, hence, it does not merit interference.

9. In view of the findings above, the Government holds that the Commissioner (Appeals) has proceeded to allow redemption on the erroneous finding that the impugned gold bars are not a prohibited item. The Commissioner (Appeals) has also incorrectly interfered with the discretion exercised by the original authority by permitting redemption of these gold bars.

10. The Commissioner (Appeals) has reduced the penalty imposed on the Respondent from Rs. 15,00,000/- to Rs. 8,00,000/-. However, considering the value

of offending goods and the conduct of the Respondent, the Government is of the opinion that this case does not deserve any leniency. As such, the impugned OIA cannot be sustained on the issue of penalty as well.

11. In view of the above, the impugned OIA dated 17.07.2018 is set aside and the OIO dated 15.11.2017 is restored. The revision application is allowed in above terms.



(Sandeep Prakash)  
Additional Secretary to the Government of India

The Commissioner of Customs,  
Airport & General,  
IGI Airport, Terminal-3,  
New Delhi-110037

Order No. 126/21-Cus dated 9-7-2021

Copy to:

1. Ms. Supriya, H.No. 5228/1, New Shimla Puri Ward No. 28, Ludhiana 141003.
2. The Commissioner of Customs (Appeals), New Custom House, Delhi-110037.
3. Joint Commissioner of Customs, IGI Airport, Terminal-3, Delhi-110037.
4. Sh. S.S. Arora & Associates, Advocates Supreme Court of India, B-1/71, Safdarjung Enclave, New Delhi- 110029.
5. PA to AS(RA).
6.  Guard File.
7.  Spare Copy.

ATTESTED

