

SPEED POST



F.No. 375/75-A/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....15/7/21

Order No. 128/21-Cus dated 16/7/2021 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/239/ 2018 dated 24.08.2018 passed by the Commissioner of Customs (Appeals), New Customs House, Near IGI Airport, Delhi-110037

Applicant : Ms. Shanaz, New Delhi

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

ORDER

A Revision Application No. 375/75-A/B/2018-RA dated 11.09.2018 has been filed by Ms. Shanaz, New Delhi (hereinafter referred to as the Applicant) against the Order-in-Appeal No. CC(A)Cus/D-I/Air/239/2018 dated 24.08.2018 passed by the Commissioner of Customs (Appeals), New Customs House, New Delhi. Commissioner (Appeals) has upheld the order of the Additional Commissioner of Customs, IGI Airport, Terminal-3, New Delhi, bearing no. 177/ADC/DR/2016 dated 30.12.2016, wherein 100 gold ginnies and four gold bars, totally weighing 1266.56 grams and valued at Rs. 29,82,359/-, have been absolutely confiscated and free allowance has been denied to the Applicant. Besides, penalty of Rs.10,00,000/- was also imposed by the original authority on the Applicant, under Section 112 & 114AA of the Customs Act, 1962, which has been maintained in appeal.

2. The brief facts of the case are that the Applicant arrived on 27.06.2015 at IGI Airport from Dubai 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 gold with her, she replied that she had brought gold concealed in two packets from Dubai, which she had left behind the Chivas Regal Whisky bottles (one packet each behind two bottles displayed in the liquor section) at the Duty Free Shop (DFS). Later the same was to be cleared by a M/s AISATS staff, on direction of one Mr. Vikram. Thereafter she accompanied the Customs Officer to the DFS, where only one packet was recovered by the Customs officer instead of two as claimed by the Applicant. Thereafter, in the presence of panchas and custom officers, the Applicant

herself opened the recovered packet which resulted in the recovery of 100 gold ginnies and four gold bars. The value of seized gold was appraised at Rs.29,82,359/- by the Jewellery Appraiser at IGI airport. The 100 gold ginnies and four gold bars, recovered from the Applicant, were seized under Section 110 of the Customs Act, 1962, under panchanama dated 27.06.2015. The Applicant in her statement dated 28.06.2015, recorded under Section 108 of the Customs Act, 1962, admitted the recovery of 100 gold ginnies and four gold bars and agreed with the contents of the panchanama dated 27.06.2015. She further stated that she had smuggled the gold from Dubai which she was going to handover to one Mr. Vikaram Devbrat CSA with AI SATS, IGI Airport, New Delhi at the exit gate of the airplane; that she was promised a sum of Rs. 40,000/- as consideration; that due to the movement of the Customs Officers near the exit gate of airplane she could not handover the gold to Mr. Vikram; that after immigration formalities she contacted Mr. Vikram and informed him that she had kept two packets containing gold behind the Chivas Regal Whisky bottles in the DFS; that on the direction of Mr. Vikram she indicated the place where she had kept the packets to a AISATS staff; that she thereafter opted for Green Channel where she was intercepted by the Customs Officer; 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 canvassing that the gold imported is bonafide; that the import of the gold is not prohibited and, therefore, may be released on payment of redemption fine and appropriate duty. Further, the penalty imposed may be set aside or reduced.

4. Personal hearing was fixed on 19.05.2021, 14.06.2021, 02.07.2021 and 13.07.2021. In the hearing held, in virtual mode, on 02.07.2021, Sh. S.S. Arora, Advocate, appeared on behalf of the Applicant and requested time to place on record certain documents that are relevant to defend their case. Three days opportunity was granted to submit these documents. The department was also directed to submit copies of Panchnama and all other relied upon documents within 3 days. PH was adjourned to 13.07.2021. Applicant, vide email dated 12.07.2021, and respondent department, vide email dated 13.07.2021, submitted the requisite documents, i.e. copy of panchnama, statement of the Applicant and Notice under Section 102 of the Customs Act, 1962. Hearing on 13.07.2021 was attended by Sh. Azim Ansari, Superintendent, on behalf of the respondent department who stated that the gold in question was left behind by the passenger at the Duty Free Shop to escape detection and the same was to be removed by her accomplice. Upon being intercepted she led the officers to the sport where the packet containing gold was kept and retrieved the packet. Thereafter in her physical search the packet containing gold was recovered. She had also admitted in her statements that the gold was brought by her. None appeared for the Applicant nor any request for the adjournment has been made. Therefore, the case is taken up for final decision.

5. The Government has carefully 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. In the Customs Declaration slip, the Applicant had not declared anything in Column 9 (Total value of dutiable goods

imported) and had also not declared anything against column no. 10(ii) and 10 (iii). 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 recovered from her was not smuggled. The modus – operandi adopted that is to smuggle the gold and then clear it undetected, in connivance with the staff of the ground handling

agency, AISATS,, clearly evidences that the Applicant had attempted to smuggle the gold in a very systematic manner so as to avoid detection by the Customs authorities. On the other hand, the contention of the Applicant is that she was falsely implicated in the case; that the packet containing gold was actually recovered from her; that she did verbally declare the gold to the Customs Officers. However, this contention of the Applicant is totally belied from the sequence of events recorded in the Panchnama and from her own statements. Further, if she was acting bonafide, she would not have made misdeclaration in the Customs Declaration slip. It is also noted that 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 question of law raised by the Applicant is that the import of gold is not 'prohibited'. The Government observes that the law on this issue is settled by the judgment of Hon'ble Supreme Court in the case of Sheikh Mohd. Omer vs Collector of Customs, Calcutta & Ors {1971 AIR 293} wherein 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 Additional Commissioner, in paras 3.3 to 3.5 of the O-I-O dated 30.12.2016, 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". 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'.

8. The original authority has denied the release of impugned goods on redemption

fine under Section 125 of Customs Act, 1962, which has been challenged. 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 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, 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 the penalty imposed is also just and fair in the facts and circumstances of the case.

11. The revision application is rejected.


(Sandeep Prakash)

Additional Secretary to the Government of India

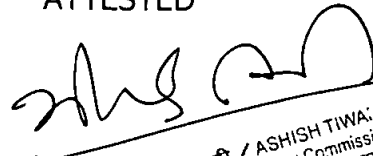
Ms. Shanaz,
T-95, Gali No. 11, Gautampuri,
Delhi - 110076

Order No. 128/21-Cus dated 14-7-2021

Copy to:

1. The Commissioner of Customs, Airport & General, IGI Airport, New Delhi-110037.
2. The Commissioner of Customs (Appeals), New Custom House, New Delhi-110037.
3. 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.
7. Spare Copy.

ATTESTED



आशीष तिवारी / ASHISH TIWARI, I
सहायक आयुक्त / Assistant Commissioner
केन्द्रीय वस्तु एवं सेवा कर, लेन्दाय उत्पाद एवं सीमा शुल्क
CGST, Central Excise & Customs
राजस्व विभाग / Department of Revenue
वित्त मंत्रालय / Ministry of Finance
भारत सरकार / Government of India
नई दिल्ली / New Delhi