

SPEED POST



F.No. 372/06/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... 02/08/21..

Order No. 143/21-Cus dated 02-08-2021 of the Government of India passed by Sh. Sandeep Prakash, Additional Secretary to the Government of India, under Section 129DD of the Customs Act, 1962.

Subject : Revision Application filed, under Section 129 DD of the Customs Act 1962 against the Order-in-Appeal No. KOL/CUS(Airport)/AA/44/2019 dated 15.01.2019 passed by the Commissioner of Customs (Appeals), Kolkata.

Applicant : Mr. Charan Das, Howrah.

Respondent : The Commissioner of Customs (Airport & Admn.), Kolkata.

ORDER

A Revision Application No. 372/06/B/2019-RA dated 21.02.2019 has been filed by Mr. Charan Das, Howrah (hereinafter referred to as the Applicant) against the Order-in-Appeal No. KOL/CUS(Airport)/AA/44/2019 dated 15.01.2019 passed by the Commissioner of Customs (Appeals), Kolkata. Commissioner (Appeals) has upheld the Order-in-Original of the Assistant Commissioner of Customs, NSCBI Airport, Kolkata, bearing ASA no. 1426/18(AIU) dated 09.09.2018, wherein 02 pcs of 'Maduli', 01 pc of 'Bala' and 01 pc Ring, all made of 24 karat Gold, collectively weighing 177.800 gms and valued at Rs. 5,51,180/- were absolutely confiscated under Section 111 of Customs Act, 1962, read with provisions of the Foreign Trade (Development & Regulation) Act, 1992. Besides, penalty of Rs.85,000/- was also imposed by the original authority on the Applicant, under Section 112 of the Customs Act, 1962.

2. The brief facts of the case are that the Applicant arrived on 29.08.2018 at NSCBI Airport, Kolkata, from Dubai and was intercepted while passing through the green channel towards the exit gate with his baggage. Search of his person resulted in the recovery of the above said gold items which were painted with silver colour but turned out to be of 24 karat gold on being washed with Nitric Acid solution. The Applicant admitted his fault before the original adjudicating authority and requested for a lenient view. The original authority, vide the Spot Adjudication order dated 09.09.2018, absolutely confiscated the gold items, under Section 111 of Customs Act, 1962, read with provisions of the Foreign Trade (Development & Regulation) Act, 1992 and imposed penalty of Rs.85,000/- on the Applicant, under Section 112 of the Customs Act, 1962. Aggrieved, the Applicant filed appeal before the Commissioner (Appeals), who, vide the impugned Order-in-Appeal, rejected the appeal.

3. The instant revision application has been filed canvassing that the gold imported is bonafide; that it was camouflaged in silver colour to avoid theft; that the import of the gold is not prohibited and, therefore, the confiscated items may be released for re-export with consequential relief.

4. Personal hearing was fixed on 04.06.2021, 30.06.2021 and 28.07.2021. None appeared for the Applicant. However, a written submission dated 23.07.2021 has been received from the Applicant requesting that the case may be decided on the basis of records. In the hearing held, in virtual mode, on 28.07.2021, Sh. Jitendra Kumar, Superintendent, appeared on behalf of the Respondent and supported the orders of the lower authorities.

5. The Government has carefully examined the matter. It is observed that the Applicant has not been able to produce any evidence to show that he had declared the subject gold items to the Customs on his arrival from Dubai. Further, the Applicant

had admitted, in writing, the recovery of gold items from him and the fact of intentional non-declaration and concealment by coating them with Silver, in the request for 'Waiver of Show Cause Notice and Personal Hearing', which was a part of Spot Adjudication Order passed by the original authority.

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 him was not smuggled. The modus – operandi adopted, to coat the Gold items with Silver, clearly evidences that the Applicant had attempted to smuggle the gold in a very systematic and pre-meditated fashion to avoid detection by the Customs authorities. On the other hand, the contention of the Applicant is that he was falsely implicated in the case as he had declared the gold items to the Customs on his arrival and even produced an invoice evidencing its lawful possession. But no

mention of the said invoice is found in the orders of the lower authorities and even the Applicant's aforesaid written request for waiver of Show Cause Notice made at the time of Spot Adjudication. Hence, the present contention is nothing but an afterthought and, as such, it cannot be accepted. The Applicant has, thus, failed to discharge the burden placed on him, in terms of Section 123, *ibid*.

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*". Gold is not allowed to be imported freely in baggage and 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, 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'. As such, the Order absolutely confiscating the seized gold is sustainable in law.

8. Section 80 of the Customs Act, 1962, reads as follows:

"Temporary detention of baggage. - Where the baggage of a passenger contains any article which is dutiable or the import of which is prohibited and in respect of which a true declaration has been made under section 77, the proper officer may, at the

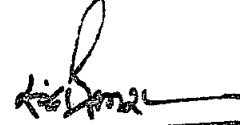
request of the passenger, detain such article for the purpose of being returned to him on his leaving India and if for any reason, the passenger is not able to collect the article at the time of his leaving India, the article may be returned to him through any other passenger authorised by him and leaving India or as cargo consigned in his name"

As the Applicant had not declared the gold at the time of his arrival, the request that the gold items may be allowed to be re-exported, cannot be acceded to, in the light of the provisions made in Section 80 *ibid*.

9. The Applicant has raised the issue of non-mention of Sub Sections of Sections 111 and 112 by the original authority in the Order-in -Original. It is observed that the said order is a Spot Adjudication order which is pre-formatted for the convenience of the passengers and has been passed pursuant to the Applicant's written request. Further, the relevant Sections are correctly

mentioned in the order and the purpose is served as they contain the relevant sub sections also.

10. In view of the above, the impugned Order of the Commissioner (Appeals) does not merit revision and the revision application is rejected.



(Sandeep Prakash)

Additional Secretary to the Government of India

Mr. Charan Das,
Vill. & P.O. – Dafarpur, Monsatala,
Howrah (West Bengal) – 711 405.

Order No. 143 /21-Cus dated 02-08-2021

Copy to:

1. The Commissioner of Customs (Airport & Admn.),
N.S.C.B.I. Airport, Kolkata - 700052
2. The Commissioner of Customs (Appeals), 3rd Floor,
Custom House, 15/1, Strand Road, Kolkata – 700001.
3. PA to AS(RA).
4. ~~Guard File.~~
5. Spare copy.

ATTESTED



Ashish Tiwari
Assistant Commissioner (RA)