

SPEED POST



F.No. 372/03/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...03/08/21....

Order No. 144/21-Cus dated 03-08-2021 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/34/2019 dated 10.01.2019 passed by the Commissioner of Customs (Appeals), Kolkata.

Applicant : Mr. Pradip Ghosh, Howrah.

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

ORDER

A Revision Application No. 372/03/B/2019-RA dated 13.02.2019 has been filed by Mr. Pradip Ghosh, Howrah (hereinafter referred to as the Applicant) against the Order-in-Appeal No. KOL/CUS(Airport)/AA/34/2019 dated 10.01.2019, passed by the Commissioner of Customs (Appeals), Kolkata. Commissioner (Appeals) has upheld the Order-in-Original of the Assistant Commissioner of Customs, AIU Cell, NSCBI Airport, Kolkata, bearing no. 78/2018 AC dated 20.11.2018, wherein 01 pc of gold wire and 01 pc of gold bar, both of 24 Karat, collectively weighing 197.400gms and valued at Rs.6,04,044/-, were absolutely confiscated under Section 111(d), 111(i) and 111(l) of Customs Act, 1962, read with provisions of the Foreign Trade (Development & Regulation) Act, 1992. Besides, penalty of Rs.1 lakh was also imposed by the original authority on the Applicant, under Section 112(a) and 112(b) 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 near exit gate of the arrival hall while passing through the green channel with his baggage. After he replied in negative about the presence of anything dutiable in his baggage or person, a search of his person resulted in the recovery of the above said gold items which were wrapped with black carbon paper and further covered with adhesive tapes and kept inside his wallet. The Applicant, in his voluntary statement dated 29.08.2018, admitted the recovery of the gold items from his possession and stated that he could not produce any bill or documents to support his licit possession of the gold items. The original authority, vide the Order-in-Original 20.11.2018, absolutely confiscated the gold items, under Section 111(d), 111(i) and 111(l) of Customs Act, 1962, read with provisions of the Foreign Trade (Development & Regulation) Act, 1992. Besides, penalty of Rs.1 lakh was also imposed by the original

authority on the Applicant, under Section 112(a) and 112(b) 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, mainly, on the ground that the Applicant had duly declared the gold to the customs authorities on his arrival from Dubai which was not concealed as alleged by the customs officers. Being an NRI, re-export of the confiscated gold may be allowed to him, and the Order-in-Appeal may be set aside. The Applicant has also raised questions about the Panchnama proceedings and the statement tendered by him before the Customs authorities.

4. Personal hearing was fixed on 04.06.2021, 28.06.2021 and 28.07.2021. None appeared for the Applicant. However, a written submission (received on 23.07.2021) and a letter dated 27.07.2021 have 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 in his voluntary statement dated 29.08.2018, recorded in his own hand, under Section 108 of Customs Act, 1962 had admitted the recovery of gold items from him while he was passing through green channel; when asked about possession of any dutiable goods, he replied in negative; he could not produce any licit documents to support his possession of the gold items and accepted his guilt. It has also been stated by the Applicant that it is a true and voluntary statement, given without any fear, threat or coercion. The Applicant has alleged that the statement

under Section 108 of Customs Act, 1962 was extracted under threat and he was forced to write the statement as dictated by the customs officers. A letter written by the Applicant to Commissioner, (Airport), Kolkata, dated 28.09.2018 (after a month of his arrival), has been placed on records vide which the Applicant has informed that the statement under Section 108 of Customs Act, 1962, was forcibly extracted from him by the Customs officers. However, the Government is not persuaded to accept this contention of the Applicant in as much as the statement is written in his own hand by the Applicant which remained un-retracted for a month. Hon'ble Supreme Court of India, has, in the case of Surjeet Singh Chhabra Vs. U.O.I. {1997 (89) E.L.T. 646 (S.C.)}, held that a confession statement made before the Customs officer, though retracted within six days, is an admission and binding since Customs officers are not police officers.

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 make a wearable item from 24 karat gold (which is usually made with 22 Karat gold) and keep the other piece, wrapped in black carbon paper and adhesive tape, clearly indicates that the Applicant had attempted to smuggle the gold in a systematic manner 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 invoices evidencing its lawful possession. But no mention of the said invoices is found in the Panchnama proceedings, before the independent witnesses. Though, the Applicant has sought to question these proceedings, the Government finds that no attempt was made to establish the same during the proceedings

before the original authority. In fact, the Applicant even got the SCN and personal hearing before the original authority, waived. Thus, it is apparent that allegations, now raised, are nothing but an afterthought and, as such, not sustainable. 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 absolute confiscation thereof is as per 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 above legal provisions of Section 80 *ibid*.

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



(Sandeep Prakash)

Additional Secretary to the Government of India

Mr. Padip Ghosh,
S/o Sh. Muchiram Ghosh,
Narana Panchanantala,
Domjur, Howrah (West Bengal) – 711 405.

Order No. 144/21-Cus dated 03-08-2021

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)