

SPEED POST



F.No. 372/13/B/2019-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..17/..8/21....

Order No. 157/21-Cus dated/7-8-2021 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(A/P)/08/2019 dated 22.02.2019 passed by the Commissioner of Customs (Appeals), Kolkata.

Applicant : Mr. Sirajuddin Jahir Hussain, Chennai.

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

smuggling the gold and that he had intentionally not declared the same. He also forfeited his right of personal hearing in the same waiver request. Thus, the Government is not persuaded to accept the plea of denial of natural justice, as alleged by the Applicant.

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. Non-declaration of gold

to the customs officers is a violation of Section 77 of Customs Act, 1962.

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 one of its latest judgments 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 In the present 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'.

7.4 The Government observes that the option to release seized 'prohibited goods' is discretionary, as held by the Hon'ble Supreme Court in the case of M/s Garg Wollen Mills (P) Ltd. Vs. Additional Collector of Customs [1998 (104) ELT 306 (SC)]. In the case of M/s Raj Grow Impex LLP & Others (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 present case, the absolute confiscation is specifically justified as the Applicant admittedly intended to evade duty.

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. Sirajuddin Jahir Hussain,  
C/O. Mr. S. Palanikumar, Advocate,  
No. 10, Sunkurama Street, Second Floor,  
Chennai – 600 001.

Order No. 154/21-Cus dated 17-8-2021

Copy to:

1. The Commissioner of Customs (Airport & Admn.), N.S.C.B.I. Airport, Kolkata – 700 052.
2. The Commissioner of Customs (Appeals), Custom House, 3<sup>rd</sup> 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)