

**REGISTERED**  
**SPEED POST**



F.No. 372/12/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.. 03/09/21...

Order No. 167/21-Cus dated 02-09- 2021 of the Government of India passed by Shri 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. KOL/CUS/(A/P)/03/2018 dated 20.12.2018, passed by the Commissioner of Customs (Appeals), Custom House, Kolkata.

Applicant : Sh. Sunil Kumar Pandey, Howrah.

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

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**ORDER**

A Revision Application No. 372/12/B/2019-R.A. dated 06.03.2019 has been filed by Sh. Sunil Kumar Pandey, Howrah (hereinafter referred to as the Applicant) against Order-in-Appeal No. KOL/CUS/(A/P)/03/2018 dated 20.12.2018, passed by the Commissioner of Customs (Appeals), Customs House, Kolkata. The Commissioner (Appeals) has upheld the Order-in-Original No. 69/2018 JC dated 27.02.2018, passed by the Joint Commissioner of Customs, AIU, NSCBI Airport, Kolkata, vide which 17 pcs of 24 carat gold chains, totally weighing 502.3 grams and valued at Rs. 14,81,785/-, seized from the Applicant, were confiscated absolutely under Sections 111(d), 111(m), 111(l) and 111(m) of Customs Act, 1962 and a penalty of Rs. 2,00,000/- has been imposed, under Section 112 (a) & (b) of the Act, *ibid*.

2. Briefly stated, the Applicant had arrived at NSCBI Airport, Kolkata, on 16.11.2017, from Bangkok. He was intercepted while passing through green channel towards the exit gate and on search of his baggage, 17 pieces of 24 carat gold chains were recovered, 16 pcs concealed in baby cream boxes and 1 pc in a paper packet. The total weight of the recovered gold chains was 502.3 grams, valued at Rs. 14,81,785/-. The original authority, vide the Order-in-Original dated 27.02.2018, confiscated absolutely the gold chains under Sections 111(d), 111(m), 111(l) and 111(m) of Customs Act, 1962 and imposed a penalty of Rs. 2,00,000/- on the Applicant,

under Section 112 (a) & (b) of the Customs Act, 1962. Aggrieved, the Applicant filed an appeal before the Commissioner (Appeals), who, vide the impugned Order-in-Appeal, upheld the Order-in-Original.

3. The revision application has been filed, mainly, on the ground that gold ornaments are not "prohibited goods" and may be allowed to be released on payment of redemption fine and penalty.

4. Personal hearing was granted on 05.08.2021, 16.08.2021 and 27.08.2021. No one appeared for the Applicant nor has any request for adjournment been received. Sh. Jitendra Kumar, Superintendent, attended the hearing on 27.08.2021 and supported the order of Commissioner (Appeal). Since sufficient opportunities have been granted, the matter is taken up for final disposal based on records.

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 Bangkok. Further, the Applicant had admitted in his statement dated 12.02.2016, recorded under Section 108 of Customs act, 1962, in his own hand writing, the recovery of gold items from him and the fact of intentional non-declaration and concealment in baby Johnson cream boxes and

paper envelope. He also admitted his mistake and that he did it out of greed.

6. Section 123 of Customs Act 1962 provides 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, i.e., concealment of chains in the Johnson Baby Cream boxes (one in each box) and paper packet, clearly evidences that the Applicant had attempted to smuggle the gold articles in a systematic and pre-meditated fashion to avoid detection by the Customs authorities. The Applicant has, thus, failed to discharge the burden placed on him, in terms of Section 123, *ibid*.

7.1 The Applicant has contended that the import of gold ornaments is not 'prohibited'. However, the Government observes that the Hon'ble Supreme Court, in the case of Sheikh Mohd. Omer vs Collector of Customs, Calcutta & Ors {1971 AIR 293}, 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 the case of UOI & Others vs. M/s Raj Grow Impex LLP & Others (2021-TIOL-187-SC-Cus-LB), 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) ELT 65 (Mad.)], the Hon'ble Madras High Court has summarized the position, 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 articles 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. It has been contended in the revision application that the gold chains imported by the Applicant are permitted as ornaments as per Baggage Rules. The Baggage Rules, 2016, allow the import of ornaments subject to the condition that the goods are 'bonafide'. Since the Applicant did not declare the gold chains before the customs authorities, on his arrival, as is mandatory under Section 77 of the Customs Act, 1962, the gold chains imported by the Applicant cannot be termed as bonafide baggage. Therefore, the Applicant is not eligible for the benefit as provided under the Baggage Rules, *ibid*.

9. The original adjudicating authority has denied the release of impugned goods on redemption fine under Section 125 of Customs Act, 1962, which has been assailed in the instant Revision Application. The Government observes that the option to release seized goods on redemption fine, in respect of "prohibited goods", 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 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 original authority has refused to grant redemption in the background that the Applicant tried to hoodwink the customs

officers by ingeniously concealing the gold articles to avoid detection. No case for interference with the discretion so exercised by the original authority is made out.

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

  
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(Sandeep Prakash)

Additional Secretary to the Government of India

Sh. Sunil Kumar Pandey,  
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Order No. 167/21-Cus dated 02-09-2021

Copy to:

1. The Commissioner of Customs, AIU Cell, NSCBI Airport, Kolkata – 700052.
2. The Commissioner of Central Excise & Central Tax (Appeals), Custom House, Kolkata – 700 001.
3. Sh. Barinder Singh & S.C. Ratho, Customs Consultants, 14, Hare Street, Room No. 9, 1<sup>st</sup> Floor, Kolkata – 700 001.
4. PA, to AS(RA)
5. Guard File.
6. Spare Copy.

ATTESTED  
  
\_\_\_\_\_  
(Ashish Tiwari)  
Assistant Commissioner (R.A.)