

SPEED POST



F.No. 372/29/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.. 22/09/21.

Order No. 188/21-Cus dated 22/09/2021 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/466/2019
dated 03.07.2019 passed by the Commissioner
of Customs (Appeals), Kolkata.

Applicant : Smt. Anees Fathima Irshad Ahmed, Chennai.

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

ORDER

A Revision Application No. 372/29/B/2019-RA dated 17.07.2019 has been filed by Smt. Anees Fathima Irshad Ahmed, Chennai (hereinafter referred to as the Applicant) against the Order-in-Appeal No. KOL/CUS(Airport)/AA/466/2019 dated 03.07.2019 passed by the Commissioner of Customs (Appeals), Kolkata. Commissioner (Appeals) has upheld the Order-in-Original passed by the Assistant Commissioner of Customs, NSCBI Airport, Kolkata, bearing ASA no. 12/2019(AIU) dated 23.01.2019, wherein, 02 pieces of bangles and 02 pieces of Chains, made of 24 Karat Gold, collectively weighing 232.600 gms and valued at Rs. 7,65,254/-, were confiscated absolutely. Miscellaneous readymade garments, valued at Rs. 22,800/-, were also confiscated and were allowed to be redeemed on payment of Rs. 4,600/- as fine. A penalty of Rs. 79,000/- was imposed on the Applicant under Section 112 of the Customs Act, 1962.

2. Brief facts of the case are that, on 23.01.2019, the Applicant arrived at NSCBI Airport, Kolkata, from Bangkok. She was intercepted by the officers of Customs Air Intelligence Unit while approaching towards the exit gate with her bags. On search of her checked-in-baggage, miscellaneous garments of commercial quantity valued at Rs. 22,800/- were recovered. Her personal search revealed 232.6 gms gold jewellery (02 pcs of Chains and 02 pcs of Bangles) of 24 Karat purity and valued at Rs. 7,65,254/-. As the Applicant had not declared the said recovered goods, the same were confiscated by the original

authority vide the Order-in-Original dated 23.01.2019. While the gold items were confiscated absolutely, the readymade garments were allowed to be redeemed on payment of redemption fine of Rs. 4,600/- along with applicable duty. Penalty of Rs. 79,000/- was also imposed on the Applicant. Aggrieved, the Applicant filed an 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 grounds that the gold jewellery in question was worn by her and there was no concealment; that gold is not a prohibited item and should have been either released on payment of redemption fine or allowed to be re-exported; and that the gold jewellery was incorrectly judged by the appraiser to be of 24 Karat gold.

4. Personal hearing was held on 16.09.2021, in virtual mode. Smt. P. Kamalamalar, Advocate, appeared for the Applicant and reiterated the contents of the revision application. She requested for the gold jewellery to be released on payment of redemption fine for home consumption or for re-export. Sh. Subrata Debnath, Superintendent, appeared for the Respondent department and submitted that the gold articles were imported by the Applicant in contravention of conditions for such import. Hence, these are 'prohibited goods' keeping in view the law laid down by the Hon'ble Supreme Court. He, accordingly, supported the orders of lower authorities.

5. The Government has carefully examined the matter. It is observed that the Applicant has not produced any evidence to show that she had declared the subject gold items to the Customs on her arrival from Bangkok. Further, the Applicant had admitted, in writing, the recovery of gold items from her and the fact of intentional non-declaration, in the request for 'Waiver of Show Cause Notice', 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 jewellery recovered from her was not smuggled. The jewellery was not declared by her to the custom officers, as required under Section 77 of Customs Act, 1962. The Applicant has, thus, failed to discharge the burden placed on her, in terms of Section 123, *ibid*.

7. It has been canvassed that the purity of the gold items was not appraised properly and the jewellery items were not of 24 Karat gold. It is observed that the Applicant accepted, in writing, the findings of the custom officers relating to weight and purity of the gold items at the time of her request for waiver of Show Cause Notice. Thus, the present contention appears to be nothing but an afterthought.

8.1 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*". Further, in the case of UOI & Ors vs. M/s Raj Grow Impex LLP & Ors (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.*"

8.2 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:

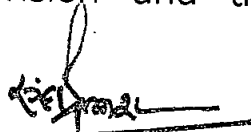
"64. Dictum of the Hon'ble Supreme Court and High Courts makes it clear that gold, may not be one of the enumerated goods, as prohibited goods, still, if the conditions for such import are not complied with, then import of gold, would squarely fall under the definition "prohibited goods", in Section 2 (33) of the Customs Act, 1962----."

8.3 The original authority has correctly brought out that the gold jewellery was not declared by the Applicant. Further, 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.

9. 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 her 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*.

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

Smt. Anees Fathima Irshad Ahmed,
C/o Sh. S. Palanikumar, Advocate,
No. 10, Sunkurama Street, Second Floor,
Chennai – 600 001.

Order No. 188 /21-Cus dated 22/09 2021

Copy to:

1. The Commissioner of Customs (Airport), Kolkata, 15/1, Strand Road, Customs House, Kolkata – 700 001.

2. The Commissioner of Customs (Appeals), 3rd Floor, Custom House, 15/1, Strand Road, Kolkata – 700001.
3. Sh. S. Palanikumar & P. Kamalamalar, Advocate, No. 10, Sunkurama Street, Second Floor, Chennai – 600 001.
4. PA to AS(RA).
5. Guard File.
6. Spare Copy.

ATTESTED

Ashish Tiwari
Assistant Commissioner (RA)