

SPEED POST



**F. No. 375/72/B/2019-RA
F. No. 375/73/B/2019-RA
GOVERNMENT OF INDIA
MINISTRY OF FINANCE
(DEPARTMENT OF REVENUE)**

*14, HUDCO VISHALA BLDG., B WING
6th FLOOR, BHICAJI CAMA PLACE,
NEW DELHI-110 066*

Date of Issue. 20/01/22

Order No. 21-22/22-Cus dated 20-01-2022 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. CC(A)Cus/D-1/Airport/331/2019-20 dated 20.09.2019 passed by the Commissioner of Customs (Appeals), New Delhi.
- Applicant** : Sh. Binny Lalji, Andheri (W), Mumbai
Ms. Leena Lalji, Andheri (W), Mumbai
- Respondent** : The Commissioner of Customs (Airport & General), IGI Airport, New Delhi.
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ORDER

Revision Application Nos. 375/72/B/2019-RA and 375/73/B/2019-RA both dated 05.12.2019 have been filed by Sh. Binny Lalji and Ms. Leena Lalji, Andheri (W), Mumbai (hereinafter referred to as 'the Applicant-1' and 'the Applicant-2') against the common Order-in-Appeal No. CC(A)Cus/D-1/Airport/331/2019-20 dated 20.09.2019, passed by the Commissioner of Customs (Appeals), New Delhi. The Commissioner (Appeals) has upheld the Order-in-Original No. 518/AS/JC/2018 dated 14.12.2018, passed by the Joint Commissioner of Customs, IGI Airport, New Delhi, wherein assorted 29 pcs of gold jewellery studded with diamond & other precious stones, concealed under compression stocking worn by the Applicant-1 on each calf below knee, collectively weighing 706.98 Gms (including the weight of the precious stones), valued at Rs. 25,48,874/- & one Rolex Watch valued at Rs. 5,42,100/- and 09 pcs of assorted gold jewellery studded with diamond and other precious stones recovered from the possession of the Applicant-2, collectively weighing 178.36 Gms (including the weight of the precious stones), valued at Rs. 5,58,987/-, were confiscated absolutely under Section 111(d), 111(i), 111(j), 111(l), 111(m) and 111(o) of the Customs Act, 1962. Penalties of Rs. 6 Lakh and Rs. 1.20 Lakh were also imposed on the Applicant-1 and Applicant-2, respectively, under Section 112 and 114AA of the Customs Act, 1962.

2. Brief facts of the case are that both the Applicants, who are husband and wife, travelled together and arrived, on 25.10.2017, at IGI Airport, New Delhi from Hong Kong by Flight No. 9W 077. They were intercepted by the Customs Officers near the Exit Gate of Arrival Hall after they had crossed the Green Channel. On personal search, assorted gold jewellery studded with diamond and precious stones, totally weighing 885.34 Gms along with one Rolex brand watch, was recovered from the possession of the Applicants. The total value of the recovered goods was appraised as Rs. 36,49,961/-, which were confiscated absolutely by the original authority, vide Order-in-Original dated 14.12.2018. Penalty of Rs. 6 Lakh and Rs. 1.20 Lakh was also imposed on the Applicant-1 and Applicant-2, respectively. Aggrieved, both the Applicants filed appeals before the Commissioner (Appeals), who vide the impugned Order-in-Appeal dated 20.09.2019, upheld the order of the original authority.

3. The revision applications have been filed, mainly, on the grounds that the recovered gold jewellery was not concealed; that the impugned goods are old and used one; that gold/ gold jewellery is not a prohibited item for import into India; that the goods may be released on payment of redemption fine or allowed to be re-exported and penalty be set aside or token penalty may be imposed.

4. Personal hearing was held, in virtual mode, on 17.01.2022. Sh. D. S. Chadha, Advocate appeared for both the Applicants and reiterated the contents of the RA. He submitted that the jewellery belonged to the Applicants but they did not declare the same. Hence, the goods may be allowed to be redeemed on payment of fine and penalty for re-export. None appeared for Respondent department nor any request for adjournment has been received. Hence, the matter is taken up for decision based on records.

5. The Government has carefully examined the matter. It is observed that neither of the Applicants declared the gold jewellery & watch brought by them as stipulated under Section 77 of Customs Act, 1962, to the customs authorities at the airport. Further, both the Applicants admitted the recovery of the gold articles & watch from them and also admitted the fact of non-declaration in their respective statements tendered under Section 108 of Customs Act, 1962. The Applicant-1 admitted the facts disclosed in his earlier statement dated 25.10.2017, in his other statement dated 02.11.2017, tendered under the Section 108, *ibid*. Hence, the goods were admittedly attempted to be removed from the customs area, in a concealed manner and the Applicants failed to declare the same before the Customs officer. It is also admitted by the Applicant-1 in his statements that the confiscated goods were handed over to them by Mr. Deep, the owner of the goods, at Hong Kong. The Applicant-2 has, on the other hand, claimed in her statement that the recovered jewellery was of personal use. However, the Government is not persuaded to accept this contention of Applicant-2. It is observed that Applicant-2 travelled with her husband (i.e. Applicant-1) who was found to be ingeniously concealing a large number of gold articles inside the compression stockings worn by him – an act which was admittedly done for a pecuniary benefit of Rs. 90,000/-. It is, therefore, improbable, that wife of Applicant-1 would for daily

use own jewellery worth more than Rs. 5.58 lakhs. Further, no documents supporting the contention that the jewellery was owned by the Applicants i.e. purchase invoices have been produced.

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. No documents evidencing licit possession and ownership of the gold articles have been produced by the Applicants. The manner of concealment and failure to make a declaration before the authorities, make it evident that the Applicants herein had attempted to smuggle gold articles in a pre-meditated manner. As such, the Applicants have failed to discharge the burden placed upon them in terms of Section 123 *ibid*.

7.1 The question of law raised by the Applicants is that the import of gold is not 'prohibited'. The Government observes that in the case of *Sheikh Mohd. Omer vs Collector of Customs, Calcutta & Others* [1971 AIR 293], the Hon'ble Supreme 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"*. The Joint Commissioner has, in paras 18.3 to 18.5 of the Order-in-Original

dated 14.12.2018, brought out that the Gold is not allowed to be imported freely in baggage. It is permitted to be imported by a passenger subject to fulfilment 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 its judgment dated 17.06.2021, 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."*

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, in respect of import 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'.

8.1 The original authority has denied the release of offending goods under Section 125 of Customs Act, 1962. The Government observes that, in terms of Section 125 of the Customs Act, 1962, the option to release 'prohibited goods', on redemption fine, is discretionary {Ref. Garg Woollen Mills (P) Ltd vs. Additional Collector of Customs, New Delhi [1998 (104) E.L.T. 306 (S.C.)]}. In the case of UOI & Ors vs. M/s Raj Grow Impex LLP & Ors (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". Similarly, in the case of Commissioner of Customs (Air), Chennai-I Vs P. Sinnasamy {2016(344) ELT1154 (Mad.)}, the Hon'ble Madras High Court has, relying upon several judgments of the Apex Court, held that "*non-consideration or non-application of mind to the relevant factors, renders exercise of discretion manifestly erroneous and it causes for judicial interference.*" Further, "*when discretion is exercised under Section 125 of the Customs Act, 1962, ----- the twin test to be satisfied is "relevance and reason".*" In the present case, the original authority has refused to grant redemption in the background of attempted smuggling by concealment with intent to evade Customs Duty as also in the context of the Government's policy objectives on the issue. Thus, the Order of the original authority, upheld by the Commissioner (Appeals), being a reasoned Order based on relevant considerations, does not merit interference.

8.2 The Applicants have also requested for the re-export of the gold articles seized from them. Section 80 of Customs Act, 1962 reads as follows:

"80. 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."

Section 80, thus, provides that the detained imported goods can be re-exported on the request of the passenger where he/ she is returning from India to a foreign country. Thus, return of the passenger to the foreign country after a short visit to India as a tourist or otherwise is a crucial condition for re-export of impugned goods. Further, a pre-condition to allow re-export under Section 80 of Customs Act, 1962 is that "***a true declaration has been made under Section 77***", which is not the case here. As the conditions, subject to which re-export can be allowed under Section 80, *ibid*, are not fulfilled, the re-export of the seized gold items cannot be permitted.

9. The penalty imposed on the Applicants is just and fair, in the facts and circumstances of the case, specifically in view of the ingenious nature and manner of concealment.

10. In view of the above, impugned Order-in-Appeal does not merit revision. The revision application is rejected.



(Sandeep Prakash)

Additional Secretary to the Government of India

1. Sh. Binny Madan Lalji,
B-602, Rendezvous Oberoi Complex,
Andheri(W) Mumbai
2. Ms. Leena Lalji,
B-602, Rendezvous Oberoi Complex,
Andheri(W) Mumbai

Order No. 21-22/22-Cus dated 20-01-2022

Copy to:

1. The Commissioner of Customs, (A&G), New Customs House, Near IGI Airport, New Delhi - 110037.
2. The Commissioner of Customs (Appeals), New Customs House, Near IGI Airport, New Delhi - 110037.
3. Shri D. S. Chadha, Advocate, 92, GF, Block V, Eros Garden, Faridabad-121009.
4. PA to AS(RA).
5. Guard File.
6. Spare Copy.

ATTESTED



(लक्ष्मी राघवन)

(Lakshmi Raghavan)

अनुभाग अधिकारी / Section Officer

वित्त मंत्रालय (राजस्व विभाग)

Ministry of Finance (Deptt. of Rev.)

भारत सरकार / Govt. of India

नई दिल्ली / New Delhi