

SPEED POST



F. No. 375/02/B/2022-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. 12/7/22

Order No. 221/22-Cus dated 12-07-2022 of the Government of India passed by Sh. Sandeep Prakash, Additional Secretary to the Government of India, under Section 129DD of the Custom Act, 1962.

Subject : Revision Application filed, under Section 129DD of the Customs Act 1962 against the Order-in-Appeal No. 286/CUS/APPL/LKO /2021 dated 20.10.2021, passed by the Commissioner (Appeals), Customs, GST & Central Excise, Lucknow.

Applicant : Smt. Raheesa Begum, Delhi.

Respondent : Commissioner of Customs (Preventive), Lucknow.

ORDER

A Revision Application No. 375/02/B/2022-RA dated 03.01.2022 has been filed by Smt. Raheesa Begum, Delhi (hereinafter referred to as the Applicant) against the Order-in-Appeal No. 286/CUS/APPL/LKO/2021 dated 20.10.2021, passed by the Commissioner (Appeals), Customs, GST & Central Excise, Lucknow. The Commissioner (Appeals) has upheld the order of the Assistant Commissioner of Customs (P), Division Varanasi, bearing No. 13/AC/AIRPORT/VNS/2020-21 dated 30.09.2020, wherein 03 pieces of gold bars, collectively weighing 236.960 grams, totally valued at Rs. 7,86,707/-, recovered from the possession of the Applicant, were confiscated absolutely under Section 111 of the Customs Act, 1962. Penalty of Rs. 1,50,000/- was also imposed on the Applicant by the original authority, under Section 112 (b) of the Customs Act, 1962, which has also been maintained in appeal.

2. The brief facts of the case are that the Applicant arrived, on 21.03.2019, at CCSI Airport, Lucknow from Bangkok. She was intercepted by the customs officers, while she was approaching towards the exit gate after she had crossed the Customs Green Channel. Detailed examination of her baggage and personal search, resulted in the recovery of three gold bars, one piece concealed in the mini purse kept inside her bra, second one from hook of bra she was wearing and third one from her private parts, collectively weighing 236.960 grams, totally valued at Rs. 7,86,707/-. The Applicant produced the Customs Baggage Declaration Form wherein no details of any dutiable/ prohibited goods were mentioned. The subject gold bars, recovered from the Applicant, were seized under Section 110 of the Customs Act, 1962, under

Panchnama dated 21.03.2019. The Applicant, in her statement dated 21.03.2019, recorded under Section 108 of the Customs Act, 1962, admitted the recovery of gold bars and agreed with the contents of the Panchnama dated 21.03.2019. She further stated that she had smuggled the gold in a concealed manner, for monetary consideration of Rs. 10,000/- to and fro ticket from Bangkok and Thai Baht 10000 for expenses; that she was fully aware that the import of gold was liable to Customs Duty; and that the smuggling of the same was a punishable offence. In her statement dated 26.08.2019, the Applicant stated that she had purchased the gold from her own sources i.e., Rs.3,00,000/- from personal savings and Rs. 3,00,000/- through a committee but failed to furnish details in this regard. The original authority, vide the aforesaid Order-in-Original dated 30.09.2020, ordered for absolute confiscation of seized gold under Section 111 of the Customs Act, 1962. A penalty of Rs 1,50,000/- under Section 112 (b) of the Customs Act, 1962, was also imposed on the Applicant. The Commissioner (Appeals) has rejected the appeal filed by Applicant.

3. The revision application is filed, mainly, on the grounds that the Applicant had duly declared the gold; that the Applicant is the owner of the gold; that the gold was purchased by her from her personal saving; and that the import of gold is not prohibited. Accordingly, it has been prayed that the gold may be allowed to be redeemed and the penalty imposed may be set aside or token penalty may be imposed.

4. A personal hearing, in virtual mode, was held on 11.07.2022. Sh. S.S. Arora, Advocate, appeared on behalf of the Applicant and reiterated the contents of the revision application. He highlighted that the Applicant is the owner of the gold and it should be released to her on redemption fine and nominal penalty. Sh. Ajay Mishra, Additional Commissioner appeared for the Respondent department and highlighted that this is a case of vaginal concealment and the Applicant had failed to substantiate the claim of ownership. Hence the orders of lower authorities may be maintained.

5. The Government has carefully examined the matter. It is observed that the Applicant did not declare the gold brought by her as stipulated under Section 77 of Customs Act, 1962, to the customs authorities at the airport and instead she opted to walk through the Green Channel. The Applicant has, in her statement dated 21.03.2019, tendered under Section 108 *ibid*, admitted that the gold did not belong to her and that she had acted as a carrier for monetary consideration. Though, in her subsequent statement the Applicant has claimed to be the owner of the goods, this contention appears to be an afterthought as she has failed to substantiate the claim of possessing Rs. 6,00,000/- for this purpose.

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. Admittedly, no declaration regarding carriage of gold was made by the Applicant, as required under Section 77 of the Act *ibid*. Further, the Applicant had crossed the Green Channel when she was intercepted. Further, the manner of concealment, i.e., in her private parts clearly establishes the intention to smuggle. The Applicant has, thus, failed to discharge the burden placed on her, in terms of Section 123, *ibid*.

7.1 The Applicant has contended that 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 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 on the issue, 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, it is not even contended that the conditions subject to which gold could have been legally imported have been fulfilled. Thus, following the ratio of the aforesaid judgments, it is held that the subject goods are 'prohibited goods' and, the Applicant's contentions to the contrary are incorrect.

8. The original adjudicating authority has denied the release of offending goods on redemption fine under Section 125 of Customs Act, 1962. In terms of Section 125, the option to release 'prohibited goods', on redemption fine, 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 Raj Grow Impex (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; has to be based on relevant considerations*". Further, in the case of Commissioner of Customs (Air), Chennai-I Vs P. Sinnasamy {2016(344) ELT1154 (Mad.)}, the Hon'ble Madras High Court has 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.*" The Hon'ble High Court has further held that "*when discretion is exercised under Section 125 of the Customs Act, 1962, the twin test to be satisfied is 'relevance and reason'*". Hon'ble Delhi high Court has, in the case of Raju Sharma Vs. UOI {2020(372)ELT249 (Del.)}, held that "*Exercise of discretion by judicial, or quasi-judicial authorities, merits interference only where the exercise is perverse, or tainted*

by patent illegality, or is tainted by oblique motives." In holding so, the Hon'ble High Court has relied upon the judgement of Apex Court in the case of Mangalam Organics Ltd. {2017(349)ELT369(SC)}. Thus, the Commissioner (Appeals) could have interfered with the discretion exercised by the original authority only if it would have been tainted by any of vices highlighted by the Hon'ble Courts. Such a case is not made out. Hence, the discretion exercised by the original authority does not merit intervention and the commissioner (Appeals) has ~~carefully~~ ^{correctly} refused to do so. 47

9. In the facts and circumstances of the case, specifically keeping in view the manner of concealment, the penalty imposed by the original authority and upheld by the Commissioner (Appeals) is just and fair.

10. In view of the above, the revision application is rejected.



(Sandeep Prakash)

Additional Secretary to the Government of India

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Order No. 221/22-Cus dated 12-07-2022

Copy to:

1. The Commissioner of Customs (Preventive), 5th & 11th Floor, Kendriya Bhawan, Sector-H, Aliganj, Lucknow, UP
2. The Commissioner (Appeals), Customs, GST & Central Excise, 3/194, Vishal Khan, Gomati Nagar, Lucknow, UP.
3. Sh. S.S. Arora, Advocate, B-1/71, Safdarjung Enclave, New Delhi 110029.

4. The Assistant Commissioner of Customs, CSSI Airport, Amausi, Lucknow (UP)
5. PA to AS(RA).
6. ~~Guard File.~~
7. Spare copy

ATTESTED

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