

F. No. 380/01/B/2019-RA
380/02/B/2019-RA
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SPEED POST



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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..20/10/21...

Order No. 226-229 /21-Cus dated 18-10-2021 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 129 DD of the Customs Act 1962 against the Order-in-Appeal No. 375-378[SM]CUS/JPR/2018 dated 26.11.2018 passed by the Commissioner (Appeals), Central Excise & CGST, Jaipur.

Applicant : Commissioner of Customs, Jodhpur (Hqrs at Jaipur).

Respondents :
1. Mrs. Hazra Mehboob Wadhel, Godhra.
2. Mrs. Hanifabibi Husein Menda, Godhra.
3. Mrs. Nafisabibi Musa Sadamas, Godhra.
4. Mrs. Hafsa Mohammad Hussein Jabha, Godhra.

ORDER

Four Revision Applications bearing Nos. 380/01/B/2019-RA 380/02/B/2019-RA 380/03/B/2019-RA and 380/04/B/2019-RA all dated 19.02.2019, have been filed by the Commissioner of Customs, Jodhpur (Hqrs at Jaipur) (hereinafter referred to as the Applicant) against Order-in-Appeal No. 375-378[SM]CUS/JPR/2018 dated 26.11.2018 passed by the Commissioner (Appeals), Customs, Central Excise & CGST, Jaipur. Commissioner (Appeals) has modified the orders of the Assistant Commissioner of Customs, LCS, Munabao, Barmer, bearing nos. 59/LCS/Imp/AC/16, 60/LCS/Imp/AC/16 54/LCS/Imp/AC/16 and 58/LCS/Imp/AC/16, all dated 05.03.2016, and allowed redemption of gold items recovered from the possession of Mrs. Hazra Mehboob Wadhel (one rectangular gold piece and one small gold piece, collectively weighing 46.70 gms, valued at Rs. 1,35,430/-) (hereinafter referred to as the Respondent 1), Mrs. Hanifabibi Husein Menda (one gold biscuit weighing 46.80 gms valued at Rs. 1,35,720/-) (hereinafter referred to as the Respondent 2), Mrs. Nafisabibi Musa Sadamas (one gold biscuit and one small gold piece totally weighing 40.77 gms, valued at Rs. 1,18,235/-) (hereinafter referred to as the Respondent 3) and Mrs. Hafsa Mohammad Hussein Jabha (one gold biscuit weighing 60.35 gms valued at Rs. 1,75,015) (hereinafter referred to as the Respondent 4), all belonging to Godhra, Gujarat, on payment of redemption fine and duty at baggage rate. The gold items had been absolutely confiscated by the original authority. Besides, penalty of Rs. 3,000/- on Respondent 1 and Rs. 5,000/ on each of the remaining Respondents which was imposed by the original authority under Section 112 & 114AA of the Customs Act, 1962, has been maintained.

2. The brief facts of the case are that all the Respondents arrived, on 05.03.2016, at Land Customs Station, Munabao, from Pakistan. During checking, the above said gold items were recovered from them, concealed in their salwars/scarf/baggage. All the Respondents requested the original authority to decide their cases without issuance of Show Cause Notice. The original authority confiscated absolutely the gold items and

penalties were imposed as above. Aggrieved, the Respondents filed appeals before Commissioner (Appeals), who, vide the impugned Order-in-Appeal, modified the Orders-in-Original by allowing release of the confiscated gold items on payment of redemption fine of Rs. 34,000/- (Respondent 1), Rs. 34,000/- (Respondent 2), Rs. 30,000/- (Respondent 3) and Rs. 44,000/- (Respondent 4) and payment of custom duty at baggage rates. Penalty, as imposed by the original authority, was maintained.

3. The instant revision applications have been filed on the ground that the Respondents had attempted to clear the gold articles without payment of duty; that the gold items were concealed to hoodwink the customs officers, violating the conditions prescribed; that the import of gold is not bonafide; that the import of the gold articles is prohibited and, therefore, release of the gold articles on payment of redemption fine and penalty is not correct.

4. Personal hearing was fixed on 29.09.2021 and 14.10.2021. Sh. U.S. Garg, Assistant Commissioner, appeared for the Applicant department and reiterated the contents of the revision applications. None appeared for the Respondents but requests have been received from them expressing their inability to attend the personal hearing. Hence, the matter is taken up for disposal on the basis of records available.

5. The Government has examined the matter. It is observed that the Respondents did not declare the gold articles brought by them under Section 77 of Customs Act, 1962, to the customs authorities at the Land Customs Station. The recovery of gold articles from them and the fact of non-declaration is not disputed.

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."

Thus, 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 Respondents have failed to produce any evidence that the gold articles were not smuggled. The non-declaration of gold articles by the Respondents and the manner of concealment clearly evidences that the Respondents had attempted to smuggle the seized gold articles. The Respondents have, thus, failed to discharge the burden placed on them, in terms of Section 123.

7.1 The Commissioner (Appeals) has allowed redemption of the offending goods on the ground that the import of gold articles is not prohibited. The Government observes that this finding of the Commissioner (Appeals) is in the teeth of law settled by various judgments of Hon'ble Supreme Court. In the case of Sheikh Mohd. Omer vs Collector of Customs, Calcutta & Ors {1971 AIR 293} 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*".

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 & 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) 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 Thus, the findings of the Commissioner (Appeals) that offending gold articles are not 'prohibited goods' cannot be sustained. The decisions relied upon by the Commissioner (Appeals) have been passed without following the dictum of the Hon'ble Supreme Court and Hon'ble High Court, as above.

7.4. In view of the findings above, the Government holds that the Commissioner (Appeals) has allowed redemption on the erroneous finding that offending gold articles are not 'prohibited item'.

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8. The revision applications are allowed, accordingly, and the impugned OIA dated 26.11.2018 is set aside.



(Sandeep Prakash)

Additional Secretary to the Government of India

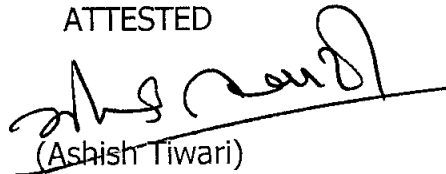
The Commissioner of Customs,
Jodhpur (Hqrs at Jaipur), Jaipur.

Order No. _ 2 2 6 - 2 2 9 / 21 - Cus dated 1 2 - 1 0 - 2021

Copy to:

1. Mrs. Hazra Mehboob Wadhel, R/o Menda, Plot Opp. Imranmasjid Muslim Society Godhara, Panchmahal (Gujarat) – 389001.
2. Mrs. Hanifabibi Husein Menda, R/o Muslim Society A, Menda Plot Vejalpur Road Godhara, Panchmahal (Gujarat) – 389001.
3. Mrs. Nafisabibi Musu Sadamas, R/o Guhya Mohalla, Godhara, Panchmahal (Gujarat) – 389001.
4. Mrs. Hafsa Mohammedhusen Jabha, D/o Jabha Mohammedhusen Abdulsamadhusa R/o Guhya Mohalla, Godhara, Panchmahal (Gujarat) – 389001.
5. The Commissioner (Appeals), Central Excise & CGST, Jaipur, NCRB, Statue Circle, Jaipur – 302005.
6. PA to AS(RA).
7. Guard File.
8. Spare Copy.

ATTESTED



(Ashish Tiwari)

Assistant Commissioner (R.A.)