

SPEED POST



F. No. 372/02/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..19/07/22

Order No. 232/22-Cus dated 18-07-2022 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 Applications under Section 129 DD of the Customs Act 1962 against the Order-in-Appeal No. KOL/CUS/Airport/KA/124/D/2020 dated 12.02.2020 passed by the Commissioner of Customs (Appeals), Kolkata.

Applicant : Sh. Jayawant Baburao Mohadkar, Nashik.

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

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ORDER

Revision Application No. 372/02/B/2022-RA dated 10.01.2022 has been filed by Sh. Jayawant Baburao Mohadkar, Nashik (hereinafter referred to as the Applicant), against the Order in Appeal No. KOL/CUS/Airport/ KA/124/D/2020 dated 12.02.2020, passed by the Commissioner of Customs (Appeals), Kolkata. The Commissioner (Appeals) has upheld the order of the Joint Commissioner of Customs (Airport & Admn.), Kolkata, bearing no. 41/2018/JC dated 13.02.2018, ordering absolute confiscation of 01 piece of gold chain of foreign origin, weighing 182.000 gms, valued at Rs. 5,75,120/- under Section 111(d), 111(i) and 111(l) of the Customs Act, 1962. Besides, penalty of Rs. 60,000/-, under Section 112(a) and 112(b) of the Act, *ibid*, was also imposed on the Applicant.

2. The brief facts of the case are that the Applicant arrived at the NSCB Airport, Kolkata, on 31.08.2016, from Bangkok. The Applicant was intercepted by the officers of Customs after he had crossed the Green Channel of the Arrival Hall and recovered 01 piece of yellow coloured metal chain believed to be made of gold, which was kept concealed in one white and blue colored envelop. It was confirmed by the Government approved valuer that the recovered chain was made of 24 carat gold weighing 182.000 gms, valued at Rs. 5,75,120/-. The Applicant in his statement dated 31.08.2016, recorded under Section 108 of the Customs Act, 1962, stated that he had tried to import the said goods illicitly and had not declared it to avoid the Customs duty; that the said goods did not belong to him and some person gave him the said goods at Bangkok to deliver to another person outside Kolkata Airport. *to be*

3. The revision application is filed, mainly, on the ground that the dutiable goods brought in by the Applicant was meant for his personal and household use and it was not brought for any sale or trade purpose so the Applicant had not contravened any provision of the Customs Act, 1962; that the Applicant was not a carrier; that the gold chain under absolute confiscation be ordered to be released under Section 125 of the Customs Act, *to be*

1962, on fine particularly when the gold is not banned under the Baggage Rules (Amendment), 2016.

4. A personal hearing, in virtual mode, was held on 18.07.2022. Sh. O.M. Rohira, Advocate appeared on behalf of the Applicant. He submitted that this is not a case of ingenious concealment and the quantity involved is small. Hence, the goods may be released on RF, Duty & Penalty. Sh. D.K. Ramuka, Superintendent appeared for the Respondent department and highlighted that Applicant failed to declare gold even when asked to do so by the Customs offices. Further, he opted for Green Channel. Hence, intent to smuggle the goods is evident.

5. The Government has carefully examined the matter. It is observed that the Applicant had not declared the subject gold articles to the Customs on his arrival from Bangkok. Even when specifically asked whether he had anything to declare to Customs, the Applicant replied in negative. Thus, it is evident that the Applicant has contravened the provisions of Section 77 of the Customs Act, 1962.

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 items recovered from him were not smuggled. The gold item was not declared by the Applicant to the custom officers, as required under Section 77 of Customs Act, 1962. No documents evidencing licit purchase and ownership have also been produced. The Applicant has, as such, failed to discharge the burden placed on him, in terms of Section 123, *ibid*.

7.1 It is contended on behalf of the Applicant that the import of gold, in baggage, is not banned i.e., 'prohibited'. However, the Government observes that this contention of the Applicant is in the teeth of law settled by a catena of 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*". The import of gold, in baggage, is allowed subject to 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."*

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 In this case, the conditions, subject to which gold could have been legally imported in baggage, have not been fulfilled. Thus, following the ratio of the aforesaid judgments, there is no doubt that the subject goods are 'prohibited goods'.

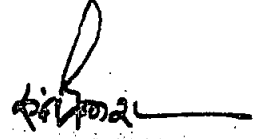
8.1 The original adjudicating authority has denied the release of offending goods on redemption fine under Section 125 of Customs Act, 1962. In terms of Section 125, the option to release 'prohibited goods', on redemption fine, is discretionary, as held by the Hon'ble Supreme Court in the case of Garg 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 the 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.

8.2 The case laws relied upon by the Applicant in support of his contention are not applicable in view of the dictum of the Hon'ble Supreme Court and Hon'ble High Courts as above.

9. The penalty imposed is just and fair, in the facts and circumstances of the case.

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



(Sandeep Prakash)

Additional Secretary to the Government of India

Sh. Jayawant Baburao Mohadkar,
S/o Sh. Baburao Vinayak Mohadkar,
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Order No. 232/22-Cus dated 18-07-2022

Copy to:

1. The Commissioner of Customs (Appeals), 3rd floor, Custom House, 15/1, Strand Road, Kolkata-700001.
2. The Commissioner of Customs (Airport & Admn.), NSCBI Airport, Kolkata-700052.
3. Sh. O.M. Rohira, Advocate, 148/301, Uphar, 10th Road, Khar(W), Mumbai-400052.
4. PA to AS(RA).
5. Guard file.
6. Spare Copy.

ATTESTED

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19/7/22
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