

**SPEED POST**



F. No. 372/01/B/2022-RA  
GOVERNMENT OF INDIA  
MINISTRY OF FINANCE  
(DEPARTMENT OF REVENUE)

14, HUDCO VISHALA BLDG., B WING  
6<sup>th</sup> FLOOR, BHIKAJI CAMA PLACE,  
NEW DELHI-110 066

Date of Issue 29/7/22

Order No. 250/22-Cus dated 29-07-2022 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. 24/CUS(A)/GHY/2021 dated 30.09.2021 passed by the Commissioner (Appeals) Customs, CGST & Central Excise Guwahati.

Applicant : Sh. Abdul Rahiman Farok K.M., Kasargod, Kerala

Respondent : The Commissioner of Customs (Preventive), Shillong.

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**ORDER**

Revision Application No. 372/01/B/2022-RA dated 06.01.2022 has been filed by Sh. Abdul Rahiman Farok K. M., Kasargod, Kerala (hereinafter referred to as the Applicant) against the Order-in-Appeal No. 24/CUS(A)/GHY/2021 dated 30.09.2021, passed by the Commissioner (Appeals), Customs, CGST & Central Excise, Guwahati. The Commissioner (Appeals) has upheld the order of the Additional Commissioner of Customs, Preventive, Shillong, Meghalaya, bearing no. COM/CUS/ADDL.COMMR/79/2020 dated 07.12.2020, ordering absolute confiscation of 01 gold necklace and 01 gold bangle in raw semi-finished form of foreign origin, collectively weighing 349.70 gms, valued at Rs. 13,86,210/- under Section 111(b) & (d) of the Customs Act, 1962. Besides penalty of Rs. 1,38,621/-, under Section 112(b)(i) of the Act, ibid was also imposed on the Applicant.

2. Brief facts of the case are that the Applicant arrived, on 16.01.2020, at the Tikendrajit International Airport, Imphal from Myanmar. The CISF staff posted at the Tikendrajit International Airport, Imphal detected 01 gold necklace and 01 gold bangle in raw semi-finished form of foreign origin, collectively weighing 349.70 gms, valued at Rs. 13,86,210/- from the possession of the Applicant without any legal documents. The gold was detected at security check-in gate of the Airport. Subsequently, the Applicant was handed over to the Customs for necessary procedures. The Applicant in his statement, recorded under Section 108 of the Customs Act, 1962, stated that he was a businessman by profession dealing with spices; that he came to Imphal on some other business and came to know that gold was available at cheaper rate at Tamu, Myanmar and so he decided to buy some for his sister's marriage; that he was the owner of the two gold pieces and this was his first time dealing with such goods.

3. The revision application is filed, mainly, on the ground that the dutiable goods brought in by the Applicant are neither restricted nor prohibited; that the goods be released under Section 125 of the Customs Act, 1962, on nominal redemption fine along with applicable duty; that the personal penalty may be reduced substantially.

4. Personal hearing was fixed on 18.07.2022 and 29.07.2022. Respondent department, vide letter dated 03.04.2022, stated that the case may be decided on the basis of the OIO and OIA. The Applicant, vide their e-mail dated 28.07.2022, stated that the case may be decided on the basis of submissions made in the revision application.

5. The Government has carefully examined the matter. It is observed that gold items were recovered from the Applicant and were admittedly smuggled in baggage, from Tamu, Myanmar. The gold items were in semi-finished form; were already smuggled in from Myanmar and were being transported further when the Applicant was intercepted at the Airport. B)

6. In terms of Section 123 of the Act, *ibid*, 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 had failed to produce any evidence that the gold items recovered from him was not smuggled. The gold articles were admittedly smuggled in from Myanmar and were not declared by the Applicant to the Custom officers, as required under Section 77 of Customs Act, 1962, at the border crossing. The Applicant has, thus, 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 is not '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*". 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."*

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 view of the above, the contention of the Applicant that the offending goods are not 'prohibited goods', cannot be accepted.

8. The original authority has denied the release of impugned goods on redemption fine 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, 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."* Further, *"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 [2020 (372) ELT 249 (Del)], relying upon the judgment of Apex Court in Mangalam Organics Ltd. [2017 (349) ELT 369 (SC)], 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 motive."* Such a case is not made out. Hence, the Commissioner (Appeals) has correctly refused to interfere in the matter.

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

10. In the facts and circumstances of the case, the penalty imposed by the original authority and upheld by the Commissioner (Appeals) is just and fair.

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



(Sandeep Prakash)

Additional Secretary to the Government of India


Sh. Abdul Rahiman Farok K.M.,  
S/o Sh. Mubarak,  
R/o Chengan House,  
Theruvath, Telangara,  
P.O. /P.S. Kasarqod, Kerala-671122.

Order No. 250/22-Cus dated 29-07-2022

Copy to:

1. The Commissioner (Appeals), CGST, Central Excise and Customs, 3<sup>rd</sup> floor, GST Bhawan, Kedar Road, Machkhowa, Guwahati-781001.
2. The Commissioner of Customs (P), N.E.R., Custom House, 110, M.G. Road, Shillong, Meghalaya.
3. Advani, Sachwani & Heera Advocates, High Court, Nulwala Building, Ground floor, 41, Mint Road, Fort, Mumbai-400001.
4. PA to AS(RA).
5. Guard file.
6. Spare Copy.

ATTESTED

  
20/07/22  
Officer / Superintendent (R.A. Unit)  
Revenue Deptt / Department of Revenue  
Min. of Finance / Ministry of Finance  
Room No. 666, 6<sup>th</sup> Floor, 6<sup>th</sup> Wing  
11, Auditor Vahia Building, New Delhi-110006