

SPEED POST



F.No. 375/70/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... (15/12/21)

Order No. 289 /21-Cus dated 15-12-2021 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.CC(A)Cus/D-I/Air/328/19-20 dated 20.09.2019 passed by the Commissioner of Customs (Appeals), New Customs House, Near IGI Airport, Delhi-110037

Applicant : Ms. Ravinder Kaur, Gurgaon, Haryana.

Respondent : Commissioner of Customs (Airport & General), New Delhi.

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ORDER

A Revision Application No. 375/70/B/2019-RA dated 28.11.2019 has been filed by Ms. Ravinder Kaur, Gurgaon, Haryana (hereinafter referred to as the Applicant) against the Order-in-Appeal No. CC(A)Cus/D-I/Air/328/19-20 dated 20.09.2019 passed by the Commissioner of Customs (Appeals), New Customs House, New Delhi. Commissioner (Appeals) has upheld the order of the Additional Commissioner of Customs, IGI Airport, Terminal-3, New Delhi, bearing no. 125/Adj/2018 dated 27.03.2018, wherein two yellow metal bars (made of gold), totally weighing 2000 grams and valued at Rs. 48,75,110/-, have been absolutely confiscated and free allowance has been denied to the Applicant. Besides, penalty of Rs.9,76,000/- was also imposed by the original authority on the Applicant, under Sections 112 & 114AA of the Customs Act, 1962, which has been maintained in appeal.

2. Brief facts of the case are that the Applicant arrived on, 03.11.2015, at IGI Airport from Bangkok and was intercepted near the exit gate after she had crossed the Customs Green Channel. After search of her person and of her baggage, 02 pieces of yellow metal bars (made of gold), was recovered from her possession. The value of seized gold, of purity 999.0, was appraised at Rs.48,75,110/- by the Jewellery Appraiser at IGI airport. The 02 pieces of gold bars, recovered from the Applicant, were seized under Section 110 of the Customs Act, 1962, under panchanama dated 03.11.2015. The Applicant in her statement dated 03.11.2015, recorded under Section 108 of the Customs Act, 1962, admitted the recovery of 02 pieces of gold bars and agreed with the contents of the panchanama dated 03.11.2015. She further stated that the said gold belonged to her brother in law namely Sh. Ravinder Pal Singh Arora; that she brought the gold to earn fast money; that she did not have documentary evidence for the purchase of gold bars; 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.

3. The revision application has been filed canvassing that the import of gold is not prohibited; that the Applicant is an eligible passenger and could bring 1 kg of gold; that gold may be released on payment of redemption fine and appropriate duty; and that penalty imposed is excessive and may be reduced.

4. Personal hearing, in virtual mode, was held on 15.12.2021. Ms. Prabhjot Kaur, Advocate, appeared on behalf of the Applicant and reiterated the contents of revision application. She highlighted that this is not a case of concealment and the pax was an eligible passenger. Therefore, she may be permitted to re-export the seized gold. None appeared for the Respondent nor any request for the adjournment has been received. Therefore, the case is taken up for final decision based on records.

5. The Government has carefully examined the matter. It is observed that the Applicant did not declare the gold brought by her under Section 77 of Customs Act, 1962 to the customs authorities at the airport. In the Customs Declaration Form, the Applicant had not declared anything in Column 9 (Total value of dutiable goods imported) and had declared 'No' against column no. 10(ii) and 10 (iii). Further, the Applicant has admitted the recovery of gold from her and the fact of non-declaration in his statement tendered under Section 108 of Customs Act, 1962. It is also brought out that the Applicant had ingeniously concealed the gold bars i.e. one each tucked at either side of the waist and held in position by jeans. Thus, the contention that gold was not concealed is incorrect.

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 recovered from her was not smuggled. It is also noted that no documentary evidence has been produced to establish bonafide ownership. The Applicant has, thus, failed to discharge the burden placed on her, in terms of Section 123.

7. The Applicant has contended that she is an eligible passenger in terms of Notification No. 12/2012- customs dated 17.03.2012. A plain reading of Notification no. 12/ 2012- customs dated 17.03.2012 makes it clear that a passenger returning to India after six months can bring one kg of gold on payment of concessional rate of customs duty subject to condition 35 of the said notification, which, inter-alia, requires the eligible passenger to file a declaration before the proper officer of customs at the time of arrival in India. In the instant case, such a declaration was not made in respect of the gold bar, with a claim for exemption, and instead a conscious attempt has been made to smuggle by not declaring the same. Thus, the Applicant does not fulfil the condition no. 35 of Notification no. 12/ 2012- Customs dated 17.03.2012. As such, the Government agrees with the lower authorities that the Applicant is not eligible for the concessional rate of duty in terms of Notification no. 12/ 2012- customs dated 17.03.2012.

8.1 The Government observes that the Hon'ble Supreme Court in the case of Sheikh Mohd. Omer vs Collector of Customs, Calcutta & Ors {1971 AIR 293} 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 Additional Commissioner, in paras 19.3 to 19.5 of the O-I-O dated 27.03.2018, has 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 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*". In one of its latest 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.*"

8.2 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----"

8.3 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'.

9. The original authority has denied the release of impugned goods on redemption fine under Section 125 of Customs Act, 1962, which has been challenged in the instant RA. The Government observes that, in terms of Section 125 of the Customs Act, 1962, the option to release seized '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 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"*. 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. It has also been observed by the original authority that objects of public policy, restricting import of gold, shall be frustrated if the redemption was permitted. Thus, the Order of the original authority, upheld by the Commissioner (Appeals), being a reasoned Order based on relevant considerations, does not merit interference.

10. The Applicant has also requested for the re-export of the gold bars recovered from her. Section 80 of Customs Act, 1962 reads as follows:

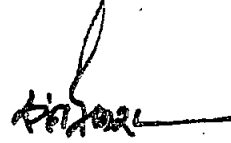
"80. Temporary detention of baggage.—Where the baggage of a passenger contains any article which is dutiable or the import of which is prohibited and in respect of which a true declaration has been made under section 77, the proper officer may, at the request of the passenger, detain such article for 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."

Thus, as per Section 80 of the Customs Act, 1962, 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. As such, 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 offending 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 has not been done in the present case. As the conditions, subject to which re-export can be allowed under Section 80 of Customs Act 1962, are not fulfilled, re-export of the seized gold items cannot be permitted.

11. The Government finds that the penalty imposed is just and fair in the facts and circumstances of the case.

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



(Sandeep Prakash)

Additional Secretary to the Government of India

Ms. Ravinder Kaur,
Jyoti Park, Street No. 1
Gurgaon- Haryana.

Order No. 289/21-Cus dated 15-12-2021

Copy to:

1. The Commissioner of Customs, Airport & General, IGI Airport, New Delhi-110037.
2. The Commissioner of Customs (Appeals), New Custom House, New Delhi-110037.
3. Additional Commissioner of Customs, IGI Airport, Terminal-3, New Delhi-110037.
4. Ms. Prabhjyot Kaur, Advocate, B-1/71, Safdarjung Enclave, new Delhi 110029.
5. PA to AS(RA).
6. Guard File.
7. Spare Copy

ATTESTED


15/12/2021

गुलशन भाटिया
अधीक्षक