

SPEED POST



F.No. 372/30/B/2019-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... 22/12/21

Order No. 293 /21-Cus dated 22/12/2021 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. KOL/CUS(AIRPORT)/AA/467/2019 dated 03.07.2019 passed by the Commissioner of Customs (Appeals), Kolkata.

Applicant : Ms. Naasira Parveen Zaheer Hussain, Chennai.

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

ORDER

A Revision Application No. 372/30/B/2019-RA dated 17.07.2019 has been filed by Ms. Naasira Parveen Zaheer Hussain, Chennai (hereinafter referred to as the Applicant) against the Order-in-Appeal No. KOL/CUS(AIRPORT)/AA/467/2019 dated 03.07.2019, passed by the Commissioner of Customs (Appeals), Kolkata, vide which the Commissioner (Appeals) has upheld the Order-in-Original ASA No. 13/2019 (AIU) dated 23.01.2019, passed by the Assistant Commissioner of Customs, NSCBI Airport, Kolkata.

2. Briefly stated, the Applicant herein arrived at NSCBI Airport, Kolkata, on 23.01.2019, from Bangkok. She was intercepted near the exit gate of the Arrival Hall by the Customs Officers. Upon being asked, the Applicant denied carrying any dutiable goods and valuable goods. Upon personal search and search of her baggage, two pieces of Bangles and 1 piece of Chain made of 24 Carat gold, totally weighing 156.800 grams and valued at Rs. 5,15,872/-, were recovered. Assorted garments, in commercial quantity, valued at Rs. 26,450/-, were also recovered. The Applicant, while waiving the show cause notice, admitted her guilt of smuggling the gold jewellery alongwith assorted garments in commercial quantity and stated that she had intentionally not declared these goods. The original authority ordered absolute confiscation of the gold jewellery, under Section 111(d), 111(i) & 111(l) of the Customs Act, 1962 and imposed a penalty of Rs. 55000/- under Section 112 of the Customs Act, 1962. The assorted garments, valued at Rs. 26,450/-, were also ordered to be confiscated under Section 111(d), (i) & (l) ibid but an option to redeem the same was granted on payment of a fine of Rs. 5300/-. The appeal filed by the Applicant herein has been rejected by the Commissioner (Appeals).

3. The revision application has been filed, mainly, on the grounds that the ownership of gold jewellery is not disputed and it is not a case of concealment; that there is no specific allegation that the Applicant was passing through the green channel; that jewellery being personal belongings, there is no need to declare the same under Section 77 of the Customs Act, 1962; that the gold jewellery is not a

'prohibited item'; and that, therefore, the gold may be allowed to be re-exported and the penalty may be reduced.

4. Personal hearing was fixed on 15.11.2021, 06.12.2021 and 22.12.2021. No one appeared for the Applicant nor any request for adjournment has been received. In the personal hearing held, in virtual mode, on 22.12.2021, Sh. Ranjan Kumar, Superintendent appeared for the department and supported the orders of the lower authorities. He highlighted that the jewellery in this case was made out of 24 carat gold whereas jewellery for such use is usually made out of 22 carat gold. Further, the Applicant had in writing admitted her guilt while waiving the SCN. Since sufficient opportunities have been granted to the Applicant, the case is taken up for disposal based on submissions made in the revision application and records.

5. The Government has carefully examined the matter. It is the contention of the Applicant that the gold jewellery was of personal use and that there was no green channel violation. However, it has been highlighted by the Respondent department that the jewellery in this case was made out of 24 carat gold whereas such jewellery is usually made out of 22 carat gold. Further, the Applicant had in writing admitted her guilt of smuggling, while waiving the show cause notice before the original authority.

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 the burden of proving that the subject gold jewellery, was not smuggled, is on the Applicant who had brought the gold into the country. In the present case, no evidence has been produced to prove licit import of the seized gold jewellery. Further, the smuggling with intent has been admitted in writing by the Applicant. Therefore, the Applicant has failed to discharge the burden placed on her, in terms of Section 123 *ibid*.

7.1 The Applicant has contended that the import of gold is not 'prohibited'. The Government observes that the law on this issue is settled by a catena of judgments of Hon'ble Supreme Court. In the case of Sheikh Mohd. Omer vs Collector of Customs, Calcutta & Others [1971 AIR 293], it has been 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 M/s Om Prakash Bhatia Vs. Commissioner of Customs, Delhi [2003(155) ELT423(SC)], the Apex 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 M/s Raj Grow Impex LLP & Others [2021-TIOL-187-SC-CUS-LB], 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 The import of gold and gold jewellery is not allowed freely in baggage. It is permitted to be imported by a passenger subject to fulfillment of certain conditions, which have not been fulfilled in this case. The contention that the gold jewellery was of personal use is belied by Applicant's own admissions to the contrary. Thus, following the law laid down as above, there is no doubt that the subject goods are 'prohibited goods'.

8. The Government observes that the option to release 'prohibited goods' on redemption fine, under Section 125 *ibid*, 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; and has to be based on 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 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, no grounds are established to interfere with the order passed by the original authority, refusing to allow redemption. There is no contention that refusal was for irrelevant or unreasonable considerations. Thus, the discretion exercised by the original authority does not merit interference.

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

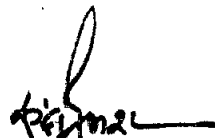
"80. Temporary detention of baggage.—Where the baggage of a passenger contains any article which is dutiable or the import of which is prohibited and in respect of which a true declaration has been made under section 77, the proper

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 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 these 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 can also not be permitted.

10. The Government further observes that the penalty imposed is just and fair, in the facts and circumstances of the case.

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



(Sandeep Prakash)

Additional Secretary to the Government of India

Ms. Naasira Parveen Zaheer Hussain, Chennai,
C/o Sh. S. Palanikumar, Advocate,
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Chennai – 600 001.


Order No. 293 /21-Cus dated 23/12/2021

Copy to:

1. The Commissioner of Customs (Airport & Admin.), N.S.C.B.I. Airport, Kolkata – 700 052.
2. The Commissioner of Customs (Appeals), Kolkata, 3rd Floor, Customs House, 15/1, Strand Road, Kolkata – 700 001.

3. Sh. S. Palanikumar & P. Kamalamalar, Advocate, No. 10, Sunkurama Street, 2nd Floor, Chennai – 600 001.
4. PA to AS(RA).
5. Guard File.
6. Spare Copy.

ATTESTED


(लक्ष्मी राघवण)
(Lakshmi Raghavan)
अनुभाग अधिकारी / Section Officer
वित्त मंत्रालय (राजस्व विभाग)
Ministry of Finance (Deptt. of Rev.)
Government of India