



F. No. 380/20/B/2016-RA  
GOVERNMENT OF INDIA  
MINISTRY OF FINANCE  
(DEPARTMENT OF REVENUE)

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

Date of Issue 06/10/22

Order No. 309/22-Cus dated 06-10-2022 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. C.Cus-I/691/2015 dated 30.10.2015 passed by the Commissioner of Customs (Appeals-I), Chennai.

Applicant : Commissioner of Customs, Airport, Chennai.

Respondent : Smt. Anoma Priyanathani, Ibulgoda, Srilanka.

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**ORDER**

A Revision Application No. 380/20/B/2016-RA dated 22.02.2016 has been filed by the Commissioner of Customs, Airport, Chennai (hereinafter referred to as the Applicant), against the Order-in-Appeal No. C.Cus-I/691/2015 dated 30.10.2015, passed by the Commissioner of Customs (Appeals-I), Chennai whereby the Commissioner (Appeals) has rejected the appeal filed by the department against the Order-in-Original No. 72/2015-16 AIRPORT dated 23.05.2015 passed by the Joint Commissioner of Customs, Airport, Chennai in the case of Smt. Anoma Priyanathani, Ibulgoda, Sri Lanka (hereinafter referred to as the Respondent).

2. Briefly stated, the Respondent herein arrived at the Anna International Airport, Chennai, on 03.02.2015, from Sri Lanka. She was intercepted by the Customs Officers when she was walking out through Green Channel and was questioned whether she was carrying any gold/contraband in her baggage or personal, to which she replied in negative. In the Customs Declaration Card, the Respondent had declared the value of the dutiable goods as 'Nil'. Upon her personal search and search of her baggage, two yellow colour metal rings (weighing 50 gms.), two yellow colour metal chains (weighing 206 gms.) and two yellow colour metal pieces (weighing 302 gms.) were recovered from a carbon paper wrapped bundle, which was concealed inside a special cavity underneath her maroon colour handbag. The recovered gold, totally weighing 558 gms valued at Rs. 15,35,384/- was seized. In her statement, recorded under Section 108 of the Customs Act, 1962, the Respondent herein stated that she frequently came to Chennai from Colombo; that she purchased textiles from Chennai to take back to Sri Lanka for trade purpose; that she had brought the seized gold for sale in India to purchase textiles; that she admitted that the seized gold was found concealed inside the special cavity underneath her maroon colour handbag; that gold was her own but she had no valid documents to prove the same; that she had concealed the gold to smuggle the same without payment of customs duty; and that she admitted her offence and requested for a lenient view. The original authority ordered confiscation of the seized gold under Section 111(d) and (l) of the Customs Act, 1962 read with Section 3(3) of the Foreign Trade (Development & Regulation) Act 1992. However, an option to redeem the same for re-export on payment of redemption fine of Rs. 6,00,000/- was given under Section 125 of the Act *ibid*. A penalty of Rs. 1,50,000/- was also imposed on the Respondent herein under Section 112(a). The appeal filed by the Applicant department was rejected by the Commissioner (Appeals).

3. The revision application has been filed, mainly, on the grounds that the Respondent had attempted to smuggle the gold by way of concealment; that she had not made a declaration as required under Section 77 of the Customs Act, 1962; that the gold is

'prohibited goods' as the Respondent had failed to comply with the conditions for the import of the same in baggage; that re-export under Section 80 of the Customs Act, 1962 cannot be allowed as there was no compliance of Section 77 of the Act; and that, accordingly, redemption of gold on payment of redemption fine may be set aside.

4. Personal hearing in the matter was fixed on 07.11.2019, 21.11.2019, 17.08.2021, 24.08.2021 and 06.10.2022. No one appeared for the Applicant department nor any adjournment has been requested. The personal hearing has been waived on behalf of the Respondent by Shri. K. Mohamed Ismail, Advocate, vide letters dated 14.08.2021 and 22.10.2021. Therefore, the matter is taken up for final disposal based on records.

5. The Government has carefully examined the matter. It is observed that the original authority has allowed redemption of the goods on the grounds that "9---gold is to be redeemed as the same is not prohibited." Further, while allowing re-export upon redemption, the original authority has reiterated that the gold is not prohibited goods and has also in Para 13 of the Order-in-Original stated that there was no ingenious concealment as the gold was kept in Respondent's handbag. The Commissioner (Appeals), while upholding this Order-in-Original, in Para 6 of the impugned Order-in-Appeal, has at first recorded that the gold was attempted to be smuggled by way of concealment but in the later part of the same para, subsequently, agreed with the original authority that there was no ingenious concealment. The Commissioner (Appeals) has also recorded that the redemption has been allowed by the original authority in exercise of his discretionary powers whereas the original authority in his order has specifically recorded that the redemption of gold has to be offered as it is not 'prohibited goods'. Thus, it is apparent that the Commissioner (Appeals) has while upholding the Order-in-Original completely misapplied himself in as much as at one hand the confiscation has been upheld as the gold was smuggled by way of concealment while in the same breath it has been stated that the re-export had been correctly allowed because there was no ingenious concealment. Further, while original authority has found that the gold was to be released mandatorily, under Section 125, as it was not 'prohibited goods' whereas the Commissioner (Appeals) has upheld the order by stating that the original authority had exercised his discretionary powers to release the gold. Further, it is specifically brought out that the offending goods were concealed inside the special cavity underneath the handbag. It is bewildering, to say the least, that such concealment in a special cavity is not found to be 'ingenious concealment' by the authorities below. In a nutshell, the orders of authorities below suffer from total non-application of mind and are liable to be set aside on this ground alone.

6.1 In any case, the finding of the original authority that the smuggled gold was not 'prohibited goods' is not legally sustainable in view of a catena of judgments of the Hon'ble Supreme Court. In the case of Sheikh Mohd. Omer vs Collector of Customs, Calcutta & Ors {1983 (23) ELT 1429 (SC)}, 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) ELT 423 (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.*" Even subsequently, 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.*"

6.2 In the case of Malabar Diamond Gallery P. Ltd. Vs ADG, DRI, Chennai [2016 (341) ELT 65 (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----."*

6.3 In view of the above, the findings of the original authority that offending goods are not 'prohibited goods' cannot be sustained.

7. As already brought out hereinabove, the original authority has allowed release of offending goods on redemption fine, under Section 125 of the Customs Act, 1962 as he had erroneously held that that gold was not 'prohibited goods'. As per Section 125, redemption is mandatory, except in case of 'prohibited goods' in which case the adjudicating authority may consider redemption in his discretion. Since the Government has, in accordance with the dictum of the Hon'ble Supreme Court and that of the jurisdictional High Court i.e. Hon'ble Madras High Court, already held that the offending gold was 'prohibited goods', the redemption of gold allowed by the original authority on the legally erroneous findings that the gold was not 'prohibited goods' cannot be sustained. The Commissioner (Appeals) has, as already brought out hereinabove, upheld this order by misconstruing the order of redemption as an order in exercise of


discretionary powers and, therefore, the order of Commissioner (Appeals) can also not be sustained.

8.1 The original authority has allowed re-export of gold upon redemption. It has been correctly pointed out by the Applicant department that the re-export of goods in baggage is covered by the provisions of Section 80 of the Customs Act, 1962. Section 80 reads as follows:

*"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 authorized by him and leaving India or as cargo consigned in his name."*

On a plain reading of Section 80, it is apparent that a declaration under Section 77 is a pre-requisite for allowing re-export. Hon'ble Allahabad High Court has, in the case of Deepak Bajaj {2019 (365) ELT 695 (All.)} held that a declaration under Section 77 is a *sine qua non* for allowing re-export under Section 80. In this case, the Respondent had made no declaration under Section 77 in respect of the subject goods. Hence, the orders of the lower authorities cannot be sustained on this count as well.

9. In view of the above, the revision application is allowed and the offending gold is ordered to be absolutely confiscated. The orders of the lower authorities are modified to this extent.

  
(Sandeep Prakash)

Additional Secretary to the Government of India

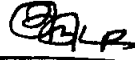
The Commissioner of Customs,  
(Airport), New Customs House,  
GST Road Meenambakkam,  
Chennai-600027.

Order No. 309 /22-Cus dated 06-10-2022

Copy to:

1. Smt. Anoma Priyanathani C/o K. Mohammed Ismail, Adovcate, New No. 102 (old No. 271), Lingi Chetty Street, Chennai – 600001.
2. The Commissioner of Customs (Appeals-I) 60, Rajaji Salai, Customs House, Chennai-600001.
3. Sh. K Mohamed Ismail, Adocate & Notary Commissioner of Oaths High Court Madras New No. 102, (Old No. 271), Lingi Chetty Street, Chennai.
4. PA to AS(RA).
5. Guard file.
6. ✓ Spare Copy.

ATTESTED



06-10-22

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(Lakshmi Raghavan)  
अनुभाग अधिकारी / Section Officer  
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Ministry of Finance (Deptt. of Rev.)  
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