

**SPEED POST**



F.No. 375/16/B/2020-RA  
375/17/B/2020-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...16/2/22...

Order No. 45-46/22-Cus dated 10-02-2022 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/419-420/2019-20 dated 31.10.2019 passed by the Commissioner of Customs (Appeals), New Customs House, Near IGI Airport, Delhi-110037

Applicant: Sh. Amit Bansal, Delhi & Sh. Anuj Bansal, Burdwan (WB).

Respondent: The Commissioner of Customs, IGI Airport, New Delhi.

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**ORDER**

Two Revision Applications bearing Nos. 375/16/B/2020-R.A. and 375/17/B/2020-R.A., both dated 30.01.2020 have been filed by Sh. Amit Bansal, Delhi (hereinafter referred to as the Applicant-1) & Sh. Anuj Bansal, Burdwan (WB) (hereinafter referred to as Applicant-2), respectively, against the Order-in-Appeal No. CC(A)Cus/D-I/Air/419-420/2019-20 dated 31.10.2019 passed by the Commissioner of Customs (Appeals), New Customs House, New Delhi. The Commissioner (Appeals) has upheld the order of the Joint Commissioner of Customs, IGI Airport, Terminal-3, New Delhi, bearing no. 49/AS/JC/2018 dated 31.01.2018, whereby one Gold Kada and one Gold chain (collectively weighing 466.8 gms, valued at Rs. 12,91,582/-) recovered from Applicant-1 and one Gold Chain with pendant (collectively weighing 292 gms, valued at Rs. 8,07,930/-) recovered from Applicant-2, all of 995.0 purity, have been absolutely confiscated. One Gold Kada weighing 233.6 gms and valued at Rs. 6,46,344/-, recovered from Applicant-2, has been confiscated and allowed to be redeemed on payment of redemption fine of Rs. 1.5 Lakhs. Penalty of Rs. 3.5 Lakhs has also been imposed on each of the Applicants.

2. The brief facts of the case are that the Applicant-1 and Applicant-I2 arrived on 03.03.2017, at IGI Airport, New Delhi from Dubai and were intercepted at the exit gate after they had crossed the Customs Green Channel. On being asked by the Customs officers whether they were carrying any dutiable goods with them, they both replied in negative. After search of their person, one Gold Kada and one Gold chain (collectively weighing 466.8 gms, valued at Rs. 12,91,582/-) were recovered from Applicant-1 and one Gold Chain with pendant and one Gold Kada (collectively

weighing 525.60 gms, valued at Rs. 14,54,274/-) were recovered from Applicant-2. All the gold items were of 995.0 purity. Both the Applicants in their statements dated 03.03.2017, tendered under Section 108 of Customs Act, 1962, admitted the recovery of the said gold items from their possession. They also stated that they had not declared the gold items at the red channel, by mistake. An invoice dated 02.03.2017, in the name of Applicant-2 was produced covering 233.28 gms of 24 carat gold purchase from Dubai. Statements of Sh. Ankit Bansal, a close relative of the Applicants, were also recorded on 07.03.2017 and 19.03.2017 wherein he, interalia, stated that he had travelled together with the Applicants on 17.02.2017; that he was carrying one gold chain and one gold kada, collectively weighing 1632.96 gms valued at Rs. 48,17,232/- which he did not declare and cleared without payment of duty; and that he voluntarily deposited Rs. 17,59,000/- as duty and interest applicable on the goods cleared by him without payment of duty. The original authority confiscated all the gold items absolutely except one kada weighing 233.6 gms (covering by the above said invoice) which was allowed to be redeemed on payment of redemption fine of Rs. 1,50,000/-. A penalty of Rs. 3.5 Lakhs was imposed on each of the Applicants. Aggrieved, the Applicants filed appeals before the Commissioner (Appeals), which were rejected.

3. The revision applications have been filed canvassing that Section 123 of the Customs Act has not been invoked and the onus is, thus, on the Respondents to prove that the subject gold items were smuggled goods; that the Applicants had not crossed green channel; the gold imported is bonafide; that the import of the gold is not prohibited and, therefore, the goods may be released on payment of redemption

fine and appropriate duty or can be re-exported. Further, the penalty imposed may be set aside or reduced.

4. Personal hearing was held, on 09.02.2022, in virtual mode. Sh. Tarun Chawla, Advocate, appeared for the Applicants and submitted that both the RAs arise out of a common Order-in-Appeal. Hence, these may be taken up together for hearing and disposal. Sh. Chawla reiterated the contents of the RAs and prayed that gold ornaments that have been absolutely confiscated may be allowed to be redeemed on redemption fine and only nominal penalty may be imposed. No one appeared for the respondents nor any request for adjournment has been received. Hence, the matter is taken up for decision on the basis of facts available on records.

5. The Government has carefully examined the matter. It is observed that both the Applicants did not declare the gold brought by them under Section 77 of Customs Act, 1962 to the customs authorities at the airport. Further, both the Applicants have admitted the recovery of gold from them and the fact of non-declaration in their statements tendered under Section 108 of Customs Act, 1962. The contention that they had not crossed Green Channel is not acceptable for the reason that the Applicants have in their statements admitted the same. Further, the search proceedings also bring out this position. It would be relevant to notice here that the Applicants travelled along with their close relative, Sh. Ankit Bansal, who has admitted smuggling on his part and paid duty along with interest after waiving the show cause notice. Thus, it is apparent that the Applicants and their relative

acted in cohesion/collusion while smuggling gold ornaments and, as such, it is undoubtedly a pre-meditated attempt.

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 Applicants have failed to produce any evidence that the gold recovered from them was not smuggled. The contention that the provisions of Section 123 need to be specifically invoked for them to become applicable in a specific case is entirely misconceived. As evident, the provisions of Section 123 shift the onus of proof in certain cases. Thus, it is a law relating to evidence, which the parties concerned have to take into account while submitting the evidence in their defence and which the adjudicator has to consider while appreciating the evidence so produced.

7.1 The question of law raised by the Applicants is that the import of gold is not 'prohibited'. The Government observes that the law on this issue is settled by the judgment of Hon'ble Supreme Court in the case of Sheikh Mohd. Omer vs Collector of Customs, Calcutta & Ors [1971 AIR 293] wherein 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.*" 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 its judgment dated 17.06.2021, in the case of UOI & Ors vs. M/s Raj Grow Impex LLP & Ors [2021 (377) ELT 145 (SC)], the Hon'ble Supreme Court has followed its earlier judgments in the cases of 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, 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 original authority has, in para 3.3 & 3.4 of the Order-in-Original, 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'.

8. The Applicants have averred that the subject gold ornaments should be released on payment of fine. 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 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) ELT 1154 (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 allowed redemption in respect of one gold item, which was covered by the invoice produced at the time of interception, whereas other gold items have been absolutely confiscated. Absolute confiscation has been ordered in the background of attempted smuggling with intent

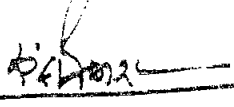
to evade Customs Duty. It has also been observed by the original authority that objects of public policy, restricting import of gold, shall be frustrated if the redemption was permitted. Thus, it is apparent that the original authority has exercised discretion judiciously and made reasonable distinction in respect of the article with legitimate ownership. In respect of the balance articles, the redemption has been denied, based on reasonable and relevant considerations. As such, no interference is merited. The case laws relied upon are not relevant/applicable in view of the discussions above.

9. Section 80 of the Customs Act, 1962 governs the re-export of goods. On a plain reading of Section 80, it is evident that re-export can be permitted only if a declaration under Section 77 of the Act *ibid* has been made. Hon'ble Allahabad High Court has, in the case of Commissioner of Customs (Preventive), Lucknow Vs. Deepak Bajaj [2019 (365) ELT 695 (All)], held that a declaration under Section 77 of the Act "*is a sine qua non for extending the benefit of Section 80 of the Act.*" In the present case, the Applicants did not make the requisite declaration under Section 77. Hence, re-export under Section 80, cannot also be considered.

10. The Government finds that the penalty imposed on Applicant-1 is just and fair in the facts and circumstances of the case. However, it appears from case records that Applicant-2 acted at the instance of and under the directions of Applicant-1. Hence, the penalty imposed on Applicant-2 is reduced to Rs. 2 Lakhs.



11. The revision applications are rejected except to the extent of reduction in penalty imposed on Applicant-2, as above.

  
(Sandeep Prakash)

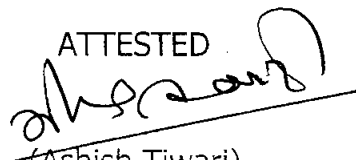
Additional Secretary to the Government of India

1. Sh. Amit Bansal,  
S/o Sh. Parshotam Bansal,  
R/o F-220, Antriksh Apartments,  
Sector-14,  
Rohini, Delhi-110 085.
2. Sh. Anuj Bansal,  
S/o Sh. Manish Bansal, R/o No. Bazar Bypass Road, Jamuria 4, Jamuria  
Bazar, Burdwan, West Bengal.

Order No. 45-46/21-Cus dated 10-02-2021

Copy to:

1. The Commissioner of Customs, IGI Airport, Terminal-3, New Delhi – 110037.
2. The Commissioner of Customs (Appeals), New Customs House, New Delhi-110037.
3. Sh. Tarun Chawla, Advocate, G-77, Lajpat Nagar-II, New Delhi.
4. PA to AS(RA)
5. ~~Guard file~~

ATTESTED  
  
(Ashish Tiwari)  
Assistant Commissioner (RA)