

'SPEED POST'



F. No. 372/18/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...10/3/22

Order No. 84/2022-Cus dated 10-03-2022 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. KOL/CUS(Airport)/KA/133/D/2020 dated 03.03.2020, passed by the Commissioner of Customs (Appeals), Kolkata.

Applicant : Ms. Neetu Jugnu Kithani, Mumbai.

Respondent : The Commissioner of Customs, Airport & Admn., Kolkata.

ORDER

A Revision Application No. 372/18/B/2020-RA dated 17.11.2020 has been filed by Ms. Neetu Jugnu Kithani, Mumbai (hereinafter referred to as the Applicant) against the Order-in-Appeal No. KOL/CUS(Airport)/KA/133/D/2020 dated 03.03.2020, passed by the Commissioner of Customs (Appeals), Kolkata. The Commissioner (Appeals) has upheld the Order-in-Original No. 28/2018-DC dated 28.02.2018, passed by the Deputy Commissioner of Customs, AIU, Kolkata vide which one cut piece of gold weighing 68.600 gms and valued at Rs. 2,16,776/-, has been absolutely confiscated under Section 111(d), 111(i) & 111(l) of the Customs Act, 1962. A penalty of Rs. 75,000/- has also been imposed on the Applicant under Section 112 of the Act, *ibid*.

2. Briefly stated, the Applicant herein was intercepted while passing through the Green Channel upon her arrival from Bangkok at NSCBI Airport, Kolkata, on 31.08.2016. Upon being asked, the Applicant denied carrying any contraband or dutiable goods such as gold or gold items in her baggage or on her person. Upon search, one cut piece of gold weighing 68.600 grams and valued at Rs. 2,16,776/-, wrapped with white tissue paper and further wrapped with black colour adhesive tape, concealed inside the hand bag of the Applicant herein, was recovered. In her statement dated 31.08.2016, recorded under Section 108 of the Customs Act, 1962, the Applicant herein agreed with the contents of the search proceedings and recovery of the aforesaid gold from her hand bag. She, *inter-alia*, stated that the recovered gold was handed over to her near Bangkok Airport to be handed over to another person outside the Kolkata Airport, who would have paid her Rs. 8,000/-; that she was booked for a smuggling of 698 grams of gold at Mumbai Airport two years back; and that she admitted her mistakes and requested to be a lenient view taken. The original authority, *vide* the aforesaid Order-in-Original dated 28.02.2018, ordered absolute confiscation of the gold recovered from the Applicant and imposed a penalty of Rs. 75,000/- on her. The appeal filed by the Applicant has been rejected, *vide* the impugned Order-in-Appeal.

3. The revision application has been filed, mainly, on the grounds that gold is not a prohibited goods; that, therefore, option to redeem is to be mandatorily provided to the Applicant; that accordingly, gold may be released under Section 125 of the Customs Act, 1962 at nominal redemption fine alongwith applicable duty. A request for reduction in personal penalty has also been made.

4. Personal hearings, in virtual mode, were fixed on 27.01.2022, 17.02.2022 & 09.03.2022. No one appeared for the Applicant. Sh. D.K. Ramuka, Superintendent appeared for the Respondent department and supported the orders of the lower authorities. However, vide the letter dated 02.03.2022 received by email on 07.03.2022, Sh. N.J. Heera, Advocate for the Applicant waived the personal hearing and requested that the decision may be made on the basis of Written Submissions and cited cases. A reference has been made to the decision of CESTAT in the case of *Commissioner of Customs, New Delhi vs. Ashwini Kumar alias Amanullah {2021 (376) ELT 321 (Tri. Del)}*.

5. The Government has carefully examined the matter. It is observed that the gold recovered from the Applicant herein was not declared to the Customs officers, as required in terms of Section 77 of the Customs Act, 1962. It is admitted by the Applicant, in her statement tendered under Section 108 *ibid*, that she did not declare the gold to the Customs officers and that she has carried the same for pecuniary benefit. No documents regarding legal possession/exportation of gold have also been produced.

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 had failed to declare the gold and pay duty on the same. Further, the gold was concealed in an ingenious manner thereby making the intention to smuggle manifest. 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.

7.1 Another contention of the Applicant is that the import of gold is not 'prohibited'. 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 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". 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 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 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' and contentions of the Applicant, to the contrary, cannot be sustained.

8.1 The original authority has denied the release of offending goods on payment of 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 *ibid*, 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)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, 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 the Applicant herein is a repeat offender. Thus, following the ratio of Raj Grow Impex (supra) and Sinnasamy (supra), the Order of the original authority, upheld by the Commissioner (Appeals), being a reasoned Order based on relevant considerations, does not merit interference.

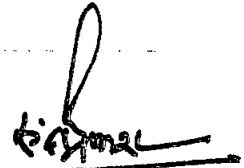
8.2 The Applicant has specifically relied upon the judgment of the Tribunal in the case of Ashwini Kumar alias Amanullah (supra) in support of her request for redemption of the confiscated gold. As already brought out hereinabove, the redemption under Section 125 of the Customs Act, 1962 in respect of ‘prohibited goods’ is discretionary and the discretion exercised by the original authority to allow or deny redemption can be interfered with only in accordance with dictum of Hon’ble Supreme Court in the case of Raj Grow Impex (supra) and that of Hon’ble Madras High Court in the case of P. Sinnasamy (supra). Hon’ble Delhi High Court has also, in its judgment dated 23.12.2019 in the case of *Raju Sharma and Anr. vs. Union of India and Ors. {W.P. (C) 12110/2019}*, held that “18.*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 motives.*” In the present case, as already indicated hereinabove the original authority has denied redemption in the background of attempt to smuggle gold by way of ingenious concealment and as the Applicant herein is a repeat offender. Nothing perverse or illegal can be attributed in respect of discretion exercised by the original authority which is based upon relevant and reasonable considerations. Even otherwise, the facts in Ashwini Kumar alias Amanullah are entirely different from the facts in the present case in as much as in Ashwini Kumar alias Amanullah, CESTAT was dealing with a case of smuggling of gold in a courier consignment where the original

authority had itself extended the option of redemption. In the present case, on the other hand, the original authority has denied the option, for sound and valid reasons. Therefore, the case of Ashwini Kumar alias Amanullah is of no help to the Applicant herein. Other case laws relied upon are also not applicable in the facts of the present case and as these have been rendered prior to P. Sinnasamy (supra) & Raj Grow Impex (supra) or have been passed without noticing the same.

9. It would be relevant to highlight here that in her statement dated 31.08.2016, the ~~earlier~~ Applicant had admitted that she had been earlier found involved in smuggling of 698 grams of gold at Mumbai airport. The Government observes that the Applicant herein was involved in another case at Kolkata airport itself when on 16.12.2014, she was found carrying 621.1 grams of gold valued at Rs. 16,95,603/-. The gold was absolutely confiscated and a penalty of Rs. 2,00,000/- was imposed on her. The order was upheld by the Government, vide GOI Order No. 56/2021-Cus dated 11.03.2021. Thus, the Applicant is undoubtedly a repeat offender and deserves no leniency.

10. The penalty imposed is just and fair in the facts and circumstances of the case.

11. The revision application is rejected.



(Sandeep Prakash)

Additional Secretary to the Government of India

Ms. Neetu Jugnu Kithani,
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Order No. 84/2022-Cus dated 10-03-2022

Copy to:

1. The Commissioner of Customs, Airport & Admn., NSCBI Airport, Kolkata – 700052.
2. The Commissioner of Customs (Appeals), 15/1, 3rd Floor, Custom House, Strand Road, Kolkata – 700001.
3. Sh. N.J. Heera, Advocate Nulwala Building, Ground Floor, 41, Mint Road, Opp. G.P.O., Fort, Mumbai – 400 001.
4. PA to AS (RA).
- ✓ 5. Guard File.
6. Spare Copy.

ATTESTED



(लक्ष्मी राघवन्)
(Lakshmi Raghavan)
अनुभाग अधिकारी / Section Officer
वित्त मंत्रालय (राजस्व विभाग)
Ministry of Finance (Deptt. of Rev.)
भारत सरकार / Govt. of India
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