

**SPEED POST**



F. No. 373/521/B/SZ/2019-RA  
GOVERNMENT OF INDIA  
MINISTRY OF FINANCE  
(DEPARTMENT OF REVENUE)

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

Date of Issue.. 10/07/24.

Order No. 133/24-Cus dated 10-07-2024 of the Government of India passed by Smt. Shubhagata Kumar, Additional Secretary to the Government of India, under Section 129DD of the Customs Act, 1962.

Subject : Revision Applications under Section 129 DD of the Customs Act, 1962, against the Order-in-Appeal No. COC-CUSTM-000-APP-70/2019-20 dated 17.10.2019, passed by the Commissioner of Customs (Appeals), Cochin.

Applicant : Shri Mannath Musthafa, Kozhikode

Respondent : The Principal Commissioner of Customs, Chennai-I

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**ORDER**

Revision Application No. 373/521/B/SZ/2019-RA dated 29.11.2019 has been filed by Shri Mannath Musthafa, Kozhikode (hereinafter referred to as the Applicant) against the Order-in-Appeal No. COC-CUSTOM-000-APP-70/2019-20 dated 17.10.2019, passed by the Commissioner of Customs (Appeals), Cochin. The Commissioner (Appeals) has rejected the appeal filed by the Applicant against the Order-in-Original O.S. No. 200/2018 dated 29.05.2018 passed by the Additional Commissioner of Customs, Air Customs, Cochin vide which one crude gold chain of 999% purity, weighing 349.500 grams and valued at Rs. 10,19,710/-, recovered from the Applicant, was confiscated absolutely under Section 111(d), (i), (l) & (m) of the Customs Act, 1962 read with Section 3(3) of the Foreign Trade (Development & Regulation) Act, 1992 and a penalty of Rs. 1,00,000/- was also imposed on the Applicant under Section 112 (a) and (b) of the Act, *ibid*.

2. Brief facts of the case are that, the Applicant, an Indian passport holder, after a short visit of 16 days, arrived in India at Cochin International Airport, Nedumbassery, from Saudi on 24.05.2018, was intercepted by the officers of Air Intelligence Unit at the exit of the arrival hall of the Airport. On examination, one gold chain weighing 349.500 grams was found concealed inside his brief's pocket. The Applicant opted for waiver of Show Cause Notice before the adjudicating authority. The seized gold chain was undeclared and concealed by the Applicant in his innerwear and it was also observed that the Applicant is a habitual offender as per previous records and he was involved in an earlier case in which 02 kgs of gold were seized from him. Therefore the Original Authority confiscated the impugned gold chain absolutely and imposed penalty vide the above order. Aggrieved, the Applicant filed an appeal before the Commissioner of Customs (Appeals), Cochin, which has been rejected.

3. The instant revision application has been filed mainly on the grounds that order of Lower Appellate Authority (LAA) is not proper and legal and hence it is liable to be set aside; option ought to have been given for the release of impugned gold under Section 125 of the Customs Act, 1962 on payment of redemption fine; gold has not been prohibited for import under Section 11 of Customs Act, 1962; penalty imposed under

Section 112(a) & (b) is unsustainable. It is prayed that the gold chain may be allowed to be redeemed on payment of redemption fine and the penalty imposed on the Applicant be set aside / reduced in the interest of justice.

4. Personal hearings in the matter were fixed on 15.04.2024, 22.04.2024 and 03.05.2024. On 03.05.2024, Shri Mithra Prasad, Consultant on behalf of the Applicant appeared and reiterated the written submissions and prayed for a lenient view as the quantity is below 350 grams and the penalty is too harsh. Shri Gurjant Singh, Superintendent appeared on behalf of the Respondent department and submitted that orders of lower authorities are correct and should be upheld.

5. The Government has examined the matter. It is observed that the Applicant brought the impugned gold chain concealed in his brief's pocket. He did not declare the impugned gold to Customs as required under Section 77 of the Customs Act, 1962 and would have walked out but for the interception by the Customs officers. The Adjudicating Authority also observed that the Applicant was a habitual offender and he was involved in earlier case of smuggling in which two kgs of gold were seized from him. Therefore no leniency is merited. Also, it has been found that the Applicant is not an eligible passenger for the import of gold in terms of Customs Notification No. 12/2012 dated 17.03.2012 (as amended) as he did not stay abroad for the prescribed minimum period and he went abroad on 09.05.2018 and came back on 24.05.2018. Hence, the impugned goods have been brought in violation of the provisions of the Customs Act & Baggage Rules.

6. As per Section 123 of the Act, *ibid*, 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. The Applicant did not only not declare the gold items, as stipulated under Section 77 of the Act, *ibid* but had also brought them concealed in his innerwear. The Applicant has, thus, failed to discharge the burden placed on him, in terms of Section 123, *ibid*. Keeping in view the facts and circumstances of the case and as the Applicant has failed to discharge the onus placed on him in terms of Section 123, the Government concurs with the adjudicating & appellate authorities that the impugned gold was liable to confiscation under Section 111 *ibid* and concurs that the Applicant was liable for penalty.

7.1 Another contention of the Applicant is that the import of gold is not 'prohibited'. However, the Government observes that this contention of the Applicant is in the teeth of several judgements of the Hon'ble Supreme Court in which it has been held that the goods, import/export whereof is allowed subject to certain conditions, are to be treated as 'prohibited goods' in case such conditions are not fulfilled. In the case of *Sheikh Mohd. Omer vs Collector of Customs, Calcutta & Ors* {1971 AIR 293}, 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 fulfilment of certain conditions. In the present case, as correctly brought out by the lower authorities, the Applicant in this case did not fulfil the conditions specified in this behalf. 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 (i.e the Hon'ble jurisdictional 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 Moreover, the Hon'ble High Court of Delhi in its order dated 23.11.2023 in Writ Petition No. 8976 of 2020 in the matter of *Kiran Juneja Vs. Union of India & Ors.* has held

that "A fortiori and in terms of the plain language and intent of Section 2(33), an import which is effected in violation of a restrictive or regulatory condition would also fall within the net of "prohibited goods". Hence, there is no doubt that the goods seized in the present case are to be treated as "prohibited goods", within the meaning of assigned to it under Section 2(33) of the Act, *ibid*.

7.4 In view of the above, the contention of the Applicant that the offending goods are not 'prohibited goods', cannot be accepted.

8. The Government observes that the original authority had denied the release of gold items on payment of redemption fine, under Section 125 of Customs Act, 1962. It is settled by the judgment of 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.)], that the option to release 'prohibited goods' on redemption fine is discretionary. Hon'ble Delhi High Court has, in the case of Raju Sharma [2020 (372) ELT 249 (Del)], held that "*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 motive.*" Further, the Hon'ble Delhi High Court in its order dated 21.08.2023 in W.P. (C) Nos. 8902/2021; 9561/2021; 13131/2022; 531/2022; & 8083/2023 held that "*.....an infraction of a condition for import of goods would also fall within the ambit of Section 2(33) of the Act and thus their redemption and release would become subject to the discretionary power of the Adjudging Officer*". Therefore, keeping in view the judicial pronouncements above, the Commissioner (Appeals) has correctly refused to interfere with the discretion exercised by the original authority.

9. The case laws relied upon by the Applicant, in support of his various contentions do not come to his rescue in view of the dictum of Hon'ble Supreme Court and Hon'ble High Courts, as above.

10. Keeping in view facts and circumstances of the case, the penalty imposed is just and fair.

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

*Shubhagata Kumar*  
10/7/24

(Shubhagata Kumar)

Additional Secretary to the Government of India

Shri Mannath Musthafa,  
Mannath House,  
Kunnamangalam, P.O. Kozhikode,  
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Order No. 133 /24-Cus dated 10-07-2024

Copy to:

1. The Commissioner of Customs (Appeals), 4<sup>th</sup> Floor, C.R Building, I.S Press Road, Cochin-18.
2. The Commissioner of Customs (Preventive), Cochin, 5<sup>th</sup> Floor, Cochin Centre, Broadway, Cochin-682031.
3. Sh. C. Mithra Prasad, Consultant, H. No. 5/469-B, Sasthrinagar, Eranhipalam, Calicut - 673006S.
4. PPS to AS (RA).
5. Guard file.
6. ✓ Spare Copy
7. Notice Board

*Shailendra Kumar Meena*  
10/7/24  
ATTESTED (शैलेन्द्र कुमार मीना)  
(Shailendra Kumar Meena)  
अनुभाग अधिकारी / Section Officer  
वित्त मंत्रालय (राजस्व विभाग)  
Ministry of Finance (Deptt. of Rev.)  
भारत सरकार / Govt. of India  
नई दिल्ली / New Delhi