

SPEED POST



F.No. 375/60/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. 12/5/22

Order No. 138 /22-Cus dated 12-5-2022 of the Government of India passed by Sh. Sandeep Prakash, Additional Secretary to the Government of India, under Section 129DD of the Customs Act, 1962.

Subject : Revision Application filed, under Section 129 DD of the Customs Act 1962 against the Order-in-Appeal No. 35(SM)Cus/JPR/2020 dated 06.07.2020 passed by the Commissioner (Appeals), Customs, Central Excise & CGST, Jaipur.

Applicant : Smt. Salma, Nagaur, Rajasthan.

Respondent : The Commissioner of Customs, Jaipur.

ORDER

A Revision Application No. 375/60/B/2020-RA dated 30.09.2020 has been filed by Smt. Salma, Nagaur, Rajasthan (hereinafter referred to as the Applicant) against the Order-in-Appeal No. 35(SM)Cus/JPR/2020 dated 06.07.2020 passed by the Commissioner (Appeals), Customs, Central Excise & CGST, Jaipur. Commissioner (Appeals) has upheld the Order-in-Original passed by the Assistant Commissioner of Customs, International Airport, Jaipur, bearing no. 10/2019-CUS dated 14.10.2019, wherein, gold rods, collectively weighing 129.87 gms and valued at Rs. 4,12,207/-, were confiscated absolutely. Penalties of Rs. 50,000/- and Rs. 10,000/- were imposed on the Applicant under Section 112(a)(i) and 114AA of the Customs Act, 1962, respectively.

2. Brief facts of the case are that, on 27.05.2018, the Applicant arrived at International Airport, Jaipur, from Dubai. She was intercepted by the Customs officers while passing through the green channel without submitting any declaration under Section 77 of the Customs Act, 1962. On search of her checked-in-baggage, gold rods/pieces, collectively weighing 129.87 gms and valued at Rs. 4,12,207/-, were recovered from handle of the trolley bag carried by her and pen refills kept inside the trolley bag. In her statement dated 27.05.2018, tendered under Section 108 of Customs Act, 1962, the Applicant admitted the recovery of the said gold from the handle of the trolley bag and pen refills. She stated that the gold was given to her by her husband, Sh. Harun Molani; that she brought gold in her earlier

visits also; and that she used to carry foreign currency also to Dubai which was given to her by one Arun Jain for delivery at Dubai. The original authority, vide the Order-in-Original dated 14.10.2019, confiscated absolutely the seized gold items. Penalties of Rs. 50,000/- and Rs. 10,000/- were imposed on the Applicant under Section 112(a)(i) and 114AA of the Customs Act, 1962, respectively. Aggrieved, the Applicant filed an appeal before the Commissioner (Appeals), who, vide the impugned Order-in-Appeal, rejected the appeal.

3. The instant revision application has been filed, mainly, on the grounds that gold is not a prohibited item and the offending gold items should be released on payment of redemption fine. Penalty under Section 112(a)(i) may be reduced and penalty under Section 114AA may be set aside.

4. Personal hearing was held on 11.05.2022, in virtual mode. Sh. S. S. Arora, Advocate, appeared for the Applicant and reiterated the contents of the revision application. He submitted that gold was handed over to the Applicant by her husband for personal use. Hence a lenient view may be taken and the goods may be released on redemption fine and penalty. Sh. B. B. Atal, AC, appeared for the Respondent and supported the orders of the lower authorities. He highlighted that this is a case of clever and ingenious concealment. Hence no case for leniency is made out.

5. The Government has carefully examined the matter. It is observed that the Applicant had not declared the subject gold items to the Customs on her arrival from Dubai. Rather, they

were ingeniously concealed in the trolley handle and refills of pens.

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 has failed to produce any evidence that the gold items recovered from her were not smuggled. The gold items were cleverly concealed and were not declared by the Applicant to the custom officers, as required under Section 77 of Customs

Act, 1962. The Applicant has, thus, failed to discharge the burden placed on her, in terms of Section 123, *ibid*.

8.1 It is contended on behalf of the Applicant that the import of gold is not 'prohibited'. However, the Government observes that this contention of the Applicant is in the teeth of law settled by a catena of judgments of Hon'ble Supreme Court. 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 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."*

8.2 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----."

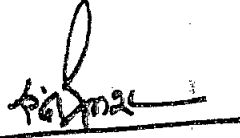
8.3 In this case, the conditions, subject to which gold could have been legally imported, have not been fulfilled. Thus, following the ratio of the aforesaid judgments, there is no doubt that the subject goods are 'prohibited goods'.

9. The original adjudicating authority has denied the release of offending goods on redemption fine under Section 125 of Customs Act, 1962. In terms of Section 125, 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 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; has to be based on relevant considerations"*. Further, 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."* The Hon'ble High Court has further held that *"when discretion is exercised under Section 125 of the Customs Act, 1962, the twin test to be*

satisfied is 'relevance and reason' ". Thus, the Commissioner (Appeals) could have interfered with the discretion exercised by the original authority only if it would have been shown to his satisfaction that the original authority had refused to grant redemption for unreasonable and irrelevant considerations. Such a case is not made out. Hence, the discretion exercised by the original authority does not merit intervention.

10. The Government observes that, in the facts and circumstances of the case, penalty imposed is just and fair. Further, as the Applicant had failed to make a correct declaration, in contravention of Section 77 of the Act, the penalty under Section 114AA is imposable and the contention of the Applicant to the contrary is not acceptable.

11. In view of the above, the impugned Order of the Commissioner (Appeals) does not merit revision and the revision application is rejected.


(Sandeep Prakash)

Additional Secretary to the Government of India

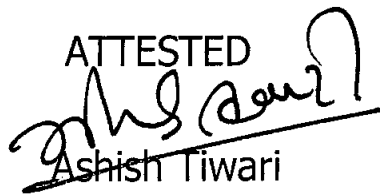
Smt. Salma,
R/o Guljarpura, Sikar Road,
Kuchaman City,
Distt. Nagaur
Rajasthan.

Order No. 138 /22-Cus dated 2-5-2022

Copy to:

1. The Commissioner of Customs, NCRB, Statue Circle, C-Scheme, Jaipur.
2. The Commissioner (Appeals), Central Excise & CGST, Jaipur.
3. Sh. S. S. Arora, Advocate, B1/71, Safdarjung Enclave, New Delhi-110 029.
4. PA to AS(RA).
5. Guard File.
6. Spare Copy.

ATTESTED



Ashish Tiwari
Assistant Commissioner (RA)