

SPEED POST



F. No. 375/30/B/2021-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. 26/04/24

Order No. 99/24-Cus dated 26-04-2024 of the Government of India passed by Smt. Shubhagata Kumar, Additional Secretary to the Government of India, under Section 129DD of the Custom Act, 1962.

Subject : Revision Application filed, under Section 129DD of the Customs Act 1962 against the Order-in-Appeal No. JNK-EXCUS-APPL-01-2021-22 dated 20.04.2021 passed by the Commissioner (Appeals), CGST, Central Excise and Customs, Jammu.

Applicant : Sh. Rahul Singla, Firozpur, Punjab.
Sh. Danish Chawla, Firozpur, Punjab.

Respondent : The Commissioner of Customs (Preventive), Amritsar, Punjab.

ORDER

A Revision Application No. 375/30/B/2021-RA dated 30.06.2021 has been filed by Sh. Rahul Singla, Firozpur & Sh. Danish Chawla, Firozpur (hereinafter referred to as the Applicants) against the Order-in-Appeal No. JNK-EXCUS-APP/01/2021-22 dated 20.04.2021, passed by the Commissioner (Appeals), CGST, Central Excise and Customs, Jammu. The Commissioner (Appeals) rejected the appeal filed by the Applicants against the Order-in-Original, bearing no. 02/DC/Import/2018 dated 27.10.2018, passed by the Deputy Commissioner of Customs, SGRDJ International Airport, Amritsar, vide which two raw gold kada, weighing 149.8 grams, recovered from Sh. Rahul Singla, valued at Rs. 4,37,415/- and two raw gold chains, weighing 149.8 grams, recovered from Sh. Danish Chawla, valued at Rs. 4,37,415/-, respectively, have been absolutely confiscated under Section 111(d), 111(i), 111(l) & 111(m) of the Customs Act, 1962. Besides, penalty of Rs. 1,50,000/- was also imposed on the Applicants, by the original authority, under Section 112 of the Act, *ibid*, which has been upheld by Commissioner (Appeals). The said RA was rejected vide Order No. 199/22-Cus dated 28.06.2022 both on maintainability as well as on merits. Aggrieved, the Applicants filed Writ Petition Nos. 11169/2022 and 11296/2022 before the Hon'ble High Court of Delhi which vide Order dated 04.12.2023 set aside the aforesaid RA order and remanded the matter back to Revisionary Authority for examining the claim of the petitioners afresh.

2. The brief facts of the case are that both the Applicants arrived on 27.10.2018, at SGRDJ International Airport, Amritsar from Dubai and attempted to smuggle the confiscated gold items without declaring the same to Customs officers and by concealing the same under full sleeves and buttoned-up shirts worn by them. The Applicants denied possession of the recovered gold items in the respective declaration forms submitted by them as well as in their oral declarations. The Customs officer recovered from them, 02 raw gold kada, weighing 149.8 grams, from Sh. Rahul Singla, valued at Rs. 4,37,415/- and also 02 raw gold chains, weighing 149.8 grams, from Sh. Danish Chawla, valued at Rs. 4,37,415/-, respectively. Subsequently, both Applicants in their oral statements, tendered under Section 108

of the Customs Act, 1962, admitted to the recovery of the subject goods from them which they had brought for sale in India to earn profit.

3. A common revision application no. 375/30/B/2021-RA dated 30.06.2021 was filed on behalf of both the Applicants canvassing that no show cause notice was issued in the case; that "due to oversight and inadvertence" the Applicants could not reflect the gold items in the declaration form submitted by them; that the subject goods are not liable for confiscation; that there was no concealment; that OIA dated 20.04.2021 may be set aside with consequential relief. The Applicants, through email dated 23.06.2022 & 21.02.2024, also submitted copies of case laws in support of their claim for redemption of the impugned goods.

4. Personal hearings were fixed on 21.02.2024 and 04.03.2024. In the hearing held on 21.02.2024, Sh. Vikas Sareen, Advocate, appeared for the Applicants and submitted that this is a case of remand back from the High Court; that the applicants were not given an opportunity to represent their case before the spot adjudication; that the applicants filed a common RA since the Commissioner (Appeals) has passed a joint order; that admittedly the applicants did not reside abroad for more than 6 months; that they did not file the Customs Declaration Form as they were not allowed by Customs to do so; that the gold was worn by the applicants in the form of ornaments; that gold jewellery of 24 carat purity is commonplace; that they ought to have been given the option to redeem the gold instead of it being absolutely confiscated. In the hearing held on 04.03.2024, Sh. Santokh Singh, Assistant Commissioner appeared for the Respondent and submitted that the Hon'ble High Court has remanded the matter for deciding the matter afresh in light of the observations therein; that the orders of the adjudicating authorities are legal and proper and should be upheld; that the applicants are repeat offenders as stated in para 7 and para 8 of the OIO and the same has been acknowledged by the applicants as they have signed it and that no relief is merited in the case. Sh. Sareen submitted that the applicants are not literate enough to know the law and rules in this regard; that there is no evidence to this effect; that they did not get any

opportunity to properly defend their case. He prayed that the value of sale proceeds be restored to the applicants after deduction of dues as applicable.

5. The Government has examined the matter. The applicants had filed Writ Petition Nos. 11169/2022 and 11296/2022 against the order of the Revisionary Authority before the Hon'ble High Court of Delhi which vide Order dated 04.12.2023, set aside the order of the revisionary authority and remanded back the matter to the Revisionary Authority to examine the claim of the petitioners afresh.

6. On the aspect of maintainability, it is observed that there was a common spot adjudication order which bears the signatures of both applicants, and that there is a single Order-in-Appeal. It is also noted that both applicants have furnished the requisite fees under Section 129DD of the Customs Act, 1962. In this context, it is observed that Section 129DD of the Customs Act also uses the phrase "any order passed under Section 128A", which means an order in the singular. Since in this matter there is a single order under Section 128A of Customs Act, 1962 (as amended) against which the applicants are aggrieved, the matter is taken up for decision based on merits.

7.1 At the outset, it is contended on behalf of the Applicants that no show cause notice was issued in the case. On this point, the Government observes that the proforma OIO bears the signatures of both applicants on the 'waiver of show cause notice' (in Hindi) header, in acknowledgement of the charges being fully explained to them as well as stating that the case may be decided by the adjudicating authority without hearing them and also admitting that the goods were brought by them for sale in India to earn profit. Later at the appellate stage, a personal hearing was held on 05.01.2021, which was duly attended by their advocate on their behalf. Since they themselves waived the requirement of an SCN at the original stage and later were represented by their advocate, therefore the contention that they did not get due opportunity to be heard, is not tenable.

7.2 The Applicants have stated during the personal hearing held on 21.02.2024, that they did not file the Customs Declaration Form as they were not allowed by Customs to do so. However, this is contrary to the facts on record, according to which, they had filed a declaration form but without mentioning the impugned items in the same. Moreover, in the RA No. 375/30/B/2021-RA dated 30.06.2021 in para-D, they have themselves stated that "*due to oversight and inadvertence they could not reflect these gold items in the declaration form submitted by them*". Further, though they have contended that they did not conceal the gold items, and were wearing them in their wrist and neck, implying that they were visible to any onlooker at that time, it is on record that they wore full sleeve garments and buttoned-up shirts (para 9E of OIO). The applicants have also contended that the gold brought by them was not declared due to "inadvertence" but it was worn on their person as ornament. On this matter the government observes that the adjudicating officer has recorded in the OIO that the chains and Kada were hidden "under their clothes(full sleeves and buttoned up shirts)". That being so, it cannot be concluded that the gold, though not declared, was visible to the naked eye. The ratio of the judgement of Hon'ble Delhi High Court in the case of Air Customs vs. Begaim Akynova {WP (CrI.) 1974/2021}, squarely applies to this case, which vide judgment dated 03.01.2022, upheld the punishment imposed in a case where the passenger was found carrying gold-concealed on the body around the waist and thigh wherein the department had, inter-alia, alleged contravention of Sections 77 & 79 of the Customs Act, 1962.

8. The Government further observes that in para 7 of OIO, it is stated that the Applicants have earlier made short visits to Dubai from 02.03.2018 to 09.03.2018, 28.06.2018 to 03.07.2018, 08.08.2018 to 12.08.2018 and 13.09.2018 to 18.09.2018 (by both passengers together) and in the column of previous offence: it is recorded that on 18.09.2018, they brought 200 grams of gold from Dubai for sale in India. It is also observed that both the Applicants have affixed their signatures in acknowledgement of the case and the charges having being explained to them and stating that they admit that these goods were brought from Dubai to earn profit in India. The Applicants have stated through their Advocate that the Department has

not adduced any evidence regarding their previous visits which is surprising, since the record of international travel would be there in the Applicant's Passport and no other evidence is necessary to establish international travel in respect of an Indian Passport holder. The dates and other details regarding their previous visits have been recorded in writing by the adjudicating officer in the adjudication order. It appears, therefore, that the Applicants, both holding Indian Passports and both hailing from Firozpur, habitually travelled together and at least on one previous occasion, brought gold for sale in India.

9. As far as the case laws cited by the applicants are concerned, it is seen that both cases i.e. Leyla Mohmoodi & Mojtaba Ebrahim Gholami Vs the Additional Commissioner of Customs in Writ Petition No. 467 of 2023 at Bombay High Court and Nathan Narayansamy Vs Commissioner of Customs in W.P (C) 6855/2023 at Delhi High Court pertain to people of foreign nationals and not to Indian citizens. In the instant matter, the applicants are Indian Passport holders and are therefore "residents" as defined in Rule 2(iv) of the Baggage Rules, 2016. As per rule 5 of the Baggage Rules, 2016 *"A passenger residing abroad for more than one year, on return to India, shall be allowed clearance free of duty in his bona fide baggage of jewellery upto a weight, of twenty grams with a value cap of fifty thousand rupees if brought by a gentleman passenger, or forty grams with a value cap of one lakh rupees if brought by a lady passenger"*. The advocate for the applicants has admitted that they did not reside abroad for more than 6 months and hence, the applicants were not entitled even to bring gold jewellery upto 20 grams in weight and upto a value of fifty thousand rupees, hence, the benefit of Rule 3(b) also cannot be given to them wherein it is mentioned that the passengers *"be allowed clearance free of duty articles in his bonafide baggage articles other than those mentioned in Annexure-I, upto the value of fifty thousand rupees if these are carried on the person or in the accompanied baggage of the passenger"*. In this case the applicants arrived after a stay of less than six months from Dubai, hence in terms of Rule 3 & rule 5, they could bring articles other than those mentioned in Annexure-I of the Baggage Rules, upto a value of Rs. 50,000/- only. Instead they brought gold articles,

purported to be ornaments, of a much higher value, i.e. Rs. 8,74,830/-. In ordinary course, wearable jewellery is made of purity less than 24 carats as gold of 24 carat purity is not able to retain its form and shape. Even if it is accepted for the sake of argument that the impugned gold was, in fact, wearable jewellery, it is observed that the applicants wore it under their clothes, did not declare it to Customs and would have walked out without paying duty but for the detection by Customs. Hence the intent to smuggle is manifest.

10. In terms of Rule 2(vi) of the Baggage Rules, 2016, "personal effects" means things required for satisfying daily necessities but does not include jewellery. Jewellery is therefore distinguished from articles of 'personal effect'. Further, Rule 3(b) of the Baggage Rules read with Annexure-I makes it clear that gold or silver ornaments upto a value of Rs. 50,000/- (Rupees Fifty Thousand), if worn on the person or carried on the person, only are freely importable. Since the value of the gold brought by the applicants exceeded Rs. 50,000/-, it was incumbent on the part of the Applicants to have made proper declaration under Section 77 of the Customs Act, 1962. This applies to all passengers including tourists coming to India. A declaration under Section 77 of the Act, *ibid* is *sine qua non* for the import of gold or silver ornaments exceeding Rs. 50,000/- for it to be treated as bonafide baggage. The Applicants ought to have declared the gold and paid customs duty, if their intentions were bonafide. The applicants have contended that they did not declare it due to "inadvertence". In view of the discussions above, since the intent to conceal and evade duty is clear, this plea is difficult to accept, especially since the duo are frequent travellers, are well aware of the law and at least on one occasion, have committed a similar offence, as recorded in the OIO.

11. In terms of 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. In the present case, gold was recovered from the Applicants after a suspicion based search by Customs and not due to an honest declaration by the applicants as was required by law. The

declaration form filed without any mention of the gold items and the concealment under their clothing as recorded by the adjudicating authority clearly show that the applicants attempted to smuggle them into India, making the gold liable for confiscation and rendering themselves liable for penalty. Further, no purchase invoice has been placed on record to substantiate the claim of ownership. The Applicants have, thus, failed to discharge the burden placed on them, in terms of Section 123, *ibid*.

12.1 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 {1971 AIR 293} 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.*" The Government observes that the subject goods i.e., raw gold kadas and raw gold chains have been imported as baggage by the Applicants, which were attempted to be smuggled without any declaration and without payment of duty. As discussed above, 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 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*".

12.2 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----."

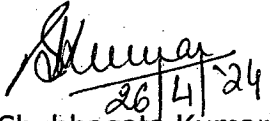
Moreover, the Hon'ble High Court of Delhi in its order dated 23.11.2023 in Writ Petition No. 8976 of 2020 in the matter of Kiran Juneja Vs. Union of India & Ors. has held that *"A fortiori and in terms of the plain language and intent of Section 2(33), an import which is effected in violation of a restrictive or regulatory condition would also fall within the net of "prohibited goods".*

12.3 As explained in paras above, since the conditions subject to which gold could have been legally imported, have not been fulfilled, there is no doubt that the subject goods are 'prohibited goods'.

13. 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 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."* 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."* Hon'ble Delhi High Court has, in the case of Raju Sharma [2020 (372) ELT 249 (Del)], relying upon the judgment of Apex Court in Mangalam Organics Ltd. [2017 (349) ELT 369 (SC)], 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."* Now in the latest judgment 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". No case is made out that the subject order of original authority suffers from any of these vices. Rather, the original authority has, after due application of mind, ordered absolute confiscation for the relevant and reasonable considerations brought out in the Spot Adjudication Order. It has been specifically noted that the Applicants are frequent travellers. Thus, the Commissioner (Appeals) has correctly refused to interfere in the matter.

14. The revision application is rejected for the reasons stated hereinabove.


26/4/24
(Shubhagata Kumar)

Additional Secretary to the Government of India

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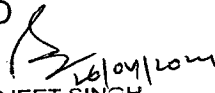
Sh. Danish Chawla
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Order No. 99 /24-Cus dated 26-04-2024

Copy to:

1. The Commissioner of Customs (Preventive), Customs House, The Mall, Amritsar, Punjab.
2. The Commissioner (Appeals), CGST, Central Excise and Customs, OB-32, Rail Head Complex, Jammu.
3. Shri Vikas Sareen, Advocate, C-131, First Floor, Lajpat Nagar-1, New Delhi-110024;
4. PPS to AS(RA)
5. ✓ Guard file
6. Notice Board

ATTESTED


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