

SPEED POST



F. No. 373/259/B/SZ/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... 17/02/2025

Order No. 17/25-Cus dated 17/02/2025 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 Application under Section 129 DD of the Customs Act, 1962, against the Order-in-Appeal COC-CUSTM-000-APP-34/2020-21 dated 29.07.2020, passed by the Commissioner of Customs (Appeals), Cochin.

Applicant : Smt. Rahamath Rafeek, Ernakulam.

Respondent : The Commissioner of Customs (Preventive), Cochin.

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ORDER

A Revision Application No. 373/259/B/SZ/2020-RA dated 18.11.2020 has been filed by Smt. Rahamath Rafeek, Ernakulam (hereinafter referred to as the Applicant) against the Order-in-Appeal COC-CUSTOM-000-APP-34/2020-21 dated 29.07.2020, passed by the Commissioner of Customs (Appeals), Cochin. The Commissioner (Appeals) has rejected the appeal filed by the Applicant and upheld the Order-in-Original, bearing O.S.No. 21/2020 dated 24.01.2020, passed by the Assistant Commissioner of Customs, Air Customs, Cochin International Airport, Nedumbassery, Cochin.

2. Brief facts of the case are that the officers of Air Intelligence Unit, Cochin International Airport, Nedumbassery, recovered four gold bangles (104.870 gms) and one pair of gold anklets (116.650 gms) having purity 22 carat weighing 221.520 grams and valued at Rs. 7,78,356/- (International Value) and Rs. 8,14,086/- (Market Value) from the Applicant at the exit gate on her arrival from Sharjah to Cochin on 12.01.2020. The said gold jewellery were found to be worn by the Applicant on her person in a non-visible manner and were recovered after repeated questioning. The recovered gold was seized on 24.01.2020 after it had been assayed. Since the seized gold jewellery was undeclared and concealed by the Applicant, the Original Authority vide the impugned O-I-O confiscated the said gold absolutely under Section 111(d), (i), (l) and (m) of the Customs Act, 1962 read with section 3(3) of the Foreign Trade (Development & Regulation) Act, 1992 and a penalty of Rs. 40,000/- was also imposed on the Applicant under the Section 112(a) & (b) of the Customs Act, 1962.

3. Aggrieved, the Applicant filed an appeal before the Commissioner of Customs (Appeals), Cochin who has rejected the appeal and upheld the impugned Order-in-Original. Aggrieved by the O-I-A, the Applicant filed this Revision Application.

4. The instant revision application has been filed mainly on the grounds that the orders passed by both the appellate and adjudicating authority are contrary to law and facts of the case; that the appellate authority ought to have appreciated the contentions of the Applicant that the investigation was not proper as the seizure was effected on 12.01.2020, but Seizure Report was prepared only on 24.01.2020 when the Applicant appeared before the authorities; that O-I-O passed is against natural justice; both the lower authorities ought to have appreciated the facts that the Applicant was working as a

house-maid in Sharjah since 2016, she was coming home for the marriage of her husband's sister's daughter, the gold under seizure were ornaments which she was wearing and the quantity was normal; that both the authorities ought not have ordered confiscation, but released the items on redemption fine and also ought to have allowed re-export of the ornaments; that both the authorities ought not have imposed penalty on the Applicant considering the circumstances of the case; that under any circumstance, the penalty imposed is highly excessive.

5. Personal hearings in the matter were fixed on 13.11.2024 and 27.11.2024. Shri Roy Verghese, Deputy Commissioner of Customs, Cochin appeared on 27.11.2024 on behalf of the Respondent department and submitted that the Applicant wore the impugned gold jewellery under her clothes such that it was not visible. It was around 221 gms in weight and the Applicant had denied possession, despite repeated questioning and opted for green channel; that she admitted during personal hearing that she had acted as a carrier for a remuneration of Rs. 10,000/-; that the O-I-A is proper and should be upheld. No one appeared from the Applicant's side and also no request for adjournment has been received till date. Therefore, it is presumed that the Applicant has nothing to state in the matter. The matter is taken up for decision based on available records.

6. At the outset, it is observed that the impugned Order-in-Appeal dated 29.07.2020 was received by the Applicant on 04.08.2020 as admitted by him. The revision application has been filed by the Applicant on 18.11.2020 causing a delay of around 17 days beyond the normal period of limitation i.e. after the expiry of three months from the date of receipt of O-I-A. The cause of delay is stated to be the Applicant could not engage the counsel due to the spread of Covid-19 and time taken for arrangement of payment of RA fee. In view of the COVID pandemic, the Hon'ble Supreme Court, vide Order dated 23.03.2020 in SMW(C) No. 3/2020 and order dated 08.03.2021 had extended the period of limitation prescribed under general law of limitation or under any special laws w.e.f. 15.03.2020 until 28.02.2022. Therefore, the delay is condoned.

7.1 The Government has examined the matter. The Applicant has attempted to smuggle the impugned gold item into India and did not make a true declaration to the Customs Authorities as required under Section 77 of the Customs Act, 1962. But for the interception of the Customs officers of Cochin International Airport, Cochin, the Applicant

would have exited undetected without payment of Customs dues. The impugned gold items cannot be considered as bonafide baggage under the Customs Act, 1962. The Applicant has admitted in her voluntary statement that the impugned gold items did not belong to her and that she carried the same for a financial benefit of Rs. 10,000/-. She admitted that non-declaration of gold to Customs is an offence. She was neither in possession of any valid documents for the legal import of impugned gold into India nor in possession of convertible foreign currency for payment of duty and therefore, she was not an eligible passenger to import impugned gold in terms of Notification No. 50/2017-Cus dated 30.06.2017.

7.2 As regards the contentions of the Applicant regarding delay in seizing the goods, ownership of gold and the invoice produced etc., the Government observes that the appellate authority has discussed it in detail in para (9) of the impugned O-I-A and stated that goods were seized later after getting the assay certificate from the assayer. As far as the contention of the Applicant that impugned gold items were purchased by her for marriage ceremony is concerned, it is observed that it is contrary to her voluntary statement recorded under Section 108 of the Customs Act, 1962 admitting that gold items did not belong to her and that she tried to smuggle them for monetary benefit of Rs. 10,000/-. As regards the invoice produced, it was not considered by the appellate authority since the gold jewellery mentioned on the invoice was of purity 0.999 (24 carat) whereas the seized gold was of 22 carat purity as per the seizure report as well as of the assay certificate of the gold assayer and that the number of pieces which is an essential part of a gold bill was also not there in the submitted invoice and thus cannot be accepted. Also, from the material on record, it appears that Applicant failed to produce licit purchase document in respect of the impugned gold at the time of his interception and before the adjudicating authority. The Government concurs with the findings of the appellate authority and holds that these contentions of the Applicant are nothing but an afterthought.

7.3 As per Section 123 of Customs Act 1962, 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 declare the gold items as stipulated under Section 77 of the Act, *ibid*. Further, the Applicant was intercepted after passing through the Green Channel. No documents evidencing ownership and licit purchase were

produced at the time of interception. The Applicant has, thus, failed to discharge the burden placed on her, in terms of Section 123, *ibid*. Keeping in view the facts of the case, the Government agrees with the adjudicating as well as appellate authorities that the seized goods were liable to confiscation under Section 111 *ibid* and the penalty was imposable on the Applicant.

8.1 The Applicant has contended that the import of gold is not 'prohibited'. However, the Government observes that this contention of the Applicant is against 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 herein had not fulfilled 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."

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 (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----."

8.3 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.*

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

9. 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.

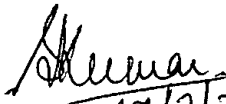
10. The Applicant has requested to be allowed to re-export the impugned gold. The Government observes that a specific provision regarding re-export of baggage articles has been made under Section 80 of the Act, *ibid* and upon a plain reading of the same, it is apparent that a declaration under Section 77 is a pre-requisite for allowing re-export. Hon'ble Allahabad High Court has, in the case of *Deepak Bajaj* {2019 (365) ELT 695 (All.)}, held that a declaration under Section 77 is a *sine qua non* for allowing re-export under Section 80 of the Act, *ibid*. In this case, the Applicant had made no declaration in

respect of the subject goods. Further, the Hon'ble Delhi High Court has, in the case of *Jasvir Kaur vs. UOI {2019 (241) ELT 521 (Del.)}*, held that re-export "cannot be asked for as of right-----". *The passenger cannot be given a chance to try his luck and smuggle Gold into the country and if caught she should be given permission to re-export.*" Hence, the request for re-export cannot be allowed.

11. The case laws relied upon by the Applicant, in support of his various contentions, are not applicable in view of the dictum of Hon'ble Supreme Court and Hon'ble High Courts, as above.

12. In view of the facts and circumstances of the case, there is no ground to interfere with order of Commissioner (Appeals) regarding absolute confiscation of impugned gold. The penalty imposed by the original authority, as upheld by the Commissioner (Appeals), is neither harsh nor excessive.

13. The revision application is rejected for the reasons aforesaid.


17/2/2025
(Shubhagata Kumar)


Additional Secretary to the Government of India

Smt. Rahamath Rafeek,
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Order No. 17/25-Cus dated 17/02/2025

Copy to:

1. The Commissioner of Central Tax, Central Excise & Customs (Appeals), Central Revenue Building, I.S. Press Road, Kochi -682018.
2. The Commissioner of Customs (Preventive), 5th Floor, Catholic Centre, Broadway, Cochin -882031.
3. Shri Rakeesh Pannikar, Advocate, 267-E, Pocket-C, Mayur Vihar Phase-2, New Delhi-110 091.
4. PPS to AS (RA).
5. Guard file.
- ✓ 6. Spare Copy.
7. Notice Board.


ATTESTED (Shailendra Kumar Meena)
अनुभाग अधिकारी / Section Officer
वित्त मंत्रालय (राजस्व विभाग)
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