

SPEED POST



F. No. 373/19/B/SZ/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...28/03/2025

Order No. 39 /25-Cus dated 28/03/2025 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 filed, under Section 129 DD of the Customs Act 1962 against the Order-in-Appeal No.COC-CUSTOM-000-APP-35-2020-21 dated 29.07.2020 passed by the Commissioner of Customs (Appeals), Cochin.

Applicant : Sh. Vithusan Vyrawasundaram, Sathiyantham, Sri Lanka.

Respondent : The Commissioner of Customs, Cochin.

ORDER

A Revision Application No. 373/19/B/SZ/2021-RA dated 25.01.2021 has been filed by Sh. Vithusan Vyrawasundaram, Sathiyantham, Sri Lanka (hereinafter referred to as the Applicant) against the Order-in-Appeal No. COC-CUSTM-000-APP-35-2020-21 dated 29.07.2020 passed by the Commissioner of Customs (Appeals), Cochin. The Commissioner (Appeals) has upheld the Order-in-Original of the Assistant Commissioner, Air Customs, Cochin, bearing No. O.S No. 409/2018 dated 21.10.2018. Vide the aforementioned Order-in-Original, One Crude gold Lump, One Crude gold Bracelet, One Crude gold Ring all of 24 carat purity, totally weighing 189.80 grams, valued at Rs. 6,16,850/-, recovered from the Applicant, had been absolutely confiscated under Section 111(d), 111(i), 111(l) and 111(m) of the Customs Act, 1962 read with Section 3(3) of the Foreign Trade (Development and Regulation) Act, 1992. Besides, a penalty of Rs. 15,000/- under Section 112(a) and 112(b) of the Customs Act, 1962 was also imposed on the Applicant. Aggrieved, the Applicant filed an appeal before the Commissioner of Customs (Appeals), Cochin, which was rejected and the Order-in-Original was upheld.

2. Brief facts of the case are that the Applicant, a Sri Lankan passport holder, who had arrived at Cochin, on 21.10.2018, was intercepted by the officers of Air Customs, Cochin at the exit gate on the suspicion that the applicant possessed un-declared dutiable goods. On detailed examination of baggage/person one Crude Gold Lump, one crude gold bracelet and one crude gold ring was recovered which were concealed in the socks worn by him. He had not declared the impugned gold to the Customs, which was seized under Section 110 of the Customs Act, 1962. The Government approved assayer has certified the gold items to be of 24 carat purity, collectively weighing 189.80 grams valued at Rs.6,16,850/-.

3. The revision application has been filed, mainly, on the grounds that order of the respondent is against law, weight of evidence and circumstances and probabilities of the case; that ownership of the gold is not disputed and there is no ingenious concealment; that the re-export of gold jewellery ought to be allowed under Section 80 of the Customs

Act, 1962; that the applicant wore the gold jewellery and the same is personal belongings and hence the question attracting or violation of baggage rule does not arise. The applicant prayed that the order of the appellate authority may be set aside and the applicant be permitted to re-export the gold and set aside or reduce the personal penalty.

4. Personal hearing in the matter was held on 24.01.2025. No one appeared for the applicants. Sh. Roy Verghese, Deputy Commissioner appeared for the respondents and stated that this is a clear-cut case of smuggling; that the applicant concealed the lump of gold, a gold bracelet and gold ring in his socks, making this a case of ingenious concealment in addition to non-declaration. Applicant is a frequent traveller, is well aware of Customs laws, Rules and knowingly violated them. Hence, the Revision application merits rejection and the OIA should be upheld. Smt. Kamalamalar Palanikumar, advocate on behalf of the applicant vide email dated 24.01.2025, submitted that she could not attend the personal hearing due to illness and requested that the order be passed in case by taking a lenient view.

5. The Government observes that the Order-in-Appeal dated 29.07.2020 was received by the Applicant on 17.08.2020 as admitted by him and the instant revision application has been filed on 25.01.2021 with a delay of around 72 days from the date of receipt of O-I-A. The cause of delay is stated to be lockdown due to COVID-19. In view of the Hon'ble Supreme Court's order dated 23.03.2020, in SMW (C) No. 3/2020 vide which the court directed extension of period of limitation w.e.f. 15.03.2020 and further up to 28.02.2022. The delay is therefore condoned.

6.1 The Government has examined the matter. The Government observes that the applicant did not declare the gold to Customs as required under Section 77 of the Customs Act, 1962. Section 77 of the Customs Act, 1962 states that, the owner of any baggage shall, for the purpose of clearing it, make a declaration of its contents to the Customs. However, the applicant brought the impugned gold items by ingeniously concealing them in his socks to avoid detection by the Customs officers. Therefore, the contention of the applicant is not tenable.

6.2 Another contention of the applicant is that the Baggage Rules 2016 have only limited application as the gold ornaments were worn by the applicant. This is clearly not the case as the items made of crude gold were recovered from his inside his socks cannot be termed as jewellery worn on the person and therefore this claim is not acceptable. As per the facts on record, the imported gold was in crude form of 24 carat purity, some of it in lump form which is neither ornament nor jewellery, concealed inside socks also of a much higher value than the prescribed limit i.e. Rs.50,000/- and not declared to Customs. It is also on record that the Applicant in this case was not an eligible passenger for concession as per rules. Further, it was incumbent on the part of the applicant to have made a proper declaration under Section 77 of the Customs Act, 1962. Moreover, it is also on record that he did not have any convertible foreign currency for paying customs duty for the said gold. Hence, applicant's claim for concessional rate of duty on the impugned goods is not tenable.

7. 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 gold items were of 24 carat purity, whereas in ordinary cause, wearable gold jewellery is almost always less than 24 carat purity, whereas in ordinary cause, wearable gold jewellery is almost less than 24 carat purity. The Applicant has, thus, failed to discharge the burden placed on him, in terms of Section 123, *ibid*. Keeping in view the facts of the case and as the Applicant has failed to discharge the onus placed on him in terms of Section 123, the Government agrees with the lower 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 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."*

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 seized 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 option to release 'prohibited goods' on redemption fine is discretionary. 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 P. Sinnasamy (*supra*), the Hon'ble Madras High Court has held that *"when discretion is exercised under Section 125 of the Customs Act, 1962, ----- the twin test to be satisfied is "relevance and reason"."* 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."* 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"*. Therefore, keeping in view the judicial pronouncements above, the Commissioner (Appeals) has correctly refused to interfere with the discretion exercised by the original authority.

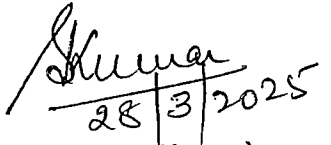
10. Further, as far as re-export of the impugned goods is concerned, the Government observes that a specific provision regarding re-export of baggage articles has been made under Section 80 of the Customs Act, 1962. On a plain reading, it is apparent that a declaration under Section 77 is a pre-requisite for allowing re-export in terms of Section

80 *ibid.* 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. In this case, not only did the Applicant not made any declaration to customs, he resorted to ingenious concealment of the same to evade duty. 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 he should be given permission to re-export.*" Hence the option of re-export also cannot be given.

11. 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.

12. In view of the facts and circumstances of the case as discussed above, the penalty imposed by the original authority, as upheld by the Commissioner (Appeals), is neither harsh nor excessive.

13. The revision application is, accordingly, rejected.


28/3/2025
(Shubhagata Kumar)

Additional Secretary to the Government of India

Sh. Vithusan Vyrawasundaram, Sathiyantham,
Shri S. Palanikumar, P. Kamalamalar & S. kameshwaran,
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Order No. 39 /25-Cus dated 28/03/2025

Copy to:

1. The Commissioner of Customs (Appeals), Custom House, Willingdon Island, Cochin-682009.
2. The Commissioner of Customs, Cochin, Custom House, Willingdon Island, Cochin, 682009.
3. Smt. Kamalamalar Palanikumar, Advocate, No. 10, Second Floor, Sunkurama Street, Chennai-600001.

F. No. 373/19/B/SZ/2021-RA

4. PA to AS(RA)
5. Guard File.
- ✓ 6. Spare Copy.
7. Notice Board.


ATTESTED

(शैलेन्द्र कुमार मीना)
(Shailendra Kumar Meena)
अनुभाग अधिकारी / Section Officer
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Ministry of Revenue (Deptt. of Rev.)
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Government of Rajasthan, Jaipur