

SPEED POST



F.No. 375/26/B/2018-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...06/01/2021

Order No. 63/21-Cus dated 05-01-2021 of the Government of India passed by Sh. Sandeep Prakash, Principal Commissioner & Additional Secretary to the Government of India, under Section 129DD of the Custom Act, 1962.

Subject: Revision Applications under Section 129 DD of the Customs Act against the Order-in-Appeal No. 63/AK/Cus/Jpr/2016 dated 09.08.2016, passed by the Commissioner of Customs & Central Excise (Appeals), Jaipur.

Applicants : Mr. Ram Niwas Bhari

Respondents : Commissioner of Customs (Prev) Jodhpur,

ORDER

A Revision Application No. F. No. 375/26/B/2018-R.A dated 16.07.2018 has been filed by Sh. Ram Niwas Bhari, (hereinafter referred to as the applicant) against Order-in-Appeal No. 63/AK/Cus/Jpr/20116 dated 09.08.2016, passed by the Commissioner of Customs & Central Excise (Appeals), Jaipur. The Order-in-Appeal has upheld the Additional Commissioner's Order-in-Original No. 21/2014 dated 12.09.2014, to the extent wherein, inter-alia, one gold bar weighing one kilogram valued at Rs. 29,80,000/- has been absolutely confiscated and free allowance was disallowed. However, the penalty of Rs.7,00,000/- was reduced to Rs. 4,00,000/- under Section 112(a) of the Customs Act, 1962.

2. The brief facts of the case are that the applicant arrived at Jaipur Airport on 23.01.2014 from Sharjah. On arrival his laptop bag was x rayed and the Customs Officers noticed an image of a gold bar contained in laptop bag. Accordingly, he was asked by the Customs Officers to report at Customs counters for payment of duty. However, the Customs Officers noticed that instead of approaching the Customs Counter, the applicant attempted to pass through the customs area. The customs officers also noticed that he was not in possession of his laptop bag and on being asked about his laptop bag and his declaration and payment of customs duty on the gold, the applicant replied that he has put his bag on the trolley of another co-passenger and the co-passenger without knowing the fact that the bag contains gold bar has taken the gold bar outside the Airport. The customs officers then intercepted the co passenger in the porch of Jaipur Airport thereafter upon search of his person and laptop bag one gold bar recovered from the laptop bag. The gold

bar was appraised at Rs. 29,80,000/- by the Government approved valuer. The applicant in his statements dated 23.01.2014, 24.01.2014 and 05.02.2014, recorded under Section 108 of the Customs Act, 1962, admitted that on seeing the crowd of the passengers in Customs arrival hall, he decided to take advantage of the same by way of sending out the gold with the help of other passengers without making declaration so as to enable him to save the Customs duty; that he put the laptop bag containing the gold bar, on the trolley of a co-passenger, who carried his laptop bag out of the Airport along with his own baggage. The Additional Commissioner of Customs, Jaipur, vide aforesaid OIO dated 12.09.2014, ordered absolute confiscation of the seized gold bar and imposed penalty of Rs. 7,00,000/- under Section 112 (a) of the Customs Act, 1962. Aggrieved, the applicant filed an appeal before the Commissioner (Appeals) which was rejected, except for reduction in penalty amount to Rs. 4,00,000/-. Against the order of Commissioner (Appeals), applicant filed an appeal before the CESTAT. The CESTAT vide order dated 18.02.2018 dismissed the appeal as non maintainable as the same was filed at the wrong forum. The instant Revision application has been filed on the ground that the order of the Commissioner (Appeals) is erroneous as the applicant has already retracted his statement vide letter dated 28.01.2014; that applicant had declared one kilogram of gold in his baggage to the officer at the x-ray machine; that panchnama dated 23.01.2014 narrating the sequence of events leading to seizure are all fabricated by the officers; that there was no concealment of gold as the same was carried by the applicant in his hand baggage; that gold is not a prohibited item and should be allowed to be redeemed on payment of redemption fine in terms of

Section 125 of the Customs Act, 1962. It is also requested that the above mentioned Order-in-Appeal may be set aside and goods may be allowed to be re exported. Apart from that the applicant has also requested for condonation of delay.

3. Personal hearing in virtual mode was held on 29.12.2020. Sh. Babu Lal soni, Consultant, and Sh. Y.P. Badhwar, Consultant, attended the hearing on behalf of the applicant. Sh. Soni requested for 07 days time to file written submission including documents to substantiate the request for condonation of delay. The written submissions have been filed on 04.01.2021. None appeared for the respondent department and no request for adjournment has been received. Hence, the case is being taken up for disposal.

4. As per Section 35 EE (2) of Central Excise Act, 1944 the application under subsection (1) i.e. Revision application can be made within 3 months from the date of communication to the applicant of the order against which the application is being made. However, proviso to sub section (2) provides discretion to allow applicant to present the application within a further period of 3 months if the Government is satisfied that the applicant was prevented by sufficient cause from presenting the application within the normal period of 3 months. In this case, the OIA was communicated to applicant on 12.08.2016 and revision application has been filed on 03.04.2018. Thus, there is a delay of more than 18 months. Applicant has stated that he lost time in pursuing the appeal before CESTAT for almost 15 months. It is observed that as per preamble of the Commissioner (Appeals)'s order dated 09.08.2016 the applicant was advised to file appeal before the CESTAT, Delhi. The

applicant has filed the appeal before the CESTAT as advised. If the period consumed in pursuing the appeal before CESTAT is excluded, it is observed that the Revision application has not been filed within the 3 months period as specified in Section 35 EE (2) and instead after 147 days i.e. 87 days for filing the appeal with CESTAT and subsequently 60 days in filing instant Revision Application after dismissal of appeal by tribunal. Thus, Government finds that delay in filing this Revision application is clearly on account of bonafide mistake. Therefore, after ignoring the period in pursuing the appeal before CESTAT, the delay is condoned.

It is observed that the applicant did not declare the impugned gold bar brought by him from Sharjah under Section 77 of Customs Act, 1962 to the customs authorities at Jaipur Airport. However, on x-ray, an image of gold bar contained in a laptop bag was noticed and accordingly applicant was directed to deposit the duty on customs counter. However, instead of depositing the duty, the applicant has attempted to divert the bag containing gold bar out of Airport through the help of co-passenger. The contention of the applicant that he had never asked the co-passenger to take the bag out of Airport and was ready to deposit the duty is clearly an afterthought as the applicant had declared that he was not carrying any dutiable goods in column 6 of the declaration slip. Moreover, it is against common sense and usual behavior that a person will hand over his bag containing gold bar to an unknown person when he is wanting to pay duty and claims to be approaching the Customs office in this regard. Rather, in such a situation, passenger will normally keep the goods in his possession so that, if required, he could present it to the Customs Officer for appraisalment. Therefore, it is apparent that the applicant

never had the intention to pay duty. Hence the contention of the applicant that the bag was moved out of Airport unintentionally is not acceptable and appears to be an afterthought.

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 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 the observation of adjudicating authority and Commissioner (Appeals) that the burden of proof is on the PAX from whom the impugned goods are recovered is correct in terms of Section 123 of Customs Act, 1962.

7. It is contended by the applicant that that he retracted from his statement dated 23.01.2014 tendered under Section 108 of Customs Act, 1962. However, it is observed that the subject seizure was made in the presence of independent witnesses. These proceedings, which remain uncontroverted through the proceedings below, corroborate the admissions made in the aforesaid statement. Further, Hon'ble Supreme Court in the case of Surjeet Singh Chhabra Vs. U.O.I. [1997 (89) E.L.T. 646 (S.C.)] has held that a confession statement made before Customs officer though retracted within six days is an admission and binding since Customs Officers are not Police Officers. Therefore, the subject statement recorded under Section 108 of the Customs Act, 1962 is admissible, even though it has been retracted.

8. The question of law raised by the applicant is that the import of gold is not 'prohibited'. The law on this issue is settled by the judgement of Hon'ble Supreme Court in the case of Sheikh Mohd. Omer vs Collection of Customs, Calcutta & Ors {1971 AIR 293}. Hon'ble Supreme Court 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". The Additional Commissioner, in para 3.6 to 3.11 of the O-I-O dated 12.09.2014, has brought out that the Gold is not allowed to be imported freely in baggage. 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". The original authority has correctly brought out that in this case the conditions subject to which gold could have been legally imported have not been fulfilled. Thus, following the law laid down by the Apex Court, there is no doubt that the subject goods are 'prohibited goods'.

9. Hon'ble Madras High Court in the case of Commissioner of Customs (Air) Chennai-I vs. Samynathan Murugesan [2009 (247) E.L.T. 21 (Mad.)] relied on the definition of 'prohibited goods' given by the Apex Court in case of Omprakash Bhatia Vs. Commissioner of Customs, Delhi Supra [2003(155) ELT 423 (SC)] and has held as under:-

*"In view of meaning of the word "prohibition" as construed laid down by the Supreme Court in Om Prakash Bhatia case we have to hold that the imported gold was 'prohibited goods' since the respondent is **not an eligible passenger** who did not satisfy the conditions".*

The Apex Court has affirmed this order of Madras High Court {2010(254)ELT A 15 (Supreme Court)}. The ratio of aforesaid judgment is squarely applicable to the facts of the present case.

10. - The original adjudicating authority has denied the release of impugned goods on redemption fine under Section 125 of Customs Act, 1962. The Government observes that the option to release seized goods on redemption fine, in respect of 'prohibited goods', 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 present case, the original authority has

refused to grant redemption as the applicant attempted to smuggle the goods for monetary gains, with intent to evade Customs Duty. In the case of Commissioner of Customs (Air), Chennai-I Vs P. Sinnasamy {2016(344)ELT1154 (Mad.)}, the Hon'ble Madras High Court, after extensive application of several judgments of the Apex 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." Further, "when discretion is exercised under Section 125 of the Customs Act, 1962, ----- the twin test to be satisfied is "relevance and reason".

It is observed that the original authority has in the instant case after appropriate consideration passed a reasoned order refusing to allow redemption. Thus, applying the ratio of P. Sinnasamy (Supra), the discretion exercised by the original authority does not merit interference.

11. The applicant has also requested for the re-export of the impugned gold bar. Section 80 of Customs Act, 1962 reads as follows:

"80. Temporary detention of baggage.—Where the baggage of a passenger contains any article which is dutiable or the import of which is prohibited and in respect of which a true declaration has been made under section 77, the proper officer may, at the request of the passenger, detain such article for the purpose of being returned to him on his leaving India and if for any reason, the passenger is not able to collect the article at the time of his leaving India, the article may be returned to him through any other passenger authorised by him and leaving India or as cargo consigned in his name."

Section 80 of the Customs Act, 1962 provides that the detained imported goods can be re-exported on the request of the passenger where he/ she is returning from India to a foreign country. Hence apart from declaration of the prohibited goods at the time of arrival of passenger, return of the passenger to the foreign country after a short visit to India as a tourist or otherwise is a crucial condition for re-export of impugned goods. It is observed that the applicant attempted to move the impugned gold bar out of the Airport with the intent to smuggle on his arrival at Jaipur Airport with an intention to evade customs duty. A pre-condition to allow re-export under Section 80 of Customs Act, 1962 is that "**a true declaration has been made under section 77**", which is not the case here. As the conditions, subject to which re-export can be allowed under Section 80 of Customs Act 1962, are not fulfilled, re-export of the seized gold cannot be allowed.

12. In view of the above, the Government upholds the orders of the lower authorities. The revision application is rejected.



(Sandeep Prakash)

Additional Secretary to the Government of India

1. Mr. Ram Niwas Bhari, Jat Colony, Bhanidhora-ke-pas, Ward No. 25, Ratangarh, District Churu, Rajasthan.
2. The Commissioner of Customs, Jodhpur (Hq at Jaipur), New Central Revenue Building Stattue circle, C Scheme, Jaipur 302005

Order No. 03/21-Cus dated 05-01-2021

Copy to:

1. The Commissioner of Customs (Appeals), New Custom House, Delhi-110037
2. Additional Commissioner of Customs, Jodhpur (Hq at Jaipur, New Central Revenue Building Stattue circle, C Scheme, Jaipur 302005

3. PA to AS(RA) -
4. Guard File.

5. Spare Copy

ATTESTED

(Nirmala Devi)
S.O (R. A.)

Ashish Tiwari
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सहायक आयुक्त/Assistant Commissioner
केन्द्रीय वस्तु एवं सेवा कर, केन्द्रीय उत्पाद एवं सीमा शुल्क
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राजस्व विभाग / Department of Revenue
विरा मंत्रालय / Ministry of Finance
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