

SPEED POST



F.No. 375/19/B/2019-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...29/9/21

Order No. 201/21-Cus dated 29-9-2021 of the
Government of India passed by Sh. Sandeep Prakash,
Additional Secretary to the Government of India, under Section
129DD of the Custom Act, 1962.

Subject: Revision Application filed, under Section 129 DD
of the Customs Act 1962 against the Order-in-
Appeal No.CC(A)Cus/D-I/Air/645/2018 dated
31.12.2018 passed by the Commissioner of
Customs (Appeals), New Delhi.

Applicant : Sh. Mir Gulam Hussain, Chikballpur, Karnataka.

Respondent : The Commissioner of Customs, IGI Airport,
New Delhi

ORDER

A Revision Application No. 375/19/B/2019-RA dated 19.03.2019 has been filed by Sh. Mir Gulam Hussain, Chikballpur, Karnataka (hereinafter referred to as the Applicant) against the Order-in-Appeal No. CC(A)Cus/D-I/Air/645/2018 dated 31.12.2018 passed by the Commissioner of Customs (Appeals), New Delhi. The Commissioner (Appeals) has upheld the Order-in-Original no. RLM/GENERAL/17/2016 dated 25.05.2016 passed by the Additional Commissioner of Customs, IGI Airport, New Delhi, vide which 15 pieces of gold bars weighing 1500 grams, valued at Rs.41,23,860/- have been confiscated absolutely under Section 111(d),111(i), 111(j), 111(l) and 111(m) of the Customs Act, 1962. Penalty of Rs. 4 lakhs has also been imposed on the Applicant under Sections 112 and 114AA of the Customs Act.

2. The brief facts of the case are that the Applicant arrived, on 31.10.2013, from Singapore via Bangkok at IGI Airport and was intercepted near the exit gate after he had crossed the Green Channel. On demand the Applicant produced his disembarkation slip, wherein, Rs. 10,000/- was mentioned against total value of dutiable goods imported. Personal search of the Applicant resulted in recovery of 15 gold bars of 999.9 purity, collectively weighing 1500 gms and valued at Rs. 41,23,860/-, which were concealed in his underwear. In his statement tendered under Section 108 of Customs Act, 1962, the Applicant stated that his contractor-employer in Singapore, as a settlement of his salary dues and compensation of an accident at site, offered him to carry the said gold bars; that he would get an amount of Rs. 6.8 Lakhs as the dues of his salary and compensation of the accident and out of the remaining

amount, he would also get an honorarium for carrying the gold. The Applicant admitted that he was not eligible to import gold into India and to enhance his profit margin, he opted for green channel so that he could take the gold out of the airport, undeclared. He agreed to the description, quantity, weight, purity and value of the seized gold bars. The original authority, vide aforesaid Order-in-Original dated 25.05.2016, ordered absolute confiscation of the said 15 gold bars and imposed a penalty of Rs. 4 Lakhs under Section 112 and 114 AA of the Customs Act, 1962. Aggrieved, the Applicant filed an appeal before the Commissioner (Appeals), who, vide the impugned Order-in-Appeal, rejected the appeal.

3. The revision application has been filed, mainly, on the grounds that gold is not a prohibited item and should have been allowed by the lower authorities to be redeemed on payment of fine. It has also been prayed that the penalty imposed on the Applicant may be set aside.

4. Personal hearing, in virtual mode, was held on 29.09.2021. Sh. Ajit Singh, Advocate appeared for the Applicant and reiterated the contents of revision application. He submitted that gold is not 'prohibited goods' and, therefore, it should be allowed to be redeemed on payment of fine and appropriate duty. None appeared for the respondent department and no request for adjournment has also been received. Hence, the matter is taken up for disposal on the basis of records available. Pursuant to the personal hearing, the Applicant has cited the decision reported as [2019 (369) ELT 1654 (Tri-Mumbai)], [2018 (364) ELT 144 (GOI)] and [2018 (363) ELT 534 (Tri-All)], in support of his contention.

5. The Government has carefully examined the matter. It is evident that the impugned gold bars were ingeniously concealed by the Applicant in his underwear, which he was wearing, to evade detection. These gold bars were not declared under Section 77 of Customs Act, 1962, to the customs authorities at the airport.

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 the burden of proving that the subject gold bars, were not smuggled, is on the Applicant who had brought the gold into the country. The manner of concealment, in this case, clearly shows that the Applicant had attempted to smuggle the seized gold in a premeditated manner to evade detection. Further, no evidence has been produced to prove licit import of the seized gold bars. The Applicant has, thus, failed to discharge the burden placed on him, in terms of Section 123, *ibid.*

7.1 The Applicant has contended that the import of gold is not 'prohibited'. The Government observes that the law on this issue is settled by the judgment of Hon'ble Supreme Court in the case of Sheikh Mohd. Omer vs Collector of Customs, Calcutta & Others [1971 AIR 293] wherein it has been 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 16.1 and 16.2 of the Order-in-Original dated 25.05.2016, 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 Apex 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 M/s Raj Grow Impex LLP & Others [2021-TIOL-187-SC-CUS-LB], 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."

7.2 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-----."

7.3 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 as above, there is no doubt that the subject goods are '*prohibited goods*'.

8. The Government observes that the option to release '*prohibited goods*' on redemption fine, under Section 125 *ibid*, 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; and 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*". 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 in the background of attempted smuggling by concealment and in the context of Government's policy objectives in the matter. Thus, the discretion exercised by the original authority does not merit interference.

9. The decisions cited by the Applicant in support of his case, have been rendered without noticing and/or following the law laid down by the Hon'ble Apex Court and Hon'ble High Court, as discussed above.

10. The penalty imposed is just and fair in the facts and circumstances of the case.

11. In view of the above, the revision application is rejected.



(Sandeep Prakash)

Additional Secretary to the Government of India

Sh. Mir Gulam Hussain,
S/o Sh. Ishtiyaq Hussain,
R/o House N. 0670, Abidili Road,
Allipura, Distt.- Chikballpur, Karnataka-561 212.

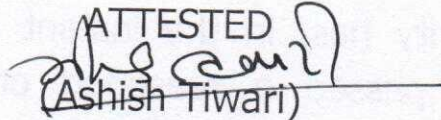
Order No. -

201/21-Cus

dated 29-9-2021

Copy to:

1. The Commissioner (Appeals), New Custom House, IGI Airport, New Delhi-110037
2. Additional Commissioner of Customs, IGI Airport, Terminal-3, Delhi-110037.
3. Sh. Ajit Singh, Advocate, N-2D, Saket, New Delhi-110 017.
4. PA to AS(RA).
5. Guard File.
6. Spare Copy.

ATTESTED

(Ashish Tiwari)

Assistant Commissioner (RA)