

SPEED POST



F.No. 375/19-A/B/2018-RA
GOVERNMENT OF INDIA
MINISTRY OF FINANCE
(DEPARTMENT OF REVENUE)

14, HUDCO VISHALA BLDG., B WING
6th FLOOR, BHICAJI CAMA PLACE,
NEW DELHI-110 066

Date of Issue... 9/3/21

Order No. 54/21-Cus dated 19-03-2021 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/05/2016 dated 20.01.2016, passed by the Commissioner of Customs (Appeals), New Customs House, Near IGI Airport, Delhi-110037

Applicant : Mr. Fazlur Rahaman

Respondent : Commissioner of Customs (Airport & General), New Delhi

ORDER

A Revision Application No. 375/19-A/B/2018-RA dated 19.04.2016 has been filed by Mr. Fazlur Rahaman, (hereinafter referred to as the applicant) against the Order-in-Appeal No. CC(A)Cus/D-I/Air/05/2016 dated 20.01.2016 passed by the Commissioner of Customs (Appeals), New Customs House, Near IGI Airport, Delhi-110037. Commissioner (Appeals) has upheld the order of the Additional Commissioner of Customs, IGI Airport, Terminal-3, New Delhi bearing no. 91/2015 dated 11.03.2015 wherein two gold bars, concealed in shoes which were worn by the applicant, weighing 2000 grams and valued at Rs. 50,42,808/-, have been absolutely confiscated and free allowance has been denied to the applicant. The adjudicating authority has imposed a penalty of Rs.8,00,000/- under Section 112 & 114AA of the Customs Act, 1962 on the applicant, which has been maintained in appeal.

2. The brief facts of the case are that the applicant arrived on 21.01.2014 at IGI Airport from Riyadh and was intercepted near the exit gate after he had crossed the Customs Green Channel. After search of his person and of his baggage two gold bars, wrapped in brown colour adhesive tape, were recovered from the shoes worn by him. The gold bars, weighing 2000 grams, were appraised at Rs.50,42,808/- by the Jewellery Appraiser at IGI airport. The applicant in his statement dated 21.01.2014, recorded under Section 108 of the Customs Act, 1962, admitted the recovery of gold bars. He further stated that he had bought the gold in Dubai for subsequent sale in India for profit motive.

3. The revision application has been filed canvassing that the seized gold is not a prohibited item and hence may be released on payment of redemption fine and appropriate duty. Gold imported by the applicant is bonafide as the gold was bought by him. Further, penalty imposed may be reduced.
4. Personal hearing was held on 01.03.2021 and 05.03.2021. Sh. Shiv Kumar, Advocate, and Sh. Ashok Kumar, Advocate, appeared on behalf of the applicant. Sh. Shiv Kumar, Advocate, reiterated the grounds of revision already stated in the revision application and requested that the gold may be allowed to be redeemed on payment of appropriate fine, penalty and duty. He highlighted that the applicant is the actual owner and has been claiming so since the beginning. None appeared on behalf of the respondent department nor any request for adjournment has been made. Therefore, the case is taken up for decision.
5. On examination of the relevant case records, the Commissioner (Appeals)'s order and the Revision Application, the Government observes that the impugned gold item were cleverly concealed in the shoes and the applicant did not declare the same under Section 77 of Customs Act, 1962 to the customs authorities at the airport. In the Customs Declaration slip, the applicant had not declared anything in Column 6 (Total value of dutiable goods imported). Further, the applicant has admitted the recovery of gold from him and the fact of non-declaration in his statement tendered under Section 108 of Customs Act, 1962.
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, 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, the applicant has failed to produce any evidence that goods were not smuggled. The manner of concealment, inside the shoes worn by him, also clearly establishes that the applicant had smuggled the seized gold. The applicant has, thus, failed to discharge the burden placed on him, in terms of Section 123.

7. 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 paras 15 to 18 of the O-I-O dated 11.03.2015, 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'.

8. 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".*

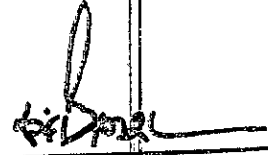
The Apex Court has affirmed this order of Madras High Court {2010(254)ELT A 15 (Supreme Court)}. The ratio of aforesaid judgment is squarely applicable to the facts of the present case.

9. The original adjudicating authority has denied the release of impugned goods on redemption fine under Section 125 of Customs Act, 1962, which has been assailed in the instant Revision Application. 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 by concealment, 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 in the background of attempted smuggling by concealment and for monetary gains. Thus, applying the ratio of P. Sinnasamy (Supra), the discretion exercised by the original authority does not merit interference. The case laws relied upon by the

applicant are decided in the fact of relevant cases and are of a period prior to P. Sinnasamy (Supra).

10. Further, the Government finds that the penalty imposed by the original authority, as upheld in appeal, is just and fair in the facts and circumstances of the case.

11. 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

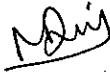
Mr. Fazlur Rahaman,
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5th cross, Bhatkal,
Karnataka 581320

Order No. 54/21-Cus dated 09-03-2021

Copy to:

1. The Commissioner of Customs, IGI Airport Terminal-3, New Delhi-110037
2. The Commissioner of Customs (Appeals), New Custom House, Delhi-110037
3. Additional Commissioner of Customs, IGI Airport, Terminal-3, Delhi-110037
4. Sh. Shiv Kumar, Advocate, 519, 5th floor, Somdatt Chamber-II, Bhikaji Cama Place, New Delhi 110066
5. PA to AS(RA)
6. Guard File.
7. Spare copy.

ATTESTED



(Nirmala Devi)
Section Officer (Revision Application)