

F.No. 375/53/B/18-RA
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F.No. 375/53/B/18-RA
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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...17/3/21

Order No. 59-60/21-Cus dated 16-3-2021 of the Government of India passed by Shri 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-1/Air/65-66/2018 dated 06.03.2018, passed by the Commissioner of Customs (Appeals), New Custom House, New Delhi

Applicant : 1. Mr. Faizan Mirza
2. Mr. Rehan Mirza

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

ORDER

Revision Application Nos.375/53/B/18-RA and 375/52/B/2018-RA both dated 11.06.2018, have been filed by Mr. Faizan Mirza (hereinafter referred to as the Applicant-1) and Mr. Rehan Mirza, (hereinafter referred to as the Applicant-2), respectively, against the Order No.CC(A)Cus/D-1/Air/65-66/2018 dated 06.03.2018, passed by Commissioner of Customs (Appeals), New Delhi. Commissioner (Appeals) has upheld the order of the Joint Commissioner of Customs, IGI Airport, Terminal-3, New Delhi, bearing no. 85/J.C./U.S./2016 dated 31.03.2016, wherein two gold bars, which were recovered from the Applicant-2 (an employee of M/s Delhi International Airport Pvt. Ltd.) and brought by Applicant-1 from Bangkok, collectively weighing 2000 grams valued at Rs. 48,83,760/-, have been confiscated. The adjudicating authority has also imposed a penalty of Rs. 16,00,000/- under Section 112(a) & 114AA of the Customs Act, 1962 on the Applicant-1 and penalty of Rs. 12,00,000/- under Section 112 (b) of the Customs Act, 1962 on the Applicant-2, which have been maintained in appeal.

2. The brief facts of the case are that the Applicant-1 arrived on 12.06.2014, at IGI Airport, from Bangkok. Customs authorities at IGI Airport, New Delhi, on a specific information regarding smuggling of gold, kept vigil in the arrival hall of IGI Airport, New Delhi. Customs officials intercepted the Applicant-2, on his suspicious movements near the exit gate, after he had crossed the green channel. After search of his person, two gold bars in a packet wrapped with brown color cello tape, concealed in the underwear worn by him, were recovered from his possession. The gold bars were of 999.9 purity, weighing 2000 grams, and were appraised at

Rs.48,83,760/- by the Jewellery Appraiser at IGI airport. Applicant-2 in his statement dated 12.06.2014, recorded under Section 108 of the Customs Act, 1962, admitted that the packet containing gold bars was handed over to him by Applicant-1 in the toilet. Applicant-1 in his statement dated 12.06.2014, recorded under Section 108 of the Customs Act, 1962, stated that he had purchased the impugned gold bars from Bangkok, as the value of the gold was cheaper in Bangkok, and attempted to smuggle the same out from IGI Airport (without payment of duty), with the connivance of Applicant-2, as it would earn handsome margin of profit on selling it in India.

3. The revision application, by Applicant-1, is filed mainly on the ground that the import of gold is not prohibited and may be released on payment of fine and penalty. Further, the penalty imposed is on higher side and the penalty has to be in proportion to the alleged offence as the purpose of penalty is deterrence and not retribution. Applicant-2 has filed the revision application on the ground that he had nothing to do with the seized gold but as the pax (Applicant-1) was his brother so he decided to help him by declaring the gold to Customs. It is also contended that import of gold is not prohibited and seized gold may be released on payment of fine, duty and penalty to the Applicant-1. Further, penalty imposed is highly excessive.

4. Personal hearing was granted on 18.02.2021 and 11.03.2021. Sh. Amit Attri, Advocate, appeared on behalf of the applicants on 11.03.2021 and stated that Applicant-2 was merely a carrier who attempted to assist his brother but had no ownership or gain in the matter. Hence penalty should be reduced on Applicant-2. Sh. Faizan Mirza, the Applicant-1, was the owner of gold and would produce invoice,

if permitted, to substantiate ownership. The seized gold should be released on payment of appropriate fine, duty and penalty, keeping in view the case law cited. Sh. R.P. Bairwah, Superintendent, appeared on behalf of the respondent and prayed that the orders of lower authorities be maintained. At the request of Shri Attri, he was allowed to produce invoice till 15.03.2021, by making it clear that if invoice is not produced on or before 15.03.2021, the matter will be decided without any further reference/opportunity. However, till date, no invoice has been submitted.

5. The Government has examined the matter. On examination of the relevant case records, the Commissioner (Appeals)'s order and the Revision Application, it is evident that the impugned gold bars were concealed in the underwear worn by Applicant-2. Further, the Applicant-2 has admitted the recovery of gold bars from him, which were handed over to him by Applicant - 1, and the fact of non-declaration in his statement tendered under Section 108 of Customs Act, 1962. In the revision applications also, it is admitted that the gold bars were carried by Applicant-1 from Bangkok and were handed over by the Applicant-1 to Applicant-2, in the toilet of IGI airport, after arrival from Bangkok. However, it is contended that the Applicant-2 was merely assisting his brother i.e. Applicant-1 to pay duty but was apprehended before he could approach the Customs Officer. It is also contended that the Applicant-2 was not aware of the procedures. The Government finds that these contentions are nothing but an afterthought in as much as:

- (i) If the Applicant-1 intended to pay duty, he should have made a declaration under Section 77 of the Customs Act.

- (ii) If the Applicant-2 intended to assist Applicant-1 in payment of duty, there was no need to surreptitiously take over the packet in the toilet, put the packet inside his underwear and then try to walk out.
- (iii) Applicant-2 was working at the airport, and therefore, in normal course, should have been familiar with the procedures etc. If he was not familiar, there was no need for him to come forward to "assist" his brother.

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 applicants have failed to produce any evidence that the gold bars were not smuggled and to the contrary it is admitted by the Applicant-1 that the gold bars were purchased by him for selling in India at higher rate for monetary gains. The manner of concealment, inside the underwear worn by the Applicant – 2, also clearly establishes that the applicants had smuggled the seized gold bars and had no intention to pay duty. Apart from that, no documentary evidence has been produced to establish bonafide ownership. The applicants have, thus, failed to discharge the burden placed on them, in terms of Section 123.

7. The question of law raised by the applicants is that the import of gold is not 'prohibited'. The Government observes that 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 & Ors {1971 AIR 293}. Hon'ble Supreme 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". The Additional Commissioner, in para 19 to 19.2 of the O-I-O dated 31.03.2016, 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 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. 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 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 due to attempted smuggling by way of concealment, 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 Applicants are not relevant in the facts of this case.

9. The Government observes that Applicant-1 in connivance with Applicant-2 attempted to smuggle gold, specifically taking advantage of the status of Applicant-2

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as a Supervisor at the airport. Modus operandi adopted is indeed ingenious. As such, there is no merit in the plea of both the Applicants to reduce the penalty amount, which is just and fair in the facts and circumstances of the case.

10. The revision applications are rejected.


(Sandeep Prakash)

Additional Secretary to the Government of India

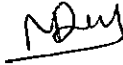
1. Mr. Faizan Mirza,
1663, Gali Takhat Wali, Sui Walan,
Delhi 110002.
2. Mr. Rehan Mirza,
1663, Gali Takhat Wali, Sui Walan,
Delhi 110002.

Order No. 59-60/21-Cus dated 16-3-2021

Copy to:

1. Commissioner of Customs (Airport & General), IGI Airport Terminal-3, New Delhi-110037
2. Commissioner of Customs (Appeals), New Custom House, Near IGI Airport, New Delhi
3. Joint Commissioner of Customs, IGI Airport, New Custom House, New Delhi
4. Shri Amit Attri, Advocate, Chamber No. 952, Patiala House Court, New Delhi.
5. PA to AS(RA)
6. Guard File.
7. Spare Copy

ATTESTED



(Nirjala Devi)
Section Officer (Revision Application)