

SPEED POST



F.No. 375/119/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... 11/4/21

Order No. 66/21-Cus dated 01-04-2021 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/158/2018 dated 07.05.2018 passed by the Commissioner of Customs (Appeals), New Customs House, Near IGI Airport, Delhi-110037
- Applicant : Mr. Neeraj Kumar Saini, Ghaziabad
- Respondent : Commissioner of Customs (Airport & General), New Delhi
-

ORDER

A Revision Application No. 375/119/B/2018-RA dated 19.11.2018 has been filed by Mr. Neeraj Kumar Saini, Ghaziabad (hereinafter referred to as the applicant) against the Order-in-Appeal No. CC(A)Cus/D-I/Air/158/2018 dated 07.05.2018 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. 160/DR/ADC/2016 dated 22.11.2016 wherein 24 pieces of white coated yellow metal (made of gold), concealed in and around the suitcase of the applicant, weighing 710 grams (net weight) and valued at Rs. 17,09,037/-, have been absolutely confiscated and free allowance has been denied to the applicant. However, the penalty of Rs.3,25,000/- under Section 112 & 114AA of the Customs Act, 1962, imposed by the original authority on the applicant was reduced by the Commissioner (Appeals) to Rs. 2,50,000/-.

2. The brief facts of the case are that the applicant arrived on 19.09.2015 at IGI Airport from Dubai and was intercepted near the exit gate after he had crossed the Customs Green Channel. After search of his person and of his baggage 24 pieces of white coated yellow metal (made of gold) concealed in and around the suitcase, were recovered from his possession. As the coating on the yellow metal was thick, the same were sent to M/s Delhi Test Centre, for testing. M/s Delhi Test Centre, vide their report dated 20.09.2015, tested the purity as 99.99% and the weight as 710 grams (net weight) whereas the gross weight was 741.85 grams. The value of seized gold was appraised at Rs.17,09,037/- by the Jewellery Appraiser at IGI

airport. The 24 pieces of gold bars, recovered from the applicant, were seized under Section 110 of the Customs Act, 1962, under panchanama dated 20.09.2015. The applicant in his statement dated 20.09.2015, recorded under Section 108 of the Customs Act, 1962, admitted the recovery of 24 pieces of gold bars and agreed with the contents of the panchnama dated 20.09.2015. He further stated that he had purchased the gold in Dubai as it was cheaper in Dubai and wanted to use that gold for preparation of personal ornaments and investment purpose.

3. The revision application has been filed canvassing that the gold was legally procured by the applicant and was brought for earning profit. Seized gold is not a prohibited item and hence may be released on payment of redemption fine and appropriate duty. Penalty under Section 112 (a) and Section 114 AA of the Customs Act, 1962 are well defined and the adjudicating authority should have specified the quantum of penalty under each section. Applicant has also filed a condonation of delay application on the ground that the delay has occurred as the impugned OIA was misplaced in the office of the counsel and got traced only during the cleaning and whitewash before Diwali.

4. During the pendency of the revision application, the applicant filed a petition WP(C) No. 1137/2021 and C.M. No. 3207/2021 before the Hon'ble Delhi High Court. Hon'ble Delhi High Court, vide judgment dated 29.01.2021, received on 16.02.2021, directed the revisionary authority to decide the instant revision application, in accordance with Law, Rules, Regulations and Government policies applicable to the facts of the case and on the basis of the evidence on record, after giving adequate opportunity of being heard to the concerned parties. It was further directed that the decision shall be taken by the revisionary authority as expeditiously

as possible and practicable and preferably within a period of 12 weeks from the date of receipt of the copy of the order dated 29.01.2021. In due compliance of the aforesaid directions of the Hon'ble High Court, the matter has been taken up for disposal, out of turn.

5.1 Personal hearing was granted on 26.02.2021. Applicant vide e-mail dated 25.2.2021 requested for the adjournment of the matter as he was busy in some other matter in Karkardooma Court.

5.2 Another hearing was fixed on 08.03.2021. Sh. Neeraj kumar Saini, Applicant, and Sh Yogesh Gaur, Advocate, appeared and explained the facts. Upon being pointed out that the impugned Order-in-Appeal was passed on 10.05.2018 and the revision application is filed on 19.11.2018 i.e. beyond the period of limitation, and that the reason advanced is that OIA was received only on 21.05.2018 (as per COD application) without proof of such service on 21.05.2018, Sh. Gaur stated that the copies of revision application and COD application are not available with them. Sh. Gaur, therefore, requested for adjournment of hearing to 19.03.2021.

5.3 As per the request of the Applicant, another hearing as a last and final opportunity was granted for 19.03.2021 at 12 noon. Applicant appeared and stated that the lawyer is on the way and, therefore matter may be adjourned upto 4 pm. But before 4 pm, a mail was received on behalf of the applicant wherein he sought another adjournment to 26.03.2021. Keeping in view the reasons advanced in the e-mail dated 19.03.2021, the hearing in the matter was again scheduled for 26.03.2021. It was also pointed out to the applicant, vide e-mail dated 22.03.2021,

that the instant case had been taken up for out of turn disposal in order to comply with the directions of the Hon'ble Delhi High Court in WP(C) No. 1137/2021 and C.M. No. 3207/2021, as contained in the judgment dated 29.01.2021, wherein on the representation of the applicant that the instant revision may be decided within a time bound schedule, the Hon'ble High Court was pleased to dispose off the matter with the directions that "*the decision shall be taken by respondent No. 1 as expeditiously as possible and practicable and preferably within a period of 12 weeks from the date of receipt of copy of this order.*" Having approached the Hon'ble High Court for time bound disposal of the matter, it is incumbent upon the applicant to join and cooperate in the proceedings so that the matter could be disposed off expeditiously, in due compliance of the directions of the Hon'ble High Court. It was further pointed out that the matter having been taken up out of turn, every adjournment that the applicant sought came at the cost of other litigants whose matters have to be taken up in their own turn.

5.4 In the hearing held on 26.03.2021, Sh. Yogesh Gaur, Advocate made submissions on behalf of the applicant and reiterated the contents of revision application and also stated that as per the speed post copy at page 18 & 19 of the revision application, the impugned OIA was dispatched only on 21.05.2021. After receipt, the papers got misplaced in the office of the advocate. Hence, condonation of delay may be allowed. Sh. Amit Kumar Meena, Superintendent appeared on behalf of the respondent department and pointed out that the gold was coated with white material, which was found concealed in an around the suitcase. Thus, the intention to smuggle being clear, OIA be maintained.

6. The instant RA has been filed with a delay of 2 months and 29 days. Delay is condoned.

7. On examination of the relevant case records, the Commissioner (Appeals)'s order and the Revision Application, the Government observes that the impugned gold items were coated with white material and concealed in the suitcase. The coating was heavy, weighing 31.85 grams i.e. about 4.5% of the net weight of gold. The applicant did not declare the gold brought by him 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 9 (Total value of dutiable goods imported) and had also not declared anything against column no. 10(ii) and 10 (iii). 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.

8. 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 the gold articles were not smuggled and to the contrary admitted the concealment of gold articles which were brought by him for use for personal ornaments and for investment purposes. The manner of concealment, in and around the suitcase, by putting heavy coating on the gold clearly evidences that the applicant had attempted to smuggle the seized gold in a very systematic manner by adopting well thought strategy so as to avoid detection by the Customs authorities. Further, no other documentary evidence has been produced to establish bonafide ownership. The applicant has, thus, failed to discharge the burden placed on him, in terms of Section 123.

9. The question of law raised by the applicant is 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 & 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 3.2 to 3.6 of the O-I-O dated 22.11.2016, 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'.

10. 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 judgment in the case of Omprakash Bhatia Vs. Commissioner of Customs, Delhi (supra) 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)}. Similar view has been taken by the Hon'ble Madras high Court in the case of Malabar Diamond Gallery P. Ltd. Vs ADG, DRI, Chennai [2016(341)ELT65(Mad.)]. In Malabar Diamond (supra), the Hon'ble High Court has

specifically held that "64 Dictum of the Hon'ble Supreme Court and High Court 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----." The ratio of the aforesaid judgments is squarely applicable in the facts of the present case.

11. 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 in the background of attempted smuggling by very clever 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. It has also been observed by the original authority that objects of public policy, restricting import of gold, shall be frustrated if the redemption was permitted. Thus, applying the ratio of P. Sinnasamy (Supra), the discretion exercised by the original authority does not merit interference. Further, the case laws relied upon by the applicant in support of his contention are not applicable in the facts of the present case and these decisions are of a period prior to the judgment in Sinnasamy case.

12. Applicant has also contended that the adjudicating authority has not specified the purpose and quantum of penalty imposed under Section 112 (a) and 114 AA separately. Section 112 (a) and Section 114 AA reads as under:

Section 112 (a)

*'Penalty for improper importation of goods, etc.- Any person, -
(a) who, in relation to any goods, does or omits to do any act which act or omission would render such goods liable to confiscation under section 111, or abets the doing or omission of such an act, or'*

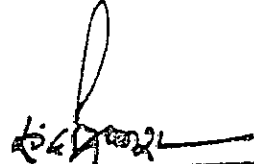
Section 114

'Penalty for use of false and incorrect material. - If a person knowingly or intentionally makes, signs or uses, or causes to be made, signed or used, any declaration, statement or document which is false or incorrect in any material particular, in the transaction of any business for the purposes of this Act, shall be liable to a penalty not exceeding five times the value of goods.'

The Government observes that the applicant has not declared the pieces of gold bars brought by him before the Customs authorities and made a false declaration on the Customs Declaration Slip. This declaration was required to be made under Section 77 *ibid.* Thus, the imposition of penalty under Section 112 (a) and Section 114 AA is merited.

13. It is further contended by the applicant that the penalty can only be imposed for willful infraction. Further, the penalty of Rs. 2,50,000/- (wrongly claimed as Rs. 7,98,000/- in the RA) imposed is highly excessive and incommensurate with the nature of allegations and the gravity of offence. It is also averred that present proceedings arose out of alleged altercation of the applicant with the Customs officers on his arrival and that his statements were dictated. The Government finds that these allegations are merely bald statements. Neither the panchanama proceedings, before independent witnesses, nor the statements recorded under section 108 have been contradicted with the help of any admissible evidence. No evidence of the alleged altercation has also been produced. The Government further finds that, as specifically brought out in paras 7 & 8 above, the nature and manner of concealment of gold and its non declaration to the Customs authorities, leaves no manner of doubt that the actions of applicant were willful and with criminal intent. It is also observed that the applicant is a lawyer by profession and as such well versed with the consequences of his actions. In the circumstances, present contention of the applicant is not acceptable. The penalty imposed is neither excessive nor incommensurate.

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



(Sandeep Prakash)

Additional Secretary to the Government of India

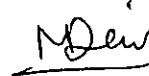
Mr. Neeraj Kumar Saini,
A-25, Surya Nagar, Ground Floor,
Sahibabad, Ghaziabad,
Uttar Pradesh - 201011

Order No. 66/21-Cus dated 01-04-2021

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. Yogesh Gaur, Advocate, Chamber No. G-707, Lawyers Chamber Block, Karkardooma Courts, Delhi-110032.
5. PA to AS(RA).
6. Guard File.
7. Spare Copy.

ATTESTED



(Nirmala Devi)
Section Officer (Revision Application)