

SPEED POST



F. No. 375/63/B/2018-R.A.
GOVERNMENT OF INDIA
MINISTRY OF FINANCE
(DEPARTMENT OF REVENUE)

14, HUDCO VISHALA BLDG., B WING
6TH FLOOR, BHIKAJI CAMA PLACE,
NEW DELHI-110066

Date of Issue... 5/4/21

Order No. 73/21-63 dated 1-4-2021 of the Government of India passed by Sh. Sandeep Prakash, Additional Secretary to the Government of India, under Section 129DD of the Customs 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/167/2018 dated 06.06.2018 passed by the Commissioner of Customs (Appeals), New Customs House, Near IGI Airport, Delhi-110037

Applicant : Mr. Suhail, Kairana (UP)

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

ORDER

A Revision Application No. 375/63/B/2018-RA dated 31.07.2018, has been filed by Mr. Suhail, Kairana (hereinafter referred to as the applicant) against the Order-in-Appeal No. CC(A)Cus/D-I/Air/167/2018 dated 06.06.2018, passed by the Commissioner of Customs (Appeals), New Customs House, Near IGI Airport, Delhi-110037. Commissioner (Appeals) has upheld the order of the Assistant Commissioner of Customs, IGI Airport, Terminal-3, New Delhi bearing no. 220/2016 dated 09.01.2017, wherein one gold bar recovered from him, concealed in rectum, weighing 176 grams valued at Rs. 4,89,049/-, has been absolutely confiscated and free allowance has been denied to the applicant. The adjudicating authority has also imposed a penalty of Rs. 1,00,000/- under Sections 112(a) & 114AA of the Customs Act, 1962 on the Applicant, which was reduced to Rs. 70,000/- by the Commissioner (Appeals).

2. The brief facts of the case are that the applicant had arrived on 21.03.2012 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 one gold bar was recovered from him, concealed in rectum, weighing 176 grams and valued at 4,89,049/-. The applicant in his statement dated 24.02.2016, recorded under Section 108 of the Customs Act, 1962, admitted the recovery of gold bar. Applicant, further stated that the gold bar was purchased by him in Dubai and that he attempted to smuggle out the same out of IGI Airport with the intent to evade duty.

3. The revision application has been filed canvassing that the applicant is an illiterate person and was not aware of the rules and implications of the laws of Indian Customs Act, 1962. The gold bar was purchased by him for self use and may be allowed to be released on payment of Customs duty@ 36.05% only.
4. Personal hearing was held on 01.04.2021. Sh. Ravinder Wadhawan, Advocate appeared on behalf of the applicant. He reiterated the grounds of revision already stated in the revision application. Sh. Wadhawan requested that the goods may be released on fine, penalty and appropriate duty; that penalty is on a higher side which may be reduced. None appeared on behalf of the respondent nor any request for adjournment was 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, it is evident that the impugned gold bar was recovered from the applicant, concealed in his rectum. He did not declare the same under Section 77 of Customs Act, 1962 to the customs authorities at the airport. Further, the applicant has admitted 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 the gold bar was not smuggled. It is on record that the gold was concealed in rectum which 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.

7. The contention of the applicant that being an illiterate person he was not aware of Customs Laws and regulations, is not acceptable. If the applicant was not aware of laws and regulations, there was no need for him to conceal the gold bar in his recturm. Thus, it is a clearly premeditated act.

8. The Government observes that the Hon'ble Supreme Court in the case of Sheikh Mohd. Omer vs Collector of Customs, Calcutta & Ors {1971 AIR 293} 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 Assistant Commissioner, in paras 7 & 8 of the O-I-O dated 09.01.2017, 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 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 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----."* The ratio of the aforesaid judgments is squarely applicable in 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, 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 decisions relied upon by the applicant in support of his contention are not applicable in the facts of the present case.

11. Applicant has also requested for the reduction of penalty. The Government observes that the original authority had imposed a penalty of Rs. 1,00,000/- which was reduced to Rs. 70,000/- by the Commissioner (Appeals). In the facts and

circumstances of the case and specifically as the gold was concealed in rectum, Government holds that the penalty of Rs. 70,000/- is just and fair and no further interference is merited.

12. The revision application is rejected.



(Sandeep Prakash)

Additional Secretary to the Government of India

Mr. Suhail, R/o 2164,
Gali Kalyan Pura, Turkman Gate,
Delhi-110006.

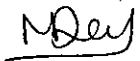
Order No. 73/21-Cus dated 1-4-2021

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. Assistant Commissioner of Customs, IGI Airport, Terminal-3, Delhi-110037
4. Sh. R.K. Wadhawan, Advocate, H.No. 70, 2nd Floor Street No. 1, Sector-7, Ram Prastha, Green Vaishali, Ghaziabad, U.P.
5. PA to AS(RA)
6. Guard File.

7. *Spare copy.*

ATTESTED



(Nirmala Devi)
Section Officer (R. A.)