

SPEED POST



F. No. 375/54/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. 9/4/21

Order No. 78/21-Cus dated 8-4-2021 of the Government of India passed by Sh. Sandeep Prakash, 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/91/2018 dated 15.03.2018 passed by the Commissioner of Customs (Appeals), New Customs House, Near IGI Airport, Delhi- 110037

Applicant : Shri Vikas Sharma, Karnal

Respondent : Commissioner of Customs (Airport & General)

ORDER

A Revision Application No. 375/54/B/2018-RA dated 04.07.2018 has been filed by Sh. Vikas Sharma, Karnal (hereinafter referred to as the applicant) against the Order-in-Appeal No. CC(A)Cus/D-I/Air/91/2018 dated 15.03.2018 passed by the Commissioner of Customs (Appeals), New Customs House, Near IGI Airport, Delhi-110037. Commissioner (Appeals) has upheld the order-in-Original No. 89-Adj./2016 dated 20.07.2016, passed by the Addl. Commissioner of Customs, IGI Airport, Terminal-3, New Delhi, wherein 8 pieces of rectangular gold strips concealed in two support rods of iron handle of checked in trolley baggage, collectively weighing 900 grams valued at Rs. 22,48,407/-, recovered from the applicant, have been absolutely confiscated and free allowance has been denied to the applicant. The adjudicating authority has imposed a penalty of Rs. 4,50,000/- 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 24.01.2015 at IGI Airport from Bangkok by Flight No. TG 323 and was intercepted near the exit gate after he had crossed the Customs Green Channel. After search of his person and of his baggage 8 pieces of rectangular gold strip (900 grams) were recovered from him concealed in two support rods of handle of the checked in trolley baggage. The value of seized gold was appraised at Rs.24.48.407/- by the Jewellery Appraiser at IGI airport. The applicant in his statement dated 24.01.2015, recorded under Section 108 of the Customs Act, 1962, admitted the recovery of subject gold strips. Applicant further stated in his statement that the gold strips were handed over to him by an unknown

person in Bangkok for onward delivery to an unknown person in Delhi, who would identity him outside the Delhi Airport as that person had his photograph and photo of his passport. In consideration, he had received an amount of Rs. 15,000/- in cash.

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 penalty. Gold imported by the applicant is *bonafide* as the gold was purchased by the Appellant from his own earnings and borrowed money from his friends and relatives staying in Bangkok. The said gold was for his personal use. It is further contended that it is not a case of concealment as the gold was kept in the hand bag of the Appellant.

4. Personal hearing was held on 07.04.2021, in virtual mode. Sh. D. S. Chadha, Advocate, appeared on behalf of the applicant. He reiterated the grounds of revision already stated in the revision application. Sh. Chadha, Advocate, further stated that gold is not a prohibited item and, therefore, even if attempted to smuggled by concealment, it should be allowed to be redeemed. He also undertook to file a compilation of case laws in support of his contention. Sh. A. K. Meena, Superintendent, appeared on behalf of the department and stated that this is the clear case of concealment and reiterated the findings of the lower authorities. Applicant vide e- mail dated 07.04.2021 submitted a compilation of decisions relied upon.

5. On examination of the relevant case records, the Commissioner (Appeals)'s order and the Revision application, it is evident that the impugned gold strips were recovered from the applicant. He 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 declared 'NIL' in Column 9 (Total value of dutiable goods imported) and declared 'NO' against the column no. 10(ii) to 10 (iii). 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 articles

were not smuggled and to the contrary admitted the concealment of gold articles which were brought by him as a carrier, for monetary consideration. The manner of concealment, in two support rods of handle of the checked in trolley baggage, clearly evidences that the applicant had attempted to smuggle the seized gold in a premeditated manner by adopting well thought out strategy so as to avoid detection by the Customs authorities. The contention of the applicant that the gold was purchased by him appears to be an afterthought as the applicant himself, in his statement dated 24.01.2015, has admitted that the gold strips were carried by him for monetary consideration. 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 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 & Ors {1971 AIR 293} wherein it was 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 3.3 to 3.8 of the O-I-O dated 20.07.2016, 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. 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.)], while relying upon the judgment in the case of Om prakash Bhatia (supra), 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 Hon'ble 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.

9. 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 present case, the original authority has refused to grant redemption in the background of attempted smuggling by concealment, for monetary gains, with intent to evade Customs Duty and keeping in view the objects of Government policy restricting import of gold. 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"." As already observed that the original authority has in the instant case after appropriate consideration passed a reasoned order refusing to allow redemption. 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 as these decisions are of a period prior to the judgment in Sinnasamy case and/or have been passed without noticing the same.

10. Keeping in view the facts and circumstances of the case, specifically the manner of concealment, the penalty imposed is just and fair.

11. The revision application is rejected.



(Sandeep Prakash)
Additional Secretary to the Government of India

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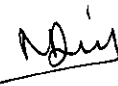
Order No. /21-Cus dated 2021

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. D. S. Chadha; Advocate, G-16, 2nd Floor, Lajpat Nagar-I, New Delhi 110024
5. PA to AS(RA)
6. Guard File.

7. spare copy.

ATTESTED



(Nirmala Devi)
S.O (R. A.)