

SPEED POST



F.No. 375/55/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...20/4/21

Order No. 82/21-Cus dated 19-4-2021 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/107/2018 dated 21.03.2018 passed by the Commissioner of Customs (Appeals), New Customs House, Near IGI Airport, Delhi-110037
- Applicant : Mr. Abdul Nissar Thaivalappu Abdul Khader, Kasargod District, Kerala
- Respondent : Commissioner of Customs (Airport & General), New Delhi
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ORDER

A Revision Application No. 375/55/B/2018-RA dated 06.07.2018 has been filed by Mr. Abdul Nissar Thaivalappu Abdul Khader, Kasargod District, Kerala, (hereinafter referred to as the applicant) against the Order-in-Appeal No. CC(A)Cus/D-I/Air/107/2018 dated 21.03.2018 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. 161/ADC/DR/2018 dated 07.12.2016 wherein 12 gold bars, which were recovered from the applicant, weighing 1399.68 grams (net weight) and valued at Rs. 33,12,035/-, have been absolutely confiscated and free allowance has been denied to the applicant. Penalty of Rs. 6,50,000/- has been imposed under Section 112 & 114AA of the Customs Act, 1962, which has been maintained in appeal.

2. The brief facts of the case are that the applicant arrived on 23.11.2014 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 12 gold bars were recovered from his possession, value whereof was appraised at Rs.33,12,035/- by the Jewellery Appraiser at IGI airport. The 12 pieces of gold bars, recovered from the applicant, were seized under Section 110 of the Customs Act, 1962, under panchanama dated 24.11.2014. The applicant in his statement dated 24.11.2014, recorded under Section 108 of the Customs Act, 1962, admitted the recovery of 12 gold bars. He further stated that the impugned gold bars were given to him by a person name Mr. Irfan at Dubai Airport, to carry to India, for onward handing over

to another person outside Delhi Airport. He was paid an amount of Rs. 30,000/- along with to and fro air tickets for this work.

3. In the revision application, it has been contended that the applicant was intercepted and the gold was detected and recovered from him while putting the hand baggage in the X-ray machine. There was absolutely no concealment in any manner and that the applicant was denied fair opportunity to declare the gold. In this light, it has been pleaded that the applicant may be permitted to either re-export the gold bars or to clear one kg of gold on payment of concessional rate of duty and the balance quantity of 399.68 grams on payment of duty at baggage rate.

4. Personal hearing was granted on 01.03.2021, 24.03.2021 and 19.04.2021. Sh. R.P. Bairwah, Superintendent, appeared on 01.03.2021 and requested that the orders of lower authorities be maintained. Sh. Mohd. Zahir, Advocate, appeared for the applicant on 19.04.2021 and reiterated the contents of the revision application. He highlighted that the goods were not concealed. In the circumstances, the absolute confiscation is harsh. Therefore, the goods may be released on appropriate fine and duty.

5. On examination of the relevant case records, the Commissioner (Appeals)'s order and the Revision Application, the Government observes that the applicant did not declare the gold brought by him under Section 77 of Customs Act, 1962 to the customs authorities at the airport. 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. Although, the facts recorded in the Panchnama and the contents of the statement recorded before the Customs Officers are being

denied by the applicant, there is nothing on record to indicate that the applicant sought to controvert these documents, with the help of cross-examination of Panchas and the officers concerned, in the adjudication proceedings. Thus, these contentions appear to be merely proforma and can not be accepted.

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. 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.

7.1 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 Additional Commissioner, in paras 4.3 to 4.5 of the O-I-O dated 07.12.2016, 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'.

7.2 Further, Hon'ble Madras high Court in the case of Malabar Diamond Gallery P. Ltd. Vs ADG, DRI, Chennai [2016(341)ELT65(Mad.)] 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

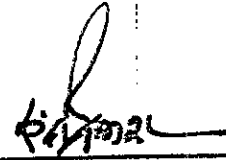
"prohibited goods", in Section 2 (33) of the Customs Act, 1962-----." The ratio of the aforesaid judgment is squarely applicable in the facts of the present case.

8. 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 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 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.

9. Further, the imposition of penalty under Section 114 AA of the Customs Act, 1962 is justified, in the facts of this case, as the applicant intentionally failed to declare

the gold being carried by him and thereby made a declaration which was false and incorrect.

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



(Sandeep Prakash)

Additional Secretary to the Government of India

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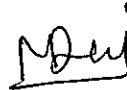
Order No. 82/21-Cus dated 19-4-2021

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. Additional Commissioner of Customs, IGI Airport, Terminal-3, Delhi-110037.
4. Sh. Mohd Zahir, Advocate, 3/57-A, Nedungadi Gardens, west Nadakkavu, Calicut, Kerala-673-011
5. PA to AS(RA).
6. Guard File.

7. Spare copy.

ATTESTED



(Nirmala Devi)

Section Officer (Revision Application)