

SPEED POST



F. No. 375/62/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....

29/4/21

Order No. 85 / 21-CW dated 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/193/2018 dated 13.07.2018, passed by the Commissioner of Customs (Appeals), New Customs House, Near IGI Airport, Delhi-110037

Applicant : Mr. Furqan, Delhi

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

ORDER

A Revision Application No. 375/62/B/2018-RA dated 24.07.2018 has been filed by Mr. Furqan, Delhi (hereinafter referred to as the applicant) against the Order-in-Appeal No. CC(A)Cus/D-I/Air/193/2018 dated 13.07.2018 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. 170/2016 dated 16.11.2016, wherein three gold bars, which were concealed in shoes worn by him, recovered during the personal search of the applicant, collectively weighing 290 grams valued at Rs. 7,05,953/-, have been absolutely confiscated and free allowance has been denied to the applicant. The adjudicating authority had imposed a penalty of Rs.1,50,000/- 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 01.10.2015 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 three gold bars, which were concealed in shoes worn by him, were recovered. The value of the gold bars of 24 carat purity, collectively weighing 290 grams, was appraised as Rs.7,05,953/- by the jewellery appraiser. The applicant in his statement dated 01.10.2015, recorded under Section 108 of the Customs Act, 1962, admitted the recovery of gold bars.

Applicant further stated that gold bars were purchased by him in Dubai but he could not produce any purchase bill to justify his claim. He also admitted that the gold bar was recovered from the shoes worn by him so as to avoid detection by the customs authorities. The applicant also submitted an application dated 24.11.2015 to the original authority requesting for the release of seized gold and waived the issue of show cause notice as well as the personal hearing.

3. The revision application has been filed canvassing that the seized gold is not a prohibited item and hence these may be released on payment of redemption fine and penalty. Gold article imported by the applicant is *bonafide* as the gold was brought by him was for his personal use. Imposition of Penalty of Rs. 1,50,000/- is on higher side as the applicant had brought the gold for his own use.

4. Personal hearing, in virtual mode, was held on 01.04.2021. Sh. S.S. Arora, Advocate appeared on behalf of the applicant and highlighted that it is incorrect to state that the gold was concealed in shoes. No panchanama was drawn and the Detention Receipt does not mention this fact; that statement of the applicant recorded under Section 108 is not admissible as it was recorded in English, a language that the applicant does not know; that gold is not prohibited goods; that Government has in the past allowed redemption in the case of concealment in Shoes (order No. 14/2018-cus dated 05.01.2018) and in underwear (Order No. 58-59/2018-Cus dated 02.04.2018). Sh. Sunil Kumar, Superintendent requested for adjournment as records were not readily available. Another hearing was held on 19.04.2018. Sh. Ashok Kumar, Superintendent

confirmed that in this case no panchnama was drawn and the Detention Receipt did not mention concealment of gold in shoes. However, the applicant has in his statement admitted to the concealment in shoes and this statement has not been retracted. Sh. Kumar further stated that the applicant is a habitual offender and has been subsequently also apprehended with rectum concealment. He undertook to furnish the details of the case, along with the status of adjudication and appeal proceedings. Sh. S.S. Arora, Advocate agreed that the statement has not been retracted but emphasized that the statement was in English (a language not known to the applicant). He also reiterated the submissions made in the Personal Hearing held on 01.04.2021. The respondent department, vide email dated 20.04.2021, submitted that the applicant is a habitual offender and was again apprehended on 01.11.2016 when he arrived from Dubai and two cut pieces of gold bars weighing 116 grams were recovered from him. The case was adjudicated by the Assistant Commissioner vide OIO No. 310/2016-17 dated 13.04.2017 and the impugned gold pieces were absolutely confiscated. As per their record, no appeal has been filed against the order dated 13.04.2017.

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, concealed in his shoes, and the fact of non-declaration in his statement tendered under Section 108 of Customs Act, 1962. This statement has admittedly not been retracted. Only ground on which the statement is, now, challenged is that it is recorded

in a language not known to the applicant, i.e., English. The Government observes that the applicant did not take this plea before the original authority. In case the applicant's statement had been so recorded, it was incumbent upon him to bring this position before the original authority. Instead the applicant even waived the opportunities available to him to effectively defend himself, i.e., he waived the issue of show cause notice and personal hearing. In appeal before the Commissioner (Appeals) also, when applicant was represented through his lawyer, this plea does not appear to have been taken. Thus, the present contention of applicant appears to be an afterthought and is, as such, not acceptable.

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 bars 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 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 7 to 8 of the O-I-O dated 16.11.2016, 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'.

7.2 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 (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".*

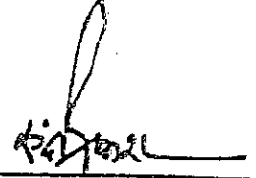
The Apex Court has affirmed this order of Madras High Court {2010(254) ELT A 15 (Supreme Court)}. Similar view has been taken by the Hon'ble Madras High Court in the case of Malabar Diamond Gallery P. Ltd. Vs ADG, DRI, Chennai [2016(341) ELT65(Mad.)], and the Hon'ble High Court has specifically held 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.

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 challenged 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 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. The decisions relied upon by the applicant have been made either without noticing the judgment in Sinnasamy (supra) or are of a period prior to it.

9. Applicant has also prayed for reduction in penalty amount to be imposed under Section 112(a). The Government observes that the penalty of Rs. 1,50,000/- imposed

under Section 112(a) and 114AA does not merit interference in the facts and circumstances of the case.

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



(Sandeep Prakash)
Additional Secretary to the Government of India

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

Order No. 85 /21-Cus 29/4/21 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. S.S. Arora, Advocate, B-1/71, Safdarjung Enclave, New Delhi 110029
5. PA to AS(RA)
6. Guard File.

7 spare copy

ATTESTED



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