

SPEED POST



F. No. 375/69/B/2018-R.A.  
GOVERNMENT OF INDIA  
MINISTRY OF FINANCE  
(DEPARTMENT OF REVENUE)

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

Date of Issue.. 13/5/21

Order No. 95/2021-Cus dated 12.5.2021 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/185/2018 dated 29.06.2018, passed by the Commissioner of Customs (Appeals), New Customs House, Near IGI Airport, Delhi-110037.

Applicant : Mr. Akram Ali, Moradabad.

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

**ORDER**

A Revision Application No. 375/69/B/2018-RA dated 03.08.2018 has been filed by Mr. Akram Ali, Moradabad (hereinafter referred to as the applicant) against the Order-in-Appeal No. CC(A)Cus/D-I/Air/185/2018 dated 29.06.2018 passed by the Commissioner of Customs (Appeals), New Customs House, Near IGI Airport, Delhi-110037. Commissioner (Appeals) has upheld the order of the Additional Commissioner of Customs, IGI Airport, Terminal-3, New Delhi, bearing no. 191/Adjn./2017 dated 28.09.2017, wherein six gold bars, which were concealed in heavy duty iron carried by him, recovered during the personal search of the applicant, collectively weighing 583 grams valued at Rs. 13,51,627/-, have been absolutely confiscated and free allowance has been denied to the applicant. The adjudicating authority had imposed a penalty of Rs.2,50,000/- 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 06.01.2016 at IGI Airport from Muscat and was intercepted near the exit gate after he had crossed the Customs Green Channel. After search of his person and of his baggage six gold bars, which were concealed in heavy duty electric iron in one of his checked in baggage, were recovered. The value of the gold bars of 999.9 purity, collectively weighing 583 grams, was appraised as Rs.13,51,627/- by the jewellery appraiser. The applicant in his statement dated 06.01.2016, recorded under Section 108 of the Customs Act, 1962, admitted the recovery of gold bars from his possession and the contents of the panchanama. Applicant further stated that gold bars were handed over to him by his maternal brother's friend, Mr. Aneesh in Saudi Arabia to hand over the same to his family. The applicant tendered another statement dated 10.01.2016 and admitted that the contents of his earlier statement dated 06.01.2016 were true and correct. Thereafter a show cause notice dated 13.06.2016 was issued to the applicant who

participated in the adjudication proceedings leading to the Order-in-Original dated 28.09.2017.

3. The revision application has been filed canvassing that the statements of the applicant are not admissible as these are recorded in a language not known to him, i.e., English; that gold imported is bonafide and the applicant is eligible to import gold, at concessional rate of duty, in terms of notfn. No. 12/2012-Cus dated 17.03.2012; and that import of gold is not prohibited. Hence, it has been prayed that the seized gold may be allowed to be redeemed on payment of appropriate fine and concessional rate of duty @ 10.2%. Personal penalty has also been requested to be set aside/ reduced.

4. Personal hearing, in virtual mode, was held on 12.05.2021. Sh. S.S. Arora, Advocate appeared on behalf of the applicant and reiterated the contents of the RA. Sh. Arora submitted that gold is not a prohibited item and, therefore, it should be allowed to be redeemed on payment of appropriate fine and penalty. He further stated that the applicant is ready to pay duty at baggage rate on the gold. No one appeared for the respondent department nor any request for adjournment has been received. Hence, the matter is taken up for decision based on records.

5. The Government has examined the matter. It is observed 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 a heavy duty electric iron carried by him, and the fact of non-declaration, in his statements tendered under Section 108 of Customs Act, 1962. As per records, these statements have not been retracted. Only ground on which these statements are, now, challenged is that these are recorded in a language not known to the applicant, i.e., English. The Government observes that applicant tendered two statements-one on 06.01.2016 and another on 10.01.2016 i.e. at a gap of 04 days by when in normal course

the applicant would have also had the benefit of legal advise before recording of statement dated 10.01.2016. Therefore, if the statement was recorded on 06.01.2016 in a language not known to him and the contents thereof were not read and explained to him, the applicant would have filed retraction immediately, which has not been done in this case. Rather, the applicant again recorded a statement on 10.01.2016, that too in English, confirming the contents of his earlier statement dated 06.01.2016. This statement dated 10.01.2016 also does not appear to have been retracted. Further, panchanama proceedings that bring out the seizure proceedings have not been challenged. 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, as

rightly observed by the original authority, the invoice produced to claim ownership appears to be an afterthought as it was not produced at the time of seizure and rather a statement was tendered claiming that the gold was carried at the instructions of one Mr. Aneesh. The Government observes that if the applicant had bonafide purchased the gold with an intention to clear on payment of duty, he would have carried the invoice with him and it would have been recovered in his personal search. Further, the applicant would have come forward declared the gold and paid duty rather than attempting to clear it without declaring by cleverly concealing it in the heavy duty electric iron. 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"*.

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

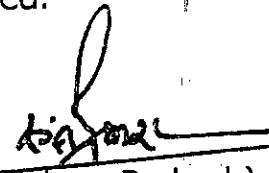
*with, then import of gold, would squarely fall under the definition "prohibited goods", in Section 2 (33) of the Customs Act, 1962-----."*

7.3 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 ratio of the judgments of the Apex Court and the Madras High Court, as cited above, there is no doubt that the subject goods are 'prohibited goods'.

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 these proceedings. 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 Garq 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 has, after extensive application of several judgments of the Apex Court, 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 with an intent to evade payment of duty. 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 are not applicable as these 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 waiver/ reduction of penalty. The Government observes that the penalty of Rs. 2,50,000/- imposed under Section 112(a) and 114AA does not merit interference in the facts and circumstances of the case, specially keeping in view the nature and manner of concealment.

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

  
(Sandeep Prakash)

Additional Secretary to the Government of India

Mr. Akram Ali,  
R/o Teekhnoti, PO-Dhakiajat, PS-Dilari,  
Teh.-Thakurdwara,  
Distt. Moradabad, Uttar Pradesh.

Order No. 95/21-Cus dated 12-5-2021

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. S.S. Arora, Advocate, B-1/71, Safdarjung Enclave, New Delhi 110029
  5. PA to AS(RA)
  6. Guard File.
- Spare Copy.

  
ATTESTED

Subdt- (RA)