

SPEED POST



F.No. 375/74/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., 13/5/21.

Order No. 96/21-Cus dated 13-5-2021 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/205/ 2018 dated 24.07.2018 passed by the Commissioner of Customs (Appeals), New Customs House, Near IGI Airport, Delhi-110037

Applicant : Mr. Surinder Kumar Sharma, New Delhi

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

ORDER

A Revision Application No. 375/74/B/2018-RA dated 20.08.2018 has been filed by Mr. Surinder Kumar Sharma, New Delhi (hereinafter referred to as the applicant) against the Order-in-Appeal No. CC(A)Cus/D-I/Air/205/2018 dated 24.07.2018 passed by the Commissioner of Customs (Appeals), New Customs House, New Delhi. Commissioner (Appeals) has upheld the order of the Additional Commissioner of Customs, IGI Airport, Terminal-3, New Delhi bearing no. 241/Adjn./2017 dated 20.10.2017 wherein three cut pieces of gold, concealed near the front wheel of the baggage trolley by the applicant, weighing 733 grams (net weight) and valued at Rs. 17,74,857/-, have been absolutely confiscated and free allowance has been denied to the applicant. Besides, penalty of Rs.4,00,000/- was also imposed by the original authority on the applicant, 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 21.01.2016 at IGI Airport from Bangkok and was intercepted near the exit gate after he had crossed the Customs Green Channel. After search of his person and of his baggage 03 pieces of gold, concealed in a packet stuck near the front wheel of the baggage trolley, were recovered from his possession. The value of seized gold, of purity 995.0, was appraised at Rs. 17,74,857/- by the Jewellery Appraiser at IGI airport. The 03 cut pieces of gold bars, recovered from the applicant, were seized under Section 110 of the Customs Act, 1962, under panchanama dated 21/22.01.2016. The applicant in his statement dated 22.01.2016, recorded under Section 108 of the Customs Act, 1962, admitted the recovery of 03 pieces of gold bars and agreed with the contents of the panchanama dated 21/22.01.2016. He further stated that he had smuggled the gold for profit motive; that he was fully aware that the import of gold was liable to Customs duty; and that the smuggling of the same was a punishable offence.

3. The revision application has been filed canvassing that there was no concealment and the gold was visible to naked eye; that the gold imported is bonafide; that the import of the gold is not prohibited and, therefore, may be released on payment of redemption fine and appropriate duty. Further, the penalty imposed may be set aside or reduced.

4. Personal hearing, in virtual mode, was held on 12.05.2021. Sh. S.S. Arora, Advocate, appeared on behalf of the applicant. Sh. S. S. Arora, Advocate stated that the applicant is the owner of the gold; that gold is not a prohibited item. Hence the gold should be allowed to be redeemed on appropriate fine. They are ready to pay duty at baggage rate. No one appeared for the respondent department and no request for adjournment has been received. Hence, the matter is taken up for disposal 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. In the Customs Declaration slip, the applicant had not declared anything in Column 9 (Total value of dutiable goods imported) and had also not declared anything against column no. 10(ii) and 10 (iii). 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.

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. The manner of concealment,

in a packet stuck with a tape near the front wheel of the baggage trolley, 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. The contention that there was no concealment as the gold was visible to naked eye is not acceptable as the front wheel of the baggage trolley (near which the packet containing gold was stuck with tape) is itself is not easily visible. 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 15.3 to 15.5 of the O-I-O dated 20.10.2017, 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"*.

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 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) ELT 65(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----."*

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 aforesaid judgments, 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 assailed in the instant Revision Application. The Government observes that, in terms of Section 125 of the Customs Act, 1962, the option to release seized 'prohibited goods', on redemption fine, 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) ELT 1154 (Mad.)}, the Hon'ble Madras High Court has, relying upon 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"."* In the present case, the original authority has refused to grant redemption in the background of attempted smuggling by very clever concealment with intent to evade Customs 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, the Order of the original authority, upheld by the Commissioner (Appeals) being a reasoned Order based on relevant considerations, does not merit interference. The case laws 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.

9. The Government finds that the penalty imposed is also just and fair 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

13.05.2021


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Order No. 96/21-Cus dated 13-5-2021

Copy to:

1. The Commissioner of Customs, IGI Airport Terminal-3, New Delhi-110037.
2. The Commissioner of Customs (Appeals), New Custom House, New Delhi-110037.
3. Additional Commissioner of Customs, IGI Airport, Terminal-3, New 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.


13/5/21
ATTESTED
Suptt (RA)