

SPEED POST



F.No. 380/19/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... 20/5/21

Order No. 98/21-Cus dated 20-5-2021 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/204/2018 dated 23.07.2018 passed by the Commissioner of Customs (Appeals), New Customs House, Near IGI Airport, Delhi-110037
- Applicant : Commissioner of Customs (Airport & General), New Delhi
- Respondent : Sh. Mohammed Ayub, Jodhpur
-

ORDER

A Revision Application No. 380/19/B/2018-RA dated 01.10.2018 has been filed by the Commissioner of Customs (Airport & General), New Custom House, New Delhi (hereinafter referred to as the applicant) against the Order-in-Appeal No. CC(A)Cus/D-I/Air/204/2018 dated 23.07.2018 passed by the Commissioner of Customs (Appeals), New Customs House, Near IGI Airport, Delhi-110037. Commissioner (Appeals) has modified the order of the Joint Commissioner of Customs, IGI Airport, Terminal-3, New Delhi bearing no. Adj-213/AS/JC/2017 dated 10.09.2017 wherein 05 pieces of yellow metal (made of gold), concealed by affixing under the handle of baggage trolley of Sh. Mohammed Ayub (herein after referred to as the respondent), weighing 506.66 grams and valued at Rs. 13,77,917/-, have been absolutely confiscated and free allowance has been denied to the applicant. Besides, the penalty of Rs.2,00,000/- under Section 112 & 114AA of the Customs Act, 1962, imposed by the original authority on the respondent has been reduced by the Commissioner (Appeals) to Rs. 1,60,000/-.

2. The brief facts of the case are that the respondent arrived on 21.01.2017 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 05 pieces of yellow metal (made of gold) concealed by affixing under the handle of baggage trolley, were recovered from his possession. The value of seized gold was appraised at Rs.13,77,917/- by the Jewellery Appraiser at IGI airport. The 05 pieces of gold bars, recovered from the respondent, were seized under Section 110 of the Customs Act, 1962, under panchanama dated 21.01.2017. The respondent, in his

statement dated 21.01.2017, recorded under Section 108 of the Customs Act, 1962, admitted the recovery of 05 pieces of gold bars and agreed with the contents of the panchnama dated 21.01.2017. 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 on the ground that the respondent had attempted to clear the gold without payment of duty; that there was concealment and thus the import of gold is not bonafide; that the import of the gold is prohibited and, therefore, release of the gold bars on payment of redemption fine and penalty is not correct.

4. Personal hearing, in virtual mode, was held on 19.05.2021. Sh. Mohammed Ayub (respondent) appeared and reiterated the contents of his written submission dated 16.05.2021, received by email dated 16.05.2021. No one appeared for the applicant 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 respondent did not declare the gold brought by him under Section 77 of Customs Act, 1962 to the customs authorities at the airport. Further, the respondent 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. In his written submissions dated



16.05.2021 also, the respondent has admitted that he attempted to smuggle gold for profit motive to ameliorate his dire financial condition.

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 respondent has failed to produce any evidence that the gold bars were not smuggled. The manner of concealment, by affixing under the handle of baggage trolley, clearly evidences that the respondent had attempted to smuggle the seized gold in a well thought out and systematic manner so as to avoid

detection by the Customs authorities. The applicant has, thus, failed to discharge the burden placed on him, in terms of Section 123.

7.1 The Commissioner (Appeals) has held that 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 Joint Commissioner, in paras 3.3 to 3.8 of the O-I-O dated 10.10.2017, 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".*

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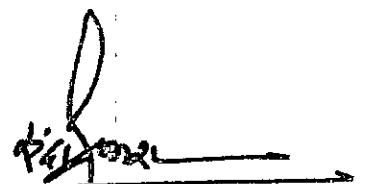
The Apex Court has affirmed this order of Madras High Court {2010(254)ELT A 15 (Supreme Court)}. Further, in the case of Malabar Diamond Gallery P. Ltd. Vs ADG, DRI, Chennai [2016(341)ELT65(Mad.)], the Hon'ble Madras High Court has specifically held that *"64. Dictum of the Hon'ble Supreme Court and 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'. As such, the Commissioner (Appeals has erred in holding that the impugned gold is not a prohibited item.

8. 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, in terms of Section 125 of the Customs Act, 1962, the option to release '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)ELT1154 (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, being a reasoned Order based on relevant considerations, does not merit interference. It is, accordingly, held that Commissioner (Appeals) has proceeded to allow redemption on the erroneous finding that impugned gold is not a prohibited item. Other observations made by the Commissioner (Appeals) to support redemption are also found to be erroneous.

9. In view of the above, the impugned OIA dated 23.08.2018²³ is set aside to the extent of allowing redemption of confiscated gold on payment of fine. However, reduction in penalty is maintained. The revision application is disposed of accordingly.



(Sandeep Prakash)
Additional Secretary to the Government of India

The Commissioner of Customs,
Airport & General,
IGI Airport, Terminal-3,
New Delhi-110037

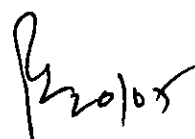
Order No. 98/21-Cus 20 dated 20-5-2021

Copy to:

1. Mr. Mohammed Ayub, D 102, Veetrag City, Near Dali Bai Circle Jodhpur-342008, Rajasthan.
2. The Commissioner of Customs (Appeals), New Custom House, Delhi-110037.
3. Joint Commissioner of Customs, IGI Airport, Terminal-3, Delhi-110037.
4. PA to AS(RA).
5. Guard File.

G. Spare copy.

ATTESTED



RAVI PRAKASH
Officer on Special Duty
Government of India
Ministry of Finance
Department of Revenue
HUDCO Vishala Building
Bhikaji Cama Place
New Delhi - 110066