

SPEED POST



F.No. 375/101/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..... 21/5/21

Order No. 59/21-Cus dated 20-05-2021 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/1927/2015 dated 09.10.2015, passed by the Commissioner of Customs (Appeals), New Custom House, New Delhi.

Applicant : Sh. Deepak Chanana, Karnal

Respondent : Commissioner of Customs, Airport & General, New Custom House, New Delhi

ORDER

A Revision Application No.375/101/B/2018-RA dated 25.09.2018 has been filed by Sh. Deepak Chanana, Karnal (hereinafter referred to as the Applicant) against the Order-in-Appeal No. CC(A)Cus/D-I/Air/1927/2015 dated 09.10.2015 passed by the Commissioner of Customs (Appeals), New Custom House, New Delhi, vide which appeal filed by the Applicant herein against Order-in-Original No. 45/2015 dated 30.01.2015 of the Additional Commissioner of Customs, IGI Airport, New Delhi has been disposed off.

2. Brief facts of the case are that the Applicant arrived from Bangkok at the IGI Airport, New Delhi on 23.02.2014. He was intercepted by the Customs Officers at the exit gate after he had crossed the Green Channel. Upon search of his person and his baggage, 8 cut pieces of gold, totally weighing 477.50 gms, were found concealed inside the hollow metal bars supporting the wheel base of violet colour trolley bag of the applicant. The Applicant had, in Column 6 of the disembarkation slip, declared total value of dutiable goods as Rs. 7000/-. The recovered gold was seized under Panchnama dated 23/24.02.2014 and was valued at Rs. 12,65,469/-. The Applicant in his statement dated 24.02.2014, recorded under Section 108 of the Customs Act, 1962, admitted the recovery of seized gold from the violet colour trolley bag carried by him. He also admitted that the gold was cut in pieces by Goldsmith in Bangkok and he charged 3000/- Baht from him; that he adopted this modus-operandi to conceal the gold to sell it in domestic market for profit motive. In a further statement dated 14.03.2014, the Applicant admitted his mistake and confirmed the contents of earlier statement dated 24.04.2018. The Additional Commissioner of Customs, vide aforesaid Order-in-Original dated 30.01.2015, ordered absolute confiscation of the seized gold and imposed a penalty of Rs. 5,00,000/- on the Applicant under Sections 112 and 114 AA of the Customs Act. In appeal, the applicant did not get any relief.

3. The revision application has been filed on the grounds that gold imported is bonafide; that import of gold is not prohibited; that penalty is

not imposable under Section 114 AA; and that only a token penalty may be imposed under Section 112(a).

4. Personal hearing in the matter was held on 19.05.2021. Sh. S.S. Arora, Advocate appeared for the Applicant. No one appeared for the respondent department. It was noted that the subject RA has been filed on 25.09.2018 against OIA dated 09.10.2015 and it is stated in the RA that the OIA was communicated to Applicant on 24.07.2018 with notation "That the order was sent at the wrong address." Upon being asked to substantiate this claim, Sh. Arora requested for adjournment. Matter was accordingly adjourned to 20.05.2021 at 1100 hrs. The personal hearing was again held on 20.05.2021. Sh. S.S. Arora drew attention to the written submission dated 18.05.2021 filed by email dated 20.05.2021 wherein it is brought out that the OIA is wrongly addressed to H. No. 308 instead of correct H. No. 322. Hence, the OIA having been originally sent to a wrong address, his contention in respect of OIA being received only on 24.07.2018 may be accepted. On merits, Sh. Arora submitted that the Commissioner (Appeals) has, while disposing off the appeal, failed to address all issues raised by them. Hence, the matter be remanded to Commissioner (Appeals) to decide afresh and pass a speaking order. The respondent department again failed to attend the personal hearing. No request for adjournment has also been received. Therefore, the matter is taken up for disposal based on records.

5. The instant RA has been filed on 25.09.2018 against the impugned Order-in-Appeal dated 09.10.2015, i.e., almost 3 years after the date of impugned Order-in-Appeal. It is the contention of the Applicant that the Order-in-Appeal originally sent to them was not received as the house number in his address is wrongly mentioned as 308 instead of the correct house number 322 and that a certified copy of the Order-in-Appeal was obtained by them subsequently, which was received only on 24.07.2018. The Government observes that this contention of the Applicant of the address being wrongly mentioned in the Order-in-Appeal is correct. Therefore, the instant RA is admitted.

6. On merits, it is observed that while in the RA detailed grounds have been spelt out to challenge the impugned Order-in-Appeal, in the personal hearing it has been submitted that the Commissioner (Appeals) has disposed of the appeal without addressing all the issues raised in the appeal memorandum and, hence, the matter is liable to be remanded to Commissioner (Appeals) to decide afresh by passing a speaking order. The Government observes that, though the Commissioner (Appeals) has passed a brief order, the basic issue of absolute confiscation has been directly addressed. The Commissioner (Appeals) has also found this to be a "case of concealment and, therefore, an attempt of smuggling" and, therefore, held that "The appeal does not merit consideration". Thus, the Government finds that the contention of the Applicant, in the personal hearing, to remand the matter to the Commissioner (Appeals) is not acceptable.

7. As regards the issues raised in the revision application, the Government observes that the gold was found concealed inside the hollow metal bar supporting the wheel base of the trolley bag of the Applicant. It has been admitted by the Applicant during the investigation that he had got the gold cut in pieces so that it could be concealed in the manner described hereinabove. It is also an admitted fact that the gold was not declared in the disembarkation slip as required under Section 77 of the Customs Act, 1962. As such, the contention of the applicant that gold imported is bonafide is not correct.

8. 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 manner of concealment clearly evidences that the gold bars were smuggled. The Applicant has failed to produce any other evidence as well to establish that the gold bars were not smuggled. The applicant has, thus, failed to discharge the burden placed on him, in terms of Section 123.

9.1 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} wherein it is 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 12 to 14 of the O-I-O dated 30.01.2015 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*".

9.2 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.)], wherein it is 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----."*

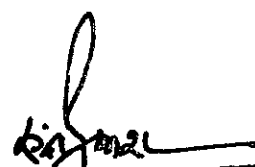
9.3 The original authority has correctly brought out that in this case the conditions subject to which gold could have been legally imported have not been fulfilled. Thus, following the ratio of the aforesaid judgments, there is no doubt that the subject goods are 'prohibited goods'.

10. 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.

11. Further, as observed above, the Applicant made a false and incorrect declaration in the disembarkation slip that he was carrying dutiable goods worth only Rs.7000/- and failed to declare the gold he was carrying, which is in contravention of Section 77 *ibid*. Therefore, the imposition of penalty under Section 114 AA is merited. The Government also finds that the quantum of penalty imposed, under Sections 112 & 114 AA, is just and fair, in the facts and circumstances of the case.

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



(Sandeep Prakash)

Additional Secretary to the Government of India

Sh. Deepak Chanana,
R/o House No. 322, Sector-8, Karnal-132 001.

Order No. 99 /21-Cus dated 20-05-2021

Copy to:

1. The Commissioner of Customs, Airport & General, IGI Airport, Terminal-3, New Delhi- 110 037.

2. The Commissioner of Customs (Appeals), New Custom House, Delhi-110 037.
3. Sh. S.S. Arora, Advocate, BI/71 Safdarjung Enclave, New Delhi- 110 029.
4. PA to AS(RA)
5. Guard File.
- ✓ 6. Spare Copy


21/5/21
~~ATTESTED~~