

SPEED POST



F.No. 375/13/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. 06/11/2020
Order No. 01/2020-Lm dated 01/01/2020 of the Government of India passed by
719 Cus of the Government of India passed by
Smt. Mallika Arya, Principal Commissioner & 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/ 532/ 2017 dated 28.11.2017 passed by the
Commissioner of Customs (Appeals), New Customs House,
Near IGI Airport, Delhi-110037

Applicant : Mr Mohd. Nasir.

Respondent : Commissioner of Customs, IGI- Airport, T-3, New Delhi

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ORDER

A Revision Application No. 375/13/B/2018-RA dated 15.02.2018 has been filed by Mr Mohd. Nasir (hereinafter referred to as the applicant) against the Order-in-Appeal No. CC(A)Cus/D-I/Air/ 532/ 2017 dated 28.11.2017 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. 30/ 2015 dated 02.02.2015 regarding absolute confiscation of the gold bars (13 nos.) total weighing 4059.76 grams valued at Rs. 1,02,01,690/- (Rupees One Crore Two Lacs One Thousand Six Hundred and Ninety only) alongwith packing material used for concealment. A penalty of Rs. 25,00,000/- (Rupees Twenty Five Lacs) has been imposed on the applicant under Section 112 read with Section 114AA of the Customs Act, 1962.

2. The brief facts of the case are that the applicant arrived from Dubai on 07.02.2014 at Terminal-3 IGI Airport, Delhi and was intercepted near the exit gate after he had crossed the customs green channel. After personal search 13 gold bars tied around his waist with the help of specifically designed elastic waist belt, were recovered from his possession. The gold bars cumulatively weighed 4059.76 grams and were valued at Rs. 1,02,01,690/ by the Jewellery Appraiser at IGI airport. The applicant in his statement recorded under Section 108 of the Customs Act, 1962 admitted that the recovered gold bars did not belong to him and were handed over to him by Mr. Shadab Ali Khan in Dubai. He had carried the impugned gold bars at the behest of Mr. Shadab Ali Khan, who provided him free tickets and stay.

3. The revision application has been filed on the grounds that the applicant is the owner of the impugned gold bars and he was carrying the same under bonafide belief that this activity is not prohibited. The Statement tendered under Section 108 of Customs Act, 1962 before the customs authorities was recorded under duress. Gold bars are not prohibited under Section 2 (33) of Customs Act, 1962. Gold bars

should be allowed to be released on redemption or re-export under Section 125 of Customs Act, 1962. He also requested that penalty under Customs Act, 1962 is not imposable on him. The applicant also contended that he has a right to rebut the adverse evidence and to cross-examine witnesses.

4. Personal hearing was fixed on 19.11.2019 and 06.12.2019 in this case. Neither the applicant nor the respondent appeared on either of the dates. However the applicant requested for another date of hearing. Accordingly another date of personal hearing was fixed on 20.12.2019. Mr. Shafiq Khan, Advocate appeared on behalf of the applicant. He submitted that the applicant was given gold bars in Dubai by a gentleman called Mohd. Aziz to manufacture jewellery out of the same. No investigation was carried out by the Customs Authorities in respect of a gentleman called Shadab Ali, who is purported to be the person who sent the applicant to Dubai. No investigation has been carried out against him by the customs authorities although his mobile no. was available with them. The applicant was asked to submit a copy of statement tendered by the applicant on 07.02.2014 before the customs authorities, which he submitted on 23.12.2019. As no one appeared on behalf of the respondent on this date also nor any request for adjournment has been received, the case is being taken up for final disposal.

5. On examination of the relevant case records, the Commissioner (Appeals)'s order and the Revision application it is evident that the impugned gold bars were recovered from the applicant. He did not declare the same under Section 77 of Customs Act, 1962 to the customs authorities at the airport. Further the applicant has admitted 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[

(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 the burden of proof is on the applicant to justify the bonafides of the import, from whom the impugned goods are recovered in terms of Section 123 of Customs Act, 1962. No evidence has been put forth by the applicant to testify the same either before the lower authorities or in the revision application.

The applicant has denied the statement tendered under Section 108 of Customs Act, 1962, after a span of four and a half years and that too in the revision application. This appears to be an afterthought.

Reliance is placed on the judgment of Supreme Court of India in the case of Surjeet Singh Chhabra Vs. U.O.I.[1997 (89) E.L.T. 646 (S.C.)] wherein the Hon'ble court has held as follows:-

“Evidence - Confession statement made before Customs officer though retracted within six days is an admission and binding since Customs Officers are not Police Officers - Section 108 of the Customs Act and FERA.”

“Natural Justice - Seized goods - Cross-examination of witnesses regarding the place at which recovery was made to be allowed but where Petitioner has confessed, non

allowing of cross examination is not violative of principles of natural justice even if such confession was retracted within six days - Customs Officers are not Police Officers hence confession though retracted is binding - Sections 108 and 111 of the Customs Act, and FERA."

Therefore the statement recorded under under Section 108 of the Customs Act, 1962 is admissible, even when it is retracted as per the aforesaid judgment of Apex Court.

The applicant has submitted in the Revision Application that he has the right to cross-examine the witnesses and rebut the adverse evidence. It is observed that the applicant did not request for cross-examination of witnesses before the adjudicating authority or before Commissioner (Appeals). Hence his request cannot be considered at this stage.

7. The applicant has requested for benefit of notification 12/2012-cus dt. 17.03.2012. A plain reading of Notification no. 12/ 2012- customs dated 17.03.2012 makes it evident that a passenger returning to India only after six months can bring one kg of gold on payment of customs duty. Since the stay of the applicant outside India was five days as per his own statement tendered under Section 108 of Customs Act, 1962, he does not fulfil the definition of an 'eligible passenger as per condition no. 35 of Notification no. 12/ 2012- customs dated 17.03.2012. Therefore benefit of Notification no. 12/ 2012- customs dated 17.03.2012 is not available to him and is denied.

8. 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 definition of 'prohibited goods' given by the Apex Court in case of Omprakash Bhatia Vs. Commissioner of Customs, Delhi [2003(155) ELT 423 (SC)] 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 upheld this order of Madras High Court and dismissed the special leave to Appeal (Civil) no. 22072 of 2009 filed by Samynathan Murugesan.

The ratio of aforesaid judgment is squarely applicable to the facts of this case.

9. In the present case the adjudicating authority has denied the release of impugned goods on redemption fine under Section 125 of Customs Act, 1962, as he was a carrier.

The High Court of Bombay in the case of Union of India Vs. Aijaj Ahmad – 2009(244)ELT 49 (Bom), while deliberating on option to be given to whom to redeem the goods has held in para 3 of the judgment as follows:-

"3. In the instant case, according to the respondent himself the owner was Karimuddin as he had acted on behalf of Karimuddin. The question of the Tribunal exercising the jurisdiction u/s 125 of the Customs Act and remit the matter to give an option to the respondent herein to redeem the goods was clearly without jurisdiction."

It is evident that the applicant had brought the gold bars (13 nos.) as a carrier totally weighing 4059.76 grams valued at Rs. 1,02,01,690/- (Rupees One Crore Two Lacs One Thousand Six Hundred and Ninety only) on behalf of someone and did not declare the impugned goods to the customs authorities with an intention to evade customs duty. He has accepted this fact in the statement tendered under Section 108 of Customs Act, 1962.

10. In light of various judicial pronouncements discussed in the earlier paras Government upholds the order of the lower authorities regarding absolute confiscation of the impugned gold bars (13 nos.) total weighing 4059.76 grams

valued at Rs. 1,02,01,690/- (Rupees One Crore Two Lacs One Thousand Six Hundred and Ninety only) under Section 111 of Customs Act, 1962.

(ii) Penalty of Rs. 25,00,000/- (Rupees Twenty Five Lacs) has been imposed on the applicant under Section 112 read with Section 114AA of the Customs Act, 1962. Penalty is not imposable under Section 114AA of the Customs Act, 1962 on the applicant. However a penalty of Rs. 25,00,000/- (Rupees Twenty Five Lacs) is imposed under Section 112 (a) of the Customs Act, 1962, keeping in view the gravity of offence adopting an ingenious method of concealment of impugned gold bars.

11. Accordingly the order-in-appeal is upheld and revision application is rejected.

Mallika Arya
(Mallika Arya)

Additional Secretary to the Government of India

1. Mr Mohd. Nasir, 2463, 1st Floor, Street Kuan Wali Chitli Qabar, Jama Masjid, Delhi-110006.

2. The Commissioner of Customs, IGI Airport Terminal-3, New Delhi-110037

Order No. 01/2020- (W) dated 01/01/2020
19 Cus 2019

Copy to:

1. The Commissioner of Customs (Appeals), New Custom House, Delhi-110037
2. PA to AS(RA)
3. Guard File.
4. Spare Copy.

ATTESTED

Nirmala Devi
(Nirmala Devi) *ISHWER CHAUDHARY*
S.O. (R.A.) *Sepal (R.A.)*