

SPEED POST



F. No. 375/64/B/2019-RA
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GOVERNMENT OF INDIA
MINISTRY OF FINANCE
(DEPARTMENT OF REVENUE)

14, HUDCO VISHALA BLDG., B WING
6th FLOOR, BHICAJI CAMA PLACE,
NEW DELHI-110 066

Date of Issue. 05/01/22

Order No. 05-07/22-Cus dated 04-01-2022 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 Applications filed, under Section 129DD of the Customs Act 1962 against the Common Order-in-Appeal No. CCA(A)Cus/D-I/Air/431-433/2019-20 dated 08.11.2019 passed by the Commissioner of Customs (Appeals), NCH, New Delhi

Applicant(s) : Sh. Deepak Kumar Gupta, Delhi.
Sh. Gulshan Soni, Delhi.
Sh. Deepak, Delhi

Respondent : Commissioner of Customs, IGI Airport, New Delhi.

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ORDER

The Revision Application No. 375/64/B/2019-RA, Application No. 375/64/B/2019-RA and Application No. 375/64/B/2019-RA, all dated 21.11.2019, have been filed by Sh. Deepak Kumar Gupta, Tilak Nagar, New Delhi - 110018 (hereinafter referred to as the '**Applicant-1**'), Sh. Gulshan Soni, Vikas Puri, New Delhi (hereinafter referred to as the '**Applicant-2**') and Sh. Deepak, Janak Puri, Delhi (hereinafter referred to as the '**Applicant-3**'), respectively, against the common Order-in-Appeal No. CCA(A)Cus/D-I/Air/431-433/2019 dated 08.11.2019, passed by the Commissioner of Customs (Appeals), New Delhi. The Commissioner (Appeals) has upheld the order of the Additional Commissioner of Customs, IGI Airport, New Delhi, bearing No. 138/Adj/19 dated 06.05.2019, wherein penalty of Rs. 2 Lakh was imposed upon the Applicant-1 under Sections 112 & 114AA of the Customs Act, 1962 for abetting in the act of smuggling by his co-passengers including Applicants-2 and Applicant-3. The original authority also ordered absolute confiscation of nine cut pieces of gold bars of 995 purity, collectively weighing 2256 grams, valued at Rs. 68,54,630/-, which were recovered from three co-passengers, including Applicants-2 and Applicant-3 and penalty amounting to Rs. 1.5 Lakh and Rs. 6 Lakh, respectively was also imposed upon Applicant-2 and Applicant-3 consequent upon recovery of 01 cut piece of gold, weighing 250 grams, valued at Rs. 7,59,600/- from the shoes of the Applicant-2 and 04 cut piece of gold, weighing 998 grams, valued at Rs. 30,32,323/- also from the shoes of the Applicant-3. The recovered gold cut pieces were confiscated absolutely under Section 111(d), 111(i), 111(j), 111(l), 111(m) and 111(o) of the Customs Act, 1962. The order of the original authority has been upheld by the Commissioner (Appeals).

2.1 The brief facts of the case are that all the Applicant(s) arrived, on 23.02.2019, at IGI Airport, New Delhi from Bangkok and they were intercepted near the exit gate after they had crossed the Customs Green Channel. On being asked by the Customs officers whether they were carrying any gold with them, they replied in negative. No Customs Declaration Form was recovered from the Applicant(s). On personal search of Applicant -1 nothing offending was recovered whereas the personal search of Applicant-2 and Applicant-3 resulted in the recovery of 01 cut piece of gold, weighing 250 grams, valued at Rs. 7,59,600/-, from the shoes of the Applicant-2 and 04 cut piece of gold, weighing 998 grams, valued at Rs. 30,32,323/-, from the shoes of the Applicant-3.

2.2 The Applicant-1, in his statement dated 24.02.2019, tendered under Section 108 of the Customs Act, 1962, admitted that he was fully aware of the fact that Applicant-2

and Applicant-3 were carrying gold which was handed over to them by the owner, namely, Sh. Kapil at Bangkok; that he was not supposed to carry the gold in person and instead he was assigned the task to keep a watch of the surroundings and alert the co-passengers, in case they would be followed by any agency while exiting IGI Airport, Delhi; and that he was supposed to receive money after successful delivery of gold.

2.3 The Applicant-2, in his statement dated 24.02.2019, tendered under Section 108 of the Customs Act, 1962, admitted that the recovered gold did not belong to him and he did not have any documentary evidence in support of the said recovered one cut piece of gold bar weighing 250 gms; that the 250 gms of gold was concealed by him in his shoe sole and the same was recovered from his possession during DFMD; that the recovered gold belonged to Sh. Kapil who offered him to carry gold against monetary consideration of Rs. 1 Lakh; and that he did not declare the gold at the Red Channel to evade customs duty.

2.4 The Applicant-3, in his statement dated 24.02.2019, tendered under Section 108 of the Customs Act, 1962, admitted that the gold weighing 998 gms was concealed by him in his shoe sole and the same was recovered from his possession; that the recovered gold belonged to Sh. Kapil; that his boss (Applicant-2) met Sh. Kapil and accepted the offer of smuggling of money in lieu of Rs. 1 Lakh.

2.5 None of the Applicants produced any documents evidencing licit possession in respect of the seized gold. They also reiterated their respective statements dated 24.02.2019 in their further statements recorded on 26.02.2019 & 10.03.2019.

2.6 The original authority, after following the principles of natural justice, passed the aforesaid Order-in-Original dated 06.05.2019, as detailed in para 1 above. The appeals filed by the Applicants herein have been rejected vide the impugned Order-in-Appeal.

3. The revision application has been filed by the Applicant-1, mainly, on the grounds that nothing incriminating was recovered from his possession; and that heavy penalty has been imposed upon him which he is unable to deposit. The revision applications have been filed by the Applicant-2 & 3, mainly, on the grounds that they had declared verbally the gold pieces in question before the concerned customs officer when questioned; that they had brought the gold on credit from Sh. Kapil from Bangkok; and that the gold is not a 'prohibited item'.

4.1 Personal hearing, in virtual mode, was held on 22.12.2021 in respect of Applicant -1 & 2. Ms. Sangita Bhayana, Advocate appeared for the Applicants and reiterated the contents of the respective revision applications. She also drew attention to the written submissions filed on 12.12.2021 and requested that seized gold may be released on payment of fine, applicable duty and penalty. Sh. Charan Singh, Superintendent appeared on behalf of the respondent department and supported the orders of the lower authorities.

4.2 Personal hearing, in virtual mode, was held on 04.01.2022 in respect of Applicant -3. Ms. Sangita Bhayana, Advocate appeared for the Applicant and reiterated the contents of revision application. She requested for release of gold on imposition of redemption fine, duty and penalty. Sh. Charan Singh, Superintendent supported the orders of the lower authorities.

5. The Government has carefully examined the matter. It is observed that Applicant-2 & 3 failed to declare the possession of gold to the customs officers, in violation of Section 77 of the Customs Act, 1962 read with Regulation 3 of the Customs Baggage Declaration Regulation, 2013, as amended vide Notification No. 31/2016-Customs (NT) dated 31.01.2016. Further, the fact of non-declaration and attempted smuggling has been admitted by them in their respective statements tendered under Section 108 of Customs Act, 1962. The Applicant-2 & 3 were also not eligible to import gold, as per conditions stipulated under Notification No. 50/2017-Customs dated 30.06.2017 (as amended). The Applicant-1 aided and abetted Applicant-2 & 3 and one other person in smuggling of gold. In fact, all three appear to have been a part of organised smuggling of gold.

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. No documents evidencing licit purchase of gold have been produced by the Applicant-2 & 3. Further, the manner of concealment i.e. in the shoe soles, also makes it apparent that the Applicants had attempted to smuggle gold in a pre-meditated manner. The Applicant-2 & 3 have, thus, failed to discharge the burden placed on them, in terms of Section 123, *ibid*.

7.1 The question of law raised by the Applicant-2 & 3 is that the import of gold is not 'prohibited'. The Government observes that in the case of *Sheikh Mohd. Omer vs Collector of Customs, Calcutta & Others* [1971 AIR 293], the Hon'ble Supreme Court has 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*". 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"*. Further, in the case of *UOI & Ors vs. M/s Raj Grow Impex LLP & Ors* [2021-TIOL-187-SC-CUS-LB], the Hon'ble Supreme Court has followed the judgments in *Sheikh Mohd. Omer* (*supra*) and *Om Prakash Bhatia* (*supra*) to hold that *"any restriction on import or export is to an extent a prohibition; and the expression "any prohibition" in Section 111(d) of the Customs Act includes restrictions."*

7.2 In the case of *Malabar Diamond Gallery P. Ltd. Vs ADG, DRI, Chennai* [2016(341) ELT65(Mad.)], the Hon'ble Madras High Court has summarized the position on the issue, in respect of gold, as under:

"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, in paras 13.3 to 13.5 of the Order-in-Original dated 06.05.2019, correctly brought out that gold is allowed to be imported in baggage, subject to certain conditions, which have not been fulfilled in this case. Thus, following the ratio of the aforesaid judgments, there is no doubt that the subject goods are 'prohibited goods'.

8. The original authority has denied the release of offending 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 [Ref. Garg Woollen Mills (P) Ltd vs. Additional Collector of Customs, New Delhi {1998 (104) E.L.T. 306 (S.C.)}]. In the case of UOI & Ors vs. M/s Raj Grow Impex LLP & Ors (supra), the Hon'ble Supreme Court has held *"that when it comes to discretion, the exercise thereof has to be guided by law; has to be according to the rules of reason and justice; and has to be based on the relevant considerations"*. Similarly, 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 clever concealment with intent to evade Customs Duty as also in the context of the Government's policy objectives on the issue. 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 judgments relied upon by the Applicants have been rendered in the facts of the relevant cases and are not applicable specifically in view of Raj Grow Impex (supra) and Sinnasamy (supra).

9. The Government also observes that the penalty imposed on the Applicants herein is just and fair. It is neither excessive nor heavy, in the facts and circumstances of the case. The contention of Applicant-1 that nothing was recovered from him and, as such, penalty imposed on him is excessive also does not merit consideration in as much

as the Applicant-1 was part of an organised attempt at smuggling and actively aided & abetted the other Applicants in the matter.

10. In view of the above, the subject revision applications are rejected.


(Sandeep Prakash)

Additional Secretary to the Government of India

1. Sh. Deepak Kumar Gupta,
S/o Sh. Subhash Chander,
R/o WZ-226, Mukherjee Nagar,
Tilak Nagar, New Delhi-110018.
2. Sh. Gulshan Soni,
S/o Suresh pal Soni,
R/o 356, Site-1, Vikas Puri,
New Delhi 110018.
3. Sh. Deepak,
S/o Sh. Satish Kumar,
R/o A-574, JJ Colony, Pankha Road,
Janak Puri, New Delhi – 110059

Order No. 05-07/22-Cus dated 04-01-2022

Copy to:

1. The Commissioner of Customs (Appeals), New Customs House, New Delhi-110037
2. The Commissioner of Customs, Airport & General, IGI Airport, New Delhi-110037
3. Ms. Sangita Bhayana, Advocate, Chamber No. 707, LCB-III, High Court of Delhi, New Delhi 110003.
4. PA to AS(RA).
- ✓ 5. Guard file.
6. Spare Copy.

ATTESTED



(लक्ष्मी राघवन)
(Lakshmi Raghavan)
अनुभाषिका अधिकाारी / Section Officer
वित्त मंत्रालय (राजस्व विभाग)
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भारत सरकार / Govt. of India
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