

F.No. 375/67/B/18-RA
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F.No. 375/67/B/18-RA
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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...16-6-2021

Order No. 107-108/21-Cus dated 16-6-2021 of the Government of India passed by Shri Sandeep Prakash, Additional Secretary to the Government of India, under section 129DD of the Custom Act, 1962.

Subject : Revision Applications filed, under section 129 DD of the Customs Act 1962 against the Order-in-Appeal No.CC(A)Cus/D-1/Air/160-161/2018 dated 08.05.2018, passed by the Commissioner of Customs (Appeals), New Custom House, New Delhi

Applicant : 1. Mr. Rachen Vongkhattri, New Delhi
2. Mrs. Manpreet Kaur, Amritsar

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

ORDER

Revision Application Nos. 375/67/B/18-RA and 375/66/B/2018-RA, both dated 37.07.2018, have been filed by Mr. Rachen Vongkhatti, (hereinafter referred to as the Applicant-1) and Mrs. Manpreet kaur w/o Mr. Rachen Vonkhatti, (hereinafter referred to as the Applicant-2), respectively, against the Order No.CC(A)Cus/D-1/Air/160-161/2018 dated 08.05.2018, passed by Commissioner of Customs (Appeals), New Delhi. Commissioner (Appeals) has upheld the order of the Additional Commissioner of Customs, IGI Airport, Terminal-3, New Delhi, bearing no. 72-Adj/2016 dated 11.07.2016, wherein nine yellow metal bars (made of gold), which were recovered from the Applicant-1, concealed in the shoes worn by him, and eight yellow metal bars (made of gold), which were recovered from the pockets of the jacket of the Applicant-2, collectively weighing 5185 grams valued at Rs. 1,17,65,491/-, have been confiscated absolutely. The adjudicating authority has also imposed a penalty of Rs. 12,50,000/- under Sections 112 and (b) & 114AA of the Customs Act, 1962 on the Applicant-1 and penalty of Rs. 11,00,000/- under Section 112 and 114AA of the Customs Act, 1962 on the Applicant-2, which have been maintained in appeal.

2. The brief facts of the case are that the Applicant-1 and Applicant -2 arrived on 30.07.2015 at IGI Airport from Bangkok and were intercepted near the exit gate after they had crossed the Customs Green Channel. After search of their person and of their baggage 09 pieces of yellow metal bars (made of gold) wrapped with black carbon and cello tape, weighing 2745 grams and valued at Rs. 62,28,789/-,

concealed in the shoes worn by the Applicant -1 and 08 pieces of yellow metal bars (made of gold) wrapped with black carbon and cello tape, weighing 2440 grams valued at Rs. 55,36,702/-, found in the pocket of jacket worn by the Applicant -2, were recovered from their possession. The value of seized gold, was appraised at Rs. 1,17,65,491/- by the Jewellery Appraiser at IGI airport. The 17 pieces of gold bars, recovered from the Applicants, were seized under Section 110 of the Customs Act, 1962, under Panchnama dated 30.07.2015. The Applicant-1, in his statement dated 30.07.2015, recorded under Section 108 of the Customs Act, 1962, admitted the recovery of 17 pieces of gold bars from him and his wife and agreed with the contents of the panchnama dated 30.07.2015. He further stated that the gold bars were given to them by their family friend named Mr. Yood for carrying to India. Mr. Yood offered Applicant -2 a sum of Rs. 2,00,000/- and free journey ticket of their family to India. Applicant-2, in her statement dated 30.07.2015, reordereed under Section 108 of the Customs Act, 1962, accepted the facts which were stated by her husband in his statement dated 30.07.2015 i.e. Applicant-1 and agreed with the contents of panchnama dated 30.07.2015. They admitted their mistake of not declaring the gold bars to the customs authorities for payment of customs.

3. The revision applications have been filed by both the Applicants canvassing that there was no concealment; that they had gone to the Red Channel to declare the gold; 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. It is further contended that the penalty imposed is on a higher side.

4. Personal hearing was granted on 01.04.2021, 22.04.2021, 04.05.2021 and 16.06.2021. Sh. S. S. Arora, Advocate, appeared, on behalf of the Applicants, on 16.06.2021. The Applicants in the present case are husband and wife and were intercepted together. The impugned Order-in-Appeal is also common. Therefore, at the request of Sh. S.S. Arora, Advocate, the RAs were taken up together for hearing. Sh. Arora reiterated the contents of the RAs and highlighted that the Applicants are the owners of gold and had brought it for offering at the Golden Temple; that there was no concealment; that Gold is not prohibited and redemption should be allowed in line with GOI Orders No. 51/2018-Cus & 214/2018-Cus and those in 2019 (369) ELT 1677 (GOI) and 2019 (369) ELT 1654 (Tri-Mum); that penalty under Section 114AA is not applicable as held in GOI Order No. 47/2018-Cus and 2019 (369) ELT 1683 (GOI); that penalty under Section 112 in respect of dutiable goods can only be upto 10% of the value of the goods. Hence, the penalty imposed should be reduced. Sh. Arora was asked to explain the following:

(i) The gold brought by the Applicants is 2440 grams and 2745 grams, i.e., not in standard units. Is it usual that offerings at religious places are made in non standard units? Sh. Arora in reply, submitted that he is not pressing this claim.

(ii) The gold pieces were found wrapped in black carbon paper with cello tape. Is it the standard wrapping/packaging for gold? Sh. Arora, in reply,

admitted that it can be treated as concealment. However, the case laws cited by him support release of the goods on RF even if there was concealment.

Sh. Rajnish Kumar, Superintendent supported the order of the Commissioner (Appeals).

5. The Government has examined the matter. It is observed that the Applicants did not declare the gold brought by them under Section 77 of Customs Act, 1962 to the customs authorities at the airport. In the Customs Declaration slip, the Applicants 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 Applicants have admitted the recovery of gold from them and the fact of non-declaration in their statements 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 Applicants have failed to produce any evidence that the gold bars were not smuggled. The manner of concealment, i.e. by wrapping in black carbon paper with cello tape and then keeping in the shoes worn by the Applicant-1 and in the pocket of jacket worn by the Applicant-2, clearly evidences that the applicant had attempted to smuggle the seized gold in a premeditated manner, to avoid detection by the Customs authorities. Applicants' contention that they are the owners of the gold is also not tenable as they themselves had admitted in their statements dated 30.07.2015 that the gold bars were handed over to them by someone else in Bangkok and they had carried the gold bars to India for monetary considerations. These statements dated 30.07.2015 have not been retracted by the Applicants. Further, no documentary evidence has been produced to establish bonafide ownership. Both the Applicants have, thus, failed to discharge the burden placed on them, in terms of Section 123.

7.1 The question of law raised by the Applicants 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 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*". The Additional Commissioner, in paras 3.3 to 4.2 of the O-I-O dated 11.07.2016, 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)ELT65(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 also been challenged herein. 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)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 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 cited in support of the plea for release of goods on redemption fine are not applicable in as much these Orders have been passed without considering the dictum of Hon'ble Supreme Court in Sheikh Mohd. Omer and Om Prakash Bhatia as well that of Hon'ble Madras High Court in Sinnasamy (supra).

9. The original authority has imposed penalty on both the Applicants, under Section 112 & 114AA *ibid* which has been upheld in the impugned Order-in-Appeal. The imposition of penalty under Section 114AA has been assailed by the Applicants. Section 114 AA reads as under:

Penalty for use of false and incorrect material. - If a person knowingly or intentionally makes, signs or uses, or causes to be made, signed or used, any declaration, statement or document which is false or incorrect in any material

particular, in the transaction of any business for the purposes of this Act, shall be liable to a penalty not exceeding five times the value of goods."

The Government observes that the Applicants had signed and made a false declaration on the Customs Declaration Slip. This declaration was required to be made under Section 77 *ibid.* Thus, the imposition of penalty under Section 114 AA is merited.

10. The contention that, in the present case, penalty only upto 10% of the value of goods can be imposed, under Section 112 of the Customs Act, 1962, is not acceptable as in respect of 'prohibited goods' the quantum of penalty (as provided for under Section 112 (i)) can be upto the value of goods liable for confiscation. The Government also finds that the quantum of penalty imposed is just and fair in the facts and circumstances of the case.

11. In view of the above, the revisions applications are rejected.



(Sandeep Prakash)

Additional Secretary to the Government of India

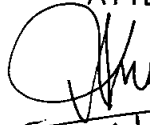
1. Mr. Rachen Vongkhattri,
C/o Mr. S. S. Arora, Advocate,
B-1/71, Safdarjung Enclave,
New Delhi 110029
2. Mrs. Manprit Kaur,
11221, Gali Masterwali ,
Mohalla Jessewala Taran,
Amritsar 143408

Order No. 107-108/21-Cus dated 16-6-2021

Copy to:

1. The Commissioner of Customs (Airport & General), IGI Airport Terminal-3, New Delhi-110037.
2. The Commissioner of Customs (Appeals), New Custom House, Near IGI Airport, New Delhi-110037.
3. Additional Commissioner of Customs, IGI Airport, New Custom House, New Delhi
4. Shri S.S. Arora, Advocate, B-1/71, Safdarjung Enclave , New Delhi 110029
5. PA to AS(RA)
6. Guard File.
7. Spare Copy

ATTESTED


16/6/21
Supdt. (RA)