

F.No. 380/16/B/2018-RA
F.No. 375/71/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...21/6/21

Order No. 110-111/21-Cus dated 18-6-2021 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. No.CC(A)Cus/D-I/Air/172/2018 dated 12.06.2018, passed by the Commissioner of Customs (Appeals), New Custom House, Near IGI Airport, New Delhi.
- Applicant : 1. Commissioner of Customs, Airport & General, New Delhi
2. Mr. Mohammad Lukman, Muzaffarnagar
- Respondent : 1. Mr. Mohammad Lukman, Muzaffarnagar
2. Commissioner of Customs, Airport & General, New Delhi.

ORDER

Revision Applications No.380/16/B/2018-RA dated 07.09.2018 and No. 375/71/B/2018-RA dated 13.08.2018, have been filed by Commissioner of Customs, Airport & General, New Delhi, (hereinafter referred to as the Applicant – 1) and Mr. Mohammad Lukman, Muzafarnagar (hereinafter referred to as the Applicant - 2), respectively, against the Order-in-Appeal No. CC(A)Cus/D- I/Air/172/2018 dated 12.06.2018, passed by the Commissioner of Customs (Appeals), New Custom House, New Delhi. Commissioner (Appeals), vide the impugned Order-in-Appeal, has modified the order of the Additional Commissioner of Customs, IGI Airport, Terminal-3, New Delhi, bearing no. 07/DR/ADC/2017 dated 31.01.2017, and allowed the appeal of the Applicant-2 to the extent that 1000 grams of gold be redeemed on payment of redemption fine of Rs. 3,70,000/- under Section 125 of the Customs Act, 1962 along with the payment of applicable customs duty @ 10.3% under Notification No. 12/2012-Cus dated 17.03.2012 and the absolute confiscation of the balance 1916 grams of gold was upheld. Besides, the penalty of Rs. 20,00,000/- imposed by the original adjudicating authority on the Applicant - 2 under Section 112 and Section 114 AA of the Customs Act, 1962 has been reduced to Rs. 7,00,000/-.

2. The brief facts of the case are that the Applicant-2 arrived, on 15.12.2014, 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 25 pieces

of gold bars (totally weighing 2916 grams), found in his hand baggage, were recovered from his possession. The value of seized gold, was appraised at Rs.70,95,211/- by the Jewellery Appraiser at IGI airport. The 25 cut pieces of gold bars, recovered from the Applicant, were seized under Section 110 of the Customs Act, 1962, under panchanama dated 15.04.2015. The Applicant-2 in his statement dated 15.04.2015, recorded under Section 108 of the Customs Act, 1962, admitted the recovery of 25 pieces of gold bars and agreed with the contents of the panchanama dated 15.04.2015. He further stated that he had purchased the seized gold bars from Gold Souk in Dubai; that he had loaned the money for purchase of gold from his relatives; 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. Further, he could not produce any document for licit possession of the seized gold bars.

3. The revision application no. 380/16/B/2018-RA has been filed by Applicant-1, mainly, on the ground that the Applicant-2 had attempted to smuggle the gold bars with the intent to evade payment of duty; that the Applicant did not fulfil the definition of "eligible passenger" as given in condition no. 35 of the Notification No. 12/2012-Cus dated 17.03.2012; that the foreign currency in his possession was not sufficient to pay duty and hence there was no intention to pay the same; that as he had not declared the same to the customs authorities on his arrival at IGI Airport, therefore, the import of gold by the Applicant -2 is not bonafide and as such the

benefit of Notification No. 12/2012 is not applicable to Applicant -2. Applicant – 2 has filed the revision application no. 375/71/B/2018-RA on the grounds that he is the owner of the gold; that the gold imported is bonafide; that the import of the gold is not prohibited and, therefore, the balance gold may be released on payment of redemption fine and appropriate duty. Further, the penalty imposed is on a higher side and may be reduced.

4. Personal hearing, in virtual mode, was held on 18.06.2021. Sh. S.S. Arora, Advocate, appeared on behalf of the Applicant-2 and reiterated the contents of RA No. 375/71/B/2018-RA. He highlighted that, as stated in para 6.6 of the impugned OIA, the Applicant – 2 is the owner of the seized gold and there was no concealment. Therefore, the balance quantity may be also be released on payment of Redemptioin Fine and at baggage rate of duty. Sh. Rajnish Kumar, Superintendent appeared for the department and reiterated the contents of RA No. 380/16/B/2018 – RA. He submitted that though in his statement passenger claimed to be owner of the gold, no documents (invoice) to this effect was produced at the time of interception nor was it recovered in search. Sh. Kumar submitted that this is a clear case of mis-declaration and, hence, the entire quantity should be absolutely confiscated as ordered by the original authority.

5. The Government has examined the matter. It is observed that the Applicant - 2 did not declare the gold brought by him under Section 77 of Customs Act, 1962 to the customs authorities at the airport. In the Customs Declaration slip, the Applicant- 2 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 applicant 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.

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."

Thus, as per Section 123, 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 Applicant-2 has failed to produce any evidence that the gold bars were not smuggled. A copy of invoice dated

14.04.2015 has been produced to claim that he had actually purchased the goods in Dubai. The Applicant-2 was apprehended on 15.04.2015 when he could have easily produced this invoice. However, he failed to do so even the during entire course of investigation. In the circumstances, the Government has no hesitation in holding that invoice produced cannot be relied upon, being an afterthought. Moreover, it is on record that the Applicant-2 had attempted to smuggle the gold bars by not declaring the same to Customs authorities at IGI airport. The Applicant-2 has, thus, failed to discharge the burden placed on him, in terms of Section 123.

7. A plain reading of Notification no. 12/2012- customs dated 17.03.2012 makes it clear that a passenger returning to India after six months can bring one kg of gold on payment of concessional rate of customs duty subject to condition 35 of the said notification, which, inter-alia, requires the eligible passenger to file a declaration before the proper officer of customs at the time of arrival in India. In the instant case, such a declaration was not made in respect of the gold bar seized, with a claim for exemption, and instead a conscious attempt has been made to smuggle by not declaring the same. Thus, the Applicant-2 does not fulfil the condition no. 35 of Notification no. 12/ 2012- Customs dated 17.03.2012. Therefore, in the facts and circumstances of the case, Government holds that the Applicant -2 is not eligible for the concessional rate of duty in terms of Notification no. 12/ 2012- customs dated 17.03.2012.

8.1 Applicant-2 has submitted 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 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 3.5 of the O-I-O dated 30.01.2017, 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*".

8.2 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, 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)}. In the case of Malabar Diamond Gallery P. Ltd. Vs ADG, DRI, Chennai [2016(341)ELT65(Mad.)], 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----*."

8.3 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'.

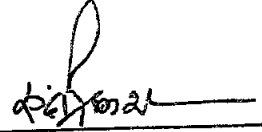
9.1 The original adjudicating authority has denied the release of impugned goods on redemption fine under Section 125 of Customs Act, 1962, however, the Commissioner (Appeals) has allowed the release of 1000 grams of gold on payment of redemption fine and at concessional rate of duty. The Government 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 with intent to evade Customs Duty. It has been specifically 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, is being a reasoned Order based on relevant considerations.

9.2 Commissioner (Appeals) could have interfered with the order of absolute confiscation only if the order passed by the original authority was not reasoned or was based upon irrelevant considerations. In the present case, the Commissioner (Appeals) has recorded no such findings. One factor that appears to have weighed on Commissioner (Appeals) is that the Applicant was eligible to import one kilogram gold, under notification no. 12/2012 dated 17.03.2012, at concessional rate of duty. This finding of Commissioners (Appeals) is erroneous, as already held hereinabove. As such, Order of Commissioner (Appeals) to allow release of one kg gold on payment of fine and at concessional rate of duty can not be sustained.

10. In view of the above, the impugned OIA dated 12.06.2018 is set aside to the extent of allowing redemption of one kg of confiscated gold on payment of fine and at concessional rate of duty. However, reduction in penalty ordered by

Commissioner(Appeals) is maintained. The revision application no. 380/16/B/2018-RA is disposed of accordingly. The revision application no. 375/71/B/2018-RA is rejected.



(Sandeep Prakash)

Additional Secretary to the Government of India

1. The Commissioner of Customs,
IGI Airport Terminal-3,
New Delhi-110037.
2. Mr. Mohammad Lukman
R/o Baghowali,
Muzaffarnagar-251001
Uttar Pradesh.

Order No. 110-111/21-Cus dated 18-6-2021

Copy to:

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

ATTESTED


21/6/2021
GULSHAN BHATIA
Superintendent