

F.No. 380/22/B/2018-RA
F.No. 375/104/B/2018-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... 27/07/2021

Order No. 138-139/21-Cus dated 26/07/2021 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/190/2018 dated 09.07.2018, 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. Vikram, Gurgaon

Respondent : 1. Mr. Vikram, Gurgaon
2. Commissioner of Customs, Airport & General, New Delhi.

ORDER

Revision Applications No.380/22/B/2018-RA dated 11.10.2018 and No. 375/104/B/2018-RA dated 15.10.2018, have been filed by Commissioner of Customs, Airport & General, New Delhi, (hereinafter referred to as the Applicant – 1) and Mr. Vikram, Gurgaon (hereinafter referred to as the Applicant - 2), respectively, against the Order-in-Appeal No. CC(A)Cus/D- I/Air/190/2018 dated 09.07.2018, 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. 143/Adj/2017 dated 08.08.2017 read with the Corrigendum dated 21.08.2017, 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.6,20,000/- under Section 125 of the Customs Act, 1962 along with the payment of applicable customs duty at Baggage Rates. Besides, the penalty of Rs. 4,00,000/- 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. 3,00,000/-.

2. The brief facts of the case are that the Applicant-2 arrived, on 30.12.2015, at IGI Airport from Hong Kong and was intercepted near the exit gate after he had crossed the Customs Green Channel. After search of his person and of his baggage two cut pieces of gold bars, concealed in the upper side tray of trolley, were recovered from his possession. The value of seized gold, was appraised at

Rs.23,31,840/- by the Jewellery Appraiser at IGI airport. The two cut pieces of gold bars, recovered from the Applicant, were seized under Section 110 of the Customs Act, 1962, under panchanama dated 30/31.12.2015. The Applicant-2 in his statement dated 31.12.2015, recorded under Section 108 of the Customs Act, 1962, admitted the recovery of two cut pieces of gold bars and agreed with the contents of the panchanama dated 30/31.12.2015. He further stated that he had purchased the seized gold bars in Hong Kong; that he had borrowed the money for purchase of gold from his friends; 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. 380/22/B/2018-RA has been filed by Applicant-1, mainly, on the ground that the Applicant-2 had attempted to smuggle the gold bars and adopted a method of ingenious concealment with the intent to evade payment of duty; 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 as the Applicant -2 had not made a true declaration. As such, the Commissioner (Appeals) ought not have interfered with the order of the original authority. Applicant – 2 has filed the revision application no. 375/104/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. Further, the redemption fine and

penalty imposed by the Commissioner (Appeals) are on a higher side and may be reduced.

4. Personal hearing was fixed on 28.06.2021 and 26.07.2021. Sh. S.S. Arora, Advocate, appeared on behalf of the Applicant-2 in the hearing, in virtual mode, held on 26.07.2021 and reiterated the contents of RA No. 375/104/B/2018-RA and written submissions dated 23.07.2021. Sh. Arora submitted that the redemption fine is much more than the MOP and hence it should be reduced so also the penalty. Sh. Rajnish Kumar, Superintendent, appeared on behalf of the Applicant – 1, and stated that the Commissioner (Appeals) has erred in allowing redemption of prohibited goods which were concealed and in commercial quantity.

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 declared nil value of the goods imported in Column 9 (Total value of dutiable goods imported) and had also not declared any gold items against column no. 10. Further, the Applicant-2 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 had failed to produce any evidence that the gold bars were not smuggled and to the contrary it was admitted by him that the gold bars were attempted to be smuggled by concealment in the upper side tray of trolley. The manner of concealment, i.e. pasted and concealed in the upper side tray of the trolley covered with the handkerchief clearly establishes the malafide intent of the Applicant. The Applicant-2 has, thus, failed to discharge the burden placed on him, in terms of Section 123.

7.1 The Commissioner (Appeals) has allowed redemption of seized gold holding that gold is not "prohibited goods". 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 Court has held that for the purposes 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 has, in paras 22 to 24 of the O-I-O dated 08.08.2017, 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*". In one of its latest pronouncements dated 17.06.2021, in the case of UOI & Ors vs. M/s Raj Grow Impex LLP & Ors (CA Nos. 2217-2218 of 2021), 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, specifically 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 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'. As such, the Commissioner (Appeals) clearly erred in holding otherwise.

8.1 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 gold on payment of redemption fine and at baggage 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 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"*. 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 a reasoned Order based on relevant considerations.

8.2 In view of the above, the Government observes that the 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. As such, Order of Commissioner (Appeals) to allow release of one kg gold on payment of fine and at baggage rate of duty can not be sustained.

9. In view of the above, the impugned OIA dated 09.07.2018 is set aside to the extent of allowing redemption of one kg of confiscated gold on payment of fine and at baggage rate of duty. However, reduction in penalty ordered by Commissioner (Appeals) is maintained. The revision application no. 380/22/B/2018-RA is disposed of accordingly. The revision application no. 375/104/B/2018-RA is rejected.



(Sandeep Prakash)

Additional Secretary to the Government of India

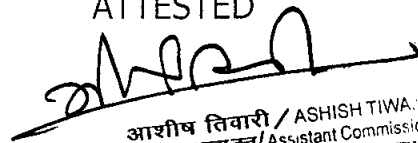
1. The Commissioner of Customs,
IGI Airport Terminal-3,
New Delhi-110037.
2. Mr. Vikram,
H.No. 35 B, Village Garauli Kalan,
Gurgaon, Haryana 122001

Order No. 138-139 /21-Cus dated 26/07/2021

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



आशीष तिवारी / ASHISH TIWARI
सहायक आयुक्त/ Assistant Commissioner
केन्द्रीय वस्तु एवं सेवा कर, केन्द्रीय उत्पाद एवं सीमा शुल्क
CGST, Central Excise & Customs
राजस्व विभाग / Department of Revenue
वित्त मंत्रालय / Ministry of Finance
भारत सरकार / Government of India
नई दिल्ली / New Delhi