

SPEED POST



F.No. 375/136/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... 11/8/21...

Order No. 151/21-Cus dated 11-08-2021 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.CC(A)Cus/D-I/Air/430/ 2018 dated 26.09.2018 passed by the Commissioner of Customs (Appeals), New Customs House, Near IGI Airport, Delhi-110037

Applicant : Mr. Mukhtar Singh, Amritsar, Punjab.

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

ORDER

A Revision Application No. 375/136/B/2018-RA dated 12.12.2018 has been filed by Mr. Mukhtar Singh, Amritsar (hereinafter referred to as the Applicant) against the Order-in-Appeal No. CC(A)Cus/D-I/Air/430/2018 dated 26.09.2018 passed by the Commissioner of Customs (Appeals), New Customs House, New Delhi. Commissioner (Appeals) has set aside the order of the Additional Commissioner of Customs, IGI Airport, Terminal-3, New Delhi, bearing no. 136/Adj/2016 dated 16.09.2016, to the extent the two gold bars, totally weighing 2000 grams and valued at Rs. 50,56,920/-, which, were seized from the Applicant, were ordered to be released on payment of redemption fine of Rs. 20,00,000/- under Section 125 of the Customs Act, 1962. Besides, penalty of Rs.10,00,000/- was also imposed by the original authority on the Applicant, under Section 112 & 114AA of the Customs Act, 1962, which has been maintained in appeal.

2. The brief facts of the case are that the Applicant arrived on 28.12.2014 at IGI Airport from Malaysia and was intercepted near the exit gate after he had crossed the Customs Green Channel. After search of his person and of his baggage 02 piece of gold bars, were recovered from his possession. The value thereof was appraised at Rs.50,56,920/- by the Jewellery Appraiser at IGI airport. The 02 pieces of gold bars, recovered from the Applicant, were seized under Section 110 of the Customs Act, 1962, under panchanama dated 29.12.2014. The Applicant in his statement dated 29.12.2014, recorded under Section 108 of the Customs Act, 1962, admitted the recovery of 02 pieces of gold bars and agreed with the contents of the

panchanama dated 29.12.2014. He further stated that the said gold belonged to him and he had purchased it from Malaysia from the money borrowed from his friend; that he admitted his mistake and stated that he would not commit such mistake in future. Additional Commissioner of Customs, vide OIO dated 16.09.2016, ordered confiscation of seized gold but gave an option to release the same on payment of redemption fine and penalty. Aggrieved, the Respondent department filed an appeal before the Commissioner (Appeals) who, vide OIA dated 26.09.2018, set aside the OIO dated 16.09.2016 to the extent indicated above.

3. The revision application has been filed canvassing that the import of gold is not prohibited; that the Applicant is an eligible passenger and could bring 1 kg of gold; and that gold may be released on payment of redemption fine and appropriate duty.

4. Personal hearing, in virtual mode, was held on 10.08.2021. Sh. D.S. Chadha, Advocate appeared for the Applicant. He reiterated the contents of the revision application and highlighted that the gold was not concealed; that it was bought by the Applicant; and that the Applicant at the first instance itself submitted that the invoices had been misplaced. Upon being asked Sh. Chadha submitted that the copies of the invoices had not been submitted at any stage thereafter. Sh. Rajnish Kumar, Superintendent appeared on behalf of the Respondent and stated that this is a case of willful misdeclaration as the Applicant had specifically stated 'No' and 'Nil' in the Custom Declaration slip. Further, he was a frequent traveler and hence was aware of the requirements.

5. The Government has carefully examined the matter. It is observed that the Applicant 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 had not declared anything in Column 9 (Total value of dutiable goods imported) and declared 'No' 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. The Applicant in his revision application has contended that he is a eligible passenger in terms of Notification No. 12/2012- customs dated 17.03.2012. 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, with a claim for exemption, and instead a conscious attempt has been made to smuggle by not declaring the same. Thus, the Applicant 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 agrees with the lower authorities that the Applicant is not eligible for the concessional rate of duty in terms of Notification no. 12/ 2012- customs dated 17.03.2012 and the impugned OIA does not warrant any interference, on this count.

7. 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 Applicant has failed to produce any evidence that the gold recovered from him was not smuggled. Though at the time of interception, it was the claim of Applicant that the purchase invoice of the gold bars had been misplaced, however, the copies of the said invoices were never produced thereafter either before the adjudicating authority or before the Commissioner (Appeals). It is

also noted that no other documentary evidence has also been produced to establish bonafide ownership. Thus, the claim that purchase invoice had been misplaced is merely a bald assertion. As such, the Applicant has failed to discharge the burden placed on him, in terms of Section 123.

8.1 The question of law raised by the Applicant 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 Apex 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 16.09.2016, 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"*. In its judgment 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."*

8.2 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-----."

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. The original authority has allowed the release of impugned goods on redemption fine under Section 125 of Customs Act, 1962, which has been set aside by the Commissioner (Appeals) in appeal. 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 Additional Commissioner has allowed redemption observing that "the value, quantity and nature of items does not appear to invoke any purpose or warrants otherwise that such option may not be given. The goods are normal trade item and are imported in regular course of international trade". The Government observes that in the present case an individual passenger has attempted to smuggle gold and it is not a case of import in the regular course of international trade. Thus, the Additional Commissioner has, by equating a smuggling episode with the import in regular course of international trade, committed a grave error. Undoubtedly, the redemption allowed based on such erroneous observations/findings merits interference. As such, the Order of the Commissioner (Appeals), setting aside redemption, has to be upheld.

10. The Government finds that the penalty imposed is also just and fair in the facts and circumstances of the case.

11. The revision application is rejected.



(Sandeep Prakash)

Additional Secretary to the Government of India

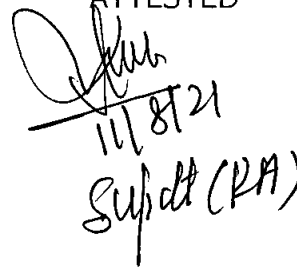
Mr. Mukhtar Singh,
Village Balowali, P.O. Ram Diwali, Musalmana,
The. Baba Bakala, District, Amritsar,
Punjab.

Order No. 151/21-Cus dated 11-08-2021

Copy to:

1. The Commissioner of Customs, Airport & General, IGI Airport, New Delhi-110037.
2. The Commissioner of Customs (Appeals), New Custom House, New Delhi-110037.
3. Additional Commissioner of Customs, IGI Airport, Terminal-3, New Delhi-110037.
4. Sh. D.S. Chadha, Advocate, 92, GF, Block V, Eros Garden, Faridabad – 121 009.
5. PA to AS(RA).
- ✓ 6. Guard File.
7. Spare Copy.

ATTESTED



11/8/21
Supdt (RA)