

SPEED POST



F.No. 375/07/B/2020-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. 17/1/22

Order No. 16/22-Cus dated 14-01-2022 of the Government of India passed by Sh. Sandeep Prakash, Additional Secretary to the Government of India, under Section 129DD of the Customs 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-1/Airport/448/2019-20 dated 19.11.2019 passed by the Commissioner of Customs (Appeals), New Delhi.

Applicant : Sh. Aman Akber Ali Fidai, Mumbai.

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

ORDER

A Revision Application No. 375/07/B/2020-RA dated 20.01.2020 has been filed by Sh. Aman Akber Ali Fidai, Mumbai (hereinafter referred to as the Applicant) against the Order-in-Appeal No. CC(A)Cus/D-1/Airport/448/2019-20 dated 19.11.2019 passed by the Commissioner of Customs (Appeals), New Delhi. Commissioner (Appeals) has upheld the Order-in-Original No. 230-Adjn. /2017 dated 20.10.2017, passed by the Additional Commissioner of Customs, IGI Airport, New Delhi, wherein, 04 pieces of gold bars and 02 cut pieces of gold bars, collectively weighing 538.56 gms, valued at Rs. 14,96,488/-, were confiscated absolutely under Section 111(d), 111(i), 111(j), 111(l), and 111(m) of the Customs Act, 1962. A penalty of Rs. 3 Lakhs was also imposed on the Applicant under Section 112 and 114AA of the Customs Act, 1962, which has been maintained in appeal.

2. Brief facts of the case are that the Applicant arrived, on 20.02.2016, at IGI Airport, New Delhi, from Abu Dhabi. He was intercepted by the officers of Customs at the exit gate of arrival hall after he had crossed the green channel and diverted for detailed examination of his baggage. On search of his checked-in baggage, 04 pieces of gold bars and 02 cut pieces of gold bars, collectively weighing 538.56 gms, valued at Rs. 14,96,488/-, were recovered, which were found concealed and wrapped with a grey colour tape and pasted with double side white tape under his baggage trolley. In his statement dated 20.02.2016, tendered under Section 108 of Customs Act, 1962, the Applicant stated that he was engaged in business of artificial jewellery and earned Rs. 35,000/- per month; that he was not having any other source of income. On being asked about the frequent visits, he stated that he worked in Mumbai and always went to Abu Dhabi/Dubai/Sharjah for supply/sale of artificial jewellery. Further, he stated that he went on 17.02.2016 with some artificial jewellery, sold it for Rs. 4,00,000/- and also received Rs. 10,00,000/- as his old payments. He used Rs. 14,00,000/- to purchase the recovered gold from Abu Dhabi. He was not able to produce the invoice of the said gold as he had purchased the said gold without bill. He further stated that he was aware that import of gold was liable to customs duty and smuggling of the same was a punishable offence. The recovered gold was confiscated absolutely by the original authority, vide the Order-in-Original dated 20.10.2017. Penalty of Rs. 3 Lakhs was also imposed on the Applicant. Aggrieved, the Applicant filed an appeal before the Commissioner (Appeals), who, vide the impugned Order-in-Appeal, rejected the appeal.

3. The instant revision application has been filed, mainly, on the grounds that import of gold is not prohibited and in view of the orders passed by various judicial fora and past practice, an option to redeem the confiscated gold should have been

given by the lower authorities. Also, personal penalty under Section 114 of the Customs Act, 1962, be set aside.

4. Personal hearing was held on 14.01.2022, in virtual mode. Sh. Chirag Shetty, Advocate appeared for the Applicant and reiterated the contents of the RA. He requested that the goods may be allowed to be redeemed on payment of fine and penalty may be reduced. Sh. Shetty relied upon the 08 case laws, as per compilation emailed by him. None appeared for Respondent nor any request for adjournment has been received. Hence, the matter is being taken up for disposal on the basis of facts available on record.

5. The Government has carefully examined the matter. The Applicant has prayed that the confiscated gold should be released on payment of redemption fine under Section 125 of Customs Act, 1962, penalty under Section 114AA be set aside and may be reduced. It is observed that the Applicant had not produced any evidence to show that he had declared the subject gold items to the Customs on his arrival from Abu Dhabi. To the contrary, the original authority has recorded that the Applicant had declared 'Nil' in the Col. 9 and 'No' in Col. 10 of the Customs Declaration Form. Further, the Applicant had admitted, in his statement dated 20.02.2016, tendered under Section 108 of Customs Act, 1962, the recovery of the gold items from him and the fact of intentional non-declaration. It was also stated that he was not in possession of any documentary evidence to show licit possession of the gold items in question.

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 Applicant failed to produce any evidence that the gold items recovered from him were not smuggled. The gold was not declared by him to the custom officers, as required under Section 77 of Customs Act, 1962. He admitted that he had intentionally not declared the gold items at the red channel to evade customs duty. The Applicant has, thus, failed to discharge the burden placed on him, in terms of Section 123, *ibid*.

8.1 The Government observes that Hon'ble Supreme Court, in the case of Sheikh Mohd. Omer vs Collector of Customs, Calcutta & Ors [1971 AIR 293], 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 Apex 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.*"

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----."

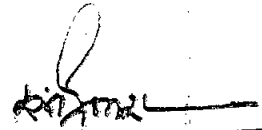
8.3 The original authority has correctly brought out, in paras 15.3 to 15.5 of the Order-in-Original, that the gold is allowed to be imported subject to certain conditions and that, in this case, the conditions, subject to which gold could have been legally imported, have not been fulfilled. Thus, following the ratio of the aforesaid judgments, there is no doubt that the subject goods are 'prohibited goods'.

9. The Applicant has contended that the confiscated gold should be allowed to be redeemed on payment of fine. The Government observes that the option to release '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 Raj Grow Impex (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 according to the rules of reason and justice; has to be based on 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, after extensive application of several judgments of the Apex Court, has 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'*". It is observed that the original authority has, in the instant case, after appropriate consideration, passed a reasoned order refusing to allow redemption in the background of attempted smuggling by ingenious concealment and in the context of Government's policy objectives. Thus, the discretion exercised by the original authority cannot be interfered with. The case laws relied upon by the Applicant viz [1994 (73) ELT 425 (Tri)], [2001 (136) ELT 758 (Tri-Kolkata)], [2008 (230) ELT 305 (Tri-Mum)], [1994 (72) ELT 473 (GOI)], [2007 (218) ELT 442 (Tri-Ch.)], [2009 (248) ELT 127 (Bom.)], [2015 (321) ELT 540 (Tri-C.)] and [2017 (358) ELT 1275 (Comr. Appl.)], are not relevant in view of the discussions above.

10. The Government finds that the penalty imposed is just and fair in the facts and circumstances of the case, specifically the ingenious manner and nature of concealment.

11. In view of the above, the revision application is rejected.



(Sandeep Prakash)

Additional Secretary to the Government of India

Sh. Aman Akber Ali Fidai, Mumbai,
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Mumbai – 400 009.

Order No. 16/22-Cus dated 14-01-2022

Copy to:

1. The Commissioner of Customs, IGI Airport, Terminal-3 New Delhi-110037.

2. The Commissioner of Customs (Appeals), New Customs House, Near IGI Airport, New Delhi – 110037.
3. M/s H.R. Shetty & Co., Advocate, High Court, 124, Bazar Gate Street, Doctor House, 2nd Floor, Above Vishwashanti Hotel, Fort, Mumbai – 400 001.
4. PA to AS(RA).
5. Guard File.
6. Spare Copy.

ATTESTED

Ashish Tiwari
Assistant Commissioner (RA)