

F.No. 375/117/B/18-RA
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F.No. 375/117/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 27/8/21

Order No. 161-162/21-Cus dated 26-8-2021 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/481-482/2018 dated 08.10.2018, passed by the Commissioner of Customs (Appeals), New Custom House, New Delhi

Applicant : 1. Mr. Jalal Ahamed, Chennai.
2. Mr. Ranjith Khan, Chennai.

Respondent : Commissioner of Customs (Preventive), New Delhi

ORDER

Revision Application Nos. 375/117/B/18-RA and 375/116/B/2018-RA, both dated 13.11.2018, have been filed by Mr. Jalal Ahmed, (hereinafter referred to as the Applicant-1) and Mr. Ranjith Khan, (hereinafter referred to as the Applicant-2), respectively, against the Order No.CC(A)Cus/D-1/Air/481-482 dated 08.10.2018, passed by Commissioner of Customs (Appeals), New Delhi. Commissioner (Appeals) has upheld the order of the Additional Commissioner of Customs, Preventive, Customs House, New Delhi, bearing no. DLI/CUSTM/PREV./ASR/ADC/106/2016 dated 30.08.2016, wherein 12 cut pieces of yellow metal bars (made of gold), which were recovered from the Applicant-1, packed in three packets wrapped with black adhesive tapes, and 2950 grams of yellow colour metal shaped into element of the iron (made of gold), which were recovered from the Applicant – 2, concealed in deluxe automatic iron, which was kept inside one black colour checked in luggage, collectively weighing 3949.98 grams totally valued at Rs. 1,01,08,552/-, have been confiscated absolutely. The adjudicating authority has also imposed a penalty of Rs.2,00,000/- each on both the Applicants under Sections 112(a) and (b) of the Customs Act, 1962, which have been maintained in appeal.

2. The brief facts of the case are that the Applicant-1 and Applicant -2 arrived on 29.05.2015 at IGI Airport from Imphal and were intercepted by the officials of Directorate of Revenue Intelligence (DRI) on an information that both the Applicants were carrying smuggled gold of foreign origin. After search of their person and of

their baggage, 12 cut pieces of yellow metal bars (made of gold) wrapped with black adhesive tapes, weighing 999.80 grams and valued at Rs. 25,59,088.82/-, were recovered from the Applicant -1 and 2950 grams of yellow colour metal shaped into element of the iron (made of gold), valued at Rs. 75,49,463/-, concealed in deluxe automatic iron, which was kept inside one black colour checked in luggage, were recovered from the Applicant-2. The total value of seized gold, was appraised at Rs. 1,01,08,552/- by the Jewellery Appraiser at IGI airport. The 12 pieces of gold bars and 2950 grams of iron element shaped gold piece, recovered from the Applicants, were seized under Section 110 of the Customs Act, 1962, under Panchnama dated 30.05.2015. The Applicants in their statements dated 29.05.2015, recorded under Section 108 of the Customs Act, 1962, admitted the recovery of 12 pieces of gold bars and 2950 grams of yellow metal element shaped gold from them, respectively. They further stated that the gold bars were given to them by their one Sh. Agee Mohammed at Imphal Airport for onward delivery to Sh. Khaleed Dastageer at Chennai; that Sh. Angee Mohammed provided them free air tickets from Imphal to Delhi and Delhi to Chennai.

3. The revision applications have been filed by both the Applicants canvassing that the import of the gold is not prohibited and, therefore, it 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 07.07.2021, 09.08.2021 and 25.08.2021. None appeared on behalf of the Applicants on any of the above dates nor any request for adjournment has been received. Sh. Anil Kumar Meena, Superintendent, appeared on behalf of the Respondent department and supported the order of the Commissioner (Appeals). Since sufficient opportunities have been granted to the Applicants, the case is being taken up for final decision, on the basis of facts available on record.

5. 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 was not smuggled. The manner of concealment, i.e., packed in three packets wrapped with black adhesive tapes by the Applicant-1 and concealed in deluxe automatic iron (shaped as element of iron), which was kept inside one black colour checked in luggage by the Applicant-2, clearly evidences that the seized gold was smuggled in nature and the Applicants were handling it in a premeditated manner to avoid detection. Applicants' contention that they are the owners of the gold is also not tenable as they themselves had admitted in their statements dated 30.05.2015 that the gold was handed over to them by someone else at Imphal Airport and they were carrying the same for monetary considerations. It is also not claimed that these statements dated 30.05.2015 were retracted by the Applicants. Further, the evidence discussed in para 13 of the OIO clearly brings out that the Applicants were in constant contact with the person, who had handed over the gold to them as disclosed in these statements. Thus, the statements are independently corroborated. Furthermore, 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.

6.1 The question of law raised by the Applicants is that the import of gold is not 'prohibited'. The Government observes that the 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*". The Additional Commissioner has, in para 32 of the O-I-O dated 30.08.2016, brought out that the Gold is not allowed to be imported freely. It is permitted to be imported 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 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."*

6.2 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----."

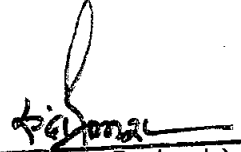
6.3 The original authority has correctly brought out that, in this case, the conditions subject to which gold could have been legally imported have not been fulfilled. Thus, following the ratio of the aforesaid judgments, there is no doubt that the subject goods are 'prohibited goods'.

7. The original authority has denied the release of impugned goods on redemption fine under Section 125 of Customs Act, 1962, which has been challenged in the instant RA. 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 that the Applicants were merely carriers and that the

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.

8. It has been contended that the penalty should be reduced. The Government observes that, in the facts and circumstances of the case, the original authority has been rather lenient in imposition of penalty. Hence, no case is made out for reducing the penalty imposed.

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



(Sandeep Prakash)

Additional Secretary to the Government of India

1. Mr. Jalal Ahamed,
R/o No. 36, Appar Street, Vivekanandha,
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Chennai - 600118
2. Mr. Ranjith Khan
R/O 29/36, Krishnappa Street, Chepauk,
Chennai 600005

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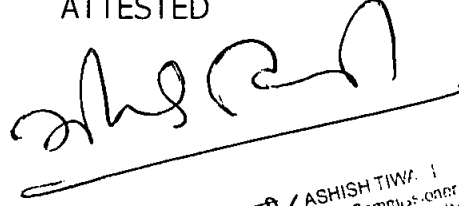
1. The Commissioner of Customs (Preventive), New Custom House, Near IGI Airport, New Delhi 110037.

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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. Sh. S. Palanikumar, Advocate (High Court Madras), No. 10, Sunkuram Street, Chennai – 600 001.
5. PA to AS(RA)
6. ~~Guard File.~~
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ATTESTED



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