

REGISTERED
SPEED POST



F.No. 372/20/B/2019-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. 02/09/21

Order No. 166/21-Cus dated 01-09-2021 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. KOL/CUS/(A/P)/11/2019 dated 22.02.2019 passed by the Commissioner of Central Excise & Central Tax (Appeals), Imphal Custom House, Kolkata.

Applicant : Sh. Rambhavan Gupta, Gorakhpur.

Respondent : The Commissioner of Customs (Airport & Admin), Kolkata.

ORDER

A Revision Application No. 372/20/B/2019-RA dated 22.04.2019 has been filed by Sh. Rambhavan Gupta, Gorakhpur (hereinafter referred to as the Applicant) against the Order-in-Appeal No. KOL/CUS/(A/P)/11/2019 dated 22.02.2019 passed by the Commissioner of Customs (Appeals), Kolkata wherein the Commissioner (Appeals) has upheld the Order-in-Original No. 38/2018 DC dated 30.03.2018 passed by the Deputy Commissioner of Customs, AIU, NSCBI Airport, Kolkata.

2. The facts leading up to present proceedings are that the Applicant arrived at NSCBI Airport, Kolkata on 22.08.2016 from Bangkok. He was intercepted while passing through the green channel towards the exit gate. Upon search, two cut pieces of yellow metallic bar, believed to be made of gold of foreign origin, which were wrapped with red coloured paper and further covered with transparent adhesive tape, were recovered from the wallet of Applicant. The two pieces of 24 carat gold bar of foreign origin, collectively weighing 104.100 gms, valued at Rs. 3,32,079/- were seized. It was noted that in the Customs Declaration Form, the Applicant had not declared about bringing of any gold item into India. In his voluntary statement dated 22.08.2016, recorded under Section 108 of the Customs Act, 1962, the Applicant agreed with the contents of the search list dated 22.08.2016 and stated that the gold bar was purchased by him from Bangkok for selling in Kolkata for profit; that he admitted his mistake and requested to take a lenient view in his case. The original authority, vide Order-in-Original dated 30.03.2018, absolutely confiscated the seized gold bars and imposed a penalty of Rs. 1,40,000/- on the Applicant under Section 112 (a) & 112 (b) of the Customs Act,

1962. The appeal filed by the Applicant has been rejected by the Commissioner (Appeals).

3. The revision application has been filed, mainly, on the grounds that the Applicant was a bonafide passenger and had orally declared the gold pieces before the Baggage Officer; that he had no intention to evade Customs Duty; that in several other cases, superior authorities had allowed redemption; and, therefore, the Commissioner (Appeals) and the original authority were bound to allow redemption. Accordingly, it has been prayed that the seized gold may be allowed to be redeemed being non prohibited confiscated goods, on payment of reasonable fine and penalty.

4. Personal hearings in the matter were fixed on 05.08.2021, 16.08.2021 & 27.08.2021. No one appeared for the Applicant nor any request for adjournment has been received. In the hearing held on 27.08.2021, Sh. Jitendra Kumar, Superintendent appeared for the respondent and supported the orders of the lower authorities. Since sufficient opportunities have been granted to the Applicant, the case is taken up for final disposal based on records.

5. The Government has carefully examined the matter. It is observed that the Applicant did not declare the gold brought by him in the Customs Declaration Form. Further, in his statement recorded under Section 108, the Applicant had admitted the recovery of gold from him and that the gold was bought by him for profit motive. Hence, the contention that he had orally declared the gold to the Baggage Officer is nothing but an afterthought.

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."

Therefore, 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. It is also noted that no documentary evidence has been produced to establish bonafide ownership. The Applicant has, thus, failed to discharge the burden placed on him, in terms of Section 123.

7.1 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 Deputy Commissioner has, in para 12 (v) of the O-I-O dated 30.03.2018, pointed 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"*. 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."*

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 Thus, following the ratio of the aforesaid judgments, there is no doubt that the subject goods are 'prohibited goods'.

8. 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 of attempted smuggling by concealment with intent to evade

Customs Duty. It has also been observed by the original authority that the Applicant herein is a repeat offender. Thus, the Order of the original authority, upheld by the Commissioner (Appeals), being a reasoned Order based on relevant considerations, does not merit interference.

9. The Government finds that the penalty imposed is also just and fair in the facts and circumstances of the case, specially keeping in view the fact that the Applicant is a repeat offender.

10. The revision application is rejected.



(Sandeep Prakash)

Additional Secretary to the Government of India


Sh. Rambhavan Gupta,
S/o Sh. Shiv Moorat Gupta,
Vill.-Khutahana, Post-Khajni,
Gorakhpur-273 212.

Order No. 166/21-Cus dated 01-09-2021

Copy to:

1. The Commissioner of Customs (Airport & Admin), NSCBI Airport, Kolkata – 700 052.
2. The Commissioner of Customs (Appeals), Kolkata, 3rd Floor, Custom House, 15/1, Strand Road, Kolkata – 700 001.
3. Sh. Barinder Singh & S.C. RATHO, Customs Consultants, 14, Hare Street, Room No. 9, 1st Floor, Kolkata – 700 001.
4. PA to AS(RA)
5. Guard File.
6. Spare Copy

ATTESTED



(लक्ष्मी राघवन)
(LAKSHMI RAGHAVAN)
अनुभाग अधिकारी / Section Officer
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