

SPEED POST

F. No. 375/08/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. 17/22-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 Custom Act, 1962.

Subject : Revision Application filed, under Section 129DD of the
Customs Act 1962 against the Order-in-Appeal No. CCA(A)
Cus/D-I/Air/841/2019-20 dated 22.11.2019 passed by
the Commissioner of Customs (Appeals), NCH, New Delhi

Applicant : Sh. Aashik Aziz Bhai Khoja, Valsad, Gujarat

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

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ORDER

A Revision Application No. 375/08/B/2020-RA dated 20.01.2020 has been filed by Sh. Aashik Aziz Bhai Khoja, Valsad, Gujarat (hereinafter referred to as the Applicant) against the Order-in-Appeal No. CCA(A)Cus/D-I/Air/841/2019-20 dated 22.11.2019, passed by the Commissioner of Customs (Appeals), New Delhi. The Commissioner (Appeals) has upheld the order of the Joint Commissioner of Customs, IGI Airport, New Delhi, bearing no. 225/AS/JC/2017 dated 24.10.2017, wherein 57 pcs of assorted Gold Articles, collectively weighing 472.4 grams and totally valued at Rs. 12,08,937/-, which were recovered from the Applicant, were confiscated absolutely, under Section 111(d), 111(i), 111(j), 111(l) and 111(m) of the Customs Act, 1962. Besides, a penalty of Rs. 2.5 Lakhs was also imposed on the Applicant by the original authority, under Sections 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 30.05.2015, at IGI Airport, New Delhi from Dubai and was intercepted near the exit gate after he had crossed the Customs Green Channel. On being asked by the Customs officers whether he was carrying any gold with him, he replied in negative. In his Customs Declaration Form, he had declared 'NIL' in Column No. 9 (Total Value of the goods imported) and in Column No. 10 (ii) (Gold Jewellery) & 10(iii) (Gold Bullion), he ticked 'NO'. Scanning and examination of his checked-in baggage resulted in the recovery of the 57 pcs of assorted gold articles, in the form & shape of coil, circles, rectangular sheet, fish shape, butterfly shape, mathematical instruments, bracelets etc., collectively weighing 472.4 grams and totally valued at Rs. 12,08,937/-, which were concealed in various household, daily use articles like Key Ring, Cape of Glass Bottle, White Board, Wrist Watches, Sandals, Necklace Geometrical Compass Box and

Bracelets, kept in his baggage. The Applicant, in his statement dated 30.05.2015, tendered under Section 108 of the Customs Act, 1962, admitted the recovery of the 57 Pcs of gold articles from his checked-in baggage possession. He stated that the gold did not belong to him and was handed over to him by Mr. Aman Patel; and that gold was concealed in the recovered articles but he had not declared the gold at the Customs red channel.

3. The revision application is filed, mainly, on the grounds that the gold is not a prohibited item for import into India; that the goods may be released on payment of redemption fine and penalty be reduced.

4. Personal hearing was held, in virtual mode, on 14.01.2022. 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 08 case laws, as per compilation email by him. None appeared for Respondent department nor any request for adjournment has been received. Hence, the matter is taken up for decision bases on records.

5. The Government has carefully examined the matter. It is observed that the Applicant did not declare the gold articles brought by him as stipulated under Section 77 of Customs Act, 1962, to the customs authorities at the airport and a true and correct declaration was not made in the Customs Declaration Form. Further, the Applicant admitted the recovery of concealed gold articles from him and the fact of non-declaration in his statement dated 30.05.2015, tendered under Section 108 of Customs Act, 1962. He also admitted that the confiscated gold articles, in concealed manner were handed over to him by Mr. Aman Patel in Dubai who was the owner of the goods. The

Applicant departed from India on 27.05.2015 and arrived back on 30.05.2015, thus he also not eligible to import gold in any form.

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. No documents evidencing licit possession of the gold articles have been produced. The manner of concealment and fact of misdeclaration in the Customs Declaration Form, make it evident that the Applicant herein had attempted to smuggle gold articles in a pre-meditated manner. The Applicant has, thus, failed to discharge the burden placed on him, in terms of Section 123, *ibid*.

7.1 The question of law raised by the Applicant is that the import of gold is not 'prohibited'. The Government observes that in the case of Sheikh Mohd. Omer vs Collector of Customs, Calcutta & Others [1971 AIR 293], the Hon'ble Supreme 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 Joint Commissioner has, in paras 3.3 to 3.4 of the Order-in-Original dated 24.10.2017, 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 fulfilment 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 its judgment dated 17.06.2021, 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, 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-----."

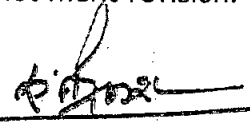
7.3 The original authority has correctly brought out that, in this case, the conditions subject to which gold could have been legally imported have not been fulfilled. Thus, following the ratio of the aforesaid judgments, there is no doubt that the subject goods are 'prohibited goods'.

8. The original authority has denied the release of offending goods under Section 125 of Customs Act, 1962. The Government observes that, in terms of Section 125 of the Customs Act, 1962, the option to release 'prohibited goods', on redemption fine, is discretionary {Ref. 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"*. Similarly, 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 as also in the context of the Government's policy objectives on the issue. Thus, the Order of the original authority, upheld by the Commissioner (Appeals), being a reasoned Order

based on relevant considerations, does not merit interference. The case laws relied upon by the Applicant viz 1994(73) ELT425(Tri), 2001(136) ELT758(Tri-Kolkata, 2008(230) ELT305(Tri-Mum), 1994(72)ELT473(GOI), 2007(218) ELT442 (Tri-Chennai), 2009(248)ELT127(Bom.), 2015(321)ELT540(Tri-Chennai) & 2017(358)ELT1275(Commr. Appl.) are not relevant in view of discussion above.

9. The penalty imposed is just and fair, in the facts and circumstances of the case, specifically in view of the ingenious nature and manner of concealment.

10. In view of the above, impugned Order-in-Appeal does not merit revision. The revision application is rejected.



(Sandeep Prakash)

Additional Secretary to the Government of India

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Order No. 17/22-Cus dated 14-01-2022

Copy to:

1. The Commissioner of Customs (Appeals), New Customs House, New Delhi-110037
2. The Commissioner of Customs, IGI Airport, New Delhi
3. Sh. H R Shetty & Co. Advocate, 124 Bazaar Gate, Street Doctor House, 2nd Floor, Above Vishwashanti Hotel Fort, Mumbai- 400001
4. PA to AS(RA)
5. Guard file
6. Spare Copy

ATTESTED

कल्प

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Ministry of Finance (Deptt. of Rev.)
भारत सरकार / Govt. of India
नई दिल्ली / New Delhi