

SPEED POST



F. No. 375/18-A/B/2018-R.A.
GOVERNMENT OF INDIA
MINISTRY OF FINANCE
(DEPARTMENT OF REVENUE)

14, HUDCO VISHALA BLDG., B WING
6TH FLOOR, BHIKAJI CAMA PLACE,
NEW DELHI-110066

Date of Issue... 06/09/21

Order No. 170/21-Cus. dated 06/09/2021 of the Government of India passed by Sh. Sandeep Prakash, Principal Commissioner & 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-I/Air/587/2017 dated 29.12.2017 passed by the Commissioner of Customs (Appeals), New Customs House, Delhi.

Applicant : Shri Shakeel Ur Rehman, Delhi.

Respondent : The Commissioner of Customs (Airport), New Delhi.

ORDER

A Revision Application No. 375/18-A/B/2018-RA dated 07.03.2018 has been filed by Sh. Shakeel Ur Rehman, (hereinafter referred to as the Applicant) against the Order-in-Appeal No. CC(A)Cus/D-I/Air/587/2017 dated 28.12.2017 passed by the Commissioner of Customs (Appeals), New Delhi. Commissioner (Appeals) has upheld the Order-in-Original No. 69-Adj/2016 dated 11.07.2016 of the Addl. Commissioner of Customs, IGI Airport, New Delhi, wherein eleven cut pieces of Gold Bars, recovered during the search of the Applicant (concealed in the suitcases), collectively weighing 465 grams, valued at Rs. 11,59,186/-, have been confiscated absolutely and free allowance has been denied to the Applicant. A penalty of Rs.2,50,000/-, under Section 112(a), 112(b) & 114AA of the Customs Act, 1962, was also imposed on the Applicant.

2. The brief facts of the case are that the Applicant arrived on 17.06.2015, at IGI Airport from Dubai and was intercepted near the exit gate after he had crossed the Customs Green Channel. After search of his person and of his baggage, eleven cut pieces of Gold Bars were recovered from him, concealed inside the suitcases, by pasting the gold pieces wrapped with black colour adhesive tape with the metal frame of the suitcases. The value of the said gold bars, collectively weighing 465 grams, came out to be Rs.11,59,186/-. The Applicant in his statement, recorded under Section 108 of the Customs Act, 1962, admitted the recovery of gold bars which were not declared by him to the customs officers at the time of his arrival.

3. The revision application has been filed canvassing that the seized gold is not a prohibited item and hence may be released on payment of nominal redemption fine for home consumption and personal penalty may be reduced. Gold articles imported by the Applicant were *bonafide* as they were brought by him for his personal use. It is further contended that the gold was brought for the purpose of marriage of his son. Imposition of penalty under section 114 AA is not applicable as no incorrect declaration was made.

4. Personal hearing was held on 03.09.2021, in virtual mode. Sh. S.S. Arora, Advocate, appeared on behalf of the Applicant. He submitted that the Applicant is the owner of confiscated gold; that he is not a frequent visitor and not a repeat offender; and that the gold was not concealed. Hence option to redeem may be granted and penalty should be reduced. Sh. Azim Ansari, Superintendent, appeared on behalf of the Respondent. He stated that it is a case of misdeclaration. He also submitted that the gold was wrapped in black adhesive tape to escape detection and hence it cannot be claimed that it was not concealed. Further, the Applicant was also not the owner of the gold as he could not produce any documents towards purchase. Hence the impugned Order-in-Appeal may be upheld.

5. Government has carefully examined the matter. It is evident that the impugned gold items recovered were not declared by the Applicant to the customs authorities at the airport, as required under Section 77 of Customs Act, 1962. Further, the Applicant had

admitted the fact of non-declaration in his statement tendered under Section 108 of Customs Act, 1962. The gold pieces were wrapped with the black adhesive tape and pasted with the metal frame of the suitcases. Hence, it is incorrect to state that the gold was not concealed.

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."

No documents towards purchase of gold by the Applicant and evidencing bonafide ownership have been produced. The manner of concealment and non-declaration of gold to the Customs officers makes it apparent that the gold was smuggled. The Applicant has,

thus, failed to discharge the burden placed on him under Section 123 *ibid*.

7.1 The Applicant has contended that the import of gold is not 'prohibited'. 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 & Others [1971 AIR 293]. Hon'ble Supreme Court 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 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 & Others vs. M/s Raj Grow Impex LLP & Others [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 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 law laid down by the Apex Court, there is no doubt that the subject goods are 'prohibited goods'.

8. The original adjudicating authority has denied the release of impugned goods on redemption fine under Section 125 of Customs Act, 1962. The Government observes that the option to release seized goods on redemption fine, in respect of "prohibited goods", 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 present case, the original authority has refused to grant redemption as the Applicant attempted to smuggle the goods by concealment, with intent to evade Customs Duty. 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 concealment and in the context of Government's policy objectives. Thus, the discretion exercised by the original authority does not merit interference.

9. The original authority has imposed penalty under Section 112 & 114AA *ibid* which has been upheld in the impugned Order-in-Appeal. The imposition of penalty under Section 114AA has been assailed by the Applicant. Section 114 AA reads as under:

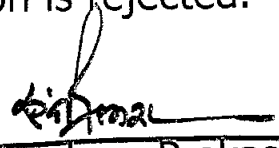
'Penalty for use of false and incorrect material. - If a person knowingly or intentionally makes, signs or uses, or causes to be made, signed or used, any declaration, statement or document which is false or incorrect in any material particular, in the transaction of any business for the purposes of this Act, shall be liable to a penalty not exceeding five times the value of goods.'

The Government observes that the Applicant has signed and made a false declaration on the Customs Declaration Slip as he had declared 'nil' in the column showing 'total value of dutiable goods imported'. This declaration was required to be made under Section

77 ibid. Thus, the imposition of penalty under Section 114 AA is merited.

10. Applicant has also prayed for only a token penalty to be imposed under Section 112(a). The Government observes that the penalty of Rs. 2,50,000/- imposed under Section 112(a) & (b) and 114AA is just and fair in the facts and circumstances of the case, and, hence, does not merit interference.

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


(Sandeep Prakash)

Additional Secretary to the Government of India

Mr. Shakeel Ur Rehman,
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Delhi-110006.

Order No. 170 /21-Cus dated 06/09/2021

Copy to:

1. The Commissioner of Customs, IGI Airport Terminal-3, New Delhi-110037
 1. The Commissioner of Customs (Appeals), New Custom House, Delhi-110037
 2. Sh. S.S. Arora, Advocate, B-1/71, Safdarjung Enclave, New Delhi 110029
 3. PA to AS(RA)
 - ✓ 4. Guard File.
5. spare copy.


ATTESTED
(Ashish Tiwari)
Assistant Commisioner(RA)