

SPEED POST



F.No. 380/30/B/2018-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. 08/09/21.....

Order No. 171 /21-Cus dated 07/09/ 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.CC(A)Cus/D-I/Air/427/ 2018 dated
25.09.2018 passed by the Commissioner of
Customs (Appeals), New Customs House, Near
IGI Airport, Delhi-110037

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

Respondent : Shri Mohammad Nasiruddin, Delhi.

ORDER

A Revision Application No. 380/30/B/2018-RA dated 26.12.2018 has been filed by the Commissioner of Customs, IGI Airport, New Delhi (hereinafter referred to as the Applicant) against the Order-in-Appeal No. CC(A)Cus/D-I/Air/427/2018 dated 25.09.2018 passed by the Commissioner of Customs (Appeals), New Delhi. Commissioner (Appeals) has modified the Order-in-Original no. 25/2018-19 dated 25.04.2018 passed by the Assistant Commissioner of Customs, New Delhi, to the extent of release, on payment of redemption fine of Rs. 60,000/-, under Section 125 of the Customs Act, 1962, along with applicable Customs Duty, of 08 gold rivets and 02 gold strips recovered from the possession of Shri Mohammad Nasiruddin, Delhi (hereinafter referred to as the Respondent), totally weighing 135 grams and valued at Rs. 3,65,003/-. Penalty of Rs. 70,000/-, imposed under Section 112 of the Customs Act, 1962, by the original authority, has been reduced by the Commissioner (Appeals) to Rs. 35,000/-.

2. The brief facts of the case are that the Applicant arrived on 22.06.2017 at the IGI Airport, New Delhi from Dubai and was intercepted near the exit gate after he had crossed the Green Channel. On examination of his baggage, 08 pieces of white colour coated gold rivets and 02 pieces of gold strips were recovered, found concealed inside the body of his trolley bag. The value of the 24 karat gold articles, totally weighing 135 grams, was appraised at Rs. 3,65,000/- by the Jewellery Appraiser at IGI airport and these were seized under Section 110 of the Customs act,1962, under Panchnama dated 22.06.2017. The Respondent, in his statement dated 22.02.2017, recorded under Section 108 of the Customs Act,

1962, admitted the recovery of the said gold items. He further stated that he had purchased the same for his personal use; that he did not declare the said gold items at the red channel and accepted his mistake. The Respondent also sought waiver of Show Cause Notice and the Personal Hearing. The original authority, vide the Order-in-Original dated 26.09.2018, confiscated absolutely the said gold items under Section 111(d), 111(j), 111(l) and 111(m) of the Customs Act, 1962. Aggrieved, the Respondent filed an appeal before the Commissioner (Appeals), who, vide the impugned Order-in-Appeal, has allowed the subject gold items to be released on payment of redemption fine of Rs. 60,000/- under Section 125 of the Customs Act, 1962 and also reduced the penalty from Rs. 70,000/- to Rs. 35,000/-.

3. The revision application has been filed, mainly, on the ground that the Respondent had attempted to clear the gold without payment of duty; that there was concealment and thus the import of gold is not bonafide; that the import of the gold is prohibited and, therefore, release of the gold on payment of redemption fine is not correct.

4. Personal hearing, in virtual mode, was held on 03.09.2021. Sh. Azim Ansari, Superintendent, appeared for the Applicant department and reiterated the contents of the Revision Application. Sh. Kumar Vikram and Sh. Chetan Kumar, Advocates, appeared for the Respondent and adopted the submissions made in the cross objections dated 15.03.2019.

5. The Government has examined the matter. It is evident that the impugned gold items were ingeniously concealed in the Trolley Bag and the Respondent did not declare the same

under Section 77 of Customs Act, 1962, to the customs authorities at the airport. Further, the Respondent has admitted the recovery of gold from him and the fact of non-declaration in his statement tendered under Section 108 of Customs Act, 1962.

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 the burden of proving that the subject gold items, were not smuggled, is on the Respondent from whom these were recovered. The manner of concealment, in this case, clearly shows that the Respondent had attempted to smuggle the seized gold in a well thought out manner to avoid detection by the Customs authorities. The respondent has, thus, failed to discharge the burden placed on him, in terms of Section 123 *ibid*.

7.1 The Commissioner (Appeals) has held that import of gold is not prohibited. The Government observes that the law on this issue is settled by the judgment of Hon'ble Supreme Court in the case of Sheikh Mohd. Omer vs Collection of Customs, Calcutta & Others [1971 AIR 293] wherein it has been 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 Assistant Commissioner, in Para 10 and 11 of the Order-in-Original dated 25.04.2018, has 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 fulfillment of certain conditions. 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*". In its judgment dated 17.06.2021, in the case of M/s Raj Grow Impex LLP & Others [2021-TIOL-187-SC-CUS-LB], 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:

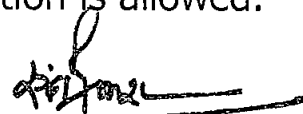
"64. Dictum of the Hon'ble Supreme Court and High Courts makes it clear that gold, may not be one of the enumerated goods, as prohibited goods, still, if the conditions for such import are not complied with, then import of gold, would squarely fall under the definition "prohibited goods", in Section 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*'. As such the Commissioner (Appeals) has erred in holding that the impugned gold is not a prohibited item.

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 and in the background of the Government's policy objectives. 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 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 in the matter. Thus, the discretion exercised by the original authority should not have been interfered with.

9. In view of the above, the impugned Order-in-Appeal dated 25.09.2018 is set aside and the revision application is allowed.



(Sandeep Prakash)

Additional Secretary to the Government of India

The Commissioner of Customs
Terminal-3, IGI Airport,

New Delhi

Order No. 171/21-Cus dated 04/09 2021

Copy to:

1. Shri Mohammad Naseeruddin, R/o 1283, Raqab Ganj Behind Delite Cinema, Delhi-110002.
2. Additional Commissioner of Customs, IGI Airport, Terminal-3, Delhi-110037.
3. The Commissioner of Customs (Appeals), New Customs House, Near IGI Airport, New Delhi-110037.
4. PA to AS(RA).
5. Guard File.
6. spare copy.

ATTESTED



(Ashish Tiwari)

Assistant Commissioner (Revision Application)