

REGISTERED
SPEED POST



F.No. 380/28/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. 172/21-Cus dated 08/09/21 2021 of the Government of India passed by Shri Sandeep Prakash, Principal Commissioner & 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-1/Air/433/2018 dated 27.09.2018, passed by the Commissioner of Customs (Appeals), New Custom House, New Delhi

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

Respondent : Mr. Mohammad Iqbal, Delhi.

ORDER

A Revision Application No. 380/28/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-1/Air/433/2018 dated 27.09.2018, passed by Commissioner of Customs (Appeals), New Delhi vide which the Commissioner (Appeals) has modified the Order-in-Original No. 81/2018-19 dated 28.05.2018, passed by the Joint Commissioner of Customs, IGIA, New Delhi, by allowing redemption of 116 grams of gold valued at Rs. 3,10,805/-, 180 pouches of Saffron (25 gram each) valued at Rs. 2,94,075/- and 74 bottles of Rhoduna (100 ml each) valued at Rs. 2,99,475/- which were confiscated absolutely by the original authority. The penalty has also been reduced from Rs. 1,80,000/- to Rs. 1,00,000/-.

2. The brief facts of the case are that the Respondent Sh. Mohammad Iqbal arrived, on 07.06.2017, at the IGI Airport from Dubai and was intercepted near the exit gate of the arrival hall after he had crossed the Green Channel. On examination of his baggage, 175 boxes of Cigarettes, 180 Pouches of Saffron, 74 Bottles of Rhoduna and 116 grams gold, totally valued Rs.9,04,355/- (other than Cigarettes) were recovered from him. He could not provide any document evidencing the licit possession/import of the recovered items. The Respondent, in his statement dated 07.06.2017, recorded under Section 108 of the Customs Act, 1962, admitted the concealment and recovery of the confiscated items. He also admitted that the recovered items belonged to one Mr. Raju who met him in market and told him to visit Dubai and bring

some goods for him. In return, he received an amount of Rs.20,000/- for this act. Out of these items, 175 boxes of Cigarettes were confiscated absolutely by the Customs officers, on the spot. The Respondent also waived Show Cause Notice and personal hearing. The Joint Commissioner, vide Order-in-original No. 81/2018-19 dated 28.05.2018, ordered absolute confiscation of gold items weighing 116gms, 180 Pouches of Saffron and 74 bottles of Rhoduna and imposed a penalty of Rs.1,80,000/- under Section 112 of the Customs Act, 1962. Being aggrieved, the Respondent filed an appeal before the Commissioner of Customs (Appeals), who, vide the impugned Order-in-Appeal, modified the order passed by the original authority to the extent of giving the option to redeem the confiscated goods, namely, gold items weighing 116gms, 180 Pouches of Saffron and 74 bottles of Rhoduna, on payment of redemption fine of Rs. 1,80,000/-, along with applicable Customs duty and reduced the penalty from Rs. 1,80,000/- to Rs. 1,00,000/-.

3. The revision application has been filed, mainly, on the ground that the act of green channel violation, non-declaration and concealment of goods proves the Respondent's malafide intention. Since the respondent is not the owner of the recovered goods and is merely a carrier, the allowance of redemption of the seized goods to the carrier was not warranted. Further, the non-compliance of the conditions of import of gold makes such goods liable for absolute confiscation.

4. Personal hearing, in virtual mode, was held on 03.09.2021. Sh. Azim Ansari, Superintendent, appeared for the

Applicant and reiterated the contents of revision application. Sh. Chetan Kumar, Advocate, appeared for the Respondent and reiterated the contents of the written reply received on 27.06.2019.

5. The Government has examined the case. Gold articles and other seized items were recovered from the respondent which were not declared by him under Section 77 of Customs Act, 1962, to the customs. Further, the Respondent had admitted the recovery of the seized items and the fact of non-declaration in his statement tendered under Section 108 of Customs Act, 1962. The gold coins and belt hook were painted with silver colour and the gold hemisphere shaped piece was concealed in his mouth by the Respondent to avoid detection by the Customs officers.

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 gold items, were not smuggled, is on the Respondent herein from whom the impugned goods are recovered. The manner of concealment, in this case, clearly shows that the Respondent had attempted to smuggle the seized gold in a planned manner to avoid detection by the Customs authorities. The Respondent, thus, failed to discharge the burden placed on him, in terms of Section 123 *ibid*.

7.1 The Commissioner (Appeals), vide the impugned Order-in-Appeal, has held that import of gold is not prohibited. However, the Government observes that the Apex Court, in the case of Sheikh Mohd. Omer vs Collection of Customs, Calcutta & Others [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 Joint Commissioner, in Para 10 and 11 of the Order-in-Original dated 28.05.2018, 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 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 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, there is no doubt that the seized gold items are '*prohibited goods*'. As such, the Commissioner (Appeals) has erred in holding that the impugned gold is not a prohibited item. However, in respect of

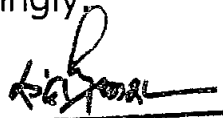
other items, namely, saffron and Rodhuna, the original authority has not elaborated the grounds for treating these items as 'prohibited goods'. Thus, Commissioner (Appeals)'s findings in relation to these items do not merit any interference.

8. The original 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 Respondent 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 in the matter. Thus, the discretion exercised by the original authority should not have been interfered with in so far as it related to the absolute confiscation of the gold items..

9. In view of the above, the impugned Order-in-Appeal dated 27.09.2018 is set aside to the extent of allowing redemption of confiscated gold on payment of fine. However, the redemption of other items, i.e., 180 pouches of Saffron and 74 bottles of Rodhuna, is maintained, under Section 125 of Customs Act, 1962, on payment of a reduced fine of Rs. 1,20,000/-, along with duty at baggage rate. The reduction of penalty to an amount of Rs. 1,00,000/- is maintained.

10. Revision application is disposed of, accordingly,


(Sandeep Prakash)

Additional Secretary to the Government of India

Mr. Mohd Iqbal,
H. No. 847, Chandni Mahal, Darya Ganj,
Delhi 110002

Order No. _ 172/21-Cus dated 08/09/2021

Copy to:

1. The Commissioner of Customs, IGI Airport, New Delhi.
2. The Commissioner of Customs (Appeals), New Delhi.
3. Shri Chetan Kumar, Advocate, 107-Ring Road Market, Sarojini Nagar, New Delhi -110023.
4. PA to AS(RA).

5. Guard File.

6. spare copy.

Attested



(लक्ष्मी राघवण)
(LAKSHMI RAGHAVAN)
अनुभाग अधिकारी / Section Officer
वित्त मंत्रालय (राजस्व विभाग)
Ministry of Finance (Deptt. of Rev.)
भारत सरकार / Govt. of India
नई दिल्ली / New Delhi