

**SPEED POST**



F.No. 375/139/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...13/09/21..

Order No. 179 /21-Cus dated 13/09/2021 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/229/2018 dated  
14.08.2018 passed by the Commissioner of  
Customs (Appeals), New Delhi.

Applicant : Sh. Shah Hussain, Muzaffarnagar.

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

\*\*\*\*\*

**ORDER**

A Revision Application No. 380/30/B/2018-RA dated 14.12.2018 has been filed by Sh. Shah Hussain, Muzaffarnagar (hereinafter referred to as the Applicant) against the Order-in-Appeal No. CC(A)Cus/D-I/Air/229/2018 dated 14.08.2018 passed by the Commissioner of Customs (Appeals), New Delhi, vide which the Commissioner (Appeals) has rejected the appeal filed by the Applicant against Order-in-Original no. 51-Adj-2016 dated 14.06.2016 passed by Additional Commissioner (Customs), IGI Airport, New Delhi, wherein the original authority had confiscated absolutely 30 gold bars and one gold locket, collectively weighing 3509.20 grams and valued at Rs. 85,81,047/- under Section 111(d), 111(i), 111(j), 111(l) and 111(m) of the Customs Act, 1962. Penalty of Rs. 17 lakhs was also imposed on the Applicant under Section 112 and 114AA of the Customs Act.

2. The brief facts of the case are that the Applicant arrived on 30.09.2014 at the IGI Airport, New Delhi from Riyadh and was intercepted near the exit gate after he had crossed the Green Channel. On examination of a mobile shaped packet carried by the Applicant, 30 pieces of gold bars and 01 piece of gold locket, collectively weighing 3509.20 grams and valued at Rs. 85,81,047/-, were recovered. The said gold was confiscated absolutely and a penalty of Rs 17 lakhs was imposed on the Applicant by the original authority vide the Order-in-Original dated 14.06.2016. Aggrieved, the Applicant filed an appeal before the Commissioner (Appeals), who, vide the impugned Order-in-Appeal, has rejected the appeal.

3. The revision application has been filed, mainly, on the grounds that the Applicant had brought the gold for his personal use; that gold is not a prohibited item as it is freely importable as per rules; that the confiscated gold may be released on payment of fine, duty and reduced penalty which is excessive.

4. Personal hearing, in virtual mode, was held on 10.09.2021. Sh. Amit Attri, Advocate, appeared for the Applicant and reiterated the contents of the revision application. He also requested for a lenient view to be taken as the penalty imposed is on a higher side. Sh. Rajnish Kumar, Superintendent, appeared for the Respondent department. He supported the orders of the lower authorities and highlighted that the case involves large scale smuggling (30 gold bars).

5. The Government has carefully examined the matter. It is evident that the impugned gold items were concealed in the form of a mobile shaped packet which was not declared to the customs authorities by the Applicant at the airport on his arrival as required under Section 77 of Customs Act, 1962. The Applicant admitted the recovery of gold from him and the fact of non-declaration in his statement dated 30.09.2014, tendered under Section 108 of Customs Act, 1962. The Applicant has contended that this statement was recorded under duress. However, nothing has been brought on record that the said statement was retracted by the Applicant. Hence, this appears to be an afterthought. He also admitted that the said gold

packet was given to him by his brother at Riyadh. Earlier, he was carrying it in his pant pocket but after collecting his baggage from the baggage belt, put the same on the bucket side of his baggage trolley and opted for green channel. Thus, it is clear that the Applicant acted in a premeditated fashion with a malafide intention to smuggle the gold.

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 Applicant from whom these were recovered. No evidence to rebut the presumption has also been placed on record. On the other hand, the manner of concealment makes it apparent that the Respondent had attempted to smuggle the seized gold in a well thought out manner to avoid detection by the Customs authorities. The Applicant has, thus, failed to discharge the burden placed on him, in terms of Section 123 *ibid*.

7.1 The Applicant has contended 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 Collector 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 Additional Commissioner, in paras 3.3, 3.4 and 3.5 of the Order-in-Original dated 14.06.2016, 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----."*

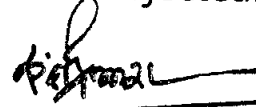
7.3 The original authority has correctly brought out that in this case the conditions subject to which gold could have been legally imported have not been fulfilled. Thus, keeping in view the law laid down as above, there is no doubt that the subject goods are *'prohibited goods'*. As such the Applicant's plea that gold is not a prohibited item and is freely importable does not hold any ground.

8. The Applicant has canvassed that the subject gold be released on payment of redemption fine. The original

adjudicating authority has denied the release of impugned goods on redemption fine under Section 125 of Customs Act, 1962, as discussed in Paras 4.1, 4.2 and 5 of the Order-in-Original. The Government observes that the option to release '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 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 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, 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 passed a well-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 does not warrant any interference.

9. As regards the penalty imposed on the Applicant, it is observed that in the facts and circumstances, the quantum thereof is just and fair.

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



(Sandeep Prakash)

Additional Secretary to the Government of India

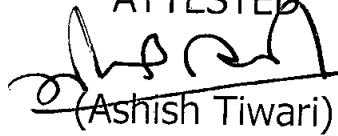
Sh. Shah Hussain, S/o Sh Mohd. Murtaza,  
R/o Mohalla Pharpatti, VPO-Baghonwali,  
PS New Mandi, Muzaffarnagar, UP.

Order No. \_ 179/21-Cus dated 13/09/2021

Copy to:

1. The Commissioner of Customs, IGI Airport, N Delhi-37.
2. The Commissioner of Customs (Appeals), IGIA, N Delhi-37.
3. PA to AS(RA).
4. Guard File.
5. spare copy.

ATTESTED



(Ashish Tiwari)

Assistant Commissioner (Revision Application)