

SPEED POST



F.No. 375/142/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..14/09/21...

Order No. 181 /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/235/2018 dated
23.08.2018 passed by the Commissioner of
Customs (Appeals), New Delhi.

Applicant : Shri Wakar Alam, Muzaffarnagar

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

ORDER

A Revision Application No. 375/142/B/2018-RA dated 19.12.2018 has been filed by Shri. Wakar Alam, Muzaffarnagar (hereinafter referred to as the Applicant) against the Order-in-Appeal No. CC(A)Cus/D-I/Air/235/2018 dated 23.08.2018 passed by the Commissioner of Customs (Appeals), New Delhi. The Commissioner (Appeals) has upheld the Order-in-Original no. 53-Adj./2016 dated 24.06.2016 passed by the Additional Commissioner of Customs, New Delhi, vide which twenty two gold bars weighing 2566.08 grams, valued at Rs.62,25,078/- have been confiscated absolutely under Section 111(d),111(i), 111(j), 111(1) and 111(m) of the Customs Act,1962. Penalty of Rs. 6.50 lakh has also been imposed on the Applicant under Sections 112 and 114AA of the Customs Act.

2. The brief facts of the case are that a person named Shri. Vikram Singh was intercepted on 03/04.11.2014 near the exit gate of the IGI Airport, New Delhi after he had crossed the Green Channel. During his frisking with the help of metal detector, 11 gold bars, concealed in each of his shoes, i.e., a total of 22 pieces of gold bars were recovered. The value of the 22 gold bars, totally weighing 2566.08 grams, was appraised at Rs. 62,25,078/- and the same were seized under Section 110 of the Customs Act,1962. On enquiry, Sh. Vikram, a technician working at the airport, admitted that the recovered gold bars did not belong to him and the same were handed over to him by a person whose name was not known to him but he recognizes that person by face. He was offered Rs.50,000/- for taking the gold out of the airport. Sh. Vikram recognized a passenger who was coming out through the green channel. The identified passenger, Shri. Wakar Alam (the Applicant,

herein), who had arrived at the IGI Airport from Riyadh via Bahrain, was intercepted near exit gate of arrival hall after he had crossed the customs green channel. In his statement tendered under Section 108 of the Customs Act, 1962, the Applicant admitted that he had handed over the said gold bars to Sh. Vikram on the direction of a person named Shoib. He also disclosed that the said gold bars were given to him by one Sh. Kumar at Riyadh and in return he received Rs. 20,000/- and return ticket to India. The original authority, vide Order-in-Original no. 53/Adj./2016 dated 24.06.2016, confiscated absolutely the said 22 gold bars and imposed penalty of Rs. 6,50,000/- under Section 112 and 114 AA of the Customs Act, 1962. Aggrieved, the Applicant filed an appeal before the Commissioner (Appeals), who, vide the impugned Order-in-Appeal, rejected the appeal.

3. The revision application has been filed, mainly, on the grounds that gold is not a prohibited item and should have been allowed by the lower authorities to be redeemed on payment of fine; that the statement tendered by the Applicant, under Section 108 of Customs Act, 1962, was recorded under duress; that the assessable value of the gold was appraised at a very high value as compared to the international market price; and that the penalty is on a higher side.

4. Personal hearing, in virtual mode, was held on 10.09.2021. Sh. Amit Kumar Attri, Advocate appeared for the applicant and reiterated the contents of Revision Application. He requested for a lenient view to be taken. Shri. Rajnish Kumar, Superintendent, appeared on behalf of the Respondent department. He supported the order of Commissioner

(Appeals) and highlighted that this is a case of smuggling in connivance with an airport employee.

5. The Government has carefully examined the matter. It is evident that the impugned gold bars were ingeniously concealed in the shoes of the carrier, Shri. Vikram Singh who was working as a technician at IGI Airport. The gold bars were brought into India by the Applicant herein and were given by him to the carrier to evade detection. These gold bars were not declared under Section 77 of Customs Act, 1962, to the customs authorities at the airport. Further, the Applicant agreed with the contents of the Panchnama dated 04.11.2014, manner of proceedings and Jewellery Appraiser's report. Hence, the averment about the higher valuation of the gold does not hold any ground. Further, the contention that the statement, recorded under Section 108, was obtained under duress also does not appear to be acceptable as this statement was never retracted and as the statement is corroborated by the statement of Sh. Vikram Singh.

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 bars, were not smuggled, is on the Applicant who had brought the gold into the country. The manner of concealment, in this case, clearly shows that the Applicant had attempted to smuggle the seized gold in connivance with an airport employee to avoid detection by the Customs authorities. The Applicant's contention that he is the owner of the gold bars is not acceptable in view of the fact that in his statement dated 04.11.2014, he had admitted that the gold bars were carried by him from Riyadh for someone else, for monetary consideration. Further, no evidence has been produced to prove licit import of the seized gold bars. 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 the 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 Para 3.3 to 3.5 of the Order-in-Original dated 24.06.2016, 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"*. Further, 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 as above, there is no doubt that the subject goods are '*prohibited goods*'.

8. The original authority has denied the release of impugned goods on redemption fine under Section 125 of Customs Act, 1962, which has been assailed in the instant revision application. It is observed 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 Government's policy regulating the import of gold. 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, 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 does not merit interference.

9. The penalty imposed is just and fair in the facts and circumstances of the case.

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


(Sandeep Prakash)

Additional Secretary to the Government of India

Mr. Wakar Alam, S/o Shri. Mohad Zahid
R/o H. No.176, Village & P.O. Nirana
Muzaffarnagar-251001.

Order No. _ 181_/21-Cus dated 13/09/ 2021

Copy to:

1. The Commissioner (Appeals), New Custom House, IGI Airport, New Delhi-110037
2. Additional Commissioner of Customs, IGI Airport, Terminal-3, Delhi-110037.
3. Sh. Amit Attri, Advocate, Chamber No. 952, Patiala House Courts, New Delhi-110 001.

4. PA to AS(RA).

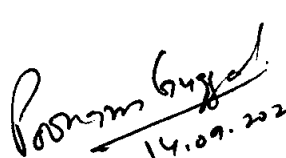
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ATTESTED 

(Ashish Tiwari)

Assistant Commissioner (RA)


14.09.2021

(Poonam Guggal)
Supd-(RA)