

SPEED POST



F.No. 375/121/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.. 22/09/21.

Order No. 189 /21-Cus dated 22/09/ 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/291/2017 dated
08.08.2017 passed by the Commissioner of
Customs (Appeals), New Delhi.

Applicant : Shri Jasmeet Singh Chadha, Faridabad.

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

ORDER

A Revision Application No. 375/121/B/2018-RA dated 22.11.2018 has been filed by Shri. Jasmeet Singh Chadha, Faridabad (hereinafter referred to as the Applicant) against the Order-in-Appeal No. CC(A)Cus/D-I/Air/291/2017 dated 08.08.2017 passed by the Commissioner of Customs (Appeals), New Delhi. As per letter C. No. Commr./APPL/DLH/CUS/Air/65/2016/3311 dated 07.09.2018 of the Office of the Commissioner (Appeals), the original copy of the aforesaid Order-in-Appeal was handed over to the Applicant, herein, on 07.09.2018. Vide the impugned Order-in-Appeal, the Commissioner (Appeals) has upheld the Order-in-Original no. 250-Adj./2015 dated 30.03.2016, passed by the Additional Commissioner of Customs, New Delhi, vide which two gold bars weighing 2000 grams, valued at Rs.51,24,000/- 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. 11 Lakhs 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 the Applicant, upon his arrival from Dubai, on his arrival from Dubai, was intercepted on 09.09.2014 near the exit gate of the arrival hall of IGI Airport, New Delhi, after he had crossed the Green Channel. During his frisking with the help of metal detector, 02 gold bars, concealed in his shoes, were recovered. The value of the 02 gold bars, totally weighing 2000 grams, was appraised at Rs. 51,24,000/- and the same were seized under Section 110 of the Customs Act,1962. On enquiry, the Applicant, in his statement dated 09.09.2014, recorded under Section 108 of Customs Act, 1962, admitted the recovery of the undeclared

gold bars. He stated that the gold bars were given to him by one person named Lakhi who offered him Rs 15,000/- to carry the gold bars and hand over the same to one Gagan Deep at the taxi stand outside IGI airport. The original authority, vide Order-in-Original no. 250-Adj./2015 dated 30.03.2016, confiscated absolutely the said 02 gold bars and imposed penalty of Rs. 11 Lakhs 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 under Section 125 of Customs Act; that the Applicant had approached Settlement Commission and an amount of Rs. 18,47,202/- was paid, vide TR-6 Challan dated 25.03.2015, as duty, fine and penalty; that the Settlement Commission vide Order dated 22.01.2016, held that the Applicant's application was not maintainable before it and reverted the case back to the original authority for adjudication; that the Panchnama dated 09.09.2014 drawn at the time of seizure was invalid as it did not contain the signatures of the Applicant; that it was incorrect to state that the gold was recovered from the shoes of the Applicant as the shoes were not confiscated by the original authority vide the Order dated 30.03.2016, as stipulated under Section 119 of the Customs Act; that the gold was imported with a bonafide intent of declaring it at the Red Channel.

4. Personal hearing, in virtual mode, was held on 03.09.2021 and 16.09.2021. Sh. Chinmay Seth, Advocate, appeared for the

Applicant and Sh. Azim Ansari, Superintendent, appeared for the Respondent department, on both the occasions. On 03.09.2021, Sh. Chinmay Seth drew attention to the written submissions filed on 02.09.2021 and fairly admitted that a copy thereof had not been furnished to the department. Subsequently, a copy of the written submissions was emailed to the department and comments on the same have been received and placed on record. On 16.09.2021, Sh. Seth reiterated the contents of the revision application as well as the written submissions dated 02.09.2021. Sh. Ansari prayed for rejection of the revision application.

5. The Government has carefully examined the matter. In his statement tendered under Section 108 of the Customs Act, 1962, the Applicant admitted the recovery of the gold bars from his possession and agreed with the contents of the Panchnama drawn on the spot, manner of Panchnama proceedings and jewellery appraiser's report. It was also admitted that he did this job for a pecuniary benefit as also the fact of intentional non-declaration, in contravention of Section 77 of Customs Act, 1962. Thus, it is evident that the gold bars were indeed ingeniously concealed in the shoes of the Applicant. Though, the shoes which were used for concealing the gold bars were not confiscated by the original authority, the fact of recovery of undeclared gold cannot be denied due to such technical flaws. Respondent department has rebutted that the Panchnama was not signed by the Applicant and it has been contended that it was signed by the Applicant on every page. It is further observed that the Applicant herein had not controverted the Panchnama by cross examination of the Pancha witnesses before the original authority. Further, the

Applicant has, in his voluntary statement recorded under Section 108 of Customs Act, agreed with the contents of the Panchnama. As such, this contention can also not be accepted.

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 to avoid detection by the Customs authorities. 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----."

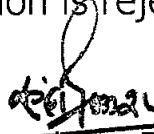
7.3 The original authority has correctly brought out that in this case the conditions, subject to which gold could have been legally imported, have not been fulfilled. Thus, following the law laid down as above, there is no doubt that the subject goods are '*prohibited goods*'.

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

Sh. Jasmeet Singh Chadha,
 C/o Sh. D. S. Chadha,
 92 GF, Block V, Eros Garden,
 Faridabad- 121 009.

Order No. _ 189 /21-Cus

dated 22/09 | 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. Chinmay Seth, Advocate, Q-148, Jangpura Extn., New Delhi-110020.
4. PA to AS(RA).
5. Guard File.
6. *spare copy.*

ATTESTED

(Ashish Tiwari)

Assistant Commissioner (RA)