

SPEED POST



F. No. 375/19/B/2021-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. 30/6/22

Order No. 203 /22-Cus dated 30-06-2022 of the Government of India passed by Sh. Sandeep Prakash, Additional Secretary to the Government of India, under Section 129DD of the Customs 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/867/2020-21 dated 12.01.2021 passed by the Commissioner of Customs (Appeals), New Delhi.

Applicant : Sh. Mohd. Faizan, Darya Ganj, Delhi.

Respondent: The Commissioner of Customs (Airport), New Delhi.

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ORDER

A Revision Application No. 375/19/B/2021-RA dated 05.04.2021, has been filed by Sh. Mohd. Faizan, Darya Ganj, Delhi (hereinafter referred to as the Applicant) against the Order-in-Appeal No. CC(A)Cus/D-I/Air/867/2020-21 dated 12.01.2021 passed by the Commissioner of Customs (Appeals), New Delhi. Commissioner (Appeals) has rejected the appeal filed by the Applicant against the Order-in-Original passed by the Deputy Commissioner of Customs, IGI Airport, New Delhi, bearing no. 103/2020-21 dated 27.10.2020, wherein, mercury coated 174 pieces of screws/ cut pieces of screws of gold, collectively weighing 188 gms, valued at Rs. 8,51,305/-, recovered from Applicant, were confiscated absolutely under Section 111 of the Customs Act, 1962. Penalty of Rs. 1,60,000/- was also imposed on the Applicant under Section 112 of the Act, *ibid*.

2. Brief facts of the case are that the Applicant arrived, on 01.10.2020, at IGI Airport, New Delhi, from Dubai. He was intercepted by the customs officers at the exit gate of the Arrival Hall after he had crossed the Green Channel. During the personal search of the Applicant, 174 pieces of screws/ cut pieces of screws of gold, collectively weighing 188 gms, valued at Rs. 8,51,305/-, were recovered which were coated with mercury to alter appearance. In his statement dated 01.10.2020, tendered under Section 108 of

Customs Act, 1962, the Applicant admitted the recovery of the subject gold in the form of screws/cut pieces of screws coated with mercury; and the fact that to save the customs duty, he did not declare the gold at Red Channel and admitted this mistake on his part. The original authority, vide the aforesaid Order-in-Original dated 27.10.2020, confiscated absolutely the seized gold, under the provisions of Section 111 of the Act, *ibid* and also imposed a penalty of Rs. 1,60,000/- on the Applicant under Section 112. Aggrieved, the Applicant filed an appeal which has been rejected.

3. The instant revision application has been filed, mainly, on the grounds that that Applicant himself declared the gold to the Baggage Officer and the case of mis-declaration was wrong and the gold was kept in the baggage of the Applicant; that the subject gold is not smuggled and hence the provisions of Section 123 are not applicable; that import of gold is not prohibited; that it is obligatory on the part of the customs officer to give option to pay in lieu of confiscation; and that a token penalty under Section 112 may be imposed .

4. Personal hearing was fixed on 26.05.2022, 13.06.2022 and 29.06.2022. In the personal hearing held on 29.06.2022, in virtual mode, Sh. S. S. Arora, Advocate, appeared for the Applicant and reiterated the contents of the revision application. He highlighted that

the goods were originally detained for payment of duty & ITC fine. Hence, these could not have been absolutely confiscated. He also submitted that the penalty is on a higher side. None appeared for the department nor any request for adjournment has been received. Hence, the matter is taken up for decision on the basis of the records available.

5. The Government has carefully examined the matter. It is observed that the proceedings before the authorities below are based on green channel violation dated 01.10.2020. This fact was also admitted by the Applicant in his statement. Therefore, the contentions to the contrary are incorrect and unacceptable. Further, manner of concealment, i.e., changing the form and coating of gold articles with mercury to change its appearance, also belies the contention that the Applicant had made a declaration in this regard to the customs officers.

6.1 In terms of Section 123 of the Act, *ibid*, in respect of the gold and manufactures thereof, the burden of proof that such goods are not smuggled is on the person, from whom goods are recovered. In the present case, the Applicant has failed to produce any evidence that the gold articles recovered from him were not smuggled. The gold articles were ingeniously concealed and coated with mercury to

evade detection and also were not declared by the Applicant to the custom officers, as required under Section 77 of Customs Act, 1962. The Applicant has, thus, failed to discharge the burden placed on him, in terms of Section 123, *ibid*.

6.2.1 It is the contention of the Applicant that Section 123 is not applicable in the instant case, since the subject goods are not "smuggled goods" as the seizure was made before customs barrier i.e., within Customs bonded area. The decision of Tribunal in the case of Prakash Chandra Shantilal Versus Commissioner of Customs, Ahmedabad {2013(290)ELT125(Tri-Ahmd.)} has been cited in support. The Government observes that, in terms of Section 2 (39) of the Customs Act, "smuggling", in relation to any goods, means any act or omission which will render such goods liable to confiscation under Section 111 or Section 113." Thus, "smuggled goods" are any goods that are liable to confiscation under Section 111 or Section 113. In the present case, the goods have been held to be liable to confiscation under Section 111. There is no challenge to the liability to confiscation of the goods in the instant revision application. In fact, a prayer has been made to allow redemption under Section 125 of the Act. Section 125 provides for an option to pay fine in lieu of confiscation. Thus, by Applicant's own admission the goods are liable to confiscation as consequent to such liability only, redemption could

have been sought. In this light, the present contention of the Applicant is misconceived and un-acceptable.

6.2.2 It may also be observed that, as per Section 2 (25) of the Act, "imported goods" means any goods brought into India from a place outside India but does not include goods which have been cleared for home consumption." Further, as already brought out hereinabove, the "smuggled goods" are any goods that are liable to confiscation under Section 111 or Section 113. The Applicant's contention is that since the goods have not crossed the Customs barrier i.e., they were within Customs bonded area, as such, these had not been cleared for home consumption. Therefore, these are "imported goods" and not "smuggled goods". By implication, it is the contention of the Applicant that the goods that have not been cleared for home consumption cannot be held liable to confiscation under Section 111. There is no authority in law for such a proposition. In fact, a plain reading of Section 111 makes it evident that liability to confiscation fastens to any goods that are improperly imported including those that are unloaded, or are attempted to be unloaded at any customs port or airport, or are attempted to be imported etc. Therefore, there is no manner of doubt that "imported goods" if they are liable to confiscation under Section 111 are to be termed as "smuggled goods" as well. As such, with respect, the case law cited

by the Applicant does not appear to have been decided correctly, to this extent.

7.1 It is contended on behalf of the Applicant that the import of gold is not 'prohibited'. However, the Government observes that this contention of the Applicant is in the teeth of law settled by a catena of judgments of Hon'ble Supreme Court. In the case of Sheikh Mohd. Omer vs Collector of Customs, Calcutta & Ors {1971 AIR 293}, the Apex Court 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*". Gold is not allowed to be imported freely in baggage and 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"*. Further, in the case of UOI & Ors vs. M/s Raj Grow Impex LLP & Ors (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 In this case, since the conditions, subject to which gold could have been legally imported, have not been fulfilled, there is no doubt that the subject goods are 'prohibited goods'. The case laws cited by the Applicant are not applicable in view of the dictum of Hon'ble Supreme Court and Hon'ble Madras High Court, as above.

8. The original authority has denied the release of the offending goods on redemption fine under Section 125 of Customs Act, 1962.

The Government observes that, in terms of Section 125 of the Customs Act, 1962, 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 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; 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".*" Hon'ble Delhi High Court has, in the case of Raju Sharma [2020 (372) ELT 249 (Del)], relying upon the judgment of Apex Court in Mangalam Organics Ltd. [2017 (349) ELT 369 (SC)], held that "*Exercise of discretion by judicial, or quasi-judicial authorities, merits interference only where the exercise is perverse or tainted by patent illegality, or is tainted by oblique motive.*" In the present case, the Order of the original authority does not suffer from any of these vices. Rather, the original authority has,

after due application of mind, ordered absolute confiscation for the relevant and reasonable considerations brought out in para 9.4 of the Order-in-Original. Thus, the Commissioner (Appeals) has correctly refused to interfere in the matter.

9. It has been averred that the goods were detained for appraisal and payment of duty etc., as per the DR countersigned by the AC, but later the goods were confiscated absolutely by the AC. It is observed that the detained goods are subject to clearance as per rules. The detention of any goods, either on the request of the passenger/ person or by the Customs authorities, at international airports, are subject to quasi-judicial proceedings, depending upon the nature of the goods as well as the gravity of the offence involved therein. Thus, this contention does not hold good as upon detailed examination, it was found by the original authority that the goods merited absolute confiscation, as per law.

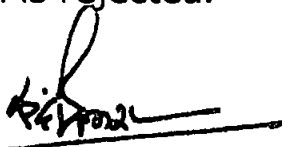
10. The imposition of penalty under Section 114AA has also been assailed by the Applicant. Section 114 AA reads as under:

'Penalty for use of false and incorrect material. - If a person knowingly or intentionally makes, signs or uses, or causes to be made, signed or used, any declaration, statement or

document which is false or incorrect in any material particular, in the transaction of any business for the purposes of this Act, shall be liable to a penalty not exceeding five times the value of goods."

The Government observes that the Applicant had replied in negative when he was asked whether he had anything to declare thereby, making a false declaration to the Customs. This declaration was required to be made under Section 77A. Thus, the imposition of penalty under Section 114AA is merited. The Government further observes that, in the facts and circumstances of the case, penalty imposed on Applicant is just and fair.

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



(Sandeep Prakash)

Additional Secretary to the Government of India

Sh. Mohd. Faizan,
R/o H. No. 1833-A, Chatta Agha Jaan,
Kalan Mahal, Darya Ganj,
Delhi - 110002.

Order No. 203/22-Cus dated 30-06-2022

Copy to:

1. The Commissioner of Customs, T-3, IGI Airport, New Delhi-110037

2. The Commissioner of Customs (Appeals), New Customs House,
New Delhi-110037.

3. Sh. S. S. Arora, Advocate, BI/71, Safdarjung Enclave, New Delhi-
110 029.

4. PA to AS(RA).

✓ 5. Guard File.

6. Spare Copy.

ATTESTED

2022/01/21
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