

SPEED POST



F. No. 375/49/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...05/7/22

Order No. 209/22-Cus dated 05-07-2022 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. 94(SM)CUS/JPR/2021 dated 06.07.2021, passed by the Commissioner (Appeals), Customs, Central Excise & CGST, Jaipur.

Applicants : Sh. Bhavdeep Kantilal Viroja, Rajkot, Gujrat.

Respondent : The Commissioner of Customs (Preventive), Jodhpur, Hqrs at Jaipur.

ORDER

A Revision Application, bearing No. 375/49/B/2021 dated 18.10.2021, has been filed by Sh. Bhavdeep Kantilal Viroja, Rajkot, Gujrat (hereinafter referred to as the Applicant), against the Order-in-Appeal No. 94(SM)CUS/JPR/2021 dated 06.07.2021, passed by the Commissioner (Appeals), Customs, Central Excise & CGST, Jaipur. The Commissioner (Appeals) has upheld the Order-in-Original, passed by the Assistant Commissioner of Customs, International Airport, Sanganer, Jaipur, bearing no. 03/2020-CUS dated 23.02.2020, wherein, inter-alia, one gold kada, weighing 247.450 gms and valued at Rs. 8,09,644/-, was confiscated absolutely under Section 111(d), 111(i), 111(j), 111(l) and 111(m) of the Customs Act, 1962. Penalty of Rs. 1,00,000/- under Section 112(a)(i) and Penalty of Rs. 10,000/- under 114AA of the Customs Act, 1962, respectively, was imposed on the Applicant.

2. Brief facts of the case are that the Applicant arrived at International Airport, Sanganer, Jaipur, from Dubai, on 13.03.2019. He was intercepted by the Customs officers when he had already crossed the green channel without submitting any declaration under Section 77 of the Customs Act, 1962. On search of hand baggage of the Applicant, one gold kada, weighing 247.450 gms and valued at Rs. 8,09,644/-, wrapped with peach coloured hand towel and concealed in a black coloured hand bag with mark "Gene", was recovered from the Applicant. In his statement dated 13.03.2019, tendered under Section 108 of Customs Act, 1962, the Applicant admitted the recovery of the said gold kada from him. He

further stated that the subject gold was purchased by him at Dubai for profit making. The original authority, vide the Order-in-Original dated 23.02.2020, confiscated absolutely the seized gold kada. Penalties, as mentioned in Para 1 above, were also imposed on the Applicant under Section 112 and 114AA 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 instant revision application has been filed, mainly, on the grounds that the Applicant had filed the Customs Declaration Form and it was also sovereign duty of the officers to get the declaration filed; that there was no pre-notice consultation and thus show cause notice was otiose; that the goods are not liable for confiscation within the jurisdiction of Customs Rajasthan; that import of gold jewellery is not prohibited; that the penal provisions are not invokable; that absolute confiscation of gold is not tenable and the same liable to be released.

4. Personal hearing was fixed on, 03.06.2022, 17.06.2022 and 01.07.2022. The Counsel of the Applicant sought adjournment on first two (02) dates and further informed inability to attend hearing to be held on 01.07.2022, due to non-availability of internet services. Therefore, keeping in view the special circumstances, another hearing was fixed on 08.07.2022. However, the Counsel, vide mail dated 01.07.2022, requested to attend the hearing on 04.07.2022 with the submission that he has to appear in another case before the revisionary authority. Hence, with the consent of the Respondent department, the

hearing was held on 04.07.2022, in virtual mode, wherein Sh. Arun Goyal, Advocate, appeared for the Applicant. Sh. Goyal reiterated the contents of the revision application and written submissions dated 01.07.2022. He requested that in view thereof goods may be released on nominal RF & PP. Sh. B.B. Atal, AC supported the orders of lower authorities.

5.1 The Government has carefully examined the matter. It is the case of the department, as borne out from the Panchnama, that the Applicant had not declared the subject gold kada to the Customs on his arrival from Dubai. Even when specifically inquired about carriage of any dutiable goods, the Applicant replied in negative. During scanning of his hand baggage, the confiscated gold in the form of kada, wrapped with peach coloured hand towel and concealed in a black coloured hand bag with mark "Gene", was recovered. On the other hand, it is the contention of the Applicant that he had filed the requisite Declaration while simultaneously it is also claimed that it was the sovereign duty of the officers to get the Declaration filed. As already observed, the Panchnama supports the departments' contention that no written Declaration was filed and in the oral Declaration the Applicant had denied carriage of any contraband. No evidence has been placed on record to dispute the Panchnama other than a bald assertion that the Applicant was forced to sign the Panchnama. Therefore, the subject contention is nothing but an afterthought and, as such, not acceptable. As regards, the duty of the officers, it is evident that the officers did fulfil their duty by asking the Applicant to make a declaration but the Applicant made a misdeclaration in as much as he denied carriage of any contraband.

5.2 Another contention of the Applicant is that the show cause notice is void since there was no pre-notice consultation. The Government observes that the subject show cause notice was issued in terms of Section 124 of the Customs Act, 1962 and that there is no requirement in law mandating pre-notice consultation before issue of notice under Section 124. Hence, this contention of the Applicant also has no legs to stand.

6. In terms of Section 123 of Customs Act 1962, 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 item, which was ingeniously concealed inside his hand baggage, was not smuggled. The gold item was not declared by the Applicant to the custom officers, as required under Section 77 of Customs Act, 1962. Further, the Applicant had not produced any evidence i.e., purchase invoice etc. to substantiate his claim that he had purchased the gold article and, thus it belonged to him. Rather he had admitted that the confiscated gold kada was smuggled by him for profit motive. The Applicant has, thus, failed to discharge the burden placed on him, in terms of Section 123, *ibid*.

7.1 It is contended on behalf of the Applicant that the subject goods are not liable to absolute confiscation. By implication, it is claimed that these goods are not "prohibited goods". The Government observes that, 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 and gold jewellery 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, the conditions, subject to which gold could have been legally imported in baggage, have not been fulfilled. Thus, following the ratio of the aforesaid judgments, there is no doubt that the subject goods are 'prohibited goods'.

8.1 The original adjudicating authority has denied the release of offending goods on redemption fine under Section 125 of Customs Act, 1962. In terms of Section 125, 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.)].

8.2 The Applicant has, however, relied upon the judgment dated 17.02.2022 of the Hon'ble Rajasthan High Court, in the case of Manoj Kumar Sharma Vs. UOI & Ors [CWP No. 12001/2020] to seek redemption of the confiscated gold kada. The Government finds that the Hon'ble Court has agreed with the judgment of Hon'ble Gujarat High Court, in the case of Bhargavraj Rameshkumar Mehta Vs. UOI [2018 (361) ELT 260 (Guj)], wherein it is held that for the purposes of Section 111 *"---goods, import of which is conditional, would fall within the definition of prohibited goods if such conditions are not complied with."* The Hon'ble High Court has, however, subsequently in its judgment distinguished between the interpretation of "prohibited goods" in respect of Section 125 and that in respect of Section 112 read with Section 111 in the following terms:

"This view may seem incongruent with the view expressed by Gujarat High Court in case of Bhargavraj Rameshkumar Mehta (supra) which we have also followed in this judgment but flavours of Section 112 and 125 of the Customs Act are entirely different. Section 125 on the other hand pertains to option to pay fine in lieu of confiscation. As noted, sub-section (1) of Section 125 comes in two parts. Whenever confiscation of goods is authorised under the Act, as per sub-section (1) of Section 125 the adjudicating officer has a discretion to offer redemption fine in lieu of confiscation in case of goods importation or exportation whereof is prohibited. In all other cases, there is a statutory mandate on the adjudicating officer to offer such redemption fine. If the interpretation of Section 112 and 125(1) is not reconciled as above, this latter portion of sub-section (1) of Section 125 which covers all cases except where the importation or exportation of the goods is prohibited, would become otiose."

Thus, Hon'ble Rajasthan High Court has, in effect, held that while the goods, import/ export of which is conditional, have to be considered as "prohibited goods" for the purposes of imposition of penalty under Section 112/114, however, for the purposes of Section 125, such goods cannot be considered to be so. The Government respectfully observes that this distinction drawn by the Hon'ble Rajasthan High Court is at variance with the judgment of Hon'ble Supreme Court in the case of Raj Grow Impex (supra). The Apex Court has, in Raj Grow Impex, held that the goods which were imported beyond permissible quantity and without licence (i.e., in contravention of the conditions) were "prohibited goods" and

thereafter proceeded to hold such goods liable to absolute confiscation, i.e., without affording the option of redemption under Section 125. Thus, the Hon'ble Supreme Court has not made any distinction between the meaning of "prohibited goods" for the purpose of Section 112 read with Section 111 and that for the purpose of Section 125. The judgment in Raj grow Impex (supra) case has not been considered by the Hon'ble Rajasthan High Court in the case of Manoj Kumar Sharma. As such, the Government respectfully follows the dictum of Hon'ble Supreme Court in the matter and holds that the subject goods being "prohibited goods", the option to redeem such goods in lieu of confiscation is discretionary.

8.3 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*". Further, 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.*" The Hon'ble High Court has further held that "*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 Vs. UOI {2020(372)ELT249 (Del.)}, 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 motives.*" In holding so, the Hon'ble High Court has relied upon the judgement of Apex Court in the case

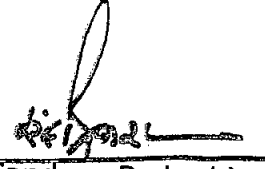
of Mangalam Organics Ltd. {2017(349)ELT369(SC)}. Thus, the Commissioner (Appeals) could have interfered with the discretion exercised by the original authority only if it would have been tainted by any of vices highlighted by the Hon'ble Courts. Such a case is not made out. Hence, the Commissioner (Appeals) has correctly refused to interfere with discretion exercised by the original authority.

8.4 The Applicant has also placed on record copies of some orders passed by the lower authorities to support his case. The Government observes that these orders passed by lower authorities have been passed in the facts of those cases and that the correctness of these orders cannot be tested in the present proceedings. As such, these are not even of persuasive value in the present case.

8.5 A judgment of the Hon'ble Delhi High Court, in the case of Commissioner of Customs vs. R. K. International {2018-TIOL-1762-HC-DEL-CUS} has also been cited to contend that since no duty has been demanded, all allegations for confiscation are otiose and redundant. The Government observes that, in the said case, the question of law framed for the consideration of Hon'ble High Court was: "Whether the revenue is entitled to recover the customs duty under Section 125(2) of the Customs Act on the goods which are confiscated under Section 111(d) and allowed redemption under Section 125(1) of the said Act, even when no specific demand is made in the show cause notice?" The Hon'ble High Court answered this question against the Revenue. There is nothing in the judgment of the Hon'ble High Court to even remotely suggest that the authorities cannot proceed with confiscation

of the offending goods under Section 111 of the Act, if the demand of duty has not been raised under Section 28.

9. In view of the above, the impugned OIA does not merit revision.



(Sandeep Prakash)

Additional Secretary to the Government of India

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Order No. 209/22-Cus dated 05-07-2022

Copy to:

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3. Sh. Arun Goyal, Advocate, 11, Jai Ambey Colony, Madrampura, Civil Lines, Jaipur-302 006, Rajasthan;
4. PA to AS(RA).
5. Guard File.
6. Spare Copy

Attested



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