

SPEED POST



F. No. 375/01/B/2018-R.A.
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. 29/12/2020

ORDER NO. 22/2020-Cus dated 28/12/2020 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 129DD of the Customs Act, 1962 against the Order-in-Appeal No. CC(A)/CUS/D-I/Air-561/2017 dated 13.12.2017, passed by the Commissioner (Appeals), Delhi.

APPLICANT : Sh. Hemendra Singh.

RESPONDENT : Commissioner of Customs (General & Airport), Delhi.

ORDER

A Revision Application No. F. No. 375/01/B/2018-R.A. dated 03.01.2018 has been filed by Sh. Hemendra Singh, (hereinafter referred to as the applicant) against order-in-appeal No. CC (A)/CUS/D-I/Air-/561/2017 dated 13.12.2017, passed by the Commissioner (Appeals), Delhi. The order-in-appeal has upheld the Additional Commissioner's Order-in-Original No. 138/2016 dated 16.08.2016 to the extent wherein four gold bars collectively weighing 300 grams valued at Rs.8,18,856/- have been absolutely confiscated and free allowance was disallowed. However, the penalty of Rs.1,60,000/- was reduced to Rs. 90,000/- under Section 112 of the Customs Act, 1962.

2. The brief facts of the case are that the applicant arrived on 01.05.2016 at IGI Airport from Bangkok and was intercepted near the exit gate after he had crossed the Customs Green Channel. After search of his person and of his baggage four gold bars concealed in mobile phones were recovered from his possession. The gold bars were appraised at Rs. 8,18,856/-. The applicant in his statement, recorded under Section 108 of the Customs Act, 1962, admitted the concealment and recovery of gold bars. The Additional Commissioner of Customs, IGI airport, New Delhi vide aforesaid OIO dated 16.08.2016, ordered absolute confiscation of the seized gold bars and imposed penalty of Rs. 1,60,000/- under Section 112 of the Customs Act, 1962. Aggrieved, the applicant filed an appeal before the Commissioner (Appeals) which was rejected, except for reduction in penalty amount to Rs. 90,000/-. The Revision application has been filed on the ground that the order of the Commissioner (Appeals) is erroneous as the gold is not a prohibited item and should be allowed to be redeemed on payment of redemption fine in terms of Section 125 of the Customs Act, 1962; that there was no concealment of gold and the

allegation to this effect is incorrect as mobile phone said to have been used for concealment was not seized. They are eligible to import gold at concessional rate in terms of notification no. 12/2012-Cus dated 17.03.2012 being an eligible passenger. He also requested for reduction of personal penalty.

3. Personal hearing in the matter was held on 09.12.2020. Sh. S.S.Arora, Advocate, attended the hearing on behalf of the applicant and reiterated the grounds of revision already stated in their revision application. Sh. Satish Panwar, Superintendent, appeared on behalf of the respondent. He stated that the applicant has no intention to pay duty on gold which was concealed as he was passing through Green Channel. He did not opt to pay duty even after detention receipt was prepared. Sh. Panwar offered to submit case records for perusal of Government within 15 days i.e. up to 24.12.2020.

4. Respondent/department vide letter dated 24.12.2020 submitted their reply. It is stated that the applicant, in his statement dated 01.05.2016, has admitted that he was intercepted by Customs Officer and 04 gold bars weighing 300 grams were recovered which were concealed in Mobile phone; that the gold belonged to him, that he intentionally did not declare the gold to evade Customs Duty. Applicant, vide letter dated 08.08.2016, requested for re-export of the gold bars and also sought waiver from Show Cause Notice & personal hearing. Later the applicant changed his stance and sought release of the seized goods on payment of Redemption Fine. As regard the case records, the original case file and statement is not traceable.

5. From the revision application, it is evident that the applicant is disputing the fact that the gold bars were concealed as the mobile phones in which the gold bars were said

to have been concealed was not seized. Further, no Panchnama was drawn to show such seizure. Government observes that the applicant in his statement dated 01.05.2016 has admitted the fact that he was intercepted by the Customs Officer and four gold bars weighing 300 gms were recovered from his possession which were concealed in mobile phones. The statement of the applicant has not been retracted neither before the Original authority nor before the Commissioner (Appeals). Hence, the contention of applicant that the gold bars were not concealed is not tenable .

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 2[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 proof is on the PAX from whom the impugned goods are recovered in terms of Section 123 of Customs Act, 1962 which the applicant failed to do.

7. The question of law raised by the applicant is that the import of gold is not 'prohibited'. The law on this issue is settled by the judgement of Hon'ble Supreme Court in the case of Sheikh Mohd. Omer vs Collection of Customs, Calcutta & Ors {1971 AIR 293}. Hon'ble Supreme Court 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 11 of the O-I-O dated 16.08.2016, 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 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". 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 by the Apex Court, there is no doubt that the subject goods are 'prohibited goods'.

8. The original adjudicating authority has denied the release of impugned goods on redemption fine under Section 125 of Customs Act, 1962. The Government observes 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 by walking through the Green Channel and not declaring the goods. In the case of Commissioner of Customs (Air), Chennai-I Vs.P. Sinnasamy {2016(344)ELT1154 (Mad.)}, the Hon'ble Madras High Court, after extensive application of several judgments of the Apex 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. Thus, applying the ration of P. Sinnasamy (Supra), the discretion exercised by the original authority does not merit interference.

9. The applicant has also prayed for setting aside/reducing the penalty. It is observed that the Commissioner (Appeals) has already reduced the penalty to Rs. 90,000/- from Rs. 1,60,000/-. In the facts of the case, no further relief is warranted.

10. In view of the above, the Government upholds the impugned Order-in-Appeal. The revision application is rejected.



(Sandeep Prakash)

Additional Secretary to the Government of India

1. Sh. Hemendra Singh, 1/228, Vishal Khand-1, Gomti Nagar, Lucknow 226010

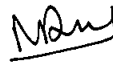
2. The Commissioner of Customs, IGI Airport, New Delhi -110037

ORDER NO. 22/2020- Cus dated 28-12-2020

Copy to:-

1. The Commissioner (Appeals), New Customs House, Near IGI Airport, New Delhi-110037
2. P.S. to A.S.
3. Guard File.
4. Spare Copy.

ATTESTED



(NIRMALA DEVI)

S. O.