

SPEED POST



F. No. 375/55/B/2021-RA
F. No. 375/56/B/2021-RA
F. No. 375/57/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... 12/1/22

Order No. 223-225/22-Cus dated 12-7-2022 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 Applications filed, under Section 129DD of the Customs Act 1962, against the Order-in-Appeal No.CC(A)Cus/D-I/Air/398-400/21-22 dated 06.09.2021, passed by the Commissioner of Customs (Appeals), New Custom House, New Delhi.
- Applicants : 1. Sh. Ali Ahmed Dost, Kandahar, Afghanistan.
2. Sh. Sardar Gul Fateh Khan, Kandahar, Afghanistan.
3. Sh. Bashir Ahmad Dost, Kandahar, Afghanistan.
- Respondent : Commissioner of Customs, IGI Airport, New Delhi.
-

ORDER

Three Revision Applications bearing Nos. 375/55/B/2022-RA, 375/56/B/2022-RA & 375/57/B/2022-RA, all dated 17.11.2021, have been filed by Sh. Ali Ahmed Dost, Kandahar, Afghanistan (hereinafter referred to as the Applicant-1), Sh. Sardar Gul Fateh Khan, Kandahar, Afghanistan (hereinafter referred to as the Applicant-2) & Sh. Bashir Ahmad Dost, Kandahar, Afghanistan (hereinafter referred to as the Applicant-3), respectively, against the Order-in-Appeal No. CC(A)Cus/D-I/Air/398-400/21-22 dated 06.09.2021, passed by the Commissioner of Customs (Appeals), New Custom House, New Delhi. The Commissioner (Appeals) has set aside the order of the Additional Commissioner of Customs, IGI Airport, New Delhi, bearing No. 145/ADJ/2019 dated 09.05.2019, wherein three gold bars and one cut piece of gold, collectively weighing 440 grams; 05 gold bars, collectively weighing 580 grams; and 05 gold bars, collectively weighing 580 grams, totally valued at Rs. 49,23,914/-, recovered from the possession of the Applicant-1, 2 & 3, respectively, were confiscated absolutely under Section 111(d), 111(i), 111(j), 111(l) 111(m) and 111(o) of the Customs Act, 1962. The Commissioner (Appeals), vide the impugned OIA, has upheld the confiscation of the seized gold but remanded the matter back to original authority in terms of Section 128A(3)(b)(i) of the Customs Act, 1962 with the direction to pass a speaking order on the request of the Applicants to allow re-export of impugned gold articles. Penalty of Rs. 2,50,000/-, Rs. 3,50,000/- and Rs. 3,50,000/- was imposed on the Applicant-1, 2 & 3, respectively, by the original authority, under Sections 112 & 114 AA of the Customs Act, 1962.

2. Brief facts of the case are that the Applicants arrived, on 20.02.2019, at IGI Airport, New Delhi, from Dubai and were intercepted near the exit gate after they had already crossed the Customs Green Channel. Detailed examination of their baggage and personal search, resulted in the recovery of gold bars and one cut piece of gold, collectively weighing 1600 grams, totally valued at Rs. 49,23,914/-. The Applicants, in their statement dated 20.02.2019, 22.02.2019 and 04.03.2019, tendered under Section 108 of the Customs Act, 1962, admitted the recovery of said gold bars/ pieces,

from their possession and stated that they were the owners of the seized gold and submitted the copies of the purchase bills; that the gold bars/ pieces were purchased to explore business opportunities in India. The Applicants, vide letter dated 25.04.2019, admitted the acts of omission and commission on their part and stated that they were ready to pay duty, fine and penalty as applicable and requested for re-export of the seized goods. The Applicants also waived the issuance of show cause notice and personal hearing. The subject goods were confiscated absolutely by the original authority, vide Order dated 13.05.2019. The Applicants preferred appeals before the Appellate Authority who remanded the matter back to the original authority, in terms of Section 128A(3)(b)(i) of the Customs Act, 1962, with the direction to pass a speaking order, in respect of the request of the Applicants to allow re-export of the subject gold articles.

3. The revision applications have been filed on identical grounds. It has been submitted that the gold was not concealed and the Applicants had made oral declaration to the officers regarding its carriage; the import of gold in baggage is not prohibited; that the absolute confiscation of the gold is not justified and it should have been allowed to be redeemed on payment of redemption fine under Section 125 of Customs Act, 1962. Accordingly, it has been prayed that the gold may be allowed to be redeemed; confiscation may be set aside and re-export of the goods may be allowed and the personal penalty may be set aside or a token penalty may be imposed.

4. Personal hearing was fixed on 10.06.2022, 27.06.2022 and 11.07.2022. No one appeared for either side. On 11.07.2022, at the time of personal hearing, a request was received by email, requesting for adjournment on behalf of the Applicants. Since several opportunities had already been granted, and this was the last and final opportunity, request for adjournment was rejected and the Applicants were advised to appear for hearing in virtual mode. However, no one appeared. Since sufficient opportunities have been granted, the case is taken up for disposal based on records.

5. The Government has carefully examined the matter. It is observed from the records that the Applicants had crossed green channel before they were intercepted. Upon being asked whether they were carrying any dutiable goods, they replied in negative and also stated that they had not filled the Customs Declaration Form. It was only after their interception and when they were made to pass through the Door Frame Metal Detector (DFMD) and beep sound was heard, that the Applicants took out the yellow material kept in their pockets. Therefore, the contention that they had orally declared the offending goods to the customs officers is incorrect. Rather by refusing to declare the goods and by not filling up the Customs Declaration Form, though they were carrying subject gold, the Applicants have contravened the provisions of Section 77 of the Act, *ibid*.

6.1 The Commissioner (Appeals) has upheld the confiscation of goods under Section 111 of the Customs Act, 1962. However, it is the contention of the Applicants that the import of gold in baggage is not prohibited. The Government observes that import of gold in baggage, is allowed subject to certain conditions. In the case of Sheikh Mohd. Omer Vs Collector of Customs, Calcutta & Ors {1971 AIR 293}, it was held by the Hon'ble Supreme Court 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". In the case of M/s Om Prakash Bhatia Vs. Commissioner of Customs, Delhi {2003(155) ELT 423 (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 judgements 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.*"

6.2 In the case of Malabar Diamond Gallery P. Ltd. Vs ADG, DRI, Chennai [2016(341) ELT 65 (Mad.)], the Hon'ble Madras High Court has specifically held that:

"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 -----."

6.3 In the present case, it is not even contended by the Applicants that the conditions subject to which gold could have been legally imported have been fulfilled. Thus, following the ratio of the aforesaid judgments, there is no doubt that the subject goods are 'prohibited goods'.

7. The original adjudicating authority has denied the release of the gold 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 (SC.)]. 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 reasons 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) ELT 1154 (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 "relevancy and reason".* Hon'ble Delhi High Court has, in the case of Raju Sharma [2020 (372)ELT 249 (Del)], relying upon the judgement 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 original authority has denied redemption after due consideration of relevant aspects. The Government's policy objectives of restricting the import of gold have been specifically taken into consideration. Thus, the original authority has exercised the discretion for reasonable and relevant considerations and the discretion so exercised does not merit interference.

8.1 As regards the request for allowing re-export, the matter has been remanded by the Commissioner (Appeals) to the original authority for disposing off this request by way of a speaking order. In normal course, the Government would not intervene in the case of a remand order. However, the Applicants themselves are not satisfied by the remand order and have approached the Government for allowing re-export. Hence, this issue is also taken up for consideration.

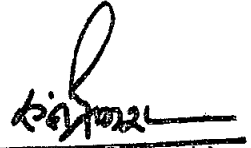
8.2 Section 80 of the Customs Act, 1962, which permits temporary detention of baggage for subsequent re-export, reads as under:

"SECTION 80. Temporary detention of baggage – Where the baggage of a passenger contains any article which is dutiable or the import of which is prohibited and in respect of which a true declaration has been made under section 77, the proper officer may, at the request of the passenger, detain such article for the purpose of being returned to him on his leaving India and if for any reason, the passenger is not able to collect the article at the time of his leaving India, the article may be returned to him through any other passenger authorised by him and leaving India or as cargo consigned in his name. "

8.3 Thus, on a plain reading of Section 80, it is apparent that a declaration under Section 77 is a pre-requisite for allowing re-export. The Hon'ble Allahabad High Court

has, in the case of Commissioner of Customs (Preventive), Lucknow vs. Deepak Bajaj {2019 (365) ELT 695 (All.)}, held that a declaration under Section 77 is a sine-qua-non for extending the benefit of Section 80. Therefore, in the present case, the benefit of re-export cannot be allowed since declaration under Section 77 was not made. Hence, the request for re-export is rejected.

9. In view of the above, the revision applications are rejected. The impugned Order-in-Appeal dated 06.09.2021 is set aside and the Order-in-Original dated 09.05.2019 is restored.



(Sandeep Prakash)

Additional Secretary to the Government of India

1. Sh. Sardar Gul Fateh Khan
H. No. 420, Dorahi, Kandhar,
Afghanistan.
2. Sh. Ali Ahmad Dost,
H. No. 195, Gulshan Mina, Kandhar,
Afghanistan.
3. Sh. Bashir Ahmad Dost,
H. No. 215,
Shani Mina, Kandhar,
Afghanistan.

Order No. 223-225/22-Cus dated 12-7-2022

Copy to:

1. The Commissioner of Customs, Airport & General, IGI Airport, New Delhi-110037.
2. The Commissioner of Customs (Appeals), New Custom House, New Delhi-110037.
3. Ms. Kanika Goswami, Advocate, WZ-258 A, Street No. 4, Sai Nagar, Rani Bagh, Delhi-110034.
4. PS to AS(RA).
5. Guard File.
6. Spare Copy

ATTESTED



असिस्टेंट सचिव (आय) / Assistant Secretary (AU)
आय विभाग / Department of Revenue
सर्वकार विभाग / Ministry of Finance
Room No. 665, 6th Floor, 6/11/12
14, Huda Metro Building, New Delhi-110058