

SPEED POST



F.No. 375/44/B/2019-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... 25/10/21

Order No. 236/21-Cus dated 25-10-2021 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. 195(SM)CUS/JPR/2018 dated
17.07.2018 passed by the Commissioner
(Appeals), Customs, Central Excise and CGST,
Jaipur.

Applicant : Sh. Jamil Ahmad, Nagaur (Rajasthan).

Respondent : Commissioner of Customs, Jaipur.

ORDER

A Revision Application No. 375/44/B/2019-RA dated 19.06.2019 has been filed by Sh Jamil Ahmad, Nagaur, Rajasthan (hereinafter referred to as the Applicant) against the Order-in-Appeal No. 195(SM)CUS/JPR/2018 dated 17.07.2018 passed by the Commissioner (Appeals), Customs, Central Excise and CGST, Jaipur. Commissioner (Appeals) has upheld the Order-in-Original No. 03/2016-JC Customs dated 08.02.2016, passed by the Joint Commissioner of Customs, Jaipur, wherein, 02 pieces of gold biscuits, collectively weighing 233.328 gms and valued at Rs. 6,18,319/-, were confiscated absolutely under Section 111(d), 111(i), 111(j), 111(l), and 111(m) of the Customs Act, 1962. Penalties of Rs. 1 Lakh and Rs. 25,000/-, were also imposed on the Applicant under Sections 112 and 114AA of the Customs Act, 1962, respectively.

2. Brief facts of the case are that the Applicant arrived, on 23.11.2014, at International Airport, Jaipur, from Muscat. He was intercepted by the officers of Customs while he was passing through the green channel. Two gold biscuits of 999.9 purity, collectively weighing 233.328 gms and valued at Rs. 6,18,319/-, wrapped in white paper tape, were recovered from his hand baggage. In his statement tendered under Section 108 of the Customs Act, 1962, the Applicant admitted the recovery of gold biscuits and that he had concealed the same with an intent to smuggle them without declaration before the Customs Authorities. The gold biscuits were confiscated

absolutely by the original authority and penalties were imposed on the Applicant, as above. 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 put tick mark against gold jewellery in place of gold bullion, by mistake, as he was not well versed in English; that the Applicant had fulfilled the conditions of notification no 12/2012- Cus dated 17.03.2012 and a mere clerical error cannot render the goods as prohibited which are otherwise allowed to be imported; that the gold was not concealed by the Applicant and was duly declared; that there is no Section 112(a)(i) in the Customs Act and hence penalty imposed under this Section is not sustainable; that even the penalty under Section 114 AA is also not leviable as he had declared gold jewellery in place of bullion; that the orders of the lower authorities may be set aside and the gold may be released to the Applicant.

4. Personal hearing was held on 21.10.2021, in virtual mode. Sh. Madhu Sudan Sharma, Advocate, appeared for the Applicant and reiterated the contents of the revision application. None appeared for the Respondent department and no request for adjournment has also been received. Hence, the matter is being taken up for disposal on the basis of records available.

5. The Government has carefully examined the case. Gold biscuits were not declared by the Applicant, even on specific

query by the customs officers on his arrival, about the jewellery he had tick marked in his declaration, in violation of Section 77 of the Customs Act, 1962. In his statement tendered under Section 108 of Customs Act, 1962, the Applicant admitted that he had concealed the gold biscuits in his hand bag with an intent to smuggle the same into India without declaration before Customs authorities and also that he had bought the biscuits from Riyadh out of his own money. There is nothing on record to evidence that this statement was retracted. It has been contended by the Applicant that he had put a tick mark by mistake against jewellery in place of bullion. However, it is observed that no value was assigned to the jewellery. Also, in his statement recorded in Hindi, the Applicant has admitted that he had concealed the gold biscuits to evade customs duty. Hence, the intention of the Applicant was manifestly mala fide. As such, the contention that the gold biscuits were duly declared is not sustainable.

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, 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 gold biscuits were not declared by him to the customs officers, as required under Section 77 of Customs Act, 1962. He admitted that he had intentionally not declared the gold items at the red channel to evade customs duty. The Applicant has, thus, failed to discharge the burden placed on him, in terms of Section 123, *ibid*.

7. As regards the question of eligibility of the Applicant to bring gold, as per notification no. 12/2012-Cus dated 17.03.2012, no evidence has been produced to show that he had stayed abroad for more than six months before his current arrival in the country. Hence, the observation of the Commissioner (Appeals) that the Applicant had come to India before a period of six months, holds ground. In any case, the Applicant had no intention to pay duty and he did not claim the exemption, showing compliance with the conditions of the notification.

8.1 The Applicant has contended that the import of gold is not 'prohibited'. The Government observes that Hon'ble Supreme Court, in the case of Sheikh Mohd. Omer vs Collector of

Customs, Calcutta & Ors [1971 AIR 293], 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 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 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."*

8.2 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, 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-----."

8.3 The original authority has correctly brought out, in para 17 and 18 of the Order-in-Original, that the gold is allowed to be imported subject to certain conditions and that, in this case, the conditions, subject to which gold could have been legally imported, have not been fulfilled. Thus, following the ratio of the aforesaid judgments, there is no doubt that the subject goods are 'prohibited goods'.

9. 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.)]. 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. 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 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, 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*". 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' ". It is observed that the original authority has, in the instant case, after appropriate consideration, passed a reasoned order refusing to allow redemption. Thus, the discretion exercised by the original authority does not merit intervention.

10. The Applicant has averred that there is no Section 112(a)(i) in the Customs Act and hence penalty imposed under this Section is not sustainable. The Government observes that clause (a)(i) is indeed contained in the Section¹¹² and the penalties imposed on the Applicant under both the Sections, i.e., 112(a)(i) and 114 AA are apt and justified in the facts and circumstances of the case.

11. In view of the above, the impugned Order of the Commissioner (Appeals) does not merit revision and the revision application is rejected.


(Sandeep Prakash)

Additional Secretary to the Government of India

Sh. Jamil Ahmad, S/o Sh. Fakhruddin,
R/o VPO: Sherani Abad,
Suphiya Mohalla, Bus Stand,
Teh. Deedwana, Distt. Nagaur (Rajasthan)

Order No. 236/21-Cus dated 25-10-2021

Copy to:

1. The Commissioner of Customs, Jaipur.
2. The Commissioner (Appeals), CE & CGST, Jaipur.

3. Sh. Madhu Sudan Sharma, Advocate, B-182, Mangal Marg, Bapu Nagar, Jaipur-302 015.

4. PA to AS(RA).

✓ 5. Guard File.

6. Spare Copy.

ATTESTED



(Ashish Tiwari)

Assistant Commissioner (RA)