

SPEED POST



F.No. 375/39/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. 237/21-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 Custom Act, 1962.

Subject : Revision Application filed, under Section 129 DD of the Customs Act 1962 against the Order-in-Appeal No. Lud/Excus-001/App-2362/2019 dated 07.05.2019 passed by the Commissioner of Customs (Appeals), Ludhiana

Applicant : Shri Mohammad Wasi, Delhi.

Respondent : Commissioner of Customs, Ludhiana.

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ORDER

A Revision Application No. 375/39/B/2019-RA dated 29.05.2019 has been filed by Sh Mohammad Wasi, Delhi (hereinafter referred to as the Applicant) against the Order-in-Appeal No. Lud/Excus/001/App/2362/2019 dated 07.05.2019 passed by the Commissioner (Appeals), Customs & CGST, Ludhiana. Commissioner (Appeals) has upheld the order of the Joint Commissioner of Customs, Ludhiana, bearing no. LDH-CUS-JC-RRG-049-18-19 dated 23.10.2018, wherein 8 cut pieces of gold, collectively weighing 468 grams and valued at Rs. 13,57,200/-, which were recovered from the Applicant, have been confiscated absolutely under Section 111(d), 111(l) and 111(m) of the Customs Act, 1962. Besides, a penalty of Rs.1,00,000/- was also imposed on the Applicant by the original authority, under Section 112 & 114AA of the Customs Act, 1962, which has been maintained in the Order-in-Appeal.

2. The brief facts of the case are that the Applicant arrived, on 02.01.2018, at the Chandigarh International Airport from Dubai and was intercepted near the exit gate after he had crossed the Customs Green Channel. On being asked by the Customs officers whether he was carrying any gold with him, he replied in negative. On search of his baggae, 8 cut pieces of gold, concealed in the outer Zip pocket of the suitcase, were recovered. The value of the seized gold was appraised at Rs.13,57,200/-by the approved valuer. The Applicant in his statement dated 02.01.2018 tendered under Section 108 of the Customs Act, 1962, admitted the recovery of 8 gold pieces from his possession and also admitted that he had indulged in smuggling of the gold by way of concealment for pecuniary benefit. The

offending gold was confiscated absolutely by the original authority vide the Order-in-Original dated 23.10.2018. The appeal filed by the Applicant herein was rejected by the Commissioner (Appeals).

3. The revision application has been filed, mainly, on the grounds that the Applicant had brought the gold bars for self use only; that the gold imported by the Applicant is bonafide; that the import of the gold is not prohibited and, therefore, may be released on payment of redemption fine and appropriate duty; and that the penalty imposed may be set aside or reduced.

4. Personal hearing was held on 21.10.2021, in virtual mode. Ms Harsimran Kaur, Advocate, appeared for the Applicant and reiterated the contents of the revision application. None appeared for the respondent and no request for adjournment has been received. Hence the case is taken up for decision on the basis of available records.

5. The Government has carefully examined the matter. It is observed that the Applicant did not declare the gold brought by him as stipulated under Section 77 of Customs Act, 1962 to the customs authorities at the airport. Further, the Applicant admitted the recovery of gold from him and the fact of non-declaration in his statement dated 02.01.2018, tendered under Section 108 of Customs Act, 1962.

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 Applicant has failed to produce any evidence that the gold recovered from him was not smuggled. The gold pieces were not declared by him to the Customs officers, as required under Section 77 of Customs Act, 1962. He admitted that his cousin suggested to him to take gold to India in a clandestine manner to earn money. No evidence or documents showing licit acquisition of the offending gold have also been produced. The Applicant has, thus, failed to discharge the burden placed on ~~her~~ ^{him} in terms of Section 123, *ibid*.

7.1 The Applicant has contended that the import of gold is not 'prohibited'. The Government observes that the law on this issue is settled by the judgment of Hon'ble Supreme Court in the case of Sheikh Mohd. Omer vs Collector of Customs, Calcutta & Ors {1971 AIR 293} wherein it has been 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 Joint Commissioner, in paras 4.3 to 4.4 of the O-I-O dated 23.10.2018, 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 fulfilment 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"*. In its judgment dated 17.06.2021, 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, 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----."

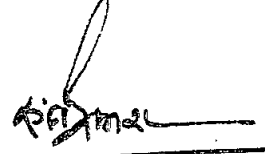
7.3 The original authority has correctly brought out that, in this case, the conditions subject to which gold could have been legally imported have not been fulfilled. Thus, following the ratio of the aforesaid judgments, there is no doubt that the subject goods are 'prohibited goods'.

8. It has been prayed that the confiscated gold may be allowed to be redeemed on payment of fine. The original authority has denied the release of impugned 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 UOI & Ors vs. M/s Raj Grow Impex LLP &Ors (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 based on the 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, relying upon several judgments of the Apex Court, 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"*. In the present case, the original authority has refused to grant redemption in the background of attempted smuggling by concealment with intent to evade Customs Duty. Thus, the Order of

absolute confiscation, being a reasoned Order based on relevant considerations, does not merit interference.

9. The Government finds that the penalty imposed is also just and fair in the facts and circumstances of the case.

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



(Sandeep Prakash)

Additional Secretary to the Government of India

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Order No. 237/21-Cus dated 25/10/2021

Copy to:

1. The Commissioner of Customs(Appeals), Ludhiana
2. The Joint Commissioner of Customs, Ludhiana
3. Sh. S. S. Arora, Adv., B1/71, Safdarjung Enclave, New Delhi-110029
4. PA to AS(RA)
- ✓ 5. Guard file
6. spare copy.

ATTESTED



(लक्ष्मी राघवन)
(Lakshmi Raghavan)
अनुभाग अधिकारी / Section Officer
वित्त मंत्रालय (राजस्व विभाग)
Ministry of Finance (Deptt. of Rev.)
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