

SPEED POST



F.No. 375/63/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. 27/10/21

Order No. 242/21-Cus dated 27/10/2021 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. CCA(A)Cus/D-I/Air/345/19-20
dated 26.09.2019 passed by the Commissioner
of Customs (Appeals), NCH, New Delhi

Applicant : Sh. Abdul Basit Khan, Delhi.

Respondent : Commissioner of Customs, IGI Airport, New
Delhi.

ORDER

A Revision Application No. 375/63/B/2019-RA dated 19.11.2019 has been filed by Sh. Abdul Basit Khan, Delhi (hereinafter referred to as the Applicant) against the Order-in-Appeal No. CCA(A)Cus/D-I/Air/345/19-20 dated 26.09.2019 passed by the Commissioner of Customs (Appeals), New Delhi. The Commissioner (Appeals) has upheld the order of the Assistant Commissioner of Customs, IGI Airport, New Delhi, bearing no. 309/2017-18 dated 07.04.2017, wherein one gold bar weighing 116.6 grams and one cut piece of gold bar weighing 51 grams (collectively weighing 167.6 grams) and totally valued at Rs. 3,88,564/-, which were recovered from the Applicant, were confiscated absolutely under Section 111(d), 111(j), 111(l) and 111(m) of the Customs Act, 1962. Besides, a penalty of Rs. 80,000/- was also imposed on the Applicant by the original authority, under Section 112 of the Customs Act, 1962, which has been maintained in appeal.

2. The brief facts of the case are that the Applicant arrived, on 03.01.2016, at IGI Airport, New Delhi 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. After search of his person, one Gold Bar weighing

116.64 gram and one cut piece of Gold bar weighing 51 grams total weighing 167.6 grams which were concealed and pasted under the lower side of the luggage trolley were recovered. The value of seized Gold bars was appraised at Rs. 3,88,564/-. The Applicant, in his statement dated 04.01.2016, tendered under Section 108 of the Customs Act, 1962, admitted the recovery of 2 Gold bars from his possession and stated that the gold bars belonged to him; and that he had not declared the gold at the Customs red channel, deliberately.

3. The revision application is filed, mainly, on the grounds that the Applicant had declared the gold to the Customs officers and the same was kept in an open condition on the trolley which was visible to naked eye; that no panchnama was drawn on the spot; 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 under Section 125 of Customs Act; and that the penalty under Section 112(a) is on a higher side and may be reduced.

4. Personal hearing was held on 25.10.2021, in virtual mode. Ms. Harsimran Kaur, Advocate, appeared on behalf of the Applicant and reiterated the contents of the revision application. She highlighted that gold is only 167.6 grams which was brought by the Applicant for personal use. Hence, it may be

allowed to be redeemed on payment of fine and nominal penalty. Sh. Ashok Kumar, Superintendent, appeared on behalf of the Respondent department and supported the orders of the lower authorities and highlighted that the gold was ingeniously concealed in the handle of the trolley bag. Hence, intention to smuggle is manifest.

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 04.01.2016, tendered under Section 108 of Customs Act, 1962.

6. It has been averred that no panchnama was drawn on the spot. It is seen that the gold was detained temporarily under Section 80 of the Customs Act, 1962 and it was later that the gold was confiscated. The detention was not contested at the relevant time. Hence, this contention does not merit consideration at this stage.

7. 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. As regards the contention of the Applicant that the gold was intended to be declared, does not appear to be tenable as he himself in his statement dated 04.01.2016 had admitted the recovery of gold bars which were ~~which were~~ concealed and pasted under the lower side of the luggage trolley and were not declared to the Customs authorities. No evidence or documents showing licit procurement of the offending gold have been produced. The

Applicant has, thus, failed to discharge the burden placed on him, in terms of Section 123, *ibid*.

8.1 The question of law raised by the Applicant is that the import of gold is not 'prohibited'. The Government observes that in the case of *Sheikh Mohd. Omer vs Collector of Customs, Calcutta & Others* [1971 AIR 293] the Hon'ble 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". The Assistant Commissioner has, in paras 7 and 8 of the Order-in-Original dated 07.04.2017, 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*". Further, 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.*"

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 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 authority has denied the release of impugned goods on redemption fine under Section 125 of Customs Act, 1962, which has been challenged. The Government observes that, in terms of Section 125 of the Customs Act, 1962, the option to release seized '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*". Similarly, 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 as also in the context of the Government's policy objectives on the issue. Thus, the Order of the original authority, upheld by the Commissioner (Appeals) being a reasoned Order based on relevant considerations, does not merit interference.

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

11. The revision application is rejected.


(Sandeep Prakash)

Additional Secretary to the Government of India

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Order No. 242 /21-Cus dated 27/10/2021

Copy to:

1. The Commissioner of Customs (Appeals), New Customs House, New Delhi-110037
2. The Commissioner of Customs, IGI Airport, New Delhi
3. Sh. S. S. Arora, Advocate, B1/71, Safdarjung Enclave, New Delhi-110029
4. PA to AS(RA)
- ✓ 5. Guard file
6. spare copy.

ATTESTED

(Ashish Tiwari)
Assistant Commissioner (RA)