

SPEED POST



F. No. 375/07/B/2022-RA
F. No. 375/08/B/2022-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. 27/7/22

Order No. 245-246/22-Cus dated 27/7/2022 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. 2-3(SM)/CUS/JPR/2022 dated 17.01.2022 passed by the Commissioner (Appeals), Customs, Central Excise and CGST, Jaipur.

Applicants : Sh. Mohd. Salman, Delhi.
Sh. Mohd. Fazal, Delhi.

Respondent : The Commissioner of Customs (Preventive) Jodhpur, Hqrs at Jaipur.

ORDER

Two Revision Applications bearing Nos. 375/07/B/2022-RA and 375/08/B/2022-RA both dated 08.02.2022, have been filed by Sh. Mohd. Salman, Delhi (hereinafter referred to as the Applicant-1) and Sh. Mohd. Fazal, Delhi (hereinafter referred to as the Applicant-2) against the Order-in-Appeal No. 2-3(SM)/CUS/JPR/2022 dated 17.01.2022, passed by the Commissioner (Appeals), Customs, Central Excise and CGST, Jaipur. The Commissioner (Appeals) has rejected the appeals filed by the Applicants herein against the Order-in-Original passed by the Additional Commissioner of Customs (Preventive), Jaipur, bearing no. 03/2021-ADC dated 29.01.2021.

2. Brief facts of the case are that, both the Applicants arrived at Jaipur airport, on 18.08.2019, from Dubai. They were intercepted by the Customs officers while passing through the Green Channel. On being inquired about any dutiable item to be declared for Customs duty the Applicants denied to have any such items. During the personal search of the Applicants, one strip containing gold in paste form each, wrapped in brown adhesive tape was found concealed inside the belt/ waist portion of jeans worn by both the Applicants. After the process of extraction, total 06 pieces (03 pieces each) and gold weighing 224.020 gms, valued at Rs. 8,62,477/-, were recovered from Applicant-1 and gold weighing 224.920 gms, valued at Rs. 8,65,942/-, was recovered from Applicant-2, collectively weighing 448.940 gms, totally valued at Rs. 17,28,419/-. In their respective statements both dated 18.08.2019, tendered under Section 108 of Customs Act, 1962, the Applicants admitted that they had purchased the gold from Dubai and brought it to India, in the form of paste, by way of concealment. The Applicant-1 in his statement, categorically admitted that he had paid 68,000 Dirham (equal to Rs. 12,24,000/- approx.) for purchasing the recovered gold. He further revealed that he carried 68,000 Dirham from India by concealing in his luggage. The Applicant-2 also admitted that he took the Applicant-1 to Dubai and borne his all expenses for the purpose of bringing of recovered gold from Dubai to India, in concealed manner in the form of Paste for the purpose of smuggling. He admitted that the strips containing gold in paste form belonged to him and he took the Applicant-1 as a carrier to smuggle gold. The original authority, vide the

aforesaid Order-in-Original dated 29.01.2021, confiscated absolutely the seized gold pieces, under Section 111(d), 111(i), 111(j), 111(l) and 111(m) of the Act, *ibid.* Penalty of Rs. 2,00,000/- each, under Section 112(a)(b)(i) of the Customs Act, 1962 and Rs. 1,00,000 each, under Section 114AA of the Act, *ibid.*, respectively, were imposed on the Applicants. Aggrieved, the Applicants filed appeals before the Commissioner (Appeals), which have been rejected.

3. The instant revision applications have been filed, mainly, on the grounds that the Applicants have been falsely implicated in the case; that the statements made by them have been retracted; that the gold is not a prohibited item; and that the gold of the Applicants is liable to be released on payment of nominal redemption fine and penalty.

4. Personal hearing, in virtual mode, was held on 27.07.2022. Ms. Sangita Bhayana, Advocate, appeared for the Applicants and reiterated the contents of the revision applications. She submitted that gold is not a prohibited item and it should be released on fine under Section 125 of the Customs Act, 1962. Sh. S. K. Nawal, Superintendent appeared for the respondent department and supported the orders of lower authorities.

5. The Government has carefully examined the matter. It is observed from the Orders of the authorities below that the confiscated gold was in paste form and was carried by the Applicants by hiding the same, inside the belt/ waist portion of jeans, worn by them. The Applicants have admitted to the recovery of gold and its non-declaration in their statements recorded under Section 108 of the Customs Act, 1962. Though, the statements are said to have been subsequently retracted, the facts of recovery from them and non-declaration cannot be disputed as the recovery and seizure was made in the presence of independent witnesses under Panchnama proceedings, which remain undisputed. Further, the Hon'ble Supreme Court has, in the case of *Surjeet Singh Chhabra vs. U.O.I {1997 (89) ELT 646 (SC)}*, held that a confession statement made before the Customs Officer, though retracted within six days, is an admission and binding since Customs Officers are not Police Officers. As such, the question of the Applicants being falsely implicated does not arise.

6. In terms of Section 123 of the Act, *ibid*, 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 Applicants had failed to produce any evidence that the gold items recovered from them were not smuggled. The gold was in paste form to camouflage its identity and was ingeniously concealed by them. The manner of concealment, by keeping the same in the form of paste strip, inside the belt/waist portion of jeans worn by both the Applicants, clearly evidences that the Applicants had attempted to smuggle the seized gold in a pre-meditated manner. The Applicants have, thus, failed to discharge the burden placed on them, in terms of Section 123, *ibid*.

7.1 It is contended on behalf of the Applicants that the import of gold is not 'prohibited'. However, the Government observes that this contention of the Applicants is in the teeth of law settled by a catena of judgments of Hon'ble Supreme Court. In the case of Sheikh Mohd. Omer vs Collector of Customs, Calcutta & Ors {1971 AIR 293}, the 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*". 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 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 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, specifically 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----"

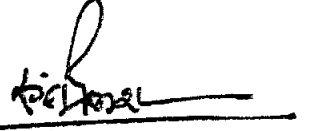
7.3 Therefore, there is no doubt that the offending goods, in the present case, are to be held as "prohibited goods"

8. The original authority has denied the release of offending 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 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; 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 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"."* Hon'ble Delhi High Court has, in the case of Raju Sharma [2020 (372) ELT 249 (Del)], relying upon the judgment 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 Order of the original authority does not suffer from any of these vices. Rather, the original authority has, after due application of mind, ordered absolute confiscation for the relevant and reasonable considerations brought out in para 17 and 18 of the Order-in-

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Original. Thus, the Commissioner (Appeals) has correctly refused to interfere in the matter.

9. The case laws relied upon by the Applicants in support of their various contentions are not applicable, in view of the dictum of Hon'ble Supreme Court and Hon'ble High Courts, as above.
10. In the facts and circumstances of the case, the penalty imposed is just and fair.
11. In view of the above, the revision applications are rejected.



(Sandeep Prakash)

Additional Secretary to the Government of India


1. Sh. Mohd. Salman S/o Mohd. Saleem,
R/o Plot No. 2415, Gali Gudriyan,
Near Haj Manjil, Turkman Gate,
Delhi-110006.
2. Sh. Mohd. Fazal S/o Sh. Asif Ali,
R/o Plot No. 2421, Gali Gudriyan,
Near Haj Manjil, Turkman Gate,
Delhi-110006.

Order No. 245-246/22-Cus dated 23/7/2022

Copy to:

1. The Commissioner of Customs (Preventive), Jodhpur, Hqrs at NCRB, Statue Circle, Jaipur-302005.
2. The Commissioner of Customs (Appeals), Customs, Central Excise & CGST, NCRB, Statue Circle, Jaipur-302005.
3. Ms Sangita Bhayana, Advocate, Ch. No.707, LCB-III, Delhi High Court, New Delhi-110001.
4. PA to AS(RA)
5. ~~Guard File~~
6. Spare Copy

ATTESTED


अश्वनी कुमार लौ / Ashwani Kumar Lau
अधीक्षक / Superintendent (R.A. Unit)
राजस्व विभाग / Department of Revenue
वित्त मंत्रालय / Ministry of Finance
Room No. 606, 6th Floor, B-Wing
14, Hudco Vishala Building, New Delhi-110066