

SPEED POST



F.No. 375/15-A/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... 01/11/21.....

Order No. 248/21-Cus dated 01-11-2021 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/561/2018
dated 20.11.2018 passed by the Commissioner
of Customs (Appeals), NCH, New Delhi

Applicant : Sh. Shadab Khan, Lucknow.

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

ORDER

A Revision Application No. 375/15-A/B/2019-RA dated 01.02.2019 has been filed by Sh. Shadab Khan, Lucknow (hereinafter referred to as the Applicant) against the Order-in-Appeal No. CCA(A)Cus/D-I/Air/561/2018 dated 20.11.2018 passed by the Commissioner of Customs (Appeals), New Delhi. The Commissioner (Appeals) has upheld the order of the Additional Commissioner of Customs, IGI Airport, New Delhi, bearing no. 221/Adjn./2018 dated 26.04.2018, wherein three pieces of gold bars of 995/999 purity, collectively weighing 2116 grams and totally valued at Rs. 59,21,844/-, which were recovered from the Applicant, were confiscated absolutely under Section 111(d), 111(i), 111(j) 111(l), 111(m) and 111(o) of the Customs Act, 1962. Besides, a penalty of Rs. 11.85 Lakhs was also imposed on the Applicant by the original authority, under Section 112 and 114AA of the Customs Act, 1962, which has been maintained in appeal.

2. The brief facts of the case are that the Applicant arrived, on 18.09.2017, at IGI Airport, New Delhi, from Dubai and was intercepted near the exit gate of the Customs Arrival Hall after he had crossed the Green Channel. On being asked by the Customs officers whether he was carrying any gold/contraband items with him, he replied in negative. His baggage search resulted in the recovery of three pieces of gold bars of 995/999

purity, collectively weighing 2116 grams and totally valued at Rs. 59,21,844/-, from his small strolley bag. The Applicant, in his statements dated 18.09.2017 and 19.09.2017, tendered under Section 108 of the Customs Act, 1962, admitted the recovery of the 3 Gold bars from his possession. He stated that the gold did not belong to him and he did not have any bill/invoice for the same; that the strolley bag containing the gold bars was given to him by one Shazad Khan in Dubai, to be carried to India in lieu of air ticket to India as he did not have money to buy the ticket; that he did not know that the bag had gold in it and thus, he did not declare it at the Red Channel. The original authority, vide the Order-in-Original dated 26.04.2018, confiscated absolutely the said three pieces of gold bars, collectively weighing 2116 grams and totally valued at Rs. 59,21,844/-, under Sections 111(d), 111(i), 111(j) 111(l), 111(m) and 111(o) of the Customs Act, 1962. Besides, a penalty of Rs. 11.85 Lakhs was also imposed on the Applicant under Section 112 and 114AA of the Customs Act, 1962. The appeal filed by the Applicant before the Commissioner (Appeals), has been rejected vide the impugned Order-in-Appeal.

3. The revision application is filed, mainly, on the grounds that the Applicant was an eligible passenger as he was coming after 2 years of stay, abroad; that he had purchased the gold

from his personal savings and borrowings for marriage in India; that the gold was not concealed; that the import of gold in baggage is not prohibited; that the gold may be allowed to be redeemed/re-exported; and that the gold may be allowed to be cleared on payment of concessional rate of duty after waiver or reduction of penalty.

4. Personal hearing was held on 29.10.2021, in virtual mode. Sh. D. S. Chadha, Advocate, appeared for the Applicant and reiterated the contents of the revision application. Drawing attention to the documents filed vide email on 29.10.2021, Sh. Chadha highlighted that: -

- (i) the Applicant is an eligible passenger;
- (ii) he is the owner of the gold;
- (iii) there was no concealment;
- (iv) the statement has been retracted at the first opportunity.

No one appeared for the Respondent department nor any request for adjournment has been received. Hence, the matter is taken up for disposal on the basis of records available.

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 statements dated 18/19.09.2017, tendered under Section 108 of Customs Act, 1962. Though a copy of retraction has been filed at this stage, there is nothing on record to indicate that the department received this retraction, at the relevant time, nor is there any indication that this aspect was highlighted to the authorities below.

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. The Applicant has contended that the gold was intended to be declared. However, this contention does not appear to be tenable as he himself, in his statement dated 18/19.09.2017, had admitted the recovery of gold bars, which were not declared to the Customs authorities. A copy of Invoice dated 17.09.2017 has also been produced, at this stage, to claim ownership. However, the Government observes that this invoice was never produced during investigation spread over six months nor was this ever produced before the lower authorities. It was also not recovered from the Applicant at the time of interception, which would have been the case if the Applicant had brought it himself and had an intention to declare the same. It is also noted that the Applicant has claimed to have purchased this gold from his savings and borrowings from friends. However, there is no documentary evidence produced to support the claim of savings as well as that of borrowings. As such, this claim of licit purchase is nothing but an afterthought. The Applicant has, thus, failed to discharge the burden placed on 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, 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 Additional Commissioner has, in paras 14.3, 14.4 and 14.5 (wrongly numbered as para 17.5) of the Order-in-Original dated 26.04.2018, 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."*

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 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 The Government agrees with the original authority 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*'.

7.4 The issue of eligibility, in terms of Notn. 12/2012- Cus dated 17.03.2012 was never raised before the lower authorities. Even at this stage, no evidence has been produced to support this claim. Moreover, the said gold was never declared to the Customs authorities. As already discussed in para 6 above, the contention that the gold was purchased by the Applicant is unacceptable, being an afterthought.

8. 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 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.

9. Section 80 of the Customs Act, 1962, reads as follows:

“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”

As the Applicant had not declared the gold at the time of his arrival, the request that the gold items may be allowed to be re-exported, cannot also be acceded to, in the light of the provisions of Section 80 *ibid*.

10. The penalty imposed on the Applicant appears to be just and fair, considering the facts and circumstances of the case.

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



(Sandeep Prakash)

Additional Secretary to the Government of India

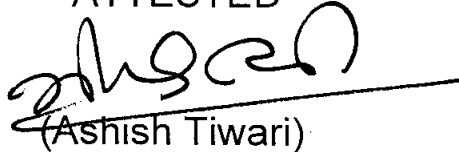
Sh. Shadab Khan,
R/o H. No. 14, Ghari Peer Khan, Lucknow-226 003.

Order No. 248/21-Cus dated 01-11-2021

Copy to:

1. The Commissioner of Customs (Appeals), New Customs House, New Delhi-110037.
2. Sh. D. S. Chadha, Advocate, 92 GF, Bick V, Eros Garden, Faridabad-121 009.
3. The Commissioner of Customs, IGI Airport, New Delhi
4. PA to AS(RA)
5. Guard file

ATTESTED



(Ashish Tiwari)
Assistant Commissioner (RA)