

SPEED POST



F. No. 375/12/B/2019-RA  
GOVERNMENT OF INDIA  
MINISTRY OF FINANCE  
(DEPARTMENT OF REVENUE)

14, HUDCO VISHALA BLDG., B WING  
6<sup>th</sup> FLOOR, BHIKAJI CAMA PLACE,  
NEW DELHI-110 066

Date of Issue. 01/11/21....

Order No. 249/21-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/571/2018 dated 27.11.2018 passed by  
the Commissioner of Customs (Appeals),  
NCH, New Delhi

Applicant : Sh. Younas Haroon Ahmad Waezi, Kabul,  
Afghanistan.

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

## ORDER

A Revision Application No. 375/12/B/2019-RA dated 01.02.2019 has been filed by Sh. Younas Haroon Ahmad Waezi, Kabul, Afghanistan (hereinafter referred to as the Applicant) against the Order-in-Appeal No. CCA(A)Cus/D-I/Air/541/2018 dated 27.11.2018 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. 71/2017 dated 28.04.2017, wherein two cut pieces of gold bars of 995 purity, collectively weighing 1000 grams and totally valued at Rs. 23,62,500/-, which were recovered from the Applicant, were confiscated absolutely under Section 111(d), 111(i), 111(j), 111(l) and 111(m) of the Customs Act, 1962. Besides, a penalty of Rs. 4.5 Lakhs was also imposed on the Applicant by the original authority, under Sections 112 & 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 21.03.2015, 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. In his Customs Declaration Form, he had not declared anything in Column No. 9 (Total Value of the goods imported) and Column No. 10. His personal search resulted in the recovery of the two gold bars of 995 purity, weighing 1000 grams and valued at Rs. 23,62,5000/-, which were concealed in his wallet. The Applicant, in his statement dated 21.03.2015, tendered under Section 108 of the Customs Act, 1962, admitted the recovery of the 2 gold bars from his possession and produced the purchase invoice issued at Dubai for the evidencing purchase of the said gold bars. He stated that the gold belonged to him and was to be used in his marriage; that he had not declared the gold at the Customs red channel.

3. The revision application is filed, mainly, on the grounds that the Applicant is of Afghan origin and holder of a British Passport; that he was not aware of the Indian laws; that he bought the gold from Dubai and was enroute to Kabul, stopping in India for a medical check-up; that he did not intend to indulge in any commercial activity with the said gold; that he was never given an opportunity to declare gold at the red channel and was falsely implicated for violation of Section 77 of the Customs Act, 1962; that gold is not a prohibited item for import into India; that his statement was recorded under duress and the department

has not produced any corroboratory evidence in support of their claim; and that the gold bars may be released or allowed to be re-exported.

4. Personal hearing was granted on 27.09.2021, 14.10.2021 and 29.10.2021. No one appeared for either side. No request for adjournment has also been received. Since sufficient opportunities have been granted, the matter is taken up for disposal based on records available. b7

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 as no declaration was made in his Customs Declaration Form. Further, the Applicant admitted the recovery of gold from him and the fact of non-declaration in his statement dated 21.03.2016, 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. Though the documents evidencing purchase of gold were produced after being intercepted, there is no declaration regarding carriage of gold in the Customs Declaration Form. Further, the Applicant

had crossed the Green Channel when he was intercepted. Hence, the contention of the Applicant that the gold was intended to be declared, is not tenable. The Applicant has, thus, failed to discharge the burden placed on him, in terms of Section 123, *ibid*.

7.1 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 Supreme 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 3.5 to 3.7 of the Order-in-Original dated 28.04.2017, 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.”*

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. 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 seized 'prohibited goods', on redemption fine, is discretionary {Ref. 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.

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 be acceded to, in the light of the aforesaid provisions of Section 80, *ibid*.

10. In view of the <sup>above</sup> impugned Order-in-Appeal does not merit revision and the revision application is rejected.

  
(Sandeep Prakash)

Additional Secretary to the Government of India

Sh. Younas Haroon Ahmad Waezi,  
C/o Sh. Tarun Chawla, Advocate  
A-2/101, Rajouri Garden,  
New Delhi-110 027

Order No. 249/21-Cus dated 01-11-2021

Copy to:

1. The Commissioner of Customs (Appeals), New Customs House, New Delhi-110037
2. The Commissioner of Customs, IGI Airport, New Delhi
3. PA to AS(RA)
4. Guard file
5. spare copy.

ATTESTED  
  
(Ashish Tiwari)  
Assistant Commissioner (RA)