

SPEED POST



F. No. 375/56/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..01/12/21

Order No. 269/21-Cus dated 01-12-2021 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 129DD of the Customs Act 1962 against the Order-in-Appeal No. CCA(A)Cus/D-I/Air/307/2019-20 dated 22.08.2019 passed by the Commissioner of Customs (Appeals), NCH, New Delhi

Applicant : Sh. Salahuddin, Kandahar, Afghanistan.

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

.....

ORDER

A Revision Application No. 375/56/B/2019-RA dated 01.10.2019 has been filed by Sh. Salahuddin, Kandhar, Afghanistan (hereinafter referred to as the Applicant) against the Order-in-Appeal No. CCA(A)Cus/D-I/Air/307/2019-20 dated 22.08.2019 passed by the Commissioner of Customs (Appeals), NCH, New Delhi. The Commissioner (Appeals) has upheld the order of the Additional Commissioner of Customs, IGI Airport, New Delhi, bearing no. 82/2018-19 dated 25.03.2019, wherein one cut piece of gold of 995 purity, collectively weighing 354 grams and totally valued at Rs. 9,93,347/-, which was recovered from the possession of the Applicant, was 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. 1.80 Lakh was imposed on the Applicant by the original authority, under Sections 112 & 114AA of the Customs Act, 1962, which has also been maintained in appeal.

2. The brief facts of the case are that the Applicant arrived, on 04.10.2018, at IGI Airport, New Delhi from Kandahar, Afghanistan 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. His personal search resulted in the recovery of one cut piece of gold of 995 purity, collectively weighing 354 grams and totally valued at Rs. 9,93,347/-. The Applicant, in his statement dated 04.10.2018, tendered under Section 108 of the Customs Act, 1962, admitted the recovery of one cut pieces of gold from his possession. He stated that the gold did not belong to him and he was carrier of the gold which he had collected from Mr. Mohd. Nabi at Kandahar and same was to be collected by his agent in Delhi; that he walked through the Green Channel with an intent to evade payment of Customs Duty.

3. The revision application is filed, mainly, on the grounds that the gold brought by the Applicant was kept in his handbag which he informed to the officers but the case was foisted upon him; that he was not aware of the laws; that the statement was

recorded under pressure; that gold is not a prohibited item for import into India and that the redemption may be allowed under Section 125 of the Customs Act, 1962 and token penalty be imposed.

4. Personal hearing, in virtual mode, was held on 26.11.2021. Ms. Kanika Goswami, Advocate appeared on behalf of the Applicant and submitted that the written submission emailed on 26.11.2021 may be taken on record. She reiterated the contents of revision application and written submissions dated 26.11.2021. Sh. Charan Singh, Superintendent supported the orders of the lower authorities.

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 and the Applicant opted to walk through the Green Channel. Further, the Applicant admitted the recovery of gold from him and the fact of non-declaration and acting as a carrier, in his statement dated 04.10.2018, tendered under Section 108 of Customs Act, 1962. The contention of the Applicant that this statement was recorded under pressure is not tenable as the statement was not retracted by the Applicant. The contention of the Applicant that he wanted to declare the gold but was misguided by the Custom officers is not established with reference to the records. No other evidence has also been produced to substantiate this contention.

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. There is no declaration regarding carriage of gold in the Customs Declaration Form by the Applicant. Further, the invoice, a copy whereof has been enclosed to the Written Submissions dated 26.11.2021, was never produced at the time of interception or even during the investigations. As such, the said invoice can not be relied upon. 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' goods for import. 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 13.3 to 13.5 of the Order-in-Original dated 25.03.2019, 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 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 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. The Applicant has, in the alternate also requested for the re-export of the seized gold. Section 80 of Customs Act, 1962 reads as follows:

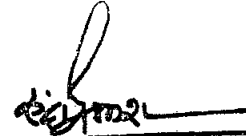
"80. Temporary detention of baggage.—Where the baggage of a passenger contains any article which is dutiable or the import of which is prohibited and in respect of which a true declaration has been made under section 77, the proper officer may, at the request of the passenger, detain such article for 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."

Section 80 of the Customs Act, 1962 provides that the detained imported goods can be re-exported at the request of the passenger where he/ she is returning from India to a foreign country. Thus, return of the passenger to the foreign country after a short visit to India as a tourist or otherwise is a crucial condition for re-export of impugned goods. Further, a pre-condition to allow re-export under Section 80 of Customs Act, 1962 is that "***a true declaration has been made under section 77***", which is not the case here. As the conditions, subject to which re-export can be allowed

under Section 80 of Customs Act 1962, are not fulfilled, re-export of the seized gold items cannot also be considered.

10. In the facts and circumstances of the case, the penalty imposed is just and fair.

11. In view of the above, the impugned Order-in-Appeal does not merit revision and the revision application is rejected.



(Sandeep Prakash)

Additional Secretary to the Government of India

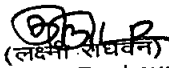
Sh. Salahuddin,
S/o Sh. Mohammed Din
R/o Gali No. 18, Inomella,
Kandahar, Afghanistan

Order No. 269/21-Cus dated 01-12-2021

Copy to:

1. The Commissioner of Customs (Appeals), New Customs House, New Delhi-110037;
2. The Commissioner of Customs, IGI Airport, New Delhi;
3. Ms. Kanika Goswami, Advocate, 1758, 1st Floor, Laxmi Narayan Street, Chuna Mandi, Pahar Ganj, New Delhi – 110001,
4. PA to AS(RA)
5. Guard file
6. Spare copy.

ATTESTED



(Lakshmi Raghavan)

अनुभाग अधिकारी / Section Officer
वित्त मंत्रालय (राजस्व विभाग)
Ministry of Finance (Deptt. of Rev.)
भारत सरकार / Govt. of India
नई दिल्ली / New Delhi