

SPEED POST

F. No. 372/02/B/2020-R.A.
380/03/B/2020-R.A.
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...०३/१२/२१...

ORDER NO. 270 - 271/21- Cus dated 02-12-2021 of the Government of India, passed by Sandeep Prakash, Additional Secretary to the Government of India, under Section 129DD of the Customs Act, 1962.

SUBJECT : Revision Applications filed under section 129DD of the Customs Act, 1962 against the Order-in-Appeal No. KOL/CUS/(Airport)/118/2019 dated 24.09.2019, passed by the Commissioner of Customs (Appeals), Kolkata.

APPLICANTS : 1. Sh. Amit Ashok Ramnani, Thane, Maharashtra.
2. Commissioner of Customs, NSCBI Airport, Kolkata.

RESPONDENTS : 1. Commissioner of Customs, NSCBI Airport, Kolkata.
2. Sh. Amit Ashok Ramnani, Thane, Maharashtra.

ORDER

Two Revision Applications, bearing Nos. 372/02/B/2020-R.A. dated 23.01.2020 and 380/03/B/2020-R.A. dated 08.01.2020, have been filed by Sh. Amit Ashok Ramnani, Thane, Maharashtra (hereinafter referred to as the Applicant) and the Commissioner of Customs, NSCBI Airport, Kolkata (hereinafter referred to as the Department), respectively. Both the RAs have been filed against Order-in-Appeal No. KOL/CUS/(Airport)/118/2019 dated 24.09.2019, passed by the Commissioner of Customs (Appeals), Kolkata, wherein the Commissioner (Appeals) has partly allowed the appeal filed by the Applicant against Order-in-Original No. 73/2018 JC dated 27.02.2018 passed by the Joint Commissioner of Customs, NSCBI Airport, Kolkata vide which three pieces of gold bars collectively weighing 1233.200 grams valued at Rs. 38,59,916/- had been confiscated absolutely and a penalty of Rs. 5 Lakhs was also imposed. The Commissioner (Appeals) has allowed the redemption of the said gold on payment of fine of Rs. 20 Lakhs and upheld the penalty imposed by the original authority.

2. Brief facts of the case are that the Applicant was intercepted, on 02.09.2016, on his arrival from Dubai at NSCBI Airport, Kolkata while attempting to walk through the green channel. He replied in negative when asked by the customs officers if he was carrying any contraband or dutiable goods in his baggage or on his person. Personal search of the Applicant resulted into recovery of 03 pieces of gold bars collectively weighing 1233.200 grams and valued at Rs. 38,59,916/-. On

demand, he could not produce any licit documents in support of legal importation, acquisition and possession of the said gold bars. The recovered goods were seized in the presence of Panchas. The Applicant, in his statement dated 02.09.2016, tendered under Section 108 of Customs Act, 1962, admitted the sequence of events and revealed that the said gold was handed over to him by one Abbas who had asked him to hand over the gold to another person outside Kolkata Airport; that he would get Rs. 40,000/- for carrying this gold and he was a carrier by profession, bringing clothes from Bangkok and Dubai and selling them in the markets of Kolkata and Mumbai for a margin of profit. The original authority confiscated absolutely the gold bars and imposed a penalty of Rs. 5 Lakhs vide the OIO dated 27.02.2018. Aggrieved, the Applicant filed an appeal before the Commissioner (Appeals), who, vide the impugned OIA, allowed redemption of the gold bars on payment of fine of Rs. 20 Lakhs but upheld the penalty imposed by the original authority.

3. The revision application has been filed by the Applicant, mainly, on the grounds that the redemption fine and penalty imposed are excessive. The department has filed the RA, mainly, on the grounds that the gold was concealed by the Applicant to evade detection by the customs officers; that the Applicant was not entitled to import gold in terms of Notification no. 12/2012-Cus dated 17.03.2012 read with Baggage Rules, 1998; that gold is a prohibited item; and that the Applicant had, in his un-retracted statement tendered under Section 108 of Customs Act, admitted that he was simply acting as a carrier of the gold for a monetary consideration.

4. Both the revision applications are filed with a delay. The delay is condoned.

5. Personal hearing, in virtual mode, was held on 01.12.2021. None appeared for the Applicant. However, a letter dated 29.11.2021 has been received, from the Advocate of the Applicant, on email whereby PH has been waived. Sh. Jitendra Kumar, Superintendent appeared for the department and highlighted that the Applicant had admitted that he was merely a carrier. He requested for the order of the original authority to be restored.

6. The Government has carefully examined the matter. It is evident that the impugned gold bars were not declared by the Applicant as stipulated under Section 77 of Customs Act, 1962, to the customs authorities at the airport. He could not produce any licit document in support of the possession, acquisition and legal importation of the said gold and admitted that he was acting as a mere carrier of the gold which was handed over to him by one Abbas to be handed over to someone at Kolkata airport. The statement dated 02.09.2016 has not been retracted.

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 the burden of proving that the subject gold bars were not smuggled, is on the Applicant who had brought the gold into the country. The concealment of the gold bars and their non-declaration clearly shows that the Applicant had attempted to smuggle the seized gold. Further, no evidence has been produced to prove licit import of the seized gold bars. The Applicant has, thus, failed to discharge the burden placed on him, in terms of Section 123 *ibid*.

7.1 The Commissioner (Appeals) has allowed redemption of the offending goods on the ground that:

"7. A plain reading of sub-Section (2) of Section 125 of Customs Act, 1962 shows that an option has to be given to the owner of the goods or where the owner is not known, the person from whose possession or custody such goods have been seized." (emphasis supplied).

The use of the word "*has*" indicates that the option for redemption was to be given mandatorily. This, in turn, would suggest that in the opinion of the Commissioner (Appeals), the offending goods were not "prohibited goods". On the other hand, it is the contention of the department that the offending goods were, in fact, "prohibited goods".

7.2 The Government observes that 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". 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 & Others vs. M/s Raj Grow Impex LLP & Others (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."

7.3 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-----."

7.4 Thus, undoubtedly, the offending goods are "prohibited goods".

8.1 The original adjudicating authority has denied the release of impugned goods on redemption fine under Section 125 of Customs Act, 1962. The Government observes that 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; and has to according to the rules of reason and justice; has to be based on relevant considerations". 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' "*. It is observed that the original authority has passed a well-reasoned order refusing to allow redemption.

8.2 The Commissioner (Appeals) has interfered with the discretion exercised by the original authority, inter-alia, on the grounds that the Order-in-Original does not substantiate that the Applicant "was carrying the said goods for somebody else". The Government observes that the Applicant admitted in his statement dated 02.09.2016, tendered under Section 108 of Customs Act, that he was carrying the gold for somebody else. This statement has not been retracted. As such the Commissioner (Appeals) has interfered with the discretion exercised by the original authority on an incorrect basis. Further, it has been held by Hon'ble Madras high Court in the case of S. Faisal Khan Vs Jt. Commissioner of Customs, Chennai [2010 (259) ELT 541 (Mad.)] and Hon'ble Delhi High Court in the case of ram Kumar Vs Commissioner of Customs [2015(320) ELT 368 (Del.)] that carrier of the offending goods cannot be allowed redemption of such goods. As such, the

Order of Commissioner (Appeals) allowing redemption of offending goods cannot be sustained.

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

10. In view of the above, the impugned Order-in-Appeal is set aside. Accordingly, the revision application no. 380/03/B/2020-RA filed by the department is allowed and revision application no. 372/02/B/2020-RA filed by the Applicant is rejected.


(Sandeep Prakash)

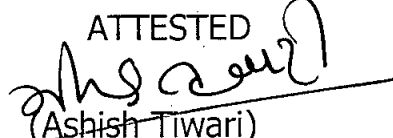
Additional Secretary to the Government of India

1. The Commissioner of Customs (Airport),
NSCBI Airport, Kolkata.
2. Sh. Amit Ashok Ramnani,
S/o Sh. Ashok Kodumal Ramnani,
R/o Flat. No. 501, Roma Apts. O T Section, Ulhasnagar, Thane,
Maharashtra.

Order No. 270-271/21-Cus dated 02-12-2021

Copy to:

1. The Commissioner (Appeals), Customs House, Kolkata.
2. Sh. N.J. Heera, Advocate, Nulwala Building, 41, Mint Road, Opp.
GPO Fort, Mumbai-400 001.
3. PA to AS(RA)
- ✓ 4. Guard File.
5. Spare copy.

ATTESTED

(Ashish Tiwari)
Assistant Commissioner (RA)