

'SPEED POST'



F. No. 375/14/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. 18/08/22

Order No. 276/2022-Cus dated 18-08-2022 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. 275(SM)CUS/JPR/2022 dated 17.12.2021, passed by the Commissioner (Appeals), Customs, Central Excise & CGST, Jaipur.

Applicant : Sh. Sandeep Singh, Delhi.

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

ORDER

A Revision Application No.375/14/B/2022-RA dated 14.03.2022 has been filed by Sh. Sandeep Singh, Delhi (hereinafter referred to as the Applicant) against the Order-in-Appeal No. 275 (SM) CUS/JPR/2021 dated 17.12.2021, passed by the Commissioner (Appeals), Customs, Central Excise & CGST, Jaipur. The Commissioner (Appeals) has, vide the impugned Order-in-Appeal, modified the Order of the Additional Commissioner of Customs (Preventive), Jodhpur, bearing no. 63/2020-ADC-Customs dated 28.10.2020, inter-alia, ordering absolute confiscation of two gold bars totally weighing 674.00 gms, valued at Rs.22,17,460/, under Sections 111(d), (i), (j), (l) and (m) of the Customs Act, 1962.

2. The brief facts of the case are that the Applicant arrived, on 30.03.2019, at Jaipur Airport, from Bangkok and was intercepted when he had already crossed the Green Channel without submitting any declaration form to the Customs Officer. On being inquired about any dutiable item to be declared for payment of Customs duty, the Applicant denied to have such item. After search of his person, two pieces of yellow metal bars appearing to be gold were recovered which were concealed in black coloured cloth wrapped around his head under his 'turban'. On weighing and testing by the Govt. approved valuer, the goods were found to be Gold, totally weighing 674 gms, valued at Rs. 22,17,460/-. The original authority, vide the aforesaid Order-in-Original dated 28.10.2020, absolutely confiscated the goods and the foreign/ Indian currency, recovered from the Applicant. Penalties of Rs. 5,00,000/-, Rs. 2,00,000/- and Rs. 1,00,000/- were also imposed, under Section 112(a)(b)(i), 114AA and 114 of the Act, *ibid*, respectively. Aggrieved, the Applicant filed an appeal before the Commissioner (Appeals), who upheld the order of absolute confiscation but reduced penalties imposed under Section 112(a)(b)(i) and Section 114AA and set aside the penalty imposed under Section 114 of the Customs Act, 1962, as mentioned above.

3. The instant revision application has been filed, mainly, on the grounds that gold is not prohibited; that gold may be released on payment of fine in lieu of confiscation; that personal penalty under Section 112(a) and (b) may be reduced and penalty under Section 114AA of the Customs Act, 1962 may be set aside.

4. Personal hearing was fixed on 15.07.2022, 29.07.2022 and 18.08.2022. In the hearing held on 18.08.2022, Sh. S.S. Arora, Advocate, appeared for the Applicant and reiterated the contents of the revision application. He also placed on record a compilation in support of his contentions. No one appeared for the Respondent department nor any request for adjournment has been received. Therefore, the case is being taken up for final decision.

5. The Government has carefully examined the matter. It is observed that the Applicant did not declare the gold brought by him under Section 77 of Customs Act, 1962 to the customs authorities at the airport. Further, the Applicant has admitted the recovery of gold from him and the fact of non-declaration in his statement tendered under Section 108 of the 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. In the present case, the Applicant had failed to declare the gold bars and pay duty on the same. Further, the gold bars were ingeniously concealed in black coloured cloth wrapped around his head under his 'turban' thereby making the intention to smuggle manifest. It is also noted that no documentary evidence has been produced to establish bonafide ownership. The Applicant has, thus, failed to discharge the burden placed on him, in terms of Section 123.

7.1 It is contended on behalf of the Applicant that the import of gold is not 'prohibited'. The Government observes that the gold is not allowed to be imported freely in baggage and it is permitted to be imported by a passenger subject to fulfilment of certain conditions. It is not even claimed that these conditions have been fulfilled in the present case.. 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 & 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 In view of the above, the contention of the Applicant that the offending goods are not 'prohibited goods', cannot be accepted.

8.1 The original authority has denied the release of impugned goods on payment of redemption fine under Section 125 of Customs Act, 1962. The Government observes that the option to release seized goods on redemption fine, in respect of 'prohibited goods', 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.)].

8.2 The Applicant has, however, relied upon the judgment dated 22.02.2022 of the Hon'ble Rajasthan High Court, in the case of Commissioner of Customs (Preventive), Jodhpur Vs. Mehboob [CWP No. 5640/2019] to seek redemption of the gold. In the said judgement Hon'ble High Court has relied on its own judgment dated 17.02.2022 passed in the case of Manoj Kumar Sharma Vs. UOI & Ors [CWP No. 12001/2020]. The Government finds that the Hon'ble Court has agreed with the judgment of Hon'ble Gujarat High Court, in the case of Bhargavraj Rameshkumar Mehta Vs. UOI [2018 (361) ELT 260 (Guj)], wherein it is held that for the purposes

of Sections 111 & 112 "----goods, import of which is conditional, would fall within the definition of prohibited goods if such conditions are not complied with." The Hon'ble High Court has, however, subsequently in its judgment distinguished between the interpretation of "prohibited goods" in respect of Section 125 and that in respect of Section 112 read with Section 111 in following terms:

"This view may seem incongruent with the view expressed by Gujarat High Court in case of Bhargavraj Rameshkumar Mehta (supra) which we have also followed in this judgment but flavours of Section 112 and 125 of the Customs Act are entirely different. Section 125 on the other hand pertains to option to pay fine in lieu of confiscation. As noted sub-section (1) of Section 125 comes in two parts. Whenever confiscation of goods is authorised under the Act, as per sub-section (1) of Section 125 the adjudicating officer has a discretion to offer redemption fine in lieu of confiscation in case of goods importation or exportation whereof is prohibited. In all other cases there is a statutory mandate on the adjudicating officer to offer such redemption fine. If the interpretation of Section 112 and 125(1) is not reconciled as above, this latter portion of sub-section (1) of Section 125 which covers all cases except where the importation or exportation of the goods is prohibited, would become otiose."

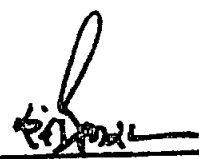
Thus, Hon'ble Rajasthan High Court has, in effect, held that while the goods, import/export of which is conditional, have to be considered as "prohibited goods" for the purposes of imposition of penalty under Section 112/114, however, for the purposes of Section 125 such goods cannot be considered to be so. The Government respectfully observes that this distinction drawn by the Hon'ble Rajasthan High Court is at variance with the judgment of Hon'ble Supreme Court in the case of Raj Grow Impex (supra). The Supreme Court has, in Raj Grow Impex, held that the goods which were imported beyond permissible quantity and without licence (i.e., in contravention of the conditions) were "prohibited goods" and thereafter proceeded to hold such goods liable to absolute confiscation, i.e., without affording the option of redemption under Section 125. The judgment in Raj grow Impex case has not been considered by the Hon'ble Rajasthan High Court in the case of Manoj Kumar Sharma and thereafter in the case Mehboob.

8.3 In the case of UOI & Ors vs. M/s Raj Grow Impex LLP & Ors (supra), the Hon'ble Supreme Court has also 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"*. In the present case, the original authority has refused to grant redemption in the background that the Applicant had attempted to smuggle the gold by concealment and specifically keeping in view the Government's policy objectives in the matter. No case for interference with the discretion so exercised by the original authority is, therefore, made out.

9. The case laws cited by the Applicant in support of his various contention are not applicable in view of the dictum of Hon'ble Supreme Court and Hon'ble High Court, as above.

10. The Commissioner (Appeals) has correctly brought out that the Applicant is liable to penalty under Section 114AA as he failed to make a declaration even when asked to do so by the officers. Further, the penalty imposed by the original authority has been substantially reduced by the Commissioner (Appeals). No case for any further reduction is made out.

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



(Sandeep Prakash)

Additional Secretary to the Government of India

Sh. Sandeep Singh,
S/o Late Sh. Gurbachan Singh,
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Order No. 276 /2022-Cus dated 18-08-2022

Copy to:

1. The Commissioner (Appeals), Customs, Central Excise & CGST, NCRB, Statue Circle, Jaipur – 302005.
2. The Commissioner of Customs (Preventive), Jodhpur (Hqrs at Jaipur), NCRB, Statue Circle, C-Scheme, Jaipur – 302005.
3. Sh. S.S. Arora, Advocate, B 1/71, Safdarjung Enclave, New Delhi 110029.
4. PA to AS(RA)
5. ~~Guard File.~~
6. Spare Copy

ATTESTED



18.08.22

(लक्ष्मी राघवन)
(Lakshmi Raghavan)
अनुभाग अधिकारी / Section Officer
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नई दिल्ली / New Delhi