

SPEED POST



F. No. 375/35/B/2022-RA
F. No. 375/36/B/2022-RA
GOVERNMENT OF INDIA
MINISTRY OF FINANCE
(DEPARTMENT OF REVENUE)

14, HUDCO VISHALA BLDG., B WING
6th FLOOR, BHIKAJI GAMA PLACE,
NEW DELHI-110 066

Date of Issue 23/8/22

Order No. 282-283/22-Cus dated 23-08-2022 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 129 DD of the Customs Act 1962 against the Order-in-Appeal No. 178-179/CUS/APPL/LKO/2021. dated 08.03.2022 passed by the Commissioner (Appeals), Customs, GST & Central Excise, Lucknow
- Applicant : 1. Sh. Milind Popat Bole, Ambernath, Thane.
2. Sh. Anil Makhan Pal, Ambernath, Thane.
- Respondent : Commissioner of Customs (Preventive), Lucknow.
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ORDER

Two Revision Applications, bearing nos. 375/35/B/2022-RA and 375/36/B/2022-RA both dated 27.05.2022, have been filed by Sh. Milind Popat Bole, Ambernath (hereinafter referred to as the Applicant-1) and Sh. Anil Makhan Pal, Ambernath (hereinafter referred to as the Applicant-2) against the Order-in-Appeal No. 178-179/CUS/APPL/LKO/2021 dated 08.03.2022, passed by Commissioner (Appeals), Customs, GST & Central Excise, Lucknow. The Commissioner (Appeals) has, vide the impugned Order-in-Appeal, dismissed the appeals filed by the Applicants herein against the Order-in-Original passed by the Joint Commissioner of Customs (P), Lucknow, bearing no. 25/JC/2021-22 dated 13.07.2021, ordering absolute confiscation of gold weighing 800 gms, valued at Rs. 27,23,760/-, recovered from Applicant-1, under Section 111 of the Customs Act, 1962 along with a blue-coloured backpack (Lunar brand) and three green-coloured capsules, used for concealing the gold under Section 119 of the Customs Act, 1962. Besides, penalties of Rs. 2,00,000/- and 1,00,000/- were also imposed on Applicant-1 and Applicant-2, respectively, under Section 112(b) of the Customs Act, 1962.

2. Brief facts of the case are that the officers of DRI, Lucknow, on 05.12.2019, intercepted the Applicant-2 at the domestic Airport, Lucknow, who was carrying smuggled gold of foreign origin from Dubai into India via Nepal and going to Mumbai from Lucknow through domestic flight. During search of baggage of the Applicant-2, three green-coloured capsules containing gold in paste form were recovered. The value of gold was appraised as Rs.27,23,760/- by the Government approved valuer, who also confirmed the weight of gold, i.e., 800 gms, which was recovered after

converting the paste into metal form. A sample of 4.93 gms of gold was drawn from the recovered gold and sent to the CRCL, New Delhi for testing, which was later confirmed by the Chemical examiner, CRCL, New Delhi that the sample was of gold of purity 94.3%, by weight. The Applicant-2, in his statement dated 05.12.2019, tendered under Section 108 of the Customs Act, 1962, admitted that he had brought the recovered gold on the direction of the Applicant-1, who made all the arrangements for his onward and return journey as well as his stay in Dubai; that one person in Dubai handed over the recovered three green-coloured capsules containing the gold in paste form; that he concealed the said capsules in his rectum and left Dubai for Kathmandu (Nepal) through flight and there he shifted the said capsules from his rectum and hid them in his hand bag and reached Nepal Ganj (Nepal) through another flight and from there he reached Indo-Nepal Border at NGR through Taxi and crossed the border; that from there, he hired a shared taxi and finally reached Lucknow; that the said gold was to be handed over to a person, namely, Sh. Vicky at Lucknow Airport for which he would receive Rs. 8,000/- from the Applicant-1 for successful delivery. He also informed that he had brought the gold in two capsules from Dubai to India in the month of September, 2019 and had received Rs. 8,000/- from the Applicant-1. The original authority, vide the aforesaid Order-in-Original dated 13.07.2021, ordered for absolute confiscation of seized foreign origin gold, weighing 800 gms and valued at Rs. 27,23,760/- under Section 111 of the Customs Act, 1962 alongwith confiscation of goods i.e., blue-coloured backpack (Lunar Brand) and three green-coloured capsules, used for concealing the said gold under Section 119 of the Customs Act, 1962. Besides, penalties of Rs. 2,00,000/- and Rs. 1,00,000/- were imposed on the Applicant-1 and

Applicant-2, respectively. Aggrieved, the Applicants filed appeals before the Commissioner (Appeals), which have been rejected.

3. The revision application has been filed by the Applicant-2 on the grounds that the gold belonged to him only, which he had purchased from Lucknow for further sale in Mumbai for monetary gains; that he was travelling from Lucknow to Mumbai as a domestic passenger, hence the provisions of Section 77 of the Act, *ibid* and other relevant provisions applicable for import of the goods from abroad were not at all attractable in this case as no declaration is required to be made before Customs/ DRI officers, for passengers travelling in domestic sectors within the country; that it was wrongly alleged in the SCN that he had imported the gold from Dubai on the instructions of the Applicant-1 and he had taken the name of the Applicant-1 just to save his own skin; that the gold is neither banned nor restricted under Baggage Rule, 2016 and same is liable for release on nominal fine and applicable duty; that the gold may be released on duty fine & nominal penalty; that penalty imposed under Section 112 of the Customs Act, 1962 may be waived/reduced. The Applicant-1 contended that all the charges and allegations are baseless, false and far from facts; that he was wrongly charged on the basis of the statement given by the co-accused (Applicant-2) and the statement had not been corroborated by any other independent material evidences; that no burden under Section 123 of the Customs Act, 1962 is cast on him to prove the smuggling of the alleged gold for simple reason that no seizure has been made from his possession or any incriminating documents recovered; that he has no relation with the Applicant-2 from whose possession the goods, if any, seized so he is not

liable for any penalty under Section 112 of the Customs Act, 1962; that penalty under Section 112 of the Act, ibid may be waived.

4. Personal hearing, in virtual mode, was held on 18.08.2022. Sh. O.M. Rohira, Advocate, appeared for the Applicants and reiterated the contents of the revision applications. Sh. Ajay Mishra, Additional Commissioner appeared for the Respondent department and supported the order of Commissioner (Appeals).

5.1 The Government has examined the matter carefully. It is observed that the Applicant-2 did not declare the gold brought by him as required under Section 77 of Customs Act, 1962, to the Customs Authorities at time of his arrival in India through Indo-Nepal Border at NGR and crossed the border. The Applicant-2 has admitted the recovery of gold from him & its carriage in concealed manner while arriving into India through Land Customs Station (LCS) and the fact of non-declaration in his statement, tendered under Section 108 of Customs Act, 1962. In the written submissions dated 06.08.2020 before the original authority, the Applicant-2 had claimed that he had purchased the gold from Lucknow but failed to provide any documentary evidence evidencing licit possession of the same.

5.2 It is further observed that the Applicant-1 has denied the allegations and challenged the proceedings in view ^{of} the fact that nothing had been recovered from him and no corroborating evidence has been placed on record. He has also claimed that nothing has been recovered from his residential premises at Ambernath. The contentions of the Applicant-1 merit consideration. It is observed that no statement of the Applicant-1 has been

recorded to substantiate the allegations regarding involvement in smuggling of confiscated goods. Nothing incriminating is reported to have been recovered from his residential premises. Thus, the statement of Applicant-2 implicating Applicant-1 remains uncorroborated.

6. In terms of Section 123 of the Act, *ibid*, 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-2 failed to produce any purchase invoice after he was intercepted and admitted that the gold was smuggled from Dubai by rectum concealment. It is also admitted that the attempt was to smuggle the offending gold to evade Customs duty with the intent to maximize his profit. The gold was also not declared by the Applicant to the Custom officers at LCS while arriving into India, as required under Section 77 of Customs Act, 1962. The Applicant has, thus, failed to discharge the burden placed on him, in terms of Section 123, *ibid*.

7.1 It is contended on behalf of the Applicant that the import of gold is not 'prohibited'. However, the Government observes that this contention of the Applicant is in the teeth of law settled by a catena of judgments of Hon'ble Supreme Court. 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*". Gold is not allowed to be imported freely in baggage and it is permitted to be imported by a passenger subject to fulfillment 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 In view of the above, the contention of the Applicant that the subject goods are not 'prohibited goods', cannot be accepted.

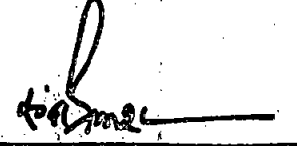
8. The original authority has denied the release of offending goods on redemption fine under Section 125 of Customs Act, 1962. The Government observes that, in terms of Section 125 of the Customs Act, 1962, the option

to release '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 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; has to be based on relevant considerations.*" Further, 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".*" Hon'ble Delhi High Court has, in the case of Raju Sharma [2020 (372) ELT 249 (Del)], relying upon the judgment of Apex Court in Mangalam Organics Ltd. [2017 (349) ELT 369 (SC)], held that "*Exercise of discretion by judicial, or quasi-judicial authorities, merits interference only where the exercise is perverse or tainted by patent illegality, or is tainted by oblique motive.*" Thus, the order of original authority could have been interfered with only if it suffered from any of the vices indicated by the Hon'ble Courts. Such a case is not made out. Thus, the Commissioner (Appeals) has correctly refused to interfere in the matter.

9. The case laws relied upon by the Applicant-2, in support of his various contentions, are not applicable in view of the law laid down by the Hon'ble Supreme Court and Hon'ble High Courts, as above.

10. In the facts and circumstances of the case, the penalty imposed by the original authority and upheld by the Commissioner (Appeals) on the Appliant-2 is just and fair. However, the penalty imposed on Appliant-1 is set-aside for the reasons indicated in para 5.2 above.

11. In view of the above, the revision application filed by Applicant-1 is allowed and penalty is set aside. The revision application filed by Applicant-2 is rejected.



(Sandeep Prakash)

Additional Secretary to the Government of India

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Order No. 282 - 283 /22-Cus dated 23-08-2022

Copy to:

1. The Commissioner (Appeals), Customs, CGST & Central Excise, 3/194, Vishal Khand, Gomti Nagar, Lucknow-226010 (UP).
2. The Joint Commissioner of Customs (Prev), 5th floor, Kendriya Bhawan, Sector-H, Aliganj, Lucknow-226024(UP).
3. Sh. O.M. Rohira, 148/301, Uphaar Mandir, 10th Road, Khar(W), Mumbai-400052.
4. PA to AS(RA).
5. Guard File.
6. Spare Copy.

ATTESTED



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