

SPEED POST



F. No. 380/13/B/2019-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. 15/12/21.

ORDER NO. 288/21 - Cus dated 15-12-2021 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 Application filed under section 129DD of the Customs Act, 1962 against the Order-in-Appeal No. KOL/CUS(Port)/AA/94/D/2019 dated 01.07.2019, passed by the Commissioner of Customs (Appeals), Kolkata.

APPLICANT : Commissioner of Customs, (Airport & Admn.), Kolkata.

RESPONDENT : Sh. Prayag Pandey, Kolkata.

ORDER

A Revision Application No. 380/13/B/2019-R.A dated 13.11.2019 has been filed by the Commissioner of Customs (Airport & Admn.), Kolkata (hereinafter referred to as the Applicant) against Order-in-Appeal No. KOL/CUS(Port)/AA/94/D/2019 dated 01.07.2019, passed by the Commissioner of Customs (Appeals), Kolkata. Commissioner (Appeals) has modified the Order-in-Original No. 37/2017 ADC dated 31.03.2017 of the Additional Commissioner of Customs, NSCBI Airport, Kolkata, vide which one cut piece of rectangular gold bar weighing 498.90 grams, valued at Rs 14,06,898/- had been confiscated absolutely and a penalty of Rs. 1,41,000/- was imposed on the Respondent, Sh. Prayag Pandey. The Commissioner (Appeals) has allowed redemption of the confiscated gold on payment of redemption fine of Rs. 4,22,000/-, under Section 125 of the Customs Act, 1962, along with applicable Customs Duty at Baggage Rate of duty on the CIF value of the gold. However, the penalty of Rs. 1,41,000/- under Section 112(a) & 112(b) of the Customs Act, 1962, imposed by the original adjudicating authority on the Respondent, has been upheld.

2. The brief facts of the case are that the Respondent arrived at NSCBI Airport, on 20.01.2015, from Bangkok and was intercepted near the exit gate while walking through the Customs Green Channel. Upon being asked by the Customs officers whether he was carrying any dutiable goods, gold etc., the Respondent replied in negative. However, on search of his person, 01 cut piece of rectangular bar made of 24 Karat gold was recovered from a black coloured zipper synthetic pouch, hanging around his neck, under the cloth worn by him. The

value of the gold bar, weighing 498.900 grams, was assessed at Rs. 14,06,898/- and the same was seized under Section 110 of the Customs act, 1962, under Panchnama dated 20.01.2015. The Respondent could not produce any licit document in support of legal importation, acquisition and possession of the gold bar recovered from him. In his statement dated 20.01.2015, tendered under Section 108 of the Customs Act, 1962, the Respondent admitted the recovery of the said gold bar. He further admitted that one Thai citizen offered him Rs. 30,000/- for selling the said gold bar in India, which he accepted out of greed. The original authority confiscated absolutely the gold bar and imposed a penalty of Rs. 1,41,000/- on the Respondent. Aggrieved, the Respondent filed an appeal before the Commissioner (Appeals), who, vide the impugned Order-in-Appeal, allowed the release of the gold on payment of Rs. 4,22,000/- as redemption fine under Section 125 of the Customs Act, 1962 along with applicable Customs Duty at Baggage Rate of duty on the CIF value of the gold. Penalty imposed vide the OIO was maintained.

3. The revision application has been filed, mainly, on the grounds that the gold was concealed by the Respondent in a meticulous manner; that the Respondent had not declared the said gold bar to the customs authorities; that he was not entitled to import the gold in terms of Notn. No. 12/2012-Cus dated 17.03.2012 read with Baggage Rules, 1998; that the Respondent was, admittedly, a frequent visitor; that the gold should not have been released to the Respondent as it is 'prohibited goods' as the conditions of its import were not fulfilled by the Respondent; and that the Respondent was not the owner of the goods as was admitted by him in his

statement dated 20.01.2015, tendered under Section 108 of the Customs Act, 1962. Cross-objections have been filed by the Respondent vide letter dated 21.12.2019.

4. Revision Application has been filed with a delay which is attributed to administrative reasons. Delay is condoned.

5. Personal hearing was held on 13.12.2021, in virtual mode. Sh. Jitendra Kumar, Superintendent, appeared on behalf of the Applicant department and reiterated the contents of the Revision Application. He highlighted that the Respondent had declared 'No' or 'Nil' against all columns in the Customs Declaration Form. Hence, the finding of Commissioner (Appeals), that the Respondent had gone to the Red Channel to declare the dutiable goods carried by him, is incorrect. Sh. Shovendu Banarjee, Advocate, appeared on behalf of the Respondent and reiterated the contents of the reply dated 22.12.2019. He submitted that the Respondent had incorrectly filled the declaration form, inadvertently, but had verbally declared the correct position at Red Channel. He supported the Order of Commissioner (Appeals).

6. The Government has carefully examined the matter. It is evident that the impugned gold bar was concealed in a black coloured zipper synthetic pouch, hanging around his neck, under the cloth worn by the Respondent. In the Customs Declaration Form, the Respondent had not declared anything in Column 9 (Total value of dutiable goods imported) and also nothing in column no. 10 (ii) and 10 (iii) against heads of gold jewellery and gold bullion. The manner of concealment and non-declaration on the Customs Declaration Form totally belies

the contention that the Respondent had intended to declare the goods at the Red Channel. Further, the contention that the Customs Declaration was incorrectly filled, inadvertently, also appears to be an afterthought as the incorrect declaration is made at all three places, which would not have been the case if it was merely an inadvertent omission. This position is substantiated by the Respondent's own admissions made in his statement tendered under Section 108 of Customs Act, 1962.

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, 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 Respondent has failed to produce any evidence that the gold was not smuggled. The manner of concealment, inside the black coloured zipper synthetic pouch, also clearly establishes that the Respondent had smuggled the seized gold item. He could not produce any licit document in support of the possession, acquisition and legal importation of the said gold and admitted that one Thai citizen offered him Rs. 30,000/- for selling the said gold bar in India, which he accepted out of greed. The statement dated 20.01.2015 has not been retracted. The concealment of the gold bar and its non-declaration clearly shows that the Applicant had attempted to smuggle the said gold. Further, no other 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*.

8.1 The Commissioner (Appeals) has opined that gold cannot be held to be a 'prohibited' item simply because of non-following of procedure by the Respondent. The Government observes that in the case of Sheikh Mohd. Omer vs Collector of Customs, Calcutta & Ors {1971 AIR 293}, 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*". 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."*

8.2 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----."

8.3 Thus, undoubtedly, the offending goods are "prohibited goods". The Commissioner (Appeals) has overlooked the binding judicial precedent, as above, to hold otherwise.

9.1 The original 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 in the background of attempted smuggling by concealment.

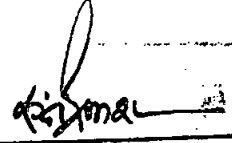
9.2 The Commissioner (Appeals) has interfered with the discretion exercised by the original authority, inter-alia, on the grounds that gold is not a prohibited item. This finding of the Commissioner (Appeals) is incorrect as already held hereinabove. Thus, the Commissioner (Appeals) could have interfered with the discretion exercised by the original authority only if the exercise of such discretion was not meeting the law laid down in Raj Grow Impex (supra), which is not the case here. The Government also observes that the 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.)] have held 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.

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Sinnasamy
(supra)

(3)

10. It is relevant to notice here that the Respondent has not contested the imposition of penalty under Section 112, by the Commissioner (Appeals). Thus, the contravention of the statutory provisions making the goods liable to confiscation is admitted.

11. In view of the above, the impugned Order-in-Appeal is set aside and the revision application is allowed.



(Sandeep Prakash)

Additional Secretary to the Government of India

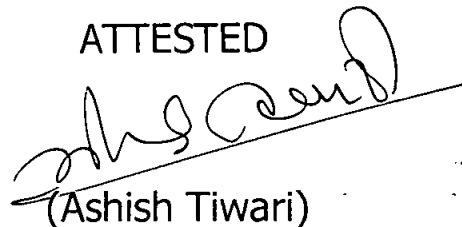
The Commissioner of Customs, Kolkata,
AIU Cell, NSCBI Airport,
15/1, Strand Road, Custom House,
Kolkata-700001

Order No. 288/21-Cus dated 15-12-2021

Copy to:

1. Shri Prayag Pandey, R/o 23/2, Ganesh Ghosh Lane, Ist Floor, FL-IC, Kolkata-700039.
2. The Commissioner of Customs (Appeals), 3rd Floor, Custom House, 15/1, Strand Road, Custom House, Kolkata-700001.
3. PA to AS(RA).
4. Guard File.
5. Spare Copy.

ATTESTED



(Ashish Tiwari)

Assistant Commissioner (RA)