

SPEED POST



**F. No. 375/68/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 16/12/21

Order No. 290/21-Cus dated 16-12-2021 of the Government of India passed by Sh. Sandeep Prakash, Additional Secretary to the Government of India, under Section 129DD of the Customs Act, 1962.

Subject : Revision Application filed under Section 129 DD of the Customs Act 1962 against the Order-in-Appeal No. CC(A)Cus/D-1/Airport/312/2019-20 dated 27.08.2019 passed by the Commissioner of Customs (Appeals), New Delhi.

Applicant : Sh. Asharaf Ulladanthodi, Malappuram, Kerala.

Respondent : The Commissioner of Customs (Airport & General), IGI Airport, New Delhi.

ORDER

A Revision Application No. 375/68/B/2019-RA dated 27.11.2019 has been filed by Sh. Asharaf Ulladanthodi, Malappuram, Kerala (hereinafter referred to as **'the Applicant'**) against the Order-in-Appeal No. CC(A)Cus/D-1/Airport/312/2019-20 dated 27.08.2019 passed by the Commissioner of Customs (Appeals), New Delhi. The Commissioner (Appeals) has upheld the Order-in-Original No. 163/DR/ADC/2016 dated 07.12.2016, passed by the Additional Commissioner of Customs, IGI Airport, New Delhi, wherein twenty-five (25) pieces of tola bar of gold concealed in emergency light and mixer, weighing 2916 grams valued at Rs. 81,45,671/-, were confiscated absolutely under Section 111 of the Customs Act, 1962. A penalty of Rs. 20 Lakh was also imposed on the Applicant under Sections 112 and 114AA of the Customs Act, 1962.

2. Brief facts of the case are that the Applicant arrived, on 21.05.2016, at IGI Airport, New Delhi from Doha. He was intercepted by the Customs Officers near the Exit Gate of Arrival Hall after he had crossed the Green Channel. On search of his baggage, twenty-five (25) pieces of tola bar of gold concealed in emergency light and mixer, weighing 2916 Grams, were recovered. The value of the recovered Gold was appraised as Rs. 81,45,671/-. The offending goods were confiscated absolutely by the original authority, vide Order-in-Original dated 07.12.2016. A penalty of Rs. 20 Lakh was also imposed on the Applicant. Aggrieved, the Applicant filed an appeal before the Commissioner (Appeals), who vide the impugned Order-in-Appeal dated 27.08.2019, rejected the appeal.

3. The instant revision application has been filed, mainly, on the grounds that the confiscated goods are not prohibitive in nature; that ownership of the Applicant has been denied in respect of confiscated goods; that an opportunity should have

been granted to pay customs duties and other charges; and that imposition of hefty penalty could cause grave losses to the Applicant. It has, accordingly, been prayed that the gold may be released and delivered to the Applicant.

4. The personal hearing was held on 15.12.2021, in virtual mode. Sh. Jose Abraham, Advocate appeared for the Applicant and submitted that a written submission along with relied upon judgements shall be made. The case may thereafter be decided taking into consideration these submissions. No one appeared for the Respondent nor any request for adjournment has been received. Applicant submitted written submissions via email dated 15.12.2021 wherein it is stated that the Applicant is ready to pay Customs duties, fine and penalty as per law for the violations for non-disclosure for releasing the confiscated goods.

5. The Government has carefully examined the matter. It is observed that the Applicant did not declare the gold brought by him as required under Section 77 of Customs Act, 1962, to the customs authorities at the airport as no declaration was made in his Customs Declaration Form. Further, the manner of concealment makes it evident that this was a pre-meditated and conscious attempt of smuggling. The Applicant has admitted the recovery of seized gold from him and its concealment in the emergency light & mixer as well as the fact of non-declaration in his statement dated 21.05.2016, tendered under Section 108 of Customs Act, 1962. He has also admitted that the recovered gold did not belong to him.

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. No documents evidencing licit possession of the seized goods were produced after recovery and also there was no declaration regarding carriage of gold in the Customs Declaration Form. Further, the Applicant had crossed the Green Channel when he was intercepted. The 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'. The Additional Commissioner has, in paras 3.3 to 3.5 of the Order-in-Original dated 07.12.2016, 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. The Government observes that:

- (a) 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".

(b) 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"*.

(c) 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."*

(d) 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----."

7.2 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'.

8.1 The original authority has denied the release of impugned goods on redemption fine under Section 125 of Customs Act, 1962. The Government observes that, 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.)]}. It is also observed that:

(a) 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*".

(b) 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".*"

8.2 In the present case, the original authority has refused to grant redemption in the background of attempted smuggling by concealment with intent to evade Customs Duty as also in the context of the Government's policy objectives in the matter. Thus, the original authority has exercised his discretion and refused redemption based on relevant and reasonable considerations. As such, following the dictum of Raj Grow Impex (supra) and Sinnasamy (supra), the discretion exercised by the original authority could not have been interfered with.

9. The Government is also not persuaded to accept the contention of the Applicant that penalty imposed is excessive. The clever manner in which offending goods were concealed and the quantity/value of such goods specifically justify the quantum of penalty imposed.

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




(Sandeep Prakash)

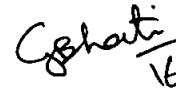
Additional Secretary to the Government of India

Mr. Asharaf Ulladanthodi
S/o Sh. Muhammed,
R/o Ulladanthodi, PO Chelembra,
Malappuram Dt, Kerala - 673637.

Order No. 290/21-Cus dated 16-12-2021

Copy to:

1. The Commissioner of Customs, (A&G), New Customs House, Near IGI Airport, New Delhi - 110037.
2. The Commissioner of Customs (Appeals), New Customs House, Near IGI Airport, New Delhi - 110037.
3.  Jose Abraham, Advocate, D-144-A, Hari Nagar Ashram, New Delhi - 110014.
4. PA to AS(RA).
5. Guard File.
6. Spare Copy.


16/12/2021

GULSHAN BHATIA
Superintendent