

SPEED POST



F. No. 375/41/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 30/9/22

Order No. 304/22-Cus dated 30-09-2022 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-I/Airport/845/2020-21 dated 21.12.2020 passed by the Commissioner of Customs (Appeals), New Delhi.

Applicant : Sh. Noufal Thazhevalappil, Kannur, Kerala.

Respondent : The Commissioner of Customs, IGI Airport, New Delhi.

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ORDER

A Revision Application No. 375/41/B/2022-RA dated 22.06.2022 has been filed by Sh. Noufal Thazhevalappil, Kannur, Kerala (hereinafter referred to as the Applicant), against the Order-in-Appeal No. CC(A)Cus/D-I/Airport/845/2020-21 dated 21.12.2020, passed by the Commissioner of Customs (Appeals), New Delhi. The Commissioner (Appeals) has rejected the appeal filed by the Applicant herein against the Order-in-Original passed by the Additional Commissioner of Customs, IGI Airport, New Delhi, bearing no. 369/Adjn./2017 dated 29.12.2017, wherein, one silver colour coated wire/rod made of gold, weighing 1506 grams, valued at Rs. 38,67,212/-, recovered from the checked-in baggage of the Applicant, was confiscated absolutely under Section 111(d), 111(i), 111(j), 111(l) and 111(m) of the Customs Act, 1962 along with the concealing material i.e., black coloured big stroller bag of 'MONZA' brand under Section 118 & 119 of the Customs Act, 1962. Penalty of Rs. 7,75,000/- was also imposed on the Applicant under Section 112 & 114AA of the Act, *ibid*.

2. Brief facts of the case are that the Applicant arrived, on 13.05.2014, at IGI Airport, New Delhi, from Dubai. He was intercepted by the Customs Offices at the exit gate after he had crossed the green channel and was diverted for detailed examination of his person & baggage. Applicant was asked whether he was carrying any dutiable goods to which he replied in negative. During the baggage search, one silver colour coated wire/rod made of gold, weighing 1506 grams, valued at Rs. 38,67,212/-, was recovered which was found concealed under the aluminum strips running around the four interior sides of the stroller bag of Monza Brand carried by the Applicant. In his statements dated 13.05.2014 and

30.07.2014, tendered under Section 108 of the Customs Act, 1962, the Applicant stated that he was the owner of the recovered gold and submitted that the same was purchased by him from his own saving; that he purchased the said gold from G.B. Gold shop at Dubai and he paid 2,27,505 UAE Dirham for that; that he gave 1.5 Kg gold bars to one Pakistani person named "Chacha" in Dubai and asked him to make the gold in the form of rod/ wire and conceal them in the stroller bag for which Applicant paid him (Chacha) 700 UAE Dirham; that there was good profit to be earned when the gold purchased in Dubai was further sold in India, so he decided to conceal the gold to avoid detection by Customs and brought the same into India without payment of Customs duty to maximize his profit; that he had visited India about 4 to 5 times in last six months from Oman and Dubai for his business activities and he was well aware of the fact that import of gold attracted Customs duty and smuggling of same was punishable offence; that he had committed a mistake and he would not do such mistake in future. The original authority, vide the aforesaid Order-in-Original dated 29.12.2017, confiscated the gold absolutely under Section 111(d), 111(i), 111(j), 111(l) and 111(m) along with the concealing material under Section 118 & 119 of the Customs Act, 1962. Penalty of Rs. 7,75,000/- was also imposed on the Applicant under Section 112 & 114AA of the Act, *ibid*. Aggrieved, the Applicant filed an appeal before the Commissioner (Appeals), which has been rejected.

3. The instant revision application has been filed, mainly, on the grounds that the order is erroneous and case was not adjudicated on the proper set of facts and applicable laws; that the Applicant was searched in contravention of the provisions of Section 102 and Section 110A of the Customs Act, 1962 as no Magistrate or Gazetted officer of the

department was present at that time; that Applicant is neither a habitual offender nor he was found involved in any such activities in the past; that Applicant has already deposited the amount of Rs. 13,94,130/- for settlement but no benefit was given under Section 125 of the Customs Act, 1962; that an exorbitant amount of penalty has been imposed under Section 112 and 114AA of the Customs Act, 1962; that the import of gold is not prohibited; that consequential relief may be granted.

4. Personal hearing, in virtual mode, was held on 28.09.2022. Sh. Saurabh Kapoor, Advocate, appeared for the Applicant and requested for a lenient view to be taken. He submitted that goods may be allowed to be redeemed or reexport may be allowed. Sh. Rajiv Ranjan, Supdt., highlighted that this is a case of ingenious concealment and supported the order of lower authorities. Further, a compilation of case laws has been submitted by the Applicant on 28.09.2022 (after the hearing), in support of his contention.

5. The Government has carefully examined the matter. It is observed that wire made of gold was concealed under the aluminium strips running around the four-interior sides of the stroller bag. This ingenious manner of concealment makes it apparent that it was premeditated attempt of smuggling.

6. The Applicant has contended that the customs authorities had contravened the provisions of Section 102 of the Customs Act, 1962 as no Magistrate or Gazetted officer of the department was present at the time of search. In support of this contention, copy of the Notice dated 13.05.2014, issued under Section 102, ibid by the Air Customs Officer,

has been produced. However, on perusal of the Notice dated 13.05.2014 (Annexure A-4 to RA), it is evident that the Applicant was made aware of the option to be produced before the nearest Gazetted officers of customs or Magistrate for search, as per subsection (1) of Section 102. However, the Applicant did not avail of this option. Therefore, there is no merit in the subject contention of the Applicant.

7. It is contended that the Applicant has already deposited the duty on the confiscated gold. However, the Government observes that vide Show Cause Notice dated 30.10.2014, no proposal was made for demand of duty by the authorities. As such, it appears that the Applicant has, on his own, deposited amount of Rs. 13,94,130/-, representing it as Customs duty, with the Bank. The TR-6 challan No. 702668 dated 30.12.2014 is not authorised by any customs officer. Thus, no cognizance needs to be taken of this suo-motu act of the Applicant.

8.1 It is further contended by 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. {1983(23)ELT1439(SC)}, 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"*. The Government finds that, even subsequently, 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."*

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 In view of the above, the contention of the Applicant that the offending goods are not 'prohibited goods', cannot be accepted.

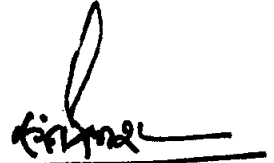
9. The original authority has denied the release of offending goods on redemption fine under Section 125 of Customs Act, 1962. The Government observes that, in terms of Section 125 of the Customs Act, 1962, the option to release 'prohibited goods', on redemption fine, is discretionary, as held by the 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; 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."* In the present case, the Order of the original authority does not suffer from any of these vices. In fact, the original authority has, after due application of mind, ordered absolute confiscation for the relevant and reasonable considerations, specifically brought out in para 14.2 & 15 of the Order-in-Original. Thus, the Commissioner (Appeals) has correctly refused to interfere in the matter.

मि. जे. ए. ए. सिन्नासामी (आर. ए. सी. ऑफिसर, चेन्नई-१) विरुद्ध
 ए. ए. सी. ऑफिसर, चेन्नई-१ (आर. ए. सी. ऑफिसर, चेन्नई-१) विरुद्ध
 ए. ए. सी. ऑफिसर, चेन्नई-१ (आर. ए. सी. ऑफिसर, चेन्नई-१) विरुद्ध
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10. In the facts and circumstances of the case, the penalty imposed by the original authority and upheld by the Commissioner (Appeals) is just and fair.

11. The case laws relied upon by the Applicant in support of his various contentions are not applicable/relevant in view of the dictum of Hon'ble Supreme Court and Hon'ble High Courts, as above.

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



(Sandeep Prakash)

Additional Secretary to the Government of India


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Order No. 304/22-Cus dated 30-09-2022

Copy to:

1. The Commissioner of Customs, T-3, IGI Airport, New Delhi-110037.
2. The Commissioner of Customs (Appeals), NCH, New Delhi-110037.
3. Sh. Saurabh Kapoor, Advocate, H. No. 553, Sector-6, MDC, Panchkula-140139 Haryana.
4. PA to AS(RA).
5. Guard File.
6. Spare Copy.

ATTESTED


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