

**SPEED POST**

**F. No. 372/01/B/2020-RA  
GOVERNMENT OF INDIA  
MINISTRY OF FINANCE  
(DEPARTMENT OF REVENUE)**

*14, HUDCO VISHALA BLDG., B WING  
6<sup>th</sup> FLOOR, BHIKAJI CAMA PLACE,  
NEW DELHI-110 066*

Date of Issue..29/12/21

Order No. 306/21-Cus dated 29-12-2021 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. KOL/CUS(Airport)/AKR/753/2019 dated 28.11.2019 passed by the Commissioner of Customs (Appeals), Kolkata.

**Applicant** : Sh. Krishan Pal, Mohali, Punjab.

**Respondent** : The Commissioner of Customs, NSCBI Airport, Kolkata.

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**ORDER**

A Revision Application No. 372/01/B/2020-RA dated 28.01.2020 has been filed by Sh. Krishan Pal, Mohali, Punjab (hereinafter referred to as '**the Applicant**') against the Order-in-Appeal No. KOL/CUS(Airport)/AKR/753/2019 dated 28.11.2019, passed by the Commissioner of Customs (Appeals), Kolkata. The Commissioner (Appeals) has upheld the Order-in-Original No. 04/2019-ADC dated 08.01.2019, passed by the Additional Commissioner of Customs, NSCBI Airport, Kolkata, in respect of four (04) pieces of gold bars of purity 99.7, concealed in the shoes of the Applicant, collectively weighing 466.400 grams and valued at Rs. 14,03,864/-, along with assorted electronics goods valued at Rs. 5,28,152/-, which were recovered from the Applicant. The gold bars were confiscated absolutely, under section 111(d), 111(i) and 111(l) of the Customs Act, 1962. The assorted electronic goods were also confiscated but were allowed to be released on payment of Rs. 1.25 lakh, as redemption fine, under section 125 of the Act, *ibid* and customs duty, as applicable. A penalty of Rs. 5 Lakh was also imposed on the Applicant under section 112(a) & 112(b) of the Customs Act, 1962.

2. Brief facts of the case are that the Applicant arrived, on 01.10.2017, at NSCBI Airport, Kolkata from Dubai. He was

- intercepted by the Customs Officers while crossing the green channel of the Arrival Hall. The Applicant replied in negative upon being asked whether he was carrying any gold or gold items etc.. During personal and baggage search of the Applicant, four (04) pieces of gold bars of purity 99.7, concealed in his shoes, weighing 466.400 grams along with assorted electronics goods, were recovered. The value of the recovered gold was assessed at Rs.14,03,864/-. Assorted electronics goods valued at Rs.5,28,152/- were also recovered. On being asked, the Applicant could not produce any licit document in support of the possession, acquisition or importation of the said four pieces of gold bars of foreign origin and electronic goods. The Applicant, in his statement dated 01.10.2017, tendered under section 108 of Customs Act, 1962, admitted the concealment and non-declaration of the recovered goods. In his further statement dated 13.10.2017, the Applicant reiterated the contents of his earlier statement dated 01.10.2017. The seized gold was confiscated absolutely whereas assorted electronic goods were allowed to redeemed by the original authority, vide Order-in-Original dated 08.01.2019. Penalty of Rs. 5 Lakh was also imposed on the Applicant under section 112 (a) & (b) *ibid*. Aggrieved, the Applicant filed an appeal before the Commissioner (Appeals),

who, vide the impugned Order-in-Appeal dated 28.11.2019, rejected the appeal.

3. The instant revision application has been filed, mainly, on the grounds that the import of gold by a passenger is not prohibited and hence may be allowed to be redeemed; that the Applicant was not well educated and due to lack of knowledge, could not declare his goods to the Customs officers; that the gold was meant for the marriage of his daughter; that the gold was kept in the shoes for safety and not for concealment, and that the redemption fine and penalty imposed by the lower authorities are excessive. It has, accordingly, been prayed that the gold may be released on payment of redemption fine, fine on released goods may be reduced and penalty may be waived.

4. The personal hearing was held on 27.12.2021, in virtual mode. Sh. Om Prakash, Advocate appeared for the Applicant and reiterated the contents of the revision application and Written Submissions dated 25.12.2021. Sh. Jitendra Kumar, Superintendent, appeared for the respondent department and highlighted that it is a case of concealment in shoes and supported the orders of the lower authorities.

- 5. The Government has carefully examined the matter. It is observed that the Applicant did not declare the gold and assorted electronic items, brought by him, in commercial quantity, as stipulated under Section 77 of Customs Act, 1962, to the customs authorities at the airport. The Applicant had stayed abroad only for a period of 05 days and being an ineligible passenger, attempted to import gold, as passenger baggage, by concealing the same in his shoes. Further, the Applicant admitted the recovery of seized gold concealed in his shoes and assorted electronic items from his checked-in baggage and also the fact of non-declaration in his statements dated 01.10.2017 and 13.10.2017, tendered under Section 108 of Customs Act, 1962. It is also observed that the gold was concealed in the shoes in specially made cavities. Therefore, it is a case of premeditated attempt of smuggling by clever concealment and the contention that the gold bars were kept in the shoes for safety reasons is far-fetched and unacceptable.

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 gold bars were not declared by the Applicant to the customs officers, as required under Section 77 of Customs Act, 1962. He also admitted that he had intentionally not declared the gold items. No documents evidencing licit possession of gold bars have been placed on record. The Applicant has, thus,

- failed to discharge the burden placed on him, in terms of Section 123, *ibid*.

7.1 The Applicant has contended that the import of gold is not 'prohibited'. Hon'ble Supreme Court has, in the case of Sheikh Mohd. Omer vs Collector of Customs, Calcutta & Ors [1971 AIR 293], 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 Apex 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 The gold and gold ornaments are allowed to be imported subject to certain conditions and, 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' and the contentions of the Applicant, to the contrary, are unsustainable.

8. The Applicant has prayed for release of gold on payment of redemption fine under Section 125 of Customs Act, 1962. In terms of Section 125, 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*". Further, in the case of Commissioner of Customs (Air), Chennai-I Vs P. Sinnasamy {2016(344) ELT1154 (Mad.)}, the Hon'ble Madras High Court, after extensive application of several judgments of the Apex 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*". The Hon'ble High Court has further held that "*when discretion is exercised under Section 125 of the Customs Act, 1962, the twin test to be satisfied is 'relevance and reason'*". In the present case, the original authority has refused to grant redemption in the background of attempted smuggling by clever concealment. Thus, the discretion has been exercised for reasonable and relevant considerations. Accordingly, no interference is called for.

9. As regards the contention of the Applicant that the fine imposed for redemption of the confiscated electronic goods is excessive, it is observed that the quantum of redemption fine appears to be justified in view of the value of the offending

electronic goods. In the facts and circumstances of the case, the quantum of penalty imposed is also just and fair.

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

  
(Sandeep Prakash)

Additional Secretary to the Government of India

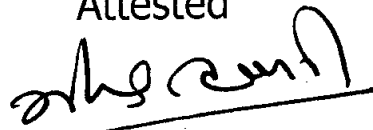
Sh. Krishan Pal,  
S/o Late Sh. Dhani Ram,  
R/o Mohalla Kamboj, Banur,  
District Mohali-140601, Punjab

Order No. \_ 306/21-Cus dated 29-12-2021

Copy to:

1. The Commissioner of Customs, NSCBI Airport, Kolkata.
2. The Commissioner of Customs (Appeals), 15/1, Strand Road, Customs House, Kolkata-700001.
3. Sh. Om Prakash, Advocate, 3248/71, Mohali-16071, Punjab.
4. PA to AS(RA).
5.  Guard File.
6. Spare Copy.

Attested



(Ashish Tiwari)

Assistant Commissioner (RA)