

SPEED POST



F. No. 373/161/B/2020-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. 18/10/22

Order No. 323/22-Cus dated 17-10-2022 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 Airport Cus.I No. 139/2020 dated 05.06.2020, passed by the Commissioner of Customs (Appeals), Custom House, Chennai.

Applicant : Sh. Ibrahim Sha, Chennai.

Respondent : Pr. Commissioner of Customs, Chennai Airport, Chennai.

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ORDER

A Revision Application, bearing No. 373/161/B/2020-RA dated 24.07.2020, has been filed by Sh. Ibrahim Sha, Chennai (hereinafter referred to as the Applicant), against the Order-in-Appeal Airport No. Cus.I No. 139/2020 dated 05.06.2020, passed by the Commissioner of Customs (Appeals), Custom House, Chennai. The Commissioner (Appeals) has upheld the order of the Joint Commissioner of Customs (Adjudication-Air), Chennai Airport, Chennai, bearing no. 355/2019-20-Commissionerate-1 dated 19.02.2020, vide which 02 nos of gold cut bits weighing 40 gms and 122 nos of circular gold ingots, weighing 4050 gms and all totally valued at Rs. 1,36,48,330/-, had been absolutely confiscated under Sections 111(d) and (l) of the Customs Act, 1962. Besides, penalty of Rs. 20,00,000/- was imposed on the Applicant, under Section 112(a) of the act, ibid.

2. Brief facts of the case are that, on 20.01.2019, Customs Officers intercepted the Applicant who had arrived from Sharjah to Chennai at the exit point of the arrival hall of Anna International Airport, Chennai. Upon being questioned whether he was carrying any gold/gold ornaments/dutiable goods, either in his baggage or on his person, the Applicant replied in negative. However, upon search of his person, 02 nos of gold cut bits were recovered which were kept concealed in his pant pocket and 122 nos of circular gold ingots were recovered from his check-in baggage (02 nos of carton box) kept concealed in 61 nos of PS4 Play Station Joy Sticks. The gold appraiser certified them to be gold of 24 Karat purity, totally weighing 4090 gms and appraised the total value at Rs. 1,36,48,330/-. The Applicant, in his statement dated 20.01.2019, inter-alia, stated that he carried textile goods to Sharjah and Dubai to sell for profit and on his return he would bring electronic goods to sell in India; that he went to Sharjah on 19.01.2019 from Chennai and returned on 20.01.2019; that the 61 nos of PS4 Play Station Joy Sticks containing gold were handed over to him by one individual outside the Sharjah airport with the instruction to hand over the same to an unknown person outside the Chennai Airport who would identify him with his photo and would give him Rs. 12,000/- for carrying the same; and that he was well aware that smuggling of gold by way of concealing and non-declaration to Customs is an offence and he committed the offence for monetary benefit. In his further statement dated 21.01.2019, Applicant, inter alia, stated that he visited abroad 20 times in the last six months; that he was a frequent traveller to Sharjah and Dubai; that he had not brought any gold in his previous foreign visits; that 61 nos of PS4 Play Station Joy Sticks containing gold and gold recovered from his pant pockets were handed over to him by unknown person outside the Sharjah Airport; that the 4090 gms of gold seized from him did not belong to him; and that he committed the offence for monetary benefit only.

3. The revision application has been filed mainly, on the grounds that gold is not prohibited item; that the appellate authority glossed over all the judgments and points

raised in grounds of appeal; that he had not passed through the green channel; and that penalty be reduced substantially and reasonably.

4. Personal Hearing was fixed on 30.09.2022 & 17.10.2022. A letter dated 16.10.2022 has been received from Ms. Kamalamalar Palanikumar, Advocate of the Applicant, wherein she has requested to pass order with the available records as she could not attend the Personal Hearing on 17.10.2022. The respondent department neither appeared for hearing nor any request for adjournment has been received. Hence, the case is being taken up for disposal based on available records.

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. Further, the Applicant admitted the recovery of gold from him and that he committed the offence for monetary benefit in his statement tendered under Section 108 of Customs Act, 1962.

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. The Applicant did not declare the gold as stipulated under Section 77 of the Act, *ibid*. No documents evidencing licit purchase and ownership of gold have been produced. In fact, the Applicant has stated that the offending goods were not of his own but he had carried them for monetary benefit. Further, the Applicant was intercepted at the exit point of the arrival hall. Hence, the contention of the Applicant that he had not passed through the green channel, is not tenable. The Applicant has, thus, failed to discharge the burden placed on him, in terms of Section 123, *ibid*. In this light, the authorities below have correctly held the goods to be liable to confiscation under Section 111 *ibid*.

7.1 Further contention of the Applicant is that gold is not 'prohibited goods'. The original authority has repelled this contention in view of the judgments of Hon'ble Supreme Court, in the case of Sheikh Mohd. Omer vs. Collector of Customs, Calcutta & Ors {1983(23)ELT1439(SC)}; in the case of Om Prakash Bhatia vs. Commissioner of Customs, Delhi {2003(155) ELT423(SC)}. The Government observes 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."*

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 (i.e., the jurisdictional 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----."

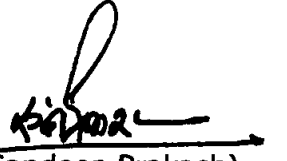
7.3 As such, the contention of the Applicant that the offending goods are not 'prohibited goods' cannot be sustained.

7.4 Further, as per Section 125 of the Act, *ibid*, the option to redeem seized goods, in lieu of confiscation, is discretionary in the case of 'prohibited goods'. It is observed from records that the original authority has, in this case, refused to grant redemption keeping in view the nature of concealment and criminal intent of the Applicant. Thus, the discretion has been exercised for relevant and reasonable considerations. The order of absolute confiscation, as such, does not suffer from any infirmity.

8. The case laws relied upon by the Applicant in support of his various contentions are not applicable in the facts of this case and in view of the dictum of Hon'ble Supreme Court and Hon'ble Madras High Court, as brought out hereinabove.

9. The Government observes that the Applicant herein is a repeat offender. He had been found involved in smuggling of foreign currency, in an earlier case, at Chennai airport itself on 08.06.2018. This case has culminated in GoI Order No. 319/22-Cus dated 17.10.2022 against the Applicant. Keeping in view the facts and circumstances of the case and as the Applicant is a repeat offender, no case for relief in penalty amount is made out.

10. In view of the above, the Revision Application is rejected.



(Sandeep Prakash)

Additional Secretary to the Government of India

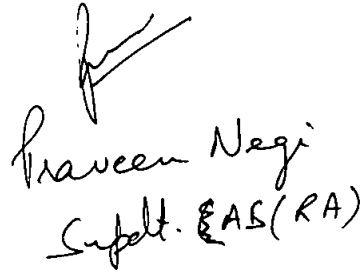
Sh. Ibrahim Sha
10, Abdul Kareem Cross Street
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Order No. 323/22-Cus dated 17-10-2022

Copy to:

1. The Commissioner of Customs (Appeals-I), 60, Rajaji Salai, Custom House, Chennai-600001.
2. The Principal Commissioner of Customs, Commissionerate-1, Chennai Airport, New Custom House, Meenambakkam, Chennai-600027.
3. Sh. S. Palanikumar, P. Kamalamalar & S. Kameshwaran, Advocates, No. 10, Sunk Ram Street, Second Floor, Chennai-600001.
4. PA to AS(RA).
5. Guard File.
6. Spare Copy

ATTESTED



Praveen Negi
Supdt. AS(RA)