

SPEED POST



F. No. 375/05/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. 28/01/22

Order No. 33/22-Cus dated 28-01-2022 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 No. CC(A)CUS/D-I/Airport/325/2019-20 dated 20.09.2019, passed by the Commissioner of Customs (Appeals), New Customs House, New Delhi.

Applicant : Sh. Ameenuddin, Delhi.

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

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ORDER

A Revision Application No. 375/05/B/2020-RA dated 16.01.2020 has been filed by Sh. Ameenuddin, Delhi (hereinafter referred to as the Applicant) against the Order-in-Appeal No. CC(A)CUS/D-I/Airport/325/2019-20 dated 20.09.2019, passed by the Commissioner of Customs (Appeals), New Customs House, New Delhi. The Commissioner (Appeals) has upheld the order of the Additional Commissioner of Customs, IGI Airport, New Delhi, bearing no. 350/ADJ/18 dated 05.09.2018, whereby two gold bars and four gold sheets, totally weighing 2466 grams having purity of 995 and collectively valued at Rs.69,60,211/-, were absolutely confiscated under Sections 111(d), 111(i), 111(j), 111(l) 111(m) & 111(o) of the Customs Act, 1962. Besides, penalty of Rs.14,00,000/- was also imposed by the original authority on the Applicant herein, under Sections 112 & 114AA of the Customs Act, 1962, which has been maintained in appeal.

2. Brief facts of the case are that the Applicant arrived, on 11.03.2018, at IGI Airport, Delhi, from Dubai and, on the basis of intelligence, he was followed by the Customs officers. The Applicant was intercepted near the exit gate after he had crossed the Customs Green Channel. After search of his person and of his baggage, nothing objectionable was recovered. However, the Customs officers visited the toilet (near Belt No. 13) in which the Applicant had entered before he was finally intercepted at the exit gate. A check of the toilet was made wherein two gold bars and four gold sheets, wrapped in a plastic sheet, and hidden in the cavity of the flush assembly/system, were recovered. The Applicant accepted that the said gold bars and gold sheets had been hidden by him. The value of seized gold, of 995 purity, weighing 2466 grams, was appraised at Rs.69,60,211/- by the Jewellery Appraiser at IGI Airport. 02 pieces of gold bars and 04 gold sheets, recovered from the Applicant, were seized under Section 110 of the Customs Act, 1962, under panchanama dated 12.03.2018. The Applicant in his statement dated 12.03.2018, recorded under Section 108 of the Customs Act, 1962, admitted the recovery of 06 pieces of gold and agreed with the contents of the panchanama dated 12.03.2018. He further stated that the recovered gold bars belonged to him and he had

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purchased the same at Dubai; that he brought the gold to earn quick money; that he was fully aware that the import of gold was liable to Customs duty; and that the smuggling of the same was a punishable offence. Subsequently upon forensic examination of his mobile phone, the photo of the toilet where the smuggled gold was hidden was found. Thereafter another statement of the Applicant was recorded when he revealed that the gold actually belonged to one Bablu of Dubai who had instructed him to put it in the cavity of the flush assembly of the toilet near Belt No. 13 on Duty Free Shop side; that as instructed he did the same and clicked a photo to send it to Bablu; that he had acted as a carrier for Bablu for a monetary consideration of Rs. 25,000/-; and that he had been paid UAE Dirham 500/- in advance.

3. The revision application has been filed canvassing that the gold belonged to the Applicant; that it is denied that the gold was kept in toilet and it was actually kept in the baggage; that the import of gold is not prohibited; that the gold may be released on payment of redemption fine and appropriate duty; and that the penalty imposed may be reduced.

4. Personal hearing, in virtual mode, was held on 28.01.2022. Ms. Sangita Bhayana, Advocate appeared for the Applicant and reiterated the contents of the RA. No one appeared for the department nor any request for adjournment has been received.

5. The revision application has been filed with a delay which is attributed to financial condition of the Applicant. Delay is condoned.

6. The Government has carefully examined the matter. It is observed that the Applicant did not declare the gold brought by him under Section 77 of Customs Act, 1962 to the customs authorities at the airport. Further, the Applicant has admitted the recovery of gold from him and the fact of non-declaration in his statements tendered under Section 108 of the Customs Act, 1962. It is, however, contended that the statements were involuntary. The Government observes that the Applicant

had in his first statement, recorded immediately after his interception, claimed that the gold belonged to him whereas in his second statement the Applicant stated that the gold belonged to one Bablu and he had hidden the same in the toilet/flush assembly as instructed by Bablu. This second statement was recorded after forensic examination of the mobile phone of the Applicant, which revealed that the Applicant had clicked a photo of the toilet where the gold was found hidden. Thus, the version given in the second statement is reliable as it is corroborated by the results of the forensic examination of mobile phone. The claim that the statements were coerced, is not acceptable as the Applicant gave two different versions in these two statements, which would not have been the case had the statements been tendered under threat or coercion.

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 Applicant had failed to declare the gold bars and pay duty on the same. Further, the gold items were recovered from the flush cavity, which is also proven from the forensic check of his mobile phone. The intention to smuggle is, thus, manifest. It is also noted that no documentary evidence has been produced

to establish bonafide ownership. The Applicant has, thus, failed to discharge the burden placed on him, in terms of Section 123.

8.1 Another contention of the Applicant is that the import of gold, in baggage, is not 'prohibited'. The Government observes that the Hon'ble Supreme Court in the case of Sheikh Mohd. Omer vs Collector of Customs, Calcutta & Ors {1971 AIR 293} 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*". The Additional Commissioner, in paras 13.3 to 13.7 of the O-I-O dated 05.09.2018, has 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 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"*. 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."*

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 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 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'.

9. The original authority has denied the release of offending goods on redemption fine under Section 125 of Customs Act, 1962, which has been challenged in the instant RA. The Government observes that, in terms of Section 125 *ibid*, 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 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*". 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".*" In the present case, the original authority has refused to grant redemption in the background of attempted smuggling by ingenious concealment with intent to evade Customs Duty. It has also been observed by the original authority that objects of public policy, restricting import of gold, shall be frustrated if the redemption was permitted. Thus, following the ratio of Raj Grow Impex (*supra*) and Sinnasamy (*supra*) the Order of the original authority, upheld by the Commissioner (Appeals), being a reasoned Order based on relevant considerations, does not merit interference. The case laws relied upon by the Applicant are not applicable as these decisions have either been made before Raj Grow Impex and Sinnasamy or have been rendered without noticing the same.

10. The Government finds that the quantum of penalty imposed is just and fair, in the facts and circumstances of the case.

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



(Sandeep Prakash)

Additional Secretary to the Government of India

Sh. Ameenuddin,
R/o H. No. 521, Gali Matia Mahal,
Jama Masjid, Delhi – 110 006.

Order No. 33/22-Cus dated 28-01-2022

Copy to:-

1. The Commissioner of Customs, IGI Airport, Terminal-3, New Delhi – 110 037.
2. The Commissioner of Customs (Appeals), New Customs House, Near IGI Airport, New Delhi – 110037.
3. Ms. Sangita Bhayana, Advocate, Chamber No. 707, LCB-III Delhi High Court New Delhi – 110 003.
4. PA to AS(RA).
5. Guard File.
6. Spare Copy.

ATTESTED



आशीष तिवारी / ASHISH TIWARI
सहायक आयुक्त / Assistant Commissioner
केन्द्रीय वस्तु एवं सेवा कर, केन्द्रीय उत्पाद एवं सीमा शुल्क
CGST, Central Excise & Customs
राजस्व विभाग / Department of Revenue
वित्त मंत्रालय / Ministry of Finance
भारत सरकार / Government of India
नई दिल्ली / New Delhi