

SPEED POST



F. No. 375/87/B/2019-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.. 4/2/22

Order No. 37/22-Cus dated 04-02-2022 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 129DD of the Customs Act 1962 against the Order-in-Appeal No. CCA(A)Cus/D-I/Airport/338/2019-20 dated 27.09.2019, passed by the Commissioner of Customs (Appeals), NCH, New Delhi

Applicant : Sh. Babu Lal Nitharwal, Sikar, Rajasthan.

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

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**ORDER**

A Revision Application No. 375/87/B/2019-RA dated 30.12.2019 has been filed by Sh. Babu Lal Nitharwal, Sikar, Rajasthan (hereinafter referred to as the Applicant) against the Order-in-Appeal No. CCA(A)Cus/D-I/Airport/338/2019-20 dated 27.09.2019, passed by the Commissioner of Customs (Appeals), NCH, New Delhi. The Commissioner (Appeals) has upheld the order of the Additional Commissioner of Customs, IGI Airport, New Delhi, bearing No. 257/2016-17 dated 14.02.2017, wherein two (02) gold bars, collectively weighing 233.28 grams, totally valued at Rs. 5,40,836/-, which were recovered from the possession of the Applicant, were confiscated absolutely under Section 111(d), 111(j), 111(l) & 111(m) of the Customs Act, 1962. Besides, a penalty of Rs. 01 Lakh was imposed on the Applicant by the original authority, under Sections 112 of the Customs Act, 1962, which has been maintained in appeal.

2. The brief facts of the case are that the Applicant arrived, on 06.01.2016, at IGI Airport, New Delhi, from Dammam and was intercepted near the exit gate after he had crossed the Customs Green Channel. Detailed examination of his baggage and frisking by way of Hand-Held Metal Detector, resulted in the recovery of two (02) gold bars, collectively weighing 233.28 grams, totally valued at Rs. 5,40,836/-. The Applicant, in his statement dated 06.01.2016, tendered under Section 108 of the Customs Act, 1962, admitted the recovery of said two (02) gold bars, from his possession. He stated that the gold did not belong to him and he was carrier of the gold which he had collected from Mr. Khushi to further hand over the same to one person outside the exit gate of IGI Airport; and that he walked through the Green Channel undetected with an intent to evade payment of Customs Duty as per the directions of Mr. Khushi.

3. The revision application is filed, mainly, on the grounds that the Applicant had the legal possession of the seized gold bars; that the Applicant produced the invoice of the seized golds bars before the original authority but the same does not find

mention in the original order; the Applicant was illiterate person and arrived from Dammam after 22 months; that the recorded statement is false on which basis the Applicant was falsely implicated; that penalty imposed was on higher side; that gold is freely importable under the Hand Book of Procedures as well as under the Indian Tariff Code (HS) and that the redemption may be allowed under Section 125 of the Customs Act, 1962 and proportionate penalty be imposed.

4. Personal hearing was granted on 12.01.2022, 21.01.2022 and 04.02.2022. None appeared either on behalf of the Applicant or Respondent department on any of the above mentioned dates nor any request for adjournment has been received. Since sufficient opportunities have been granted, the matter is taken up for disposal based on records.

5. The Government has carefully examined the matter. It is observed that the Applicant did not declare the gold brought by him as stipulated under Section 77 of Customs Act, 1962, to the customs authorities at the airport and instead he opted to walk through the Green Channel. The Applicant admitted that he was not owner of the confiscated goods and was acting as a carrier at the instance of some other person. Further, the Applicant admitted the recovery of gold from him, the fact of non-declaration and his acting as carrier in his statement dated 06.01.2016, tendered under Section 108 of Customs Act, 1962. The contention of the Applicant that this statement was recorded under pressure is not tenable as the same does not appear to have been retracted at any stage. The Government also observes that a confession made before a Customs officer is admissible as evidence and is binding upon the person who makes the confession [Ref: Surjeet Singh Chhabra vs. UOI {1997 (89) ELT 646 (SC)}]. Further, the Applicant, vide application dated 14.01.2016 filed before the Customs Officer at Warehouse, requested for release of the detained goods, as he was ready to pay the applicable duty, fine and penalty. He waived the issuance of show cause notice or grant of personal hearing, in the matter.

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. There is no declaration regarding carriage of gold in the Customs Declaration Form by the Applicant. Further, the Applicant had crossed the Green Channel when he was intercepted. Hence, the contention of the Applicant that he took out the gold and gave to the officers, appears to be an afterthought as the Applicant did not even contest this position at the original stage and waived the SCN as well as PH. 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 gold is freely importable under the Hand Book of Procedures as well as under the Indian Tariff Code (HS). The Government observes that 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*". The Additional Commissioner has, in paras 9 & 11 of the Order-in-Original dated 14.02.2017, 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. 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 its judgment dated 17.06.2021, 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, 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 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, it is held that the subject goods are 'prohibited goods' and, as such, not freely importable as pleaded by the Applicant.

8. The original authority has denied the release of offending goods on payment of redemption fine, under Section 125 of Customs Act, 1962. The Government observes that, in terms of Section 125 ibid, the option to release '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.)]}. In the case of 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".* 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".*" In the present case, the original authority has refused to grant redemption in the background of attempted smuggling as a carrier by misusing the Green Channel facility with intent to evade Customs Duty. It is also concluded that the Applicant acted as carrier of the confiscated goods and, as such, the detained goods are not termed as *bona fide* baggage for personal use. Thus, the Order of the original authority, upheld by the Commissioner (Appeals), being a reasoned Order based on relevant considerations, does not merit interference.

9. In the facts and circumstances of the case, the penalty imposed by the original authority and upheld by the Commissioner (Appeals) seems to be just and fair.

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



(Sandeep Prakash)

Additional Secretary to the Government of India


Sh. Babu Lal Nitharwal  
S/o Sh. Buddha Ram Nitharwal,  
R/o VPO – Chain Pura, Khachariawas,  
Thedantaramgarh, Sikar Rajasthan – 332710.

Order No. 37/22-Cus dated 04-02-2022

Copy to:

1. The Commissioner of Customs (Appeals), New Customs House, New Delhi-110037;
2. The Commissioner of Customs, IGI Airport, New Delhi-110037.
3. Sh. Amit Attri, Advocate, Chamber No. 952, Patiala House Courts, New Delhi – 110001.
4. PA to AS(RA).
5. ~~Guard file.~~
6. Spare Copy.

ATTESTED

  
04/02/2022  
(A. K. Lau)  
Subpoena