

SPEED POST



F. No. 380/10B/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...17/02/22

Order No. 52/22-Cus dated 17-02-2022 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 129 DD of the Customs Act 1962 against the Order-in-Appeal No. KOL/CUS (PORT)/KA/118/D/2019 dated 03.01.2020, passed by the Commissioner of Customs (Appeals), Kolkata.

Applicant : Commissioner of Customs, NSCBI Airport, Kolkata.

Respondent : Sh. Mohammed Khaleeqe, Bulandshahar, U.P.

ORDER

A Revision Application No. 380/10B/B/2020-RA dated 18.08.2020, has been filed by the Commissioner of Customs, NSCBI Airport, Kolkata (hereinafter referred to as the Applicant department) against the Order-in-Appeal No. KOL/CUS (PORT)/KA/118/D/2019 dated 03.01.2020, passed by the Commissioner of Customs (Appeals), Kolkata. The Commissioner (Appeals) has allowed the appeal filed by Sh. Mohd. Khaleeque, Bulandshahr, UP (hereinafter referred to as the Respondent) against the Order-in-Original, bearing No. 44/2016 JC dated 24.02.2016, passed by the Joint Commissioner of Customs, AIU, NSCBI Airport, Kolkata, by modifying the order of the original authority, wherein 06 pcs of gold, collectively weighing 495.800 grams and valued at Rs. 14,51,726/- and 8450 sachets of RMD Gutkha, valued at Rs. 42,250/-, were absolutely confiscated under Sections 111(d), 111(i), 111(l) & 111(m) of the Customs Act, 1962. Besides, a penalty of Rs. 1,50,000/- was also imposed by the original authority on the Respondent herein, under Section 112(a) & 112(b) of the Act, ibid. The Commissioner (Appeals) has allowed the redemption of the said gold items on payment of Rs. 4,35,000/- as RF. The Gutkha sachets have also been released on payment of redemption fine of Rs. 1000/-. Both the items have been ordered to be cleared on payment of baggage rate of customs duty. The penalty imposed by the original authority has, however, been maintained in appeal.

2. Brief facts of the case are that the Applicant arrived, on 17.04.2014, at NSCBI Airport, Kolkata, from Dubai and was intercepted while walking towards the exit gate. He replied in negative when enquired about carrying any dutiable goods. After search of his person and of his baggage, 06 pcs of gold, collectively weighing 495.800 grams (valued at Rs. 14,51,726/-) were recovered from his underwear and rectum while 8450 sachets of RMD Gutkha (valued at Rs. 42,250/-) were recovered

from his baggage. The Applicant in his statement dated 17.04.2014, recorded under Section 108 of the Customs Act, 1962, admitted the recovery of gold items from his underwear/rectum and that of Gutkha sachets from his baggage. He further stated that he would get Rs. 10000/- for delivery of the Gutkha to a person in Delhi. The original authority confiscated absolutely the gold items as well as Gutkha sachets and imposed a penalty of Rs.1.5 Lakhs on the Respondent herein. Aggrieved, the Respondent filed an appeal before the Commissioner (Appeals), who, vide the impugned OIA, has modified the OIO by allowing the redemption of the said gold items on payment of Rs. 4,35,000/- as RF. The Gutkha sachets have been released on payment of redemption fine of Rs. 1000/-.

3. The instant revision application has been filed on the ground that the Respondent had attempted to clear the gold articles by way of concealment in underwear/rectum; that no declaration was made by the Respondent in the Customs Declaration Form and even on verbal query, violating the conditions prescribed; that the import of gold is not bonafide; that the import of the gold articles is prohibited and, therefore, release of the gold articles and Gutkha, on payment of redemption fine is not correct; and that the Respondent did not appear for any personal hearing before the lower authorities, evidencing that he was not the owner of the goods and thus, granting of redemption under Section 125 of Customs Act, was not appropriate.

4. Personal hearing, in virtual mode, was fixed on 21.01.2022, 02.02.2022 and 16.02.2022. In the personal hearing held on 16.02.2022, Sh. Jitendra Kumar, Superintendent appeared for the Applicant department and reiterated the contents of the RA. He highlighted that seized gold was concealed in rectum and undergarments. Further, Gutkha has also been allowed to be redeemed despite the same being seriously injurious to health. Hence, order of original authority may be restored. None appeared

for the Respondent nor any request for adjournment has been received. Since sufficient opportunities have been granted, the case is taken up for disposal based on records.

5. The revision application has been filed with a delay which has been attributed to the prevailing COVID pandemic. Delay is condoned.

6. The Government has examined the matter carefully. It is observed that the Respondents did not declare the gold articles and Gutkha brought by him under Section 77 of Customs Act, 1962, to the customs authorities. The recovery of these articles from him and the fact of non-declaration is not disputed.

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."

Thus, 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 Respondent has failed to produce any evidence that the gold was not smuggled. The non-declaration of gold by the Respondent and the ingenious manner of concealment, i.e., in rectum and in the under garments, clearly indicates that the Respondents had attempted to smuggle the same. The Respondent has, thus, failed to discharge the burden placed on him, in terms of Section 123.

8.1 The Commissioner (Appeals) has allowed redemption of the offending goods on the ground that the import of gold is not prohibited. The Government observes that this finding of the Commissioner (Appeals) is in the teeth of law settled by various judgments of Hon'ble Supreme Court. In the case of Sheikh Mohd. Omer vs Collector of Customs, Calcutta & Ors {1971 AIR 293} 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*'. 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 & Others vs. M/s Raj Grow Impex LLP & Others (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 Thus, the findings of the Commissioner (Appeals) that offending gold is not 'prohibited goods' cannot be sustained. The decisions relied upon by the Commissioner (Appeals) have been passed without following the dictum of the Hon'ble Supreme Court and Hon'ble High Court, as above.

8.4. In view of the findings above, the Government holds that the Commissioner (Appeals) has allowed redemption on the erroneous finding that offending gold articles are not 'prohibited goods'.

9. In terms of Section 125 of the Customs Act, 1962, the option to release prohibited goods 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 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, 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 Commissioner (Appeals) has interfered with the discretion exercised by the original authority only on the basis of an erroneous finding that the gold is not prohibited goods. Hence, the order of Commissioner (Appeals) cannot be sustained.

10. The Gutkha sachets have also been released on payment of redemption fine under section 125 of Customs Act, 1962, on a plea that the same were perishable and must have expired. However, it is observed that Gutkha is seriously injurious to health and has been banned in most parts of the country. Hence, its release cannot also be justified.

11. In view of the above, the revision application is allowed, and the impugned OIA dated 03.01.2020 is set aside.



(Sandeep Prakash)

Additional Secretary to the Government of India

The Commissioner of Customs,
(Airport & Admn.), NSCBI Airport,
Kolkata – 700052.

Order No. 52/22-Cus dated 17-02-2022

Copy to:-

1. Sh. Mohammed Khaleeque, S/o Sh. Mohammed Shafique, H. No. 5, Qassaban Upper Kote, Bulandshahar, U.P. – 203001.
2. The Commissioner of Customs, Central Excise & Central Tax (Appeals), 3rd Floor, Custom House, 15/1, Strand Road, Kolkata – 700001.
3. PA to AS(RA).
4. Guard File.
5. Spare Copy.

ATTESTED



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