

'SPEED POST'



F. No. 375/49/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. 21/02/22

Order No. 57/2022-Cus dated 21-02-2022 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. CC(A)CUS/D-I/Airport/119/2020-21 dated 02.06.2020, passed by the Commissioner of Customs (Appeals), New Delhi.

Applicant : Sh. Deepak N. Wadhwa, Ulhasnagar, Thane.

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

ORDER

A Revision Application No. 375/49/B/2020-RA dated 31.08.2020 has been filed by Sh. Deepak N. Wadhwa, Ulhasnagar, Thane (hereinafter referred to as the Applicant) against the Order-in-Appeal No. CC(A)CUS/D-I/Airport/119/2020-21 dated 02.06.2020, passed by the Commissioner of Customs (Appeals), New Delhi. The Commissioner (Appeals) has upheld the order of the Additional Commissioner of Customs, IGI Airport, New Delhi, bearing no. 128/2017 dated 14.06.2017, whereby one cut piece of gold, which was concealed in the Game Cassette Player of Video game, weighing 547 grams and collectively valued at Rs.12,72,883/-, were absolutely confiscated under Sections 111(d), 111(i), 111(j), 111(l) & 111(m) of the Customs Act, 1962. Besides, penalty of Rs.1,25,000/- 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 12.01.2016, at IGI Airport, Delhi, from Bangkok. 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 one cut piece of gold, weighing 547 grams, which was concealed in the Game Cassette Player of Video game, was recovered. The value of gold was appraised at Rs.12,72,883/- by the Jewellery Appraiser at IGI Airport. 01 cut piece of gold bar, recovered from the Applicant, was seized under Section 110 of the Customs Act, 1962, under panchanama dated 12.01.2016. The Applicant in his statement dated 12.01.2016, recorded under Section 108 of the Customs Act, 1962, admitted the recovery of 01 piece of gold and agreed with the contents of the panchanama dated 12.01.2016. He further stated that the recovered gold bar belonged to him and he had purchased the same at Bangkok; that he had not declared the gold to evade duty; 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.

3. The revision application has been filed canvassing that the gold belonged to the Applicant; that the import of gold in baggage mode 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 18.02.2022. Sh. O. M. Rohira, Advocate appeared for the Applicant and reiterated the contents of the revision application. No one appeared for the department nor any request for adjournment has been received. Therefore, the case is being taken up for final decision 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 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 statement tendered under Section 108 of the 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. In the present case, the Applicant had failed to declare the gold and pay duty on the same. Further, the gold was concealed in an ingenious manner thereby making the intention to smuggle 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.

7.1 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 14 to 17 of the O-I-O dated 14.06.2017, 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."*

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 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----."

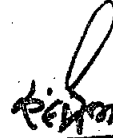
7.3 The original authority has correctly brought out that, in this case, the conditions subject to which gold could have been legally imported have not been fulfilled. Thus, following the ratio of the aforesaid judgments, there is no doubt that the subject goods are 'prohibited goods' and contentions of the Applicant, to the contrary, cannot be sustained.

8. 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 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.

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

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



(Sandeep Prakash)

Additional Secretary to the Government of India

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Order No. 57/2022-Cus dated 21-02-2022

Copy to:

1. The Commissioner of Customs, Airport & General, IGI Airport, Terminal-3, New Delhi – 110037.
2. The Commissioner of Customs (Appeals), New Custom House, Near IGI Airport, New Delhi-110037.
3. Sh. O.M. Rohira, Advocate, Plot No. 148/301, Uphaar Mandir, 10th Road, Behind Bank of Baroda, Khar (West), Mumbai, Maharashtra – 400052.
4. PA to AS (RA).
5. Guard File.
6. Spare Copy.

ATTESTED



(लक्ष्मी राघवन)
(Lakshmi Raghavan)
अनुभाग अधिकारी / Section Officer
वित्त मंत्रालय (राजस्व विभाग)
Ministry of Finance (Deptt. of Rev.)
भारत सरकार / Govt. of India
नई दिल्ली / New Delhi