

SPEED POST



F. No. 380/10A/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..... 24/02/2022 -

Order No. 62/22-Cus dated 24/02/2022 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)/AKA/119/D/2019 dated 03.01.2020 passed by the Commissioner of Customs (Appeals), Kolkata.

Applicant : The Commissioner of Customs, Airport & Admn., Kolkata.

Respondent : Shri Mohammad Nabi, Amroha, UP.

ORDER

A Revision Application No. 380/10A/B/2020-RA dated 18.08.2020 has been filed by the Commissioner of Customs, Airport & Admn., Kolkata (hereinafter referred to as the Applicant) against the Order-in-Appeal No. KOL/CUS(Port)/AKA/119/D/2019 dated 03.01.2020, passed by the Commissioner of Customs (Appeals), Kolkata. The Commissioner (Appeals) has allowed the appeal filed by the Respondent, Shri Mohammad Nabi, Amroha (UP), and ordered release of the 231 Gms of Gold Piece, valued at Rs. 6,86,070/- and 9250 Sachets of Gutkha, valued at Rs. 46,250/-, which were seized from the Respondent herein, on payment of fine of Rs. 2,01,000/- along with payment of Customs Duty and has reduced the penalty amount to Rs. 50,000/-. The original authority, i.e., the Joint Commissioner of Customs, NSCBI Airport, Kolkata, had ordered absolute confiscation of the seized goods along with concealing material and also imposed a penalty of Rs. 70,000/- on the Respondent, vide Order-in-Original No. 43/2016-JC dated 25.02.2016.

2. The brief facts of the case are that, acting on spot intelligence, the officers of Kolkata Customs AIU, intercepted the Respondent, who arrived from Dubai, on 17.04.2014, by Flight No. QR-546, while he was walking towards the Exit Gate of the arrival hall. On being asked about the possession/carrying of any dutiable goods, the Respondent replied in negative. Scanning & examination of his two checked-in baggage(s) resulted in recovery of 9250 Sachets of Gutkha, valued at Rs. 46,250/-. Further, his personal search, in the presence of two independent witnesses, resulted in recovery of four (04) cut pieces of gold wrapped in adhesive tapes, collectively weighing 231 Gms, valued at Rs. 6,86,070/-, which were found concealed in the rectum of the Respondent. The Respondent had not declared any dutiable goods in the Customs Declaration Form. These goods were seized under Section 110 of the Customs Act, 1962. In his statement dated 17.04.2014, recorded under Section 108 of the Act *ibid*, the Respondent admitted that he was in business of cloth and visited Dubai to bring clothes but due to non-availability thereof, he took RMD Gutkha for its onward delivery to a person in Delhi and gold pieces for the purpose of his sister's

marriage. He admitted that he concealed the same to avoid detection by the customs authorities and admitted his offence. After investigations, a show cause notice dated 23.09.2014 was issued. However, the Respondent neither filed any reply to show cause notice nor appeared for personal hearing before the original authority. No evidence was submitted regarding licit possession of the confiscated goods.

3. The revision application has been filed, mainly, on the grounds that the Respondent had attempted to import the gold items, by concealing the same in his rectum and Gutkha in his baggage(s), without declaring the same before the Customs authorities; that the fact was admitted by him in his statement tendered under Section 108 of the Customs Act; that the Respondent was not an eligible passenger for import of gold in baggage; that gutkha is a prohibited item under the provisions of Food Safety and Standards (Prohibition & Restriction on Sales) Regulations, 2011; that the seized goods are, therefore, 'prohibited goods'; that the same should not have been released to him on payment of redemption fine. It has, accordingly, been prayed that the OIA may be set aside. The Respondent has, on 19.02.2022, submitted a compilation of cases in support of impugned OIA.

4. Personal hearing, in virtual mode, was held on 23.02.2022. Sh. Dheeraj Kumar Ramuka, Superintendent, appeared for the Applicant department and reiterated the contents of the Revision Application. He highlighted that this is a case of rectum concealment. Ms. Sangita Bhayana, Advocate appeared for the Respondent and reiterated the contents of the written reply dated 19.02.2022. Ms. Bhayana highlighted that the impugned OIA was received by the department on 15.01.2020 whereas the RA is dated 22.07.2020. Hence, it is barred by limitation. On merits, she supported the OIA.

5.1 The Government has carefully examined the matter. Before considering the other submissions, it is appropriate to first decide the preliminary issue raised by the

learned Counsel for the Respondent regarding limitation. It is the contention of the Respondent that the OIA was received by the department on 15.01.2020 and the RA is dated 22.07.2020. Hence, it is barred by limitation.

5.2 The Government observes that, in terms of sub-section (2) of the Section 129DD, a revision application shall be made within three months from the date of the communication of the order against which the application is being made. In the present case, the OIA impugned herein was received by the Applicant department on 15.01.2020. Hence, the normal period of limitation would have ended on 15.04.2020. However, in the interim, keeping in view the COVID pandemic, the Hon'ble Supreme Court, vide Order dated 23.03.2020, in SMW(C) No. 3/2020, directed extension of period of limitation prescribed under general law of limitation or under any special laws w.e.f. 15.03.2020, till further orders. Further orders in the matter were made on 08.03.2021. The present revision application was filed on 18.08.2020, i.e., during the period of operation of Order dated 23.03.2020 of the Apex Court. Hence, the contention of the Respondent in respect of limitation is sans any merit.

6. On merits, it is observed that the Respondent did not declare the gold pieces and Gutkha to the Customs authorities, as required under Section 77 of Customs Act, 1962. Further, the Respondent has admitted the recovery of the confiscated goods from his possession and the fact of non-declaration in his statement dated 17.04.2014. The Respondent also admitted being a carrier of Gutkha for some other person of Delhi and concealment of gold in his rectum to evade payment of duty and failed to produce any licit documents for valid possession of the confiscated goods.

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, 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) ELT 423 (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 It has been correctly brought out that the import of gold, in baggage, is permissible subject to certain restrictions, which have not been fulfilled in the present case. Thus, in view of the law laid down, as above, the findings of the Commissioner (Appeals) that offending gold is not 'prohibited goods' cannot be sustained. The decisions relied upon by the Commissioner (Appeals) and those by the Applicant, at this stage, 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 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 has held that *"non-consideration or non-application of mind to the relevant factors, renders*

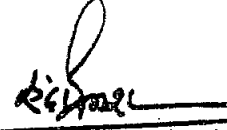
exercise of discretion manifestly erroneous and it causes for judicial interference." The Hon'ble High Court has further held that *"when discretion is exercised under Section 125 of the Customs Act, 1962, the twin test to be satisfied is 'relevance and reason'".* In the present case, the Commissioner (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 has been brought out by the Applicant department that Gutkha is a prohibited item under FSSAI Regulations, 2011. Further, it is common knowledge that Gutkha is seriously injurious to health. Hence, its release cannot also be justified.

11. Before concluding, the Government is constrained to make a few observations regarding the Order-in-Appeal impugned herein. The present case relates to smuggling of gold but in para-24 of the Order-in-Appeal, it has been recorded that *"But in the instant case neither a case of absolute prohibition of foreign currency has been established nor a case of any prescribed condition not fulfilled by the appellant has been made out because of which the foreign currency seized can be termed as prohibited goods as defined in Section 2(33) of the Customs Act, 1962 as enunciated by the Hon'ble Supreme Court in the above referred case."* (emphasis supplied). Further, in para-28, it has been stated that *"While there is no dispute in this case that the gold article brought by the applicant from Dubai is liable for confiscation because he did not follow the procedure for import thereof In India and attempted to smuggle it without payment of Customs duties, it is beyond any doubt that the gold is not prohibited item under Customs Act. Therefore, the Commissioner (Appeals) has taken a totally different stand by upholding absolute confiscation of gold in this case."* (emphasis supplied). Thus, unfortunately, it appears that the

Order-in-Appeal has been passed in a casual manner and it suffers from the vice of non-application of mind.

12. 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

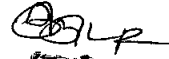
The Commissioner of Customs,
(Airport & Admn.), NSCBI Airport,
Kolkata-700052.

Order No. 62/22-Cus dated 24/02/2022

Copy to:

1. Sh. Mohammad Nabi, S/o Ali Ahmad, Masroor Ahmad Charkhiwaley, Mohalla Shafatpota, PO & PS – Amroha, JP Nagar, Uttar Pradesh – 244222.
2. The Commissioner of Customs (Appeals), 3rd Floor, Customs House, 15/1, Strand Road, Kolkata-700001.
3. Ms. Sangita Bhayana, Advocate, Chamber No. 707, LCB-3, Delhi High Court, New Delhi-110003.
4. PA to AS(RA).
5. Guard File.
6. Spare Copy.

ATTESTED



(लक्ष्मी राघवण)
(Lokesh Raghavan)
भुक्त अधिकारी / Section Officer
जिसे मंत्रालय (राजस्व विभाग)
Ministry of Finance (Deptt. of Rev.)
भारत सरकार / Govt. of India
नई दिल्ली / New Delhi