

'SPEED POST'



F. No. 372/15-16/B/2021-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.. 07/03/22

Order No. 74-75/2022-Cus dated 07-03-2022 of the Government of India passed by Sh. Sandeep Prakash, Principal Commissioner & 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(PREV)/WB/AKR/268-269/2021 dated 10.03.2021 passed by the Commissioner of Customs (Appeals), Kolkata.

Applicant : 1. Sh. Varinder Kumar, New Delhi.
2. Sh. Raj Kumar, New Delhi.

Respondent : The Commissioner of Customs (Preventive), Kolkata.

ORDER

Two Revision Applications, bearing nos. 375/15-16/B/2021-RA, both dated 14.06.2021, have been filed by Sh. Varinder Kumar, New Delhi (hereinafter referred to as the Applicant-1) & Sh. Raj Kumar, New Delhi (hereinafter referred to as the Applicant-2) against the Order-in-Appeal No. KOL/CUS(PREV)/WB/AKR/268-269/2021 dated 10.03.2021 passed by the Commissioner of Customs (Appeals), Kolkata. The Commissioner (Appeals) has upheld the Order-in-Original No. 39/ADC(P)/CUS/WB/19-20 dated 28.08.2019, passed by the Additional Commissioner of Customs (Preventive), C.C.(P), Kolkata, vide which 08 (eight) lumps of gold of foreign origin, collectively weighing 1511.100 grams and valued at Rs. 45,93,440/-, which were seized from the Applicants, were absolutely confiscated under Section 111(b), 111(d) & 119 of the Customs Act, 1962 and penalties of Rs. 10,00,000/- and Rs. 5,00,000/- have also been imposed on Applicant-1 & Applicant-2, respectively, under Section 112(a) and (b) of the Customs Act. The Commissioner (Appeals) has, vide the impugned Order-in-Appeal, rejected the appeals filed by the Applicants.

2. Briefly stated, the Applicants herein entered into India, on 04.12.2017, from Bangladesh at Zero Point, Indo- Bangla Border, Changrabandha and offered themselves before the customs officers manning the baggage check post. However, they did not declare anything before the customs officers orally or in the Declaration form. On checking, 08 pieces/lumps of gold, collectively weighing 1511.100 gms and

valued at Rs. 45,93,440/-, were recovered, concealed between two sheets of ply boards in the bag of the Applicant-1. In his statement dated 04.12.2017, tendered under Section 108 of the Customs Act, 1962, Applicant-1 stated that he had brought the gold from Bangkok/Bangladesh by concealing the same in his bag by way of wrapping it with black carbon papers/cello tapes and placing the same between two sheets of plywood boards for delivery to one Shri Tarun Jain at Delhi with whom he was in constant touch and who bore all his travel/stay expenses; that he was well aware of the illegal activities he was carrying out; that he was accompanied by Applicant-2 who had showed him the smuggling route; and that he indulged in this illegal activity for greed of some money as he was supposed to get Rs. 8,000/- on delivery of the gold. Similarly, in his statement, the Applicant-2 stated that he accompanied Applicant-1; that he was in clothes business and used to bring clothes from Dhaka; that Shri Tarun Jain was bearing his travelling expenses to bring clothes samples; and that he had shown Applicant-1, Delhi-Changrabandha-Dhaka-Bangkok route but did not know that gold was brought by him. The Additional Commissioner of Customs absolutely confiscated the said gold lumps and also imposed a penalty of Rs. 10 Lakhs on Applicant-1 and Rs. 5 lakhs on Applicant-2. Aggrieved, the Applicants filed appeals before Commissioner (Appeals), which have been rejected vide the impugned OIA.

3. The instant revision applications have been filed, mainly, on the grounds that the gold items are not covered in the prohibited category of goods and, thus, may

be released to the Applicant-1. Applicant-2 has prayed for waiver/reduction of penalty as he was not in the knowledge of the gold smuggling by Applicant-1.

4. Personal hearing, in virtual mode, was held on 04.03.2022, in both cases. Sh. Sh. S.S. Arora, Advocate appeared for the Applicants and reiterated the contents of respective RAs. He stated that the confiscated gold may be allowed to be redeemed on payment of fine and baggage rate of duty to Sh. Varinder Kumar. Further, Sh. Raj Kumar had nothing to do in the matter. As such, penalty imposed on him is not sustainable. No one appeared for the Respondent department nor any request for adjournment has been received. Therefore, the matter is taken up for final disposal based on records.

5. The Government has carefully examined the matter. It is observed that Applicant-1 did not declare the gold brought by him under Section 77 of Customs Act, 1962 to the customs authorities at the LCS. Further, he has admitted the recovery of gold from him and the fact of non-declaration in his statement tendered under Section 108 of Customs Act, 1962. Although, the said statement is said to have been retracted on 23.12.2017, it appears to be an afterthought as no evidence has been produced to show licit possession of the offending gold. Applicant-2 has also admitted that he had accompanied the Applicant-1 and had shown him the smuggling route. Thus, it is apparent that both the Applicants colluded in smuggling and, as such, it is undoubtedly a pre-meditated attempt.

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-1 has failed to produce any evidence that the gold recovered from him was not smuggled. To the contrary, the fact of non-declaration and manner of concealment make it evident that it was a pre-meditated attempt at smuggling.

7.1 Applicant-1 has contended that the import of gold is not 'prohibited'. The Government observes that the law on this issue is settled by the judgment of Hon'ble Supreme Court in the case of Sheikh Mohd. Omer vs Collector of Customs, Calcutta & Ors [1971 AIR 293] wherein 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"*. In its judgment dated 17.06.2021, in the case of UOI & Ors vs. M/s Raj Grow Impex LLP & Ors [2021 (377) ELT 145 (SC)], the Hon'ble Supreme Court has followed its earlier judgments in the cases of 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:

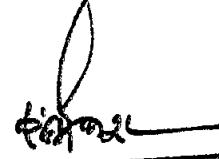
"64. Dictum of the Hon'ble Supreme Court and High Courts makes it clear that gold, may not be one of the enumerated goods, as prohibited goods, still, if the conditions for such import are not complied with, then import of gold, would squarely fall under the definition "prohibited goods", in Section 2 (33) of the Customs Act, 1962----."

7.3 It is apparent from the orders of the authorities below 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'.

8. It has been averred that the subject gold lumps should be released on payment of fine. The Government observes that, in terms of Section 125 of the Customs Act, 1962, 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*". Further, in the case of Commissioner of Customs (Air), Chennai-I Vs P. Sinnasamy [2016(344) ELT 1154 (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."*" The original authority has ordered absolute confiscation as the gold was attempted to be smuggled by way of concealment and adverse effects that redemption would have on legitimate importers. Thus, the original authority has exercised his discretion for reasonable and relevant consideration. As such, the order of the original authority, as upheld by the Commissioner (Appeals) does not merit interference.

9. The Government finds that the penalty imposed on Applicant-1 is just and fair in the facts and circumstances of the case. However, keeping in view the role played by the Applicant-2, the penalty imposed on him is reduced to Rs. 2,00,000/-.

10. The revision applications are rejected, except to the extent of reduction in penalty imposed on the Applicant-2 as indicated above.



(Sandeep Prakash)

Additional Secretary to the Government of India

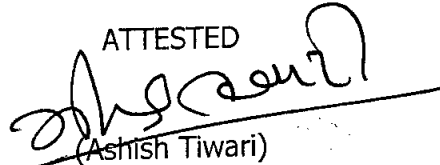
1. Sh. Varinder Kumar,
S/o Sh. Dipty Lal,
R/o 212, Old Mahavir nagar, West Delhi – 110018.
2. Sh. Raj Kumar,
S/o Lakhan Lal Churasiya,
R/o 174, Block-I, Vijay Vihar, Phase-II,
New Delhi – 110085.

Order No. 74-75/2022-Cus dated 07-03-2022

Copy to:

1. The Commissioner of Customs (Preventive), Custom House, 3rd Floor, 15/1, Strand Road, Kolkata – 700001.
2. The Commissioner of Customs (Appeals), Custom House, 3rd Floor, 15/1, Strand Road, Kolkata – 700001.
3. Sh. S.S. Arora & Associates (Advocate) B1/71, Safdarjung Enclave, New Delhi – 110029.
4. PA to AS (RA).
5. Guard File.
6. Spare Copy.

ATTESTED



(Ashish Tiwari)
Assistant Commissioner(RA)