

REGISTERED
SPEED POST



F. No. 375/59/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. 01/04/22

Order No. 117/22-Cus dated 01-04-2022 of the Government of India passed by Shri 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/192/2020-21 dated 14.07.2020 passed by the Commissioner of Customs (Appeals), New Delhi.

Applicant : Sh. Varun Verma , Ludhiana.

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

ORDER

A Revision Application No. 375/59/B/2020-R.A. dated 28.09.2020 has been filed by Sh. Varun Verma, Ludhiana (hereinafter referred to as the Applicant) against the Order-in-Appeal No. CC(A)CUS/D-I/Airport/192/2020-21 dated 14.07.2020 passed by the Commissioner of Customs (Appeals), New Delhi. The Commissioner (Appeals) has upheld the Order-in-Original No. 195/Adjn./2017 dated 28.09.2017, passed by the Additional Commissioner of Customs, IGI Airport, Terminal-3, New Delhi, vide which two 999.9 purity gold bars, collectively weighing 1500 gms and valued at Rs. 35,41,770/-, were absolutely confiscated under Section 111(d), 111(i), 111(j), 111(l) & 111(m) of the Customs Act, 1962 and a penalty of Rs. 7 Lakhs was imposed on the Applicant under Section 112 and 114AA of the Act, *ibid*.

2. Briefly stated, the Applicant had arrived at IGI Airport, New Delhi on 20.11.2015, from Bangkok. He was intercepted by the customs officers after he had crossed customs green channel and was about to exit the Customs arrival Hall. On being asked if he was carrying any dutiable goods to declare to customs, he replied in negative. He had declared 'N.A.' in column 9 (Total value of dutiable goods being imported) and "No" in column 10 (i, ii, iii-gold etc.) of the Customs Declaration Form. To verify his statement, he was diverted for X-ray of his baggage, which revealed nothing objectionable. But when he was made to pass through Door Frame Metal Detector, beep sound was heard. When he again replied in negative when asked about any dutiable things on his person, his personal search was conducted which resulted in the recovery of two 999.9 purity gold bars, wrapped with black colour adhesive tape, from his pockets, collectively weighing 1500 gms and valued at Rs. 35,41,770/-. The Applicant could not produce any documents/evidence of purchase of the recovered gold bars. In his statements dated 20.11.2015 and 16.12.2015, tendered under Section 108 of the Customs Act, 1962, the Applicant stated that he visited Bangkok for the purpose of business of garment and to collect the gold; that the gold recovered from his possession belongs to him which was not declared at red channel to evade Customs duty to maximize the profit; that he made payment of

Rs.36 Lakh to one Ravi in Ludhiana on the direction of his friend Sh. Harman who lives in Bangkok; that Sh. Harman told him that he will give him the gold in Bangkok for this payment; and that he did not have any bank account or document for these transactions. The Additional Commissioner of Customs, IGIA, New Delhi, confiscated absolutely the said gold bars and imposed a penalty of Rs. 7 Lakhs on the Applicant vide the OIO dated 28.09.2017. Aggrieved, the Applicant filed an appeal before the Commissioner (Appeals) which was rejected vide the impugned OIA.

3. The revision application has been filed, mainly, on the grounds that the statement of the Applicant was recorded under pressure; that the offending gold bars were not concealed by the Applicant; and that the gold items may be allowed to be redeemed or re-exported as the import of gold is not prohibited and the penalty may be reduced.

4. Personal hearing, in virtual mode, was held on 01.04.2022. Ms. Prabhjyoti Kaur, Advocate, appeared for the Applicant and reiterated the contents of the RA. She highlighted that the gold was not concealed and the statements were recorded under coercion. Being dutiable goods, the gold may be released on payment of fine and nominal penalty. None appeared for the Respondent department nor any request for adjournment has been received. Therefore, the matter is taken up for disposal based on records.

5. The Government has carefully examined the matter. It is evident from records, specifically the Customs Declaration Form, that the Applicant, on his arrival, had not declared the gold bars to the customs authorities, as required under Section 77 of the Customs Act, 1962, even after being repeatedly asked to do so. He admitted the fact of non-declaration in his statements at two occasions (20.11.2015 and 16.12.2015). It has been contended that the statements of the Applicant were recorded under coercion. But this cannot be accepted as there is no retraction on record. Moreover, the two statements were recorded with a gap of nearly one month

and hence the averment that the statements were recorded under pressure cannot hold ground.

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 gold bars were not declared by the Applicant to the customs officers, as required under Section 77 of Customs Act, 1962. He admitted that he had intentionally not declared the gold items to avoid customs duty. No documents evidencing licit possession of gold bars have also been placed on record. 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 the import of gold is not 'prohibited'. Hon'ble Supreme Court has, in the case of Sheikh Mohd. Omer vs Collector of Customs, Calcutta & Ors [1971 AIR 293], 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*". Gold is not allowed to be imported freely in baggage and 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 Apex 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 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-----."

7.3 The gold is allowed to be imported, in baggage, subject to certain conditions and, as correctly brought out by the original authority in paras 20, 21 and 22 of his Order dated 28.09.2017, 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. The Applicant has prayed for release of the gold bars on redemption fine under Section 125 of Customs Act, 1962. In terms of Section 125, 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 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 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 original authority has refused to allow redemption keeping in view the manner in which the gold was attempted to be smuggled as well as object of Government policy restricting import of gold. Hence, the Government holds that the original authority has exercised his discretion for relevant and reasonable considerations. As such, no grounds are made out to interfere with the discretion exercised by the lower authority as upheld by the Commissioner (Appeals).

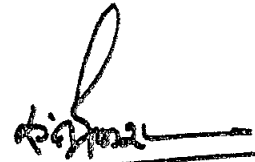
9. A request for allowing re-export under Section 80 of the Customs Act, 1962 has also been made. Section 80 reads as follows: -

80. Temporary detention of baggage.—Where the baggage of a passenger contains any article which is dutiable or the import of which is prohibited and in respect of which a true declaration has been made under section 77, the proper officer may, at the request of the passenger, detain such article for the purpose of being returned to him on his leaving India 1[and if for any reason, the passenger is not able to collect the article at the time of his leaving India, the article may be returned to him through any other passenger authorised by him and leaving India or as cargo consigned in his name].

In this case, since no declaration of the gold carried by him was made by the Applicant, the question of allowing re-export of the same does not arise. Hon'ble Allahabad High Court has, in the case of Commissioner of Customs (Prev.) Vs. Deepak Bajaj [2019 (365) ELT 695 (All.)], held that a declaration under Section 77 was a *sine qua non* for extending benefit of Section 80.

10. The penalty imposed is just and fair in the facts and circumstances of the case.

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


(Sandeep Prakash)

Additional Secretary to the Government of India

Sh. Varun Verma,
R/o H. No. 920/3-Old, 149-New Tagore Nagar,
Civil Lines, Ludhiana , Punjab-141 001

Order No. _ 117/22-Cus dated 01-04-2022

Copy to:

1. The Commissioner of Customs, IGI Airport, Terminal-3, New Delhi – 110037.
2. The Commissioner of Customs (Appeals), New Customs House, Near IGI Airport, New Delhi – 110037.
3. Sh. D.S. Chadha, Advocate, 92 GF Block V, Eros Garden, Faridabad-121 009.
4. PA to AS(RA)
5. Guard File.
6. Spare Copy.

ATTESTED


(Ashish Tiwari)
Assistant Commissioner (RA)