

**REGISTERED**  
**SPEED POST**



F. No. 375/62/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..7/4/22..

Order No. 123/22-Cus dated 07-04-2022 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/180/2020-21 dated 08.07.2020 passed by the Commissioner of Customs (Appeals), New Delhi.

Applicant : Sh. Paras M. Pahuja , Ulhasnagar.

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

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**ORDER**

A Revision Application No. 375/62/B/2020-R.A. dated 01.10.2020 has been filed by Sh. Paras M Pahuja, Ulhasnagar (hereinafter referred to as the Applicant) against the Order-in-Appeal No. CC(A)CUS/D-I/Airport/180/2020-21 dated 08.07.2020 passed by the Commissioner of Customs (Appeals), New Delhi. The Commissioner (Appeals) has upheld the Order-in-Original No. 205/ADJ/19 dated 06.08.2019, passed by the Deputy Commissioner of Customs, IGI Airport, Terminal-3, New Delhi, vide which one brown colour paste strip containing gold weighing 245 gms, valued at Rs. 6,94,361/-, was absolutely confiscated under Section 111(d), 111(i), 111(j), 111(l) 111(m) & 111(o) of the Customs Act, 1962 and a penalty of Rs. 1,40,000/- 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 11.12.2018, from Dubai. He was further scheduled to travel to Mumbai from Domestic Area of IGI Airport. As he reported for pre-embarkation security check in the Domestic Area, the CISF officer on-duty, on personal search of the Applicant, recovered one brown colour paste strip, stitched with the inner lining of the trouser waist. The Applicant was handed over to Customs authorities by the CISF, who, enquired from him about presence of any dutiable goods or gold with him to which he replied in negative. The Customs officers got extracted 245 gms of pure gold, valued at Rs. 6,94,361/- from the paste strip from a professional extractor. In his statement dated 11.12.2018, tendered under Section 108 of Customs Act, 1962, the Applicant stated that the recovered paste was handed over to him by one Girish, a friend of his cousin, Jay, at Dubai for carrying to India which was to be collected by a person outside Mumbai Airport; and that he would have got Rs. 10,000/- for this job. The Deputy Commissioner of Customs, IGI Airport, New Delhi, vide OIO dated 06.08.2019, confiscated the gold absolutely and imposed a penalty of Rs. 1,40,000/- on the Applicant. 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 Applicant had kept the Gold in the interlining of the pant for safety purposes only which was to be declared at Mumbai Airport; that the gold bar may be released on payment of redemption fine under Section 125 of Customs Act, 1962; and that the penalty imposed may be reduced.

4. Personal hearing was held on 06.04.2022, in virtual mode. Sh. O. P. Rohira, Advocate, appeared for the Applicant and reiterated the contents of the RA. He requested that the offending goods may be released on payment of fine, duty and nominal penalty. None appeared for the Respondent department nor any request for adjournment has been received. Hence, the matter is taken up for disposal on the basis of records available.

5. The Government has carefully examined the matter. It is evident from records that the Applicant had gone out of the Customs area of the IGI Airport and was apprehended as he reported for the Security Check in the Domestic area, on way to his boarding domestic flight to Mumbai. Thus, it is clear that he did not declare the gold at the customs counter. Further, since he was going to Mumbai as a domestic passenger, he would not have been subjected to Customs check at Mumbai Airport. The Government observes that his intention to hoodwink the Customs authorities and smuggle the gold, are abundantly manifest. Moreover, the gold was brought in a paste form, ingeniously concealed in the interlining of the trouser worn by the Applicant. Thus, the contentions of the Applicant that he kept the gold in the interlining of the pant for safety purpose or that he intended to declare the gold at Mumbai airport cannot be accepted.

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 was not declared by the Applicant to the customs officers, as required under Section 77 of Customs Act, 1962. Further, the manner of concealment and nature of carriage, i.e., in paste form, make the intention to smuggle evident. The Applicant has, thus, failed to discharge the burden placed on him, in terms of Section 123, *ibid*.

7.1 it is contended that gold is not a 'prohibited' item. 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. As correctly brought out by the original authority in paras 13.3 to 13.5, of the Order-in-Original dated 06.08.2019, 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 that the gold may be released on redemption fine under Section 125 of Customs Act, 1962. The Government observes that in terms of Section 125, the option to release 'prohibited goods', on redemption fine, is discretionary. Hon'ble Supreme Court has, in the case of Garg Woollen Mills (P) Ltd vs. Additional Collector of Customs, New Delhi [1998 (104) E.L.T. 306 (S.C.)], affirmed this position. 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, 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). The case laws relied upon are not applicable in view of the dictum of Hon'ble Supreme Court and Hon'ble High Court, as above.

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. Paras M. Pahuja,  
C/o Sh. O. M. Rohira, Advocate,  
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Mumbai-400 052

Order No. \_ /23\_/22-Cus dated 07-04-2022

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. PA to AS(RA)
4. Guard File.
5. Spare Copy.

ATTESTED  
  
(Ashish Tiwari)  
Assistant Commissioner (RA)