

**REGISTERED**  
**SPEED POST**



F. No. 375/64/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. 125/22-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/Air/118/2020-21 dated 02.06.2020 passed by the Commissioner of Customs (Appeals), New Delhi.

Applicant : Sh. Kazuya Ashihara, Japan, C/o Sh. Ashu Gupta, Adv., Delhi.

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

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**ORDER**

A Revision Application No. 375/64/B/2020-R.A. dated 06.10.2020 has been filed by Sh. Kazuya Ashihara, Japan, C/o Sh. Ashu Gupta, Delhi (hereinafter referred to as the Applicant) against the Order-in-Appeal No. CC(A)CUS/D-I/Air/118/2020-21 dated 02.06.2020 passed by the Commissioner of Customs (Appeals), New Delhi. The Commissioner (Appeals) has upheld the Order-in-Original No. 243/ADC/19 dated 09.10.2019, passed by the Additional Commissioner of Customs, IGI Airport, Terminal-3, New Delhi, vide which 12 gold bars, collectively weighing 7000 gms and valued at Rs. 2,08,18,490/-, were 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. 40 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 20.05.2019, from Hongkong. The Applicant was intercepted after he had crossed the Green Channel of the Arrival Hall and was approaching the Exit Gate. He was asked if he was carrying any dutiable goods or Gold to which he replied in negative. As his bag was scanned through the X-Ray machine, some suspicious black images were noticed. Search of his baggage revealed an auto part which was dis-assembled and 12 gold bars, collectively weighing 7000 gms, valued at Rs. 2,08,18,490/- were recovered. In his statement tendered under Section 108 of the Customs Act, 1962, the Applicant stated that the gold was given to him at he Hongkong Airport; that he was offered 50,000/- JPY for carrying the gold; that a man had to contact him outside Delhi Airport to take the delivery of the said gold and would have paid him 50,000/- JPY; and that he had not declared the gold at the Red Cannel as he was instructed not to do so. The Applicant could not produce any evidence in support of valid possession and licit import of the offending gold bars. Subsequently, he was arrested on 21.05.2019 under Section 104 of the Customs Act, 1962. The Additional Commissioner of Customs, IGIA, New Delhi, confiscated absolutely the said gold and imposed a penalty of Rs. 40 Lakhs on the Applicant vide OIO dated 09.10.2019.

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 and the Applicant was not well-versed with English language; that the Applicant was only carrying samples of auto parts was not aware of the presence of gold concealed in them; that the gold items may be allowed to be redeemed or re-exported as the import of gold is not prohibited; and that the penalty under Section 112 has been imposed without specifying the clause of the Section and penalty under 114AA is not applicable in this case.

4. Personal hearing was held on 06.04.2022, which was attended by Ms. Reena Rawat, Advocate and Sh. Ashu Gupta, Advocate, for the Applicant. Ms. Rawat reiterated the contents of the RA. She also submitted a compilation of case laws in support of her averments. 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 record 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 statement recorded under Section 108 of Customs Act, 1962. It has been contended that the statement of the Applicant was recorded under pressure. However, this appears to be an afterthought in as much as the retraction dated 24.05.2019, a copy whereof has been placed on record, does not bear any mark of receipt by the department. Further, the Applicant was admittedly in the profession of marketing of auto parts. Thus, evidently he would be familiar with the auto parts for whose marketing he was coming to India. In this background, if the gold was concealed without his knowledge, it is inconceivable that the Applicant would not notice the substantial

weight difference (of 07 kg), in the auto part carried by him. As such, the retraction also appears to be merely an afterthought. In any case, Hon'ble Supreme Court has, in the case of Surjeet Singh Chabra Vs. UOI [1997 (89) ELT 646 (SC)], held that a confession statement made before a Customs Officer, even though retracted, is an admission and is binding upon the person concerned.

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 items 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 detection. No documents evidencing licit possession of gold items have also been placed on record. The ingenious manner in which the gold was concealed makes it evident that it was an attempt to smuggle gold in a pre-meditated manner. The Applicant has, thus, failed to discharge the burden placed on him, in terms of Section 123, *ibid* and the intention of smuggling is manifest.

7.1 It has been 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. As correctly brought out by the original authority in paras 18.1 & 18.2, of the Order-in-Original dated 09.10.2019, 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 items 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 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. The case laws relied upon by the Applicant in support of contentions discussed in paras 7.1 and 8 above, are not applicable, in view of the dictum of Hon'ble Supreme Court and Hon'ble High Court, as above.

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

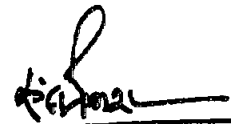
*80. Temporary detention of baggage.—Where the baggage of a passenger contains any article which is dutiable or the import of which is prohibited and in respect of which a true declaration has been made under section 77, the proper officer may, at the request of the passenger, detain such article for the purpose of being returned*

*to him on his leaving India 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.*

Thus, 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 is a *sine-qua-non* for extending benefit of Section 80.

11. The penalty imposed is just and fair in the facts and circumstances of the case, especially in view of the ingenious manner of concealment resorted to, by the Applicant. It is contended that since the original authority has not indicated the clause of Section 112 under which the penalty is imposed, the penalty should be set aside. However, the Government observes that the Show Cause Notice proposed to impose penalty under both the clauses, i.e., (a) and (b). Hence, the non-mentioning of these clauses in the Order portion does not prejudice the Applicant herein.

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



(Sandeep Prakash)

Additional Secretary to the Government of India

Sh. Kasuya Ashihara, Japan,  
C/o Sh. Ashu Gupta, Advocate,  
7280, Prem Nagar, Nera Shakti Nagar,  
Delhi-110 007.

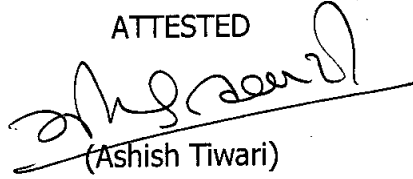
Order No. \_ 125/22-Cus dated 07-04-2022

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)