

SPEED POST



F. No. 380/15/B/2020-RA  
GOVERNMENT OF INDIA  
MINISTRY OF FINANCE  
(DEPARTMENT OF REVENUE)

14, HUDCO VISHALA BLDG., B WING  
6<sup>th</sup> FLOOR, BHIKAJI CAMA PLACE,  
NEW DELHI-110 066

Date of Issue..12/05/22

Order No. 139 /22-Cus dated 12-05-2022 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.-174/CUS/APPL/LKO/2020 dated 30.09.2020 passed by the Commissioner (Appeals), Customs, GST & Central Excise, Lucknow

Applicant : Commissioner of Customs (Preventive), Lucknow.

Respondent : Sh. Shah Aftab, Kanpur.

## **ORDER**

A Revision Application No. 380/15/B/2020-RA dated 21.12.2020 has been filed by the Commissioner of Customs (Preventive), Lucknow (hereinafter referred to as the Applicant) against the Order-in-Appeal No. 174/CUS/APPL/LKO/2020 dated 30.09.2020 passed by the Commissioner (Appeals), Customs, GST & Central Excise, Lucknow. The Commissioner (Appeals) has, vide the impugned Order-in-Appeal, modified the order of the Additional Commissioner of Customs (Preventive), HQ, Lucknow bearing No. 33/ADC/2019 dated 13.01.2020.

2. The brief facts of the case are that Sh. Shah Aftab, Kanpur (hereinafter referred to as the Respondent) arrived, on 27.04.2019 at CCSI Airport, Lucknow from Muscat by Flight No. WY-263. He was intercepted by the customs officers, while he was approaching towards the exit gate after he had crossed the Customs Green Channel. During scanning of his baggage, some

manner, for monetary consideration of Rs. 25,000/-; that he was fully aware that the import of gold was liable to Customs Duty; and that the smuggling of the same was a punishable offence. The original authority, vide the aforesaid Order-in-Original dated 13.01.2020, ordered for absolute confiscation of seized gold under Section 111 of the Customs Act, 1962. A penalty of Rs 5,00,000/- was also imposed on the Respondent. In appeal, the Commissioner (Appeals) permitted redemption of confiscated gold on payment of a fine of Rs. 3,00,000/-. The penalty imposed on the Respondent was also reduced to Rs. 2,30,000/-.

3. The revision application has been filed on the ground that the Respondent had attempted to clear the gold without payment of duty; that there was concealment and thus the import of gold is not bonafide; that the import of the gold is prohibited and, therefore, release of the gold on payment of

suspicious images were noticed and after search of his person and of his baggage small pieces/ plates of gold, concealed in five jeans pants, two knives, chocolate box and six spoons in a systematic manner, were recovered. The Respondent produced the Customs Baggage Declaration Form wherein no details of any dutiable/ prohibited goods were mentioned. The value of concealed gold, totally weighing 467.47 grams, was appraised at Rs. 15,56,674/- by the approved/ authorised valuer at the airport. The pieces/ plates of gold, recovered from the Respondent, were seized under Section 110 of the Customs Act, 1962, under Panchnama dated 27.04.2019. The Respondent, in his statement dated 27.04.2019, recorded under Section 108 of the Customs Act, 1962, admitted the recovery of gold from five jeans pants, two knives, chocolate box and six spoons in the form of pieces and plates, in systematic manner and also agreed with the contents of the Panchnama dated 27.04.2019. He further stated that he had smuggled the gold in concealed

redemption fine and penalty is not correct. A written reply dated 06.05.2022 has been filed by the Respondent.

4. Personal hearing, in virtual mode, was held on 11.05.2022. Sh. Swapan Srivastava, Supdt., who appeared for the Applicant, highlighted that the gold was cleverly and ingeniously concealed. In these specific facts and circumstances, there was no reason for the Commissioner (Appeals) to interfere with discretion exercised by the Additional Commissioner in absolutely confiscating the gold. He, accordingly, requested that the Order of Additional Commissioner may be restored. Sh. Mohammed Saleem, Advocate appeared for the Respondent and opposed the RA. He reiterated the contents of the written submissions filed on 06.05.2022.

5. The Government has examined the matter carefully. It is observed that the Respondent did not declare the gold brought

by him as required under Section 77 of Customs Act, 1962, to the Customs Authorities at the airport. Further, the Respondent 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. In the written submissions dated 06.05.2022, the Respondent has admitted that he had brought the gold but denied his intention to evade payment of Customs Duty. It is contended that the gold was deliberately concealed for safety reasons. It is also averred that the statement under Section 108 of Customs Act was recorded under duress. The Government observes that the said statement recorded on 27.04.2019 appears to have been retracted by the Respondent, vide his reply dated 06.11.2019 to the show cause notice. Such belated retraction, which is also not supported by any corroborative evidence, does not inspire confidence and appears to be merely an afterthought. Further, the Hon'ble Supreme Court has, in the case of *Surjeet Singh Chhabra vs. UOI* {1997

(89) *ELT 646 (SC)*}, held that a confessional statement made before Customs Officer, though retracted within six days, is an admission and binding on the person who has made the confession. Thus, the subject contentions of the Respondent are rejected.

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 Respondent has failed to produce any evidence that the confiscated gold was not smuggled. The manner of concealment, by keeping the same in five jeans pants, two knives, chocolate box and six spoons, in the form of pieces and plates, clearly evidences that the Respondent had attempted to smuggle the

seized gold in a pre-meditated manner. The Respondent has, thus, failed to discharge the burden placed on him, in terms of Section 123.

7.1 The Commissioner (Appeals) has held that 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}. It was held by the Hon'ble Supreme Court 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*". The Additional Commissioner, in paras 19.1.6 of the O-I-O dated 13.01.2020, has brought out that the Gold is not allowed to be imported freely in baggage. 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) 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 & 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) ELT 65(Mad.)], the Hon'ble Madras High Court has specifically held that

*"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 In the present case, it is not even contended by the Respondent that the conditions subject to which gold could have been legally imported have been fulfilled. Thus, following the ratio of the aforesaid judgments, there is no doubt that the subject goods are 'prohibited goods'. As such, the Commissioner (Appeals) has erred in holding that the impugned gold is not a prohibited item.

8.1 The original adjudicating authority has denied the release of impugned goods on redemption fine under Section 125 of Customs Act, 1962. 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

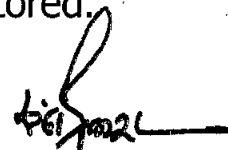
by the Hon'ble Supreme Court in the case of Garg Woollen Mills (P) Ltd vs. Additional Collector of Customs, New Delhi [1998 (104) E.L.T. 306 (S.C.)]. In the case of Raj Grow Impex (supra), the Hon'ble Supreme Court has held *"that when it comes to discretion, the exercise thereof has to be guided by law; has to be according to the rules of reason and justice; 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."* Further, *"when discretion is exercised under Section 125 of the Customs Act, 1962, ----- the twin test to be satisfied is "relevance and reason"."* Hon'ble Delhi High Court has, in the case of Raju Sharma [2020 (372) ELT 249 (Del)], relying upon the judgment of Apex Court in Mangalam Organics Ltd. [2017 (349) ELT 369

(SC)], held that *"Exercise of discretion by judicial, or quasi-judicial authorities, merits interference only where the exercise is perverse or tainted by patent illegality, or is tainted by oblique motive."*

8.2 In view of the legal position settled by the aforesaid judgments of Hon'ble Supreme Court and Hon'ble High Court, it is clear that the Commissioner (Appeals) has ordered redemption of confiscated gold on legally erroneous findings that gold is not a prohibited item. It is also clear that being a prohibited item, the redemption could have only been allowed in his discretion by the original authority. In the present case, the original authority has refused to do so. As is evident, the Commissioner (Appeals) could have interfered in the matter only if the exercise of discretion was tainted by the vices indicated by the Hon'ble Courts. Thus, looked at from any perspective, the order of Commissioner (Appeals) allowing redemption of confiscated gold cannot be sustained.

9. In the facts and circumstances of the case and specifically keeping in view the nature of concealment, the penalty imposed by the original authority was just and fair. Hence, the OIA cannot be sustained in this respect as well.

10. In view of the above, the revision application is allowed and the impugned OIA dated 30.09.2020 is set aside. Consequently, the OIO dated 13.01.2020 is restored.



(Sandeep Prakash)

Additional Secretary to the Government of India

The Commissioner of Customs (Preventive),  
5<sup>th</sup> & 11<sup>th</sup> Floor, Kendriya Bhawan,  
Sector-H, Aliganj, Lucknow, UP

Order No. 139/22-Cus dated 12-05-2022

Copy to:

1. Sh. Shah Aftab, S/o Sh. Ishrat Ali, R/o 105/696, Plot No. 2, Compound Chaman Ganj, Kanpur Nagar – 208001, UP.
2. Sh. Mohammed Saleem, Advocate, Chamber No. I-B.-20, 2<sup>nd</sup> Floor, New Building Civil Court, Kanpur Nagar-208001, Uttar Pradesh, Mobile No. 9450138749 – Email – [advocatesaleem786@yahoo.com](mailto:advocatesaleem786@yahoo.com)

3. The Commissioner (Appeals), Customs, GST & Central Excise, 3/194, Vishal Khan, Gomati Nagar, Lucknow, UP.
4. The Additional Commissioner of Customs (CSSI Airport), 5<sup>th</sup> & 11<sup>th</sup> Floor, Kendriya Bhawan, Sector-H, Aliganj, Lucknow, UP
5. PA to AS(RA).
6. Guard File.
7. Spare copy.

ATTESTED

*[Signature]*  
2020/16  
27/11  
श्री. एन. सी. अशोक कुमार लाल  
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