

SPEED POST



F. No. 380/14/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..17/5/22.....

Order No. 140/22-Cus dated 17-05-2022 of the Government of India passed by Sh. Sandeep Prakash, Additional Secretary to the Government of India, under Section 129DD of the Customs Act, 1962.

Subject : Revision Application filed, under Section 129 DD of the Customs Act 1962 against the Order-in-Appeal No.-173/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. Chakradhar Ganesh Tripathi, Howrah.

ORDER

A Revision Application No. 380/14/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. 173/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 Deputy Commissioner of Customs (Preventive), Lucknow bearing No. 45/DC/Cus/LKO/2019-20 dated 29.01.2020.

2. Briefly stated, Sh. Chakradhar Ganesh Tripathi, Howrah (hereinafter referred to as the Respondent) was intercepted, on 09.03.2019, at Kanpur Airport while boarding flight for Kolkata. A gold ring weighing 100.37 grams, valued at Rs. 3,33,730/-, concealed in a watch, was recovered from him. The Respondent, in his statement dated 09.03.2019, tendered under Section 108 of the Customs Act, 1962, admitted that he had bought the gold

in Bangkok for selling the same in India for pecuniary benefit and had smuggled the same when he arrived at Varanasi airport on 08.03.2019 from Bangkok. The original authority, vide the aforesaid Order-in-Original dated 29.01.2020, ordered for absolute confiscation of seized gold under Section 111(b) and (d) of the Customs Act, 1962. A penalty of Rs 9,870/- was also imposed on the Respondent under Section 112 of the Act *ibid*. In appeal, the Commissioner (Appeals) permitted redemption of confiscated gold on payment of a fine of Rs. 65,000/- along with applicable duty. The penalty imposed on the Respondent was maintained.

3. The revision application has been filed on the ground that the Respondent had attempted to clear the gold without payment of duty; that the Respondent has failed to discharge burden of proof as required under Section 123 of Customs Act that the gold was not smuggled; that the import of the gold is prohibited and, therefore, release of the gold on payment of

redemption fine and penalty is not correct. A written reply dated 13.04.2021 has been filed by the Respondent.

4. Personal hearing, in virtual mode, was held on 17.05.2022. Sh. Ajay Mishra, ADC, appeared for the Applicant and reiterated the contents of the RA. None appeared for the Respondent. However, a written submission dated 16.05.2022 is filed which is taken on record.

5. The Government has examined the matter carefully. In his statement dated 09.03.2019, the Applicant had revealed that he had brought the gold on 08.03.2019 from Bangkok and landed at Varanasi airport. In the written submissions dated 16.05.2022, the Respondent has again admitted that he had brought the gold out of greed to earn profit. Thus, the factum of smuggling is admitted and established.

6.1 The Commissioner (Appeals) has allowed redemption of subject gold by holding 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*". It is observed that 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."

6.2 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----."

6.3 In the present case, the fact of smuggling is admitted and consequently non-compliance with the conditions subject to which gold could have been legally imported is established. 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.

7.1 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 present case, the original authority has refused redemption, in his discretion. 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."*

7.2 As already held, 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 any of the vices indicated by the Hon'ble Courts, as brought out in para 7.1 above. Thus, the order of Commissioner (Appeals) allowing redemption of confiscated gold cannot be sustained.

8. In view of the above, the revision application is allowed and the impugned OIA dated 30.09.2020 is set aside.


(Sandeep Prakash)

Additional Secretary to the Government of India

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

Order No. 140/22-Cus dated 17-05-2022

Copy to:

1. Sh. Chakradhar Ganesh Tripathi, R/o H. No. 26/25 Rosemary Line, Howrah, West Bengal.
2. Sh. Raghvendra P. Singh, Advocate, Office-A- 526, New High Court, Gomti Nagar, Lucknow-226010.
3. The Commissioner (Appeals), Customs, GST & Central Excise, 3/194, Vishal Khan, Gomati Nagar, Lucknow, UP.

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

ATTESTED



(लक्ष्मी राघवन)
(Lakshmi Raghavan)
अनुभाग अधिकारी / Section Officer
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