

SPEED POST



F. No. 375/14/B/2021-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. 23/5/22

Order No. 151/22-Cus dated 23-05-2022 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. CC(A)Cus/D-I/Air/700/20-21 dated 27.10.2020 passed by the Commissioner of Customs (Appeals), New Delhi

Applicant : Sh. Shakil Akhtar, Purnea, Bihar

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

ORDER

A Revision Application No. 375/14/B/2021-RA dated 15.02.2021 has been filed by Sh. Shakil Akhtar, Purnea, Bihar (hereinafter referred to as the Applicant) against the Order-in-Appeal No. CC(A)Cus/D-I/Air/700/20-21 dated 27.10.2020 passed by the Commissioner of Customs (Appeals), New Delhi. Commissioner (Appeals) has upheld the Order-in-Original passed by the Additional Commissioner of Customs, IGI Airport, New Delhi, bearing no. 457/Adj./2018 dated 13.11.2018, wherein gold bars, collectively weighing 696 gms and valued at Rs. 19,10,144/-, along with concealing material, were confiscated absolutely. Penalty of Rs. 3,80,000/- was imposed on the Applicant under Section 112 and 114AA of the Customs Act, 1962.

2. Brief facts of the case are that, on 22.08.2018, the Applicant arrived at IGI Airport, New Delhi from Kuwait. He was intercepted by the Customs Officers while passing through the Green Channel without submitting any declaration under Section 77 of the Customs Act, 1962. On search of his checked-in-baggage, gold bars, collectively weighing 696 Gms and valued at Rs. 19,10,144/-, were recovered which were found concealed inside the batteries of emergency light carried by him. In his statement dated 23.08.2018, tendered under Section 108 of Customs Act, 1962, the Applicant admitted the recovery of the said gold bars concealed in the batteries of the emergency light and claimed the ownership of the confiscated goods. He stated that the gold bars were purchased by him in Saudi Arabia against the purchase bills. The original authority, vide the aforesaid Order-in-Original dated 13.11.2018, confiscated absolutely the seized gold bars under Section 111(d), 111(i), 111(j), 111(l), 111(m) and 111(o). Penalty of Rs. 3,80,000/- was imposed on

the Applicant under Section 112 and 114AA of the Customs Act, 1962. Aggrieved, the Applicant filed an appeal before the Commissioner (Appeals), who, vide the impugned Order-in-Appeal, rejected the appeal.

3. The instant revision application has been filed, mainly, on the grounds that he is otherwise eligible to import gold and being the owner, having purchased receipts evidencing purchase of the confiscated gold; that the statement was made by him on false assumption that the gold will be released to him; that he is an illiterate person; that gold bars should be allowed to be redeemed and that penalty imposed is on a higher side.

4. Personal hearing was held on 20.05.2022, in virtual mode. Sh. M. N. Dubey, Advocate, appeared for the Applicant and reiterated the contents of the revision application. None appeared for the Respondent department nor any request for adjournment has been received.

5. The Government has carefully examined the matter. It is observed that the Applicant had not declared the subject gold items to the Customs on his arrival from Kuwait, as required under Section 77 of the Customs Act. Rather, they were ingeniously concealed in the batteries of the emergency light. Further, it is observed that the purchase bills produced do not establish ownership as they do not contain the name of the buyer.

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 Applicant has failed to produce any evidence that the gold items recovered from him were not smuggled. Rather, the ingenious manner of concealment makes the intentions to smuggle manifest. The Applicant has, thus, failed to discharge the burden placed on him, in terms of Section 123, *ibid*.

7.1 The contention of the Applicant is that otherwise he is eligible to import gold and should be allowed redemption. The Government observes that the gold is allowed to be imported in baggage, subject to certain conditions. The

original authority has correctly brought out that, in the instant case, these conditions have not been fulfilled. In the case of Sheikh Mohd. Omer vs. Collector of Customs, Calcutta & Ors {1971 AIR 293}, the Apex Court has 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*". In the case of M/s Om Prakash Bhatia vs. Commissioner of Customs, Delhi {2003(155) ELT423(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) 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 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'.

8.1 The original adjudicating authority has denied the release of offending goods 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; 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*". 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'*". Hon'ble Delhi high court has, in the case of Raju Sharma Vs. UOI {2020(372)ELT249 (Del)}, 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 motives*." In holding so, the Hon'ble High Court has relied upon the judgement of Apex Court in the case of Mangalam Organics Ltd. {2017(349)ELT369(SC)}. Thus, the Commissioner (Appeals) could have interfered with the discretion exercised by the original authority only if it would

have been tainted by any of vices highlighted by the Hon'ble Courts. Such a case is not made out. Hence, the discretion exercised by the original authority does not merit intervention.

8.2 The case law cited by the Applicant to support his plea for redemption are not applicable in view of the dictum of Hon'ble Supreme Court and Hon'ble High Courts, as above.

9. The Government observes that, in the facts and circumstances of the case, specially keeping in view the ingenious nature of concealment, the penalty imposed is just and fair.

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


(Sandeep Prakash)

Additional Secretary to the Government of India

Sh. Shakil Akhtar, S/O Sh. Abdul Rajjak,
R/o Vill. Bangarora, Charaiya,
Purnea, Bihar-854 315

Order No. 151/22-Cus dated 23-05-2022

Copy to:

1. The Commissioner of Customs, IGI Airport, New Delhi.
2. The Commissioner of Customs (Appeals), New customs House, New Delhi - 110037.
3. Sh. M. N. Dubey, Advocate, 26, 7th Floor, Dakshineshwar, 10, Hailey Road, New Delhi - 110001
4. PA to AS(RA).
- ✓ 5. Guard File.
6. Spare Copy.

ATTESTED



(लक्ष्मी राघवन)
(Lakshmi Raghavan)
अनुभाग अधिकारी / Section Officer
वित्त मंत्रालय (राजस्व विभाग)
Ministry of Finance (Deptt. of Rev.)
भारत सरकार / Govt. of India
नई दिल्ली / New Delhi