

SPEED POST



F. No. 380/16/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 27/5/22

Order No. 159 /22-Cus dated 27-05-2022 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. 175/CUS/APPL/LKO /2020 dated 30.09.2020 passed by the Commissioner (Appeals), Customs, CGST and Central Excise, Lucknow

Applicant : Commissioner of Customs (Preventive), Lucknow.

Respondent : Sh. Mohd. Gulshad, Muzaffar Nagar.

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ORDER

A Revision Application No. 380/16/B/2021-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. 175/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. 28/ADC/2019 dated 13.12.2019.

2. The brief facts of the case are that Sh. Mohd. Gulshad, Muzaffar Nagar, UP (hereinafter referred to as the Respondent) arrived, on 21.08.2018, at CCSI Airport, Lucknow from Dubai by Flight No. IX-194. 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 suspicious images were noticed and after search of his person and of his baggage twenty nine rhodium polished gold plates, concealed in meat mincer machine placed in carton, were recovered from his baggage. 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 411.70 Grams, was appraised at Rs.12,70,206/- by the approved/ authorized valuer at the airport. The gold items, recovered from the Respondent, were seized under Section 110 of the Customs Act, 1962, under Panchnama dated 21.08.2018. The Respondent, in his statement dated 21.08.2018, recorded under Section 108 of the Customs Act, 1962, admitted the recovery of gold articles concealed in his baggage and also agreed with the contents of the Panchnama dated 21.08.2018. He further stated that he had smuggled the gold in concealed manner, that the gold was handed over to him one Mr. Adil in Dubai; 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 13.12.2019, ordered for absolute confiscation of seized gold under Section 111 of the Customs Act, 1962. A penalty of Rs 2,50,000/-, under Section

112, was also imposed on the Respondent. In appeal, the Commissioner (Appeals) permitted redemption of confiscated gold on payment of a fine of Rs. 2,50,000/-. The penalty imposed on the Respondent was reduced to Rs. 2,00,000/-.

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 an ingenious 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 redemption fine and penalty is not correct. A written reply dated 03.02.2021 has been filed on behalf of the Respondent.

4. Personal hearing was granted on 11.04.2022, 11.05.2022 and 27.05.2022. In personal hearing held, in virtual mode, on 23.05.2022, Sh. Swapan Srivastava, Superintendent, appeared for the Applicant and reiterated the contents of the revision application. None appeared for Respondent nor any request for adjournment has been received. Since sufficient opportunities have been granted to the Respondent, the matter is taken up for disposal based on records.

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, manner of concealment as rhodium polished gold plates inside a meat mincer makes it evident that it is a case of pre-meditated attempt at smuggling. 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. The issue of smuggling of gold and its liability to confiscation stand concluded with the order of Commissioner (Appeals), who has upheld the confiscation ordered by the original authority. The only question that, therefore, needs to be examined is whether the order of Commissioner (Appeals) releasing the goods on payment of redemption fine is sustainable.

6.1 The Commissioner (Appeals) has ordered redemption of seized gold on the ground that the 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 not in dispute 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."*

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, 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 seized gold is not prohibited goods.

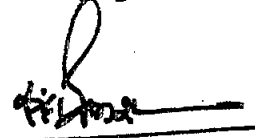
7.1 The original adjudicating authority has denied the release of impugned goods on redemption fine under Section 125 of Customs Act, 1962. The Government observes that, in terms of Section 125 of the Customs Act, 1962, the option to release 'prohibited goods', on redemption fine, is discretionary, as 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."*

7.2 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 any of the vices indicated by the Hon'ble Courts. There is no finding to this

effect by the Commissioner (Appeals). Thus, the Government holds that the order of Commissioner (Appeals) allowing redemption of confiscated gold cannot be sustained.

8. 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.

9. 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. 159 /22-Cus dated 27-05-2022

Copy to:

1. Sh. Mohd. Gulshad, R/o H.No. 930/16, Mimlana Road, Mahatma Colony, Muzaffar Nagar, Uttar Pradesh.
2. The Commissioner (Appeals), Customs, GST & Central Excise, 3/194, Vishal Khan, Gomati Nagar, Lucknow, UP.
3. The Additional Commissioner of Customs, CSSI Airport, Amausi, Lucknow (UP)
4. PA to AS(RA).
- ✓ 5. Guard File.
6. spare copy.

ATTESTED



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