

SPEED POST



F.No. 375/137/B/2018-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. 15/09/21

Order No. 184/21-Cus dated 14/09/2021 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.CC(A)Cus/D-I/Air/194/2018 dated 16.07.2018 passed by the Commissioner of Customs (Appeals), New Customs House, Near IGI Airport, Delhi-110037

Applicant : Sh. Basheer Mohd. Abdul Rahiman, Kasargod, Kerala.

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

ORDER

A Revision Application No. 375/137/B/2018-RA dated 12.12.2018 has been filed by Sh. Basheer Mohd. Abdul Rahiman, Kasargod (hereinafter referred to as the Applicant) against the Order-in-Appeal No. CC(A)Cus/D-I/Air/194/2018 dated 16.07.2018 passed by the Commissioner of Customs (Appeals), New Delhi. Commissioner (Appeals) has upheld the order of the Addl. Commissioner of Customs, IGI Airport, Terminal-3, New Delhi bearing no. 66/Adj./2016 dated 11.07.2016 wherein two Gold Bars, recovered during the personal search of the Applicant, collectively weighing 2000 grams and valued at Rs. 50,01,920/-, have been absolutely confiscated and free allowance has been denied to the Applicant. The adjudicating authority has also imposed a penalty of Rs.10,00,000/- under Section 112(a), 112(b) & 114AA of the Customs Act, 1962 on the Applicant, which has been maintained in appeal.

2. The brief facts of the case are that the Applicant arrived on 07.01.2015 at the IGI Airport, New Delhi from Dubai and was intercepted near the exit gate after he had crossed the Green Channel. Upon being enquired whether he was carrying any dutiable goods, he answered in negative. The Applicant had not declared anything in the column no. 9 (the value of goods imported) in his Customs Declaration Form and against column no. 10 (ii) and 10 (iii) {*any gold jewellery and gold bullion*} 'no' was mentioned i.e. he had not declared any value or description of the dutiable goods carried by him. During his personal search two unusually heavy packets wrapped with grey adhesive tape were recovered from left side pocket of his trouser worn by him. The packets were unwrapped and two yellow metal bars were recovered. The Applicant admitted that both the yellow metal bars were gold. On enquiry, he could not submit any documentary evidence in support of licit possession/import of the said gold. The value of the 24 karat gold bars, totally weighing 2000 grams, was appraised at Rs. 50,01,920/- by the Jewellery Appraiser at IGI airport and these were seized under Section 110 of the Customs Act. The Applicant, in his statement dated 07.01.2015, recorded under Section 108 of the Customs Act, 1962, admitted the recovery of the said gold items. He stated that he was working as a cook in Dubai on a monthly salary of 3000 Riyals. He further stated that one of his friend

Mr. Mohammed, a cloth merchant in Dubai had given him the said gold and offered him Rs.40,000/- for carrying it from Dubai to Delhi and delivering it outside the IGI Airport to a person who would have identified and contacted him of his own. He admitted his mistake of not declaring the gold at red channel for payment of customs duty even though he was aware that import of gold was liable to customs duty.

3. The revision application has been filed canvassing that the seized gold is not a prohibited item and hence may be released on payment of nominal redemption fine for home consumption and personal penalty may be set aside or token penalty be imposed. Gold article imported by the applicant is *bonafide* as the gold was brought by him was for his personal use and he is not a carrier. It is further contended that it is not a case of mis-declaration as the gold was brought for the purpose to look after his son's health.

4. Personal hearing was held on 25.08.2021, in virtual mode. Sh. D.S. Chadha, Advocate appeared for the Applicant. He requested for a short adjournment to ~~substantiate the COD application as well as to make a few more submissions on~~ merit. The matter was again taken up for hearing, in virtual mode, on 10.09.2021. Sh. D.S. Chadha, Advocate, filed submissions regarding COD, which were taken on record. On merits, he submitted that the gold belonged to the Applicant and the statement dated 07.01.2015 was extracted. Upon being asked, he fairly admitted that the statement was never retracted and the proof of licit purchase of gold by the Applicant is not on record. He stated that the gold was purchased from savings to look after his son's health who was suffering from cancer and has since expired. Hence, he pleaded for leniency. Shri Rajnish Kumar, Superintendent appeared for the Respondent and supported the orders of lower authorities. He highlighted that during the relevant period the Applicant was a frequent visitor (14 visits) for short durations (2-3 days) and used to land at Delhi and Mumbai whereas he belonged to Kerala.

5. The instant revision application has been filed with a delay of about 08 weeks. In view of the submissions made in this behalf, the delay is condoned.

6. The Government has carefully examined the matter on merits. It is observed that the impugned gold items were declared under Section 77 of Customs Act, 1962, to the customs authorities at the airport. Further, the Applicant 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. This statement, though claimed to have been extracted, was never retracted. No proof of licit purchase is also admittedly available.

7. 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 the burden of proving that the subject gold items were not smuggled, is on the Applicant from whom these were recovered. The manner of concealment and

non-declaration by the Applicant clearly evidences that he had attempted to smuggle the seized gold in a well thought out manner to avoid detection by the Customs authorities. No evidence of licit purchase and possession has also been placed on record. The Applicant has, thus, failed to discharge the burden placed on him, in terms of Section 123 *ibid*.

8.1 The Applicant has submitted that import of gold is not prohibited. The Government observes that the Hon'ble Supreme Court, in the case of Sheikh Mohd. Omer vs Collector of Customs, Calcutta & Others [1971 AIR 293], 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*". The Additional Commissioner, in paras 3.3, 3.4 and 3.5 of the Order-in-Original dated 11.07.2016, 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) 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*". In its judgment in the case of M/s Raj Grow Impex LLP & Others [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.*".

8.2 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----"

8.3 The original authority has correctly brought out that in this case the conditions subject to which gold could have been legally imported have not been fulfilled. Thus, following the law laid down as above, the contention that the subject goods are not '*prohibited goods*'; cannot be accepted.

9. The original authority has denied the release of impugned goods on redemption fine under Section 125 of Customs Act, 1962. The Government observes that 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 to grant redemption as the Applicant attempted to smuggle the goods by concealment, with intent to evade Customs Duty and in the background of the Government's policy objectives. 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 be based on relevant considerations*". 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'*". It is observed that the original authority has, in the instant case, after appropriate consideration, passed a reasoned order. Thus, the discretion exercised by the original authority, as upheld by the Commissioner (Appeals), does not merit any interference.

10. A case of leniency is pleaded, mainly, on the grounds that the Applicant is an illiterate person and that the gold was brought for the treatment of Applicant's cancer stricken son who subsequently expired. On the other hand, it has been brought on record that the Applicant was a frequent visitor for short durations,

during the relevant period, who used to land at places such as Delhi and Mumbai faraway from his native place Kasargod in Kerala, where his son was presumably ailing. Thus, the conduct of the Applicant does not support the case pleaded on his behalf. As such, the penalty imposed also does not merit any interference.

11. In view of the above, the impugned Order-in-Appeal is upheld and the revision application is rejected.



(Sandeep Prakash)

Additional Secretary to the Government of India

Sh. Basheer Mohammed Abdul Rahiman,
S/o Mohammed Abdul Rahiman,
R/o 23/256, Zuhra Manzil, Nechipadappu,
PO Thalangara, Kasaragod, Kerala – 671122.

Order No. _ 184_/21-Cus dated 14/09/2021

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. Sh. D.S. Chadha, Advocate, 92 GF Block V, Eros Garden, Faridabad – 121 009.
4. PA to AS(RA).
5. Guard File.
6. spare copy.

ATTESTED



(Lakshmi Raghavan)

Section Officer (Revision Application)

(लक्ष्मी राघवन)
(LAKSHMI RAGHAVAN)
अनुभाग अधिकारी / Section Officer
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भारत सरकार / Govt. of India
नई दिल्ली / New Delhi