

F. No. 380/42/B/2019-RA  
F.No. 373/156/B/2019-RA

**SPEED POST**



F.No. 380/42/B/2019-RA  
F.No. 373/156/B/2019-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. 29/3/23

Order No. 113-114/23-Cus dated 29.3.2023 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. 23/2019 dated 13.02.2019, passed by the Commissioner of Customs (Appeals), Bengaluru.
- Applicants : 1.The Commissioner of Customs, Mangaluru  
2. Sh. Deepak Inderlal Sidhwani, Ulhasnagar, Thane.
- Respondent : 1. Sh. Deepak Inderlal Sidhwani, Ulhasnagar, Thane.  
2. The Commissioner of Customs, Mangaluru.

\* \* \*

**ORDER**

A Revision Application No. 373/156/B/2019 dated 08.05.2019 has been filed by Shri Deepak Inderlal Sidhwani, Ulhasnagar, Thane, Maharashtra (hereinafter referred to as the Applicant), against the Order-in-Appeal No. 23/2019 dated 13.02.2019, passed by the Commissioner of Customs (Appeals), Bengaluru. The Commissioner of Customs, Mangaluru has also filed the RA No. 380/42/B/2019-RA dated 28.05.2019 against the said Order-in-Appeal. The Commissioner (Appeals) has, vide the impugned Order-in-Appeal, upheld the Order-in-Original No. 22/2018-ADC dated 28.05.2018, passed by the Additional Commissioner of Customs, Mangaluru, except to the extent of setting aside the penalty imposed on the Applicant herein under Section 114AA of the Customs Act, 1962.

2. Brief facts of the case are that the Applicant herein arrived at Mangaluru airport from Dubai, on 08.06.2017. He was intercepted by the Customs officers as he was exiting the Customs area. On verification, it was found that he had not mentioned anything regarding import of dutiable goods in the Customs Declaration Form. The search of his baggage resulted in nothing objectionable. However, on repeated enquiries and being passed through metal detector, the Applicant finally disclosed that he had secreted four irregular rectangular shaped gold bars in his rectum. These gold bars, when removed, were found to be of 24 carat gold, totally weighing 750 gms and valued at Rs. 22,20,000/-. The gold so recovered was seized under Section 110 of the Customs Act, 1962. In his statement dated 08.06.2017, recorded under Section 108 of the Act ibid, the Applicant, inter-alia, admitted his guilt and factum of concealment and that he was aware that it is a punishable offense to conceal gold. He further disclosed that he was carrying the gold on behalf of another person for a consideration of Rs. 30,000/- due to his pathetic financial condition. After completion of investigations, a show cause notice dated 14.11.2017 was issued, which was adjudicated by the original authority vide aforesaid Order-in-Original dated 28.05.2018. The original authority ordered absolute confiscation of the smuggled gold, valued at Rs. 22,20,000/-, under Section 111(d), 111(i), 111(l) & 111(m) of the Customs Act, 1962. Penalties of Rs. 6,66,000/- and Rs. 3,33,000/- were also imposed on the Applicant herein under Section 112 and Section 114AA, respectively, of the Act ibid. In the appeal filed by the Applicant herein, the Commissioner (Appeals) upheld the order of the original authority. However, he set aside the penalty imposed under Section 114AA ibid.

3.1 The Revision Application has been filed by the Applicant, mainly, on the grounds that the gold is not a prohibited good; that, therefore, in terms of Section 125 of the Customs Act, 1962, it was mandatory for the original authority to grant option to redeem the same on payment of redemption fine. It has also been pleaded that the allegation of concealment in rectum is totally false as it is neither supported by an x-ray report nor a doctor's examination report. Accordingly, it has been pleaded that the goods may be allowed to be redeemed on redemption fine and personal penalty.

3.2 The department has filed the RA, challenging the order of Commissioner (Appeals) to the extent of setting aside the penalty under Section 114AA, mainly, on the grounds that the Applicant herein had not made requisite declaration under Section 77 of the

Customs Act, 1962 and hence, penalty under Section 114AA is required to be imposed. A written reply dated 25.03.2023 has been filed on behalf of the Applicant.

4. Personal hearings in the matter were fixed on 14.03.2023, 21.03.2023 and 28.03.2023. Shri Vasudeva Naik, AC appeared for the department on 14.03.2023 and 21.03.2023. Adjournments were sought on behalf of the Applicants for hearings fixed on 14.03.2023 and 21.03.2023. Finally, vide letter dated 25.03.2023, the personal hearing has been waived.

5. The Government has carefully examined the matter. It is the contention of the Applicant that the allegation of concealment of gold in rectum is incorrect. On the other hand, it is observed that the entire proceedings were carried out in the presence of independent witnesses. It has also been recorded by the original authority that the Applicant was informed that he shall be produced before the Magistrate for examination of his body by X-ray. Further, it was also offered to him to remove the concealed gold under medical examination. However, both the offers were declined by the Applicant. These facts have not been contradicted by producing any admissible evidence. Therefore, the present contention of the Applicant appears to be nothing but an afterthought.

6.1 It is contended by the Applicant that gold is not a 'prohibited item'. The Government observes that import of gold and articles thereof in baggage is allowed subject to fulfillment of certain conditions. In the present case, it is not even contended that these conditions were fulfilled by the Applicant herein. It is settled by a catena of judgments of Hon'ble Supreme Court that goods, in respect of which conditions subject to which their import/export is allowed are not fulfilled, are to be treated as 'prohibited goods'. [Ref: Sheikh Mohd. Omer {1983 (13) ELT 1439 (SC), Om Prakash Bhatia {2003 (155) ELT 423 (SC)} & Raj Grow Impex LLP {2021 (377) ELT 145 (SC)}]. Further, the Hon'ble Madras High Court has, in the cases of Malabar Diamond Gallery P. Ltd. {2016 (341) ELT 465 (Mad.)} and P. Sinnasamy {2016 (344) ELT 1154 (Mad.)}, taken this view specifically in respect import of gold in baggage. Hence, there is no doubt that the goods seized in the present case are to be held to be 'prohibited goods'.

6.2 In view of the above, the contention of the Applicant that the offending goods are not 'prohibited goods', cannot be accepted.

7.1 The original authority has denied the release of seized 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. This position is confirmed 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 P. Sinnasamy (supra), the Hon'ble Madras High Court has 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 [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 the present case, the original authority has, for relevant and reasonable considerations, specifically recorded in para 31.10 to 31.12 of her Order, denied the request for redemption. Hence, the Commissioner (Appeals) has correctly refused to interfere in the matter.

8.1 As regards imposition of penalty under Section 114AA, the said Section reads as under:

*"Penalty for use of false and incorrect material. – If a person knowingly or intentionally makes, signs or uses, or causes to be made, signed or used, any declaration, statement or document which is false or incorrect in any material particular, in the traction of any business for purpose of this Act, shall be liable to a penalty not exceeding five times the value of goods."*

The Government observes that the fact of the Applicant making an incorrect declaration is well established. He also failed to declare the gold carried by him even when asked to do so orally. Since an incorrect declaration was made and which declaration was required to be made for transaction of business as per Section 77 *ibid*, on a plain reading, the imposition of penalty under Section 114AA is merited.

8.2 The Commissioner (Appeals) has relied upon an Order of revisionary authority at Mumbai wherein the authority referred to the objective of introduction of Section 114AA, as explained in the para 63 of the report of Parliament's Standing Committee on Finance (2005-06), to hold otherwise. It is trite that in construing a statutory provision, the first and foremost rule of interpretation is the literal rule of interpretation {M/s. Hiralal Ratanlal vs. STO, AIR 1973 SC 1034 & B. Premanand & Ors. vs. Mohan Koikal & Ors. (2011) 4SCC 266}. Where the words of a statute are absolutely clear and unambiguous, recourse cannot be had to other principles of interpretation {Swedish Match AB vs. SEBI AIR 2004 SC 4219}. In the present case, the words of Section 114AA are absolutely clear and unambiguous. Hence, it has to be held that the Commissioner (Appeals) erred by relying upon an Order, which departed from the literal rule of interpretation, in the teeth of law settled by the Apex Court.

8.3 Further, Section 112 and Section 114 AA are two independent provisions and they refer to different violations. Therefore, when in a case both provisions are violated, penalty under both the Sections can be imposed. There is no provision in the Customs Act which ousts the imposition of penalty under Section 114 AA if penalty under Section 112 has been imposed. The Hon'ble Delhi High Court has, in the case of *Commissioner of Customs & Central Excise, Delhi-IV vs. Achiever International* {2012 (286) ELT 180 (Del.)}, held on the same lines.

8.4 In view of the above, the decision of the Commissioner (Appeals) setting aside the penalty under Section 114AA cannot be sustained.

9. The case laws relied upon by the Applicant in support of his various contentions are not applicable in the facts of this case and in view of the dictum of the Hon'ble Supreme Court and Hon'ble High Courts as above.

10. The quantum of penalty imposed, both under Section 112 and 114AA, by the original authority appears just and fair in the facts and circumstances of the case.

11. In view of the above, RA No. 373/156/B/2019 is rejected and RA No. 380/42/B/2019 is allowed. Consequently, the penalty imposed on the Applicant by the original authority, under Section 114AA is restored.



(Sandeep Prakash)

Additional Secretary to the Government of India

1. The Commissioner of Customs,  
Mangaluru, New Custom House,  
Panambur-575010.

2. Shri Deepak Inderlal Sidhwani,  
S/o Shri Inderlal Varanmal Sidhwani,  
BK No. 732, Room No. 13,  
Punjabi Colony, Ulhasnagar,  
Thane, Maharashtra – 421 003.

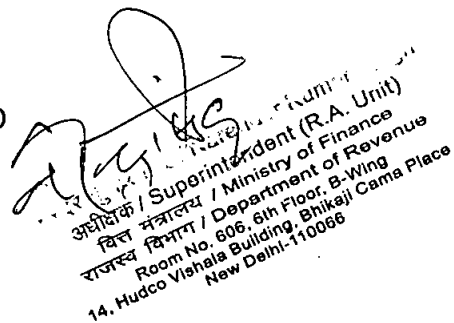
Order No. 113-114/23-Cus dated 29.03.2023

Copy to:

1. The Commissioner of Customs (Appeals), 4<sup>th</sup> Floor, BMTC Building, Above BMTC Bus Stand, Old Airport Road, Domlur, Bengaluru – 560 071.
2. M/s Advani Sachwani & Heera Advocates, Nulwala Building, 41, Mint Road, Opp. GPO Fort, Mumbai – 400 001.
3. PPS to AS(RA).
4. Guard File.
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6. Notice Board.

ATTESTED

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अधीक्षक / Superintendent (R.A. Unit)  
वित्त मंत्रालय / Ministry of Finance  
राजस्व विभाग / Department of Revenue  
Room No. 606, 6th Floor, B-Wing  
14, Hudco Vishala Building, Bhikaji Cama Place  
New Delhi-110066