

**SPEED POST**



F. No. 373/349/B/SZ/2021-RA  
F. No. 380/62/B/SZ/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. 115-116/23-Cus dated 29.03.2023 of the Government of India passed by Shri Sandeep Prakash, Additional Secretary to the Government of India, under section 129DD of the Custom Act, 1962.

Subject : Revision Applications, filed under Section 129 DD of the Customs Act, 1962, against the Orders-in-Appeal Nos. 63-64/2019 dated 24.04.2019, passed by the Commissioner of Customs (Appeals), Bengaluru.

Applicant : 1. Sh. Nizar Moulvi Abdul Khader, Kasargod.  
2. The Commissioner of Customs, Mangaluru.

Respondent : 1. The Commissioner of Customs, Mengaluru.  
2. Sh. Nizar Moulvi Abdul Khader, Kasargod.

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**ORDER**

Revision Application No. 373/349/B/SZ/2021-RA dated 27.12.2021 has been filed by Sh. Nizar Moulvi Abdul Khader, Kasargod (hereinafter referred to as the Applicant), against the Order-in-Appeal Nos. 63-64/2019 dated 24.04.2019, passed by the Commissioner of Customs (Appeals), Bengaluru. The Commissioner (Appeals) has, vide impugned Order-in-Appeal, upheld the Order-in-Original 36/2018-ADC dated 30.11.2018, passed by the Additional Commissioner of Customs, Mangaluru, except to the extent of setting aside the penalty imposed under Section 114AA of the Customs Act, 1962. The Commissioner of Customs, Mangaluru (hereinafter referred to as the Department) has challenged the setting aside of the penalty under Section 114AA by the Commissioner (Appeals), vide RA No. 380/62/B/SZ/2019-RA dated 09.08.2019.

2. Briefly stated, the Applicant herein arrived at Mangaluru airport from Dubai, on 27.11.2017, and was intercepted by the customs officers while he attempted to pass through the green channel. It was found that he had not declared possession of any dutiable goods in the Customs Declaration Form provided at the counter. Upon oral enquiry also he stated that he was not in possession of any contraband. However, upon personal search of the Applicant, he was found to be wearing foot belts, on each of his feet, which were covered by socks and shoes. Inside the foot belts, he had secreted two small plastics packets which were found to conceal one piece each of tola bars of gold. The gold recovered from him was found to be of 999.0 purity weighing 466.400 gms and valued at Rs. 14,08,528/-. In his statement dated 27.11.2017, recorded under Section 108 of the Customs Act, 1962, the Applicant accepted his guilt and factum of concealment. He also admitted that he was aware that it was a punishable offence under the customs law to smuggle the gold. A show cause notice dated 04.05.2018 was issued to the Applicant, which was adjudicated by the original authority, vide the aforesaid Order-in-Original dated 30.11.2018. The original authority ordered for absolute confiscation of offending gold under Section 111 (d), (i), (l) & (m) of the Customs Act, 1962. Penalties of Rs. 3,00,000/- and Rs. 1,50,000/- were also imposed on the Applicant under Section 112 and Section 114AA, respectively, of the Act *ibid*. The appeal filed by the Applicant herein has been rejected by the Commissioner (Appeals), except to the extent of setting aside the penalty imposed under Section 114AA. Department's appeal for enhancing the penalty imposed by the original authority under Section 114AA was also rejected.

3.1 The revision application dated 27.12.2021 has been filed by the Applicant, mainly, on the grounds that the gold is not 'prohibited goods'; that as per Section 125 of the Customs Act, 1962 allowing redemption of goods which are not 'prohibited' is mandatory; and that, therefore, the original authority should have offered the option to redeem the gold; Accordingly, it has been submitted that gold may be allowed to be redeemed on

payment of nominal redemption fine and penalty imposed under Section 112 may be dropped.

3.2 The department has filed the RA dated 09.08.2019 for restoration of penalty imposed under Section 114AA. It is the contention of the department that the Applicant herein made a false declaration under Section 77 of the Customs Act, 1962 and, therefore, penalty under Section 114AA was rightly imposed by the original authority.

3.3 Personal hearings in the matter were fixed on 14.03.2023, 21.03.2023 and 28.03.2023. Sh. Vasudev Naik, AC attended the hearings, in virtual mode, for the department on 14.03.2023 and 21.03.2023. No one appeared for the Applicant on any of the dates fixed for hearing nor any request for adjournment has been received. Since sufficient opportunities have been granted, the matter is taken up for disposal based on records.

4. The RA No. 373/349/B/2021 has been filed, on 27.12.2021, against the Order-in-Appeal dated 24.04.2019. It is contended that the delay has been caused as the Applicant initially approached CESTAT in the matter. However, the appeal has been rejected as non-maintainable by the CESTAT, vide Final Order No. 20811/2021 dated 28.10.2021. Delay caused due to pursuing remedy in the wrong forum is condoned.

5.1 On merits, the Government observes that import of gold and articles thereof in baggage is allowed subject to fulfillment of certain conditions. In the present case, as brought out in paras 29.1 to 29.3 of the Order-in-Original dated 30.11.2018, these conditions were not 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'.

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

6. 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."* In the present case, the original authority has for relevant and reasonable considerations, as specifically brought out in paras 29.6, 29.8 & 29.9 of his Order, denied redemption. Hence, the Commissioner (Appeals) has correctly refused to interfere with the order of absolute confiscation.

7.1 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. 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.

7.2 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.

7.3 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. As such, an Order of Commissioner (Appeals) setting aside the penalty under Section 114AA cannot be sustained.

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

9. In the facts and circumstances of the case, the penalty imposed by the original authority, under Sections 112 & 114AA, is just and fair.

10. In view of the above, RA No. 373/349/B/2021 is rejected and RA No. 380/62/SZ/B/2019-RA is allowed. Consequently, the penalty imposed by the original authority on the Applicant herein, under Section 114AA *ibid*, is restored.



(Sandeep Prakash)

Additional Secretary to the Government of India

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

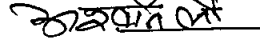
2. Sh. Nizar Moulvi Abdul Khader,  
S/o Sh. Abdul Khader Moulvi, House No.  
1/433, Kunikunnu, Thekkil Ferry,  
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Order No. 115-116/23-Cus dated 29.03.2023

Copy to:

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2. Sh. Sameer Kashimji, Advocate, 22, Sweet Home Apartments, Britto Lane, Falnir, Mangaluru-575001.
3. PPS to AS (RA).
4. Guard file.
5. Spare Copy.
6. Notice Board.

ATTESTED



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