

SPEED POST



F. No. 373/52/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...16/01/23

Order No. 13/23-Cus dated 16-01-2023 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. 965/2017 dated 21.11.2017 passed by the Commissioner of Customs (Appeals), Bengaluru.

Applicant : Sh. Mohammed Kunhi Kalanad Ahmed, Kasargod

Respondent : The Commissioner of Customs, Mangaluru

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ORDER

A Revision Application, bearing No. 373/52/B/2018-RA dated 19.02.2018, has been filed by Sh. Mohammed Kunhi Kalanad Ahmed, Kasargod (hereinafter referred to as the Applicant), against the Order-in-Appeal No. 965/2017 dated 21.11.2017, passed by the Commissioner of Customs (Appeals), Bengaluru. The Commissioner (Appeals) has upheld the order of the Assistant Commissioner of Customs, Mangaluru International Airport, Mangaluru, bearing No. 41/2017 (AP) dated 28.04.2017, vide which 03 thin narrow gold strips of 24 carat purity, weighing 116.640 gms, valued at Rs. 3,00,348/- and 01 gold coin of 22 carat purity, weighing 8.000 gms, valued at Rs. 18,800/-, brought by the Applicant, had been absolutely confiscated under Sections 111(d), 111(i), 111(l) and 111(m) of the Customs Act, 1962. Besides, penalties of Rs. 28,000/- & Rs. 20,000/- were also imposed on the Applicant, under Sections 112(a) and 114AA, respectively, of the Act, *ibid*.

2. Brief facts of the case are that the Applicant arrived from Dubai at Mangaluru International Airport, Mangaluru, on 21.11.2015, and was intercepted by the Customs officers while he attempted to exit through the Customs Green Channel along with his baggage after handing over his Customs Declaration Form. He had not declared about possession of any dutiable goods in his accompanied baggage. Upon questioning, the Applicant stated that he was not in possession of any dutiable/contraband goods, either in his accompanied baggage or about his person. However, upon examination of his brown coloured carton box 03 thin narrow gold strips, were found concealed inside along the waist portion of two denim trousers and 01 denim shorts and 01 gold coin was found concealed in the pocket of denim trousers. The Applicant was not in possession of any documents evidencing the purchase of the aforesaid gold items. The Jewellery Valuer examined the said 03 thin narrow gold strips and 01 gold coin and certified them as mentioned above. The Applicant, in his statement dated 21.11.2015, recorded under Section 108 of the Customs Act, 1962, *inter-alia*, stated that he was working as a salesman in Al Asmad Trading Est in Deira, Dubai and his cousin brother Mohammed Kunhi Abdulla was a partner of this shop; that as he had to attend a marriage ceremony of his cousin's daughter in Kasargod on 22.11.2015, he had planned to visit India and he had informed the same to his cousin brother Mohammed Kunhi Abdulla; that his cousin brother

decided to use this opportunity to carry some gold so that they can earn some money by selling the same; that accordingly his cousin brother had made all arrangements, i.e., some articles concealed with gold for carrying the gold to India and also arranged the air tickets for his travel to India; that on 20.11.2015 afternoon his cousin brother Mohammed Kunhi Abdulla handed over to him two used denim trousers and one used denim shorts, i.e., half pant and informed that about 116 gms of gold equal to the weight of one number ten tola gold bar had been concealed in the form of thin narrow gold strips along the waist portion inside each of these three dress items and told him to carry the same to his native and sell it to some jewellers, who offer the best price and informed him that whatever profit is earned, the same would be shared equally between them.

3. The revision application has been filed, mainly, on the grounds that the impugned order is opposed to law, facts and circumstances of the case; that gold is not prohibited item; that the case is made out on assumptions and presumptions; and that the redemption should have been allowed.

4. Personal hearing was held on 13.01.2023, in virtual mode. Sh. KPA Shukoor, Advocate appeared for the Applicant and reiterated the contents of the RA. He submitted that the quantity involved is small and the Applicant is not a repeat offender. Hence the goods may be allowed to be redeemed either for home consumption or for re-export. Sh. Vasudeva Naik, AC highlighted that this is a case of ingenious concealment and supported the order of lower authorities.

5. The Government has carefully examined the matter. It is observed that the Applicant 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, the Applicant admitted the recovery of gold from him and that he committed the offence for monetary benefit in his statement tendered under Section 108 of Customs Act, 1962. Therefore, it is incorrect of the Applicant to contend that the case is made out on assumptions and presumptions. Further, the entire proceedings were covered under the Mahazar dated 21.11.2015, drawn in the presence of independent witnesses.

6. As per Section 123 of Customs Act 1962, 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. The Applicant did not declare the gold items as stipulated under Section 77 of the Act, *ibid*. No documents evidencing ownership and licit purchase were produced at the time of interception. The gold items were concealed ingeniously. Hence, the intention to smuggle is manifest. The Applicant has, thus, failed to discharge the burden placed on him, in terms of Section 123, *ibid*. Keeping in view the facts of the case and as the Applicant has failed to discharge the onus placed on him in terms of Section 123, the Government agrees with the lower authorities that the seized goods were liable to confiscation under Section 111 *ibid* and the penalty was imposable on the Applicant.

7.1 It is contended on behalf of the Applicant that the import of gold is not 'prohibited'. This contention of the Applicant has not been accepted by the Commissioner (Appeals) relying upon the judgments of Hon'ble Supreme Court in the case of Sheikh Mohd. Omer vs Collector of Customs, Calcutta & Ors {1971 AIR 293}, and Om Prakash Bhatia Vs. Commissioner of Customs, Delhi {2003(155) ELT423(SC)}. The Government observes that in a recent judgment, 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.)], a Division Bench of 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----."

The judgment in Malabar Diamond Gallery (supra) has been followed by another Division Bench of the Hon'ble Madras High Court in the case of P. Sinnasamy {2016 (344) ELT 1154 (Mad.)}.

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

8. 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, 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 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."* Such a case is not made out. Hence, the Commissioner (Appeals) has correctly refused to interfere with the order of absolute confiscation.

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

10. In the facts and circumstances of the case, the quantum of penalties imposed is just and fair.

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



(Sandeep Prakash)

Additional Secretary to the Government of India


Sh. Mohammed Kunhi Kalanad Ahmed
S/o Sh. Kalanad Ahmed Ummer
Munnu Mahal, Kompanpara, Kalanad,
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Order No. 13/23-Cus dated 16-01-2023

Copy to:

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3. Sh. KPA Shukoor, Advocate, United Law Chambers, 2nd Floor, Krishnaprasad Building, K.S Rao Road, Mangaluru-575001.
4. PS to AS(RA)
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ATTESTED


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