

SPEED POST



F. No. 373/39A/B/2016-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...07/10/22

Order No. 311/22-Cus dated 07-10-2022 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. 306/2016 dated 31.03.2016, passed by the Commissioner of Customs (Appeals), Bengaluru.

Applicant : Sh. Mohamed Sherif Eachilingal Kunnil, Kasargod.

Respondent : The Commissioner of Customs, Mangaluru.

ORDER

A Revision Application No. 373/39A/B/2016-RA dated 07.06.2016 has been filed by Sh. Mohamed Sherif Eachilingal Kunnil, Kasargod (hereinafter referred to as the Applicant) against the Order-in-Appeal No. 306/2016 dated 31.03.2016, 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. 07/2015(AP) dated 24.04.2015, whereby 06 pieces of gold bar of 24 carat purity, totally weighing 116.650 gms and 01 gold coin of 22 carat purity, weighing 8.00 gms, all totally weighing 124.650 gms and collectively valued at Rs. 3,26,310/-, were absolutely confiscated under Sections 111(d), 111(i), 111(l) & 111(m) of the Customs Act, 1962. Besides, penalty of Rs. 35,000/- and Rs. 10,000/- was also imposed by the original authority on the Applicant herein, under Sections 112(a) and 114AA, respectively, of the Act, *ibid*.

2. Brief facts of the case are that the Applicant arrived, on 03.11.2014, at the Mangaluru International Airport from Dubai. The Applicant was intercepted while he was attempting to pass through the Green Channel along with his baggage after handing over his Customs Declaration Form. In his Customs Declaration Form, the Applicant had not declared the possession of any dutiable goods and when asked about the same the Applicant stated that he was not in possession of any dutiable/contraband goods either in his accompanied baggage or about his person. However, after the examination of his baggage, 06 pieces of gold bar and 01 gold coin were found, as mentioned above. The total value of the recovered gold items was appraised at Rs. 3,26,310/- by the Jewellery Valuer. The Applicant in his statement dated 03.11.2014, recorded under Section 108 of the Customs Act, 1962, *inter alia*, stated that he came to know through some of his friends that carrying gold to India without payment of Customs duty using some hiding techniques and selling the same in domestic market would fetch good profit; that he arranged some money and visited Dubai from Sharjah and purchased one ten tola bar and one gold coin weighing 8 grams from a known shop in Gold Souq Naif, Deira, Dubai; that after buying the ten tola bar, he asked them to cut the same into small pieces so that he could easily

conceal the same in some articles; that the vendor cut the said ten tola bar into six small pieces and gave the same to him, along with gold coin weighing 8 grams; and that he knowingly carried the subject gold and that he had indulged in the smuggling of gold for the lure of money even though he was aware that it is an offence.

3. The revision application has been filed canvassing that though Applicant admitted ownership and that concealment was done to evade duty, absolute confiscation may be set aside; that the penalty imposed under Section 112 of the Customs Act, 1962 may be reduced; and that personal penalty under Section 114AA be set aside.

4. Personal hearing was fixed on 14.09.2021, 21.09.2021, 05.10.2021, 12.10.2021 and 06.10.2022. No one appeared for the Applicant. Personal hearing has been waived by Sh. Prakash K. Shingrani, Advocate of the Applicant, vide letter dated 14.10.2021. Sh. D. Vasudeva Naik, Assistant Commissioner appeared for the department and supported the orders of the lower authorities.

5.1 The Government has examined the matter. It is observed that the instant revision application is not accompanied by the revision application fee of Rs. 1000/-, as required under Section 129DD (3) of the Customs Act, 1962. The Court fee stamps of Rs. 5/- each are also not affixed.

5.2 In terms of Sub-section (3) of the Section 129 DD payment of fee is mandatory. Thus, the instant revision application, which is not accompanied by fee, is liable to be dismissed on this ground alone.

6.1 On merits, absolute confiscation of the gold items has been challenged. The Commissioner (Appeals) has repelled this contention in view of the judgments of Hon'ble Supreme Court, in the case of Sheikh Mohd. Omer vs. Collector of Customs, Calcutta & Ors {1983(23)ELT1439(SC)} and in the case of Om Prakash Bhatia vs. Commissioner of Customs, Delhi {2003(155) ELT423(SC)}. The Government finds that, even subsequently, 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) 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----."

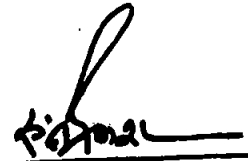
6.3 Gold is not allowed to be imported freely in baggage and it is permitted to be imported by a passenger subject to fulfillment of certain conditions. In this case, since the conditions, subject to which gold could have been legally imported, have not been fulfilled, there is no doubt that the subject goods are 'prohibited goods'.

7. The original authority has denied the release of subject 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 "relevānce 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 Order of the original authority does not suffer from any of these vices. Thus, the Commissioner (Appeals) has correctly refused to interfere in the matter.

8. The Applicant failed to make a true declaration under Section 77 of the Act. Hence, the penalty under Section 114AA is merited. In the facts and circumstances of the case, the quantum of penalty imposed is also just and fair.

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



(Sandeep Prakash)

Additional Secretary to the Government of India


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Order No. 3 // 122-Cus dated 07-10-2022

Copy to:-

1. The Commissioner of Customs, New Customs House, Panambur, Mangaluru-575010.
2. The Commissioner of Customs (Appeals), C.R Building, P.B No. 5400, Queen's Road, Bengaluru-560001
3. Sh. Prakash K. Shingrani, Advocate, 12/334 Vivek, New Mig Colony, Bandra€ Mumbai-400051
4. PA to AS(RA).
5. Guard File.
6. Spare Copy.

ATTESTED



(Poonam Guggel)

Subd. (RA-)