

SPEED POST



F. No. 373/13/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...7/11/22

Order No. 338/22-Cus dated 7-11-2022 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. 935/2017 dated 30.10.2017 passed by the Commissioner of Customs (Appeals), Bengaluru.

Applicant : Sh. Mahathab Thayapeedikayil Thaya Kuniyil, Kannur

Respondent : The Commissioner of Customs (Airport & ACC), Bengaluru

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ORDER

A Revision Application, bearing No. 373/13/B/SZ/2018-RA dated 29.01.2018, has been filed by Sh. Mahathab Thayapeedikayil Thaya Kuniyil, Kannur (hereinafter referred to as the Applicant), against the Order-in-Appeal No. 935/2017 dated 30.10.2017, passed by the Commissioner of Customs (Appeals), Bengaluru. The Commissioner (Appeals) has upheld the order of the Additional Commissioner of Customs, Kempegowda International Airport, Bengaluru, bearing No. 586/2015-16 dated 30.01.2016, vide which 04 gold bars brought by the Applicant, totally weighing 4000.150 grams of 995.0 purity and totally valued at Rs. 1,06,24,398/-, had been absolutely confiscated under Sections 111(d), 111(i), 111(l) and 111(m) of the Customs Act, 1962. Besides, penalties of Rs. 31,00,000/- & Rs. 21,00,000/- were also imposed on the Applicant, under Sections 112 and 114AA of the Act, *ibid*.

2. Brief facts of the case are that the Applicant arrived from Dubai at Kempegowda International Airport, Bengaluru, on 17.11.2014, and was intercepted by the DRI officers when he was about to cross the exit of customs arrival area. Upon questioning about the contents of his baggage, the Applicant replied that those were clothing and his personal effects and was within the free allowance provided. He had filled up the value of dutiable goods brought by him as 'NIL' in his Customs Declaration Card. However, upon examination of his black coloured hand bag, 04 gold bars, wrapped with tissue papers were recovered from one plastic carry bag. The approved registered valuer examined the said gold bars and certified as weighing 4000.150 gms, having 995.0 purity and valued at Rs. 1,06,24,398/- under Test Mahazar dated 26.11.2014. The Applicant, in his statement dated 17.11.2014, recorded under Section 108 of the Customs Act, 1962, *inter-alia*, stated that he agreed to carry the said 04 gold bars to India for one person Sh. Mujeeb and in lieu he was to receive to and fro flight tickets and Rs. 50,000/-; that it was the first time when he tried to smuggle the gold bars into India; that he admitted and agreed that he brought 04 gold bars which was out of permissible limit as per Baggage Rules and he would not be allowed to clear the said gold bars as his baggage as he was out of India only for short period and hence he did not declare the same either in Customs Declaration Slip or to Customs on his arrival at Kempegowda International Airport, Bengaluru and he

wanted to escape the payment of Customs duty on the said gold bars so he brought the same by way of concealment; and that he was aware that bringing gold by way of concealment and nondeclaration is not permitted and he was also aware that bringing gold as personal baggage is permitted only to eligible passengers and he was not eligible to bring gold.

3. The revision application has been filed, mainly, on the grounds that gold is not prohibited item; that the Applicant wanted to declare the gold, however, he was detained by DRI prior to reaching the red channel and DRI did not allow to fill the Declaration Form as per the will of the Applicant; that he did not cross Green Channel; that he gave the purchase bills to the officers of Customs at the time seizure was effected but they refused to accept the same; that adjudication order was passed in violation of principles of natural justice; that his statements were not voluntary statements and had been taken under threat, duress and coercion; and that he knows only Malayalam language and, as such, question of giving voluntary statement does not arise.

4. Personal hearing was fixed on 04.11.2022. Sh. Ashok Singh, Advocate appeared for the Applicant and requested that the compilation emailed on 01.11.2022 and 04.11.2022 may be taken on record. He reiterated the contents of the RA with the assistance of case laws cited. Sh. Singh highlighted that the Applicant is the owner of the goods, it is not a case of concealment and he is a first-time offender. Sh. Neeraj Kumar Verma, Superintendent supported the orders of the lower authorities. Subsequent to personal hearing another compilation has been emailed, on 04.11.2022 itself, on behalf of the Applicant.

5. The Government has carefully examined the matter. It is observed that the Applicant was intercepted at the exit of customs arrival hall. The Applicant had declared the value of dutiable goods as 'NIL' in his Customs Declaration Card. Orally also, a 'NIL' declaration was made. He himself had admitted to the recovery of gold bars from him and that he intended to clear the gold by way of concealment for monetary benefit of Rs. 50,000/-. Therefore, it is incorrect of the Applicant to contend that he wanted to declare the gold; or that he had opted for Red Channel; or that he did not cross Green Channel. Further, the

entire proceedings were covered under the Mahazar dated 17.11.2014, drawn in the presence of independent witnesses. Therefore, it cannot be accepted that DRI did not allow the Applicant herein to fill the Declaration Form as per his will, or that he gave the purchase bills to the officers of Customs at the time of seizure but they did not accept the same. These contentions are, obviously, nothing but an afterthought.

6. It is contended by the Applicant that the adjudication order was passed by the original authority in violation of principles of natural justice. However, it is observed that the original authority has passed the order after affording sufficient opportunities for personal hearing to the Applicant herein, which were not availed. The original authority has also duly examined the Written Reply filed by the Applicant. Hence, this contention is not tenable.

7. The other contention of the Applicant is that his statements were not voluntary statements and had been taken under threat, duress and coercion and the question of giving voluntary statement does not arise as he knows only Malayalam. At the outset, it is observed that no retraction has been placed on record. Further, the Mahazar proceedings corroborate the admissions made in the statements made by the Applicant herein. Therefore, the Government finds that the statements made were voluntary. In the case of K.I. Pavunny {1997 (90) ELT 241 (SC)}, the Hon'ble Supreme Court has held that the confessional statement of an accused if found voluntary, can form the sole basis for conviction. Further, the Hon'ble Supreme Court has, in the case of Surjeet Singh Chhabra vs. U.O.I {1997 (89) ELT 646 (SC)}, held that a confession statement made before the Customs Officer, though retracted within six days, is an admission and binding since Customs Officers are not Police Officers. Hence, the subject contention of the Applicant can also not be accepted.

8. 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*. Further, the Applicant was intercepted after passing through the Green Channel. No documents evidencing ownership and licit purchase were produced at the time of interception. The gold items were camouflaged in order to conceal

their true nature. 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.

9.1 It is contended on behalf of the Applicant that the import of gold is not 'prohibited'. However, the Government observes that this contention of the Applicant is in the teeth of law settled by a catena of judgments of Hon'ble Supreme Court. In the case of Sheikh Mohd. Omer vs Collector of Customs, Calcutta & Ors {1971 AIR 293}, the Apex Court 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*". 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 the present case, it is not even contended that these conditions were fulfilled by the Applicant herein. In the case of M/s Om Prakash Bhatia Vs. Commissioner of Customs, Delhi {2003(155) ELT423(SC)}, the Hon'ble Supreme 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*". Further, 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.*"

9.2 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.)}. The Applicant has cited a judgment dated 19.07.2022, of the Madurai Bench of the Hon'ble Madras High Court, in the case of R. Kannathasam {WP(MD) No. 13651 of 2022 and WMP(MD) Nos. 9705, 9706 and 708 of 2022} to contend otherwise. However, the Government observes that the decision in R. Kannathasam (supra) has been rendered by a Hon'ble Single Bench whereas Madras Diamond Gallery (supra) and Sinnasamy (supra) are the Orders of Hon'ble Division Bench. Further, in the case of R. Kannathasam, the Hon'ble Court has relied upon the judgment in the case of Atul Automations Pvt. Ltd. {2019 (365) ELT 465(SC)} wherein the Hon'ble Supreme Court has made a distinction between 'prohibited' and 'restricted' goods. However, as already brought hereinabove, a coordinate Bench of the Hon'ble Supreme Court has in the case of Raj Grow Impex (supra) specifically held that any restriction on import is also a prohibition for the purpose of Section 111(d). Further, the judgment in Raj Grow Impex is a later judgment.

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

10. 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 order of absolute confiscation could not have been interfered with.

11.1 At the time of hearing, a contention has been raised that penalty could not have been imposed under Section 114AA. A decision of CESTAT, in the case of Sri Krishna Sounds and Lightings {2019 (370) ELT 594 (Tri-Chennai)}, has been cited in this regard.

11.2 Section 114 AA 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 transaction of any business for the purposes of this Act, shall be liable to a penalty not exceeding five times the value of goods.'

The Government observes that the Applicant made a false declaration of the contents of baggage when asked to do so orally. He also filed a 'NIL' declaration on the Customs Declaration Slip. This declaration was required to be made or signed, as the case may be, under Section 77 *ibid*. Since a false and 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 114 AA is merited.

11.3 The CESTAT has, in the case of Sri Krishna Sounds (*supra*), not interfered with the findings of the Commissioner (Appeals), in that case, to the effect that the penalty under Section 114AA was not imposable, keeping in view the report of the Parliamentary Standing Committee in respect of the Taxation Laws (Amendment) Bill, 2005, *vide* which Section 114AA was introduced in the Customs Act. On the other hand, the Commissioner (Appeals) has, in the instant case, referred to the judgment of Hon'ble High Court of Delhi in the case of *Commissioner of Customs and Central Excise, Delhi-IV vs. Achiever*

International [2012 (2086) ELT 180 (Del)] to hold that penalty under Section 112 and 114AA are imposable when both the provisions are violated, even if the violation has taken place in course of the same transaction.

11.4 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, there is no reason to depart from the literal rule and take recourse to other principles of interpretation, such as referring to the deliberations of a Parliamentary Committee, before passage and enactment of a legislation. As such, the Government holds that the penalty has been correctly imposed under Section 114AA.

12. Other 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.

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

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


(Sandeep Prakash)

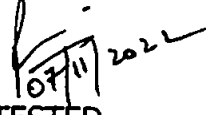
Additional Secretary to the Government of India

Sh. Mahathab Thayapeedikayil Thaya Kuniyil
TTK House, Mahe Chokli, PO Chokli
Thalassery, Kannur, Kerala-670672

Order No. 338/22-Cus dated 7-11-2022

Copy to:

1. The Commissioner of Customs (Appeals), BMTC Building, Above BMTC Bus Stand, Old Airport Road, Domlur, Bengaluru-560071
2. The Commissioner of Customs, 3rd Floor, AI SATS Cargo Terminal, Air Cargo Complex, Devanahalli, Bengaluru-560300
3. Sh. Ashok Singh, Advocate, 302, Gundecha Chambers, Nagindas Master Road, Fort, Mumbai-400023
4. PA to AS(RA)
5. Guard File
6. Spare Copy
7. Notice Board



ATTESTED

प्रवीण नेगी / Praveen Negi
अधीक्षक / Superintendent (R.A. Unit)
वित्त मंत्रालय / Ministry of Finance
राजस्व विभाग / Department of Revenue
Room No. 605, 6th Floor, B-Wing
4, Hudco Vishala Building, Bhikaji Cama Place
New Delhi-110068

राजिण नंभी / Praveen Negi
अधीनक / Superintendent (R. A. Unit)
रिज नंभर / Ministry of Finance
रजल डिपार्ल / Department of Revenue
रूम नं. 602, 6th Floor, B-Wing
J. Huceo Vistara Building, Bhikaji Cama Place
New Delhi-110068