

SPEED POST



F.No. 373/149/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. 28/11/22

Order No. 365/22-Cus dated 28-11-2022 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 129DD of the Customs Act, 1962 against the Order-in-Appeal 282/2016 dated 31.03.2016, passed by the Commissioner of Customs (Appeals), Bengaluru.
- Applicant : Sh. Muhamamed Kuni Cheeri Kundu, Kasargod, Kerala.
- Respondent : The Commissioner of Customs, Managluru
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ORDER

A Revision Application No. 373/149/B/2016-RA dated 21.07.2016 has been filed by Sh. Muhamamed Kuni Cheeri Kundu, Kasargod (hereinafter referred to as the Applicant) against the Order-in-Appeal No. 282/2016 dated 31.03.2016, passed by the Commissioner of Customs (Appeals), Bengaluru. The Commissioner (Appeals) has, vide the impugned Order-in-Appeal, upheld the Order-in-Original No. 42/2014-JC dated 08.09.2014, passed by the Joint Commissioner of Customs, Mangaluru.

2. Briefly stated, the Applicant herein arrived at the Mangaluru International Airport, on 10.03.2014, from Dubai. He was intercepted while passing through the green channel after he had handed over the Custom Declaration Form indicating that he did not carry any dutiable goods. On search of his checked-in baggage, one unbranded 'air compressor for filling air in automobile tyres' was detected, which upon further search was found to conceal 04 yellow colour metallic pieces covered with black colour adhesive tape and kept inside 04 separate packages. The approved valuer certified that the 04 yellow colour metallic pieces were made of 24 carat gold of 99.5% purity with a total weight of 1000.130 gms and valued at Rs. 30,60,398/-. A statement of the Applicant herein was recorded, under Section 108 of the Customs Act, 1962, on 10.03.2014, wherein he, inter-alia, stated that his brother-in-law, Sh. Rafeeq offered him Rs. 25,000/- and an air ticket to India for transportation of gold in concealed manner from Dubai to Mangaluru; that he agreed as he was in need of money; that he did not declare the goods carried by him in his Customs Declaration Form with an intention to evade payment of duty ; that after interception by the Customs Officers he informed them that baggage contains only personal effects etc. and did not have any valuable goods; that he confirms that gold weighing 1000.130 gms of 99.5% purity was concealed in the unbranded compressor brought by him; and that he admitted that he had committed offence and requested for a lenient view. The original authority, vide the aforesaid Order-in-Original dated 08.09.2014, ordered for absolute confiscation of the subject gold, under Sections 111(d), (i), (l) & (m) of the Customs Act, 1962. Penalties of Rs. 3,10,000/- and Rs. 1,75,000/- were also imposed on the Applicant herein under Section 112

(a) and Section 114 AA, respectively. The appeal filed by the Applicant herein has been rejected by the Commissioner (Appeals).

3. The revision application has been filed, mainly, on the grounds that the original authority had decided the case on the basis of waiver of show cause notice and personal hearing purportedly given by the Applicant vide letter dated 11.03.2014; that assuming but not admitting that any waiver had been submitted, there is no provision in Section 124 of the Customs Act, 1962 for an absolute waiver of show cause notice; that there is no provision in the Customs Act for waiver of personal hearing; that there is no finding in the Order-in-Original to justify the imposition of penalty under Section 114 AA; that the penalty imposed under Section 112 (a) should have been reduced; that the gold is not a prohibited item and, therefore, redemption thereof should have been allowed; and that, either the matter be remitted for de-novo adjudication to the original authority or, in the alternate, the penalty imposed under Section 114 AA should be set aside, that imposed under Section 112 (a) should be reduced, and the gold should be allowed to be redeemed on payment of fine.

4. Personal hearing, in virtual mode, was held on 25.11.2022. Sh. Mohammed Zahid, Advocate appeared for the Applicant and submitted that the original authority had adjudicated the case without issuing a show cause notice and without a personal hearing on the basis of a waiver thereof by the Applicant, vide letter dated 11.03.2014. As per the learned Advocate, the officers had, on 11.03.2014, obtained signatures of the Applicant on blank paper and as such he had not issued any waiver. Irrespective of the waiver being true or otherwise, the statutory requirement of notice and personal hearing, as provided under Section 124 of the Customs Act, 1962, cannot be waived. Hence, the matter should be remanded to the original authority for de-novo adjudication as per law. Sh. Vasudeva Naik, AC submitted that the Applicant had indeed waived the SCN and PH as per his letter dated 11.03.2014. Hence, the original authority has correctly adjudicated the case. He highlighted that this is a case of ingenious concealment and supported the orders of the lower authorities.

5.1 The Government has carefully examined the matter. At the outset, the Applicant has stated that the letter dated 11.03.2014 waiving the show cause notice and personal hearing was not issued by him. Further, assuming but not admitting that such letter had been submitted, there is no provision in the Customs Act for absolute waiver of the show cause notice and the waiver of the personal hearing. In the personal hearing held on 25.11.2022, it has been also stated that officers had on 11.03.2014 obtained signatures of the Applicant on blank papers.

5.2 The Government observes that, in the instant case, the seizure was made on 10.03.2014 and the waiver was issued vide letter dated 11.03.2014, whereas the matter has been adjudicated by the original authority, vide Order dated 08.09.2014, i.e., almost 06 months after the date of seizure and the waiver letter dated 11.03.2014. If the Applicant's signatures had been obtained on blank papers by the officers, sufficient time was available to the Applicant to bring on record this position so that the authorities would have proceeded on the basis of letter dated 11.03.2014 only after verifying the same. However, in the subject case, no such complaint or grievances appears to have been made by the Applicant, even though 06 months were available to do so. Therefore, it is apparent that the contention that the waiver was never issued is nothing but an afterthought.

5.3 In respect of the contention that even if such a waiver was issued, as per law, there cannot be an absolute waiver of show cause notice and the waiver of personal hearing, it would be relevant to reproduce the provisions of Section 124 of the Customs Act, 1962.

" SECTION 124. Issue of show cause notice before confiscation of goods, etc. – No Order confiscating any goods are imposing any penalty on any person shall be made under this Chapter unless the owner of the goods are such person-

(a) is given a notice in writing with the prior approval of the officer of Customs not below the rank of an Assistant Commissioner of Customs,

informing him of the grounds on which it is proposed to confiscate the goods or to impose a penalty;

(b) is given an opportunity of making a representation in writing within such reasonable time as may be specified in the notice against the grounds of confiscation or imposition of penalty mentioned therein; and

(c) is given a reasonable opportunity of being heard in the matter:

Provided that the notice referred to in clause (a) and the representation referred to in clause (b) may, at the request of the person concerned be oral:

Provided further that notwithstanding issue of notice under this section, the proper officer may issue a supplementary notice under such circumstances and in such manner as may be prescribed."

As per clause (a) of Section 124, therefore, a show cause notice has to be issued but in terms of first proviso thereof such a notice can be oral. In the subject case, it is observed that, vide letter dated 11.03.2014, the Applicant herein did not merely waive the show cause notice and personal hearing but also requested for leniency expressing his willingness to pay the Customs duty and fine/penalty for release of gold. It is, thus, abundantly clear that the case against him had been explained to the Applicant only whereupon he could have requested for a lenient view to be taken alongwith his willingness to pay Customs duty, fine/penalty etc. Therefore, it has to be held that the show cause notice was indeed given orally.

5.4 As regards the waiver of personal hearing, the mandate of clause (c) of Section 124 is to give a "reasonable opportunity of being heard". Thus, the law does not require that the personal hearing has to be held mandatorily rather it provides that a reasonable opportunity has to be granted. The question of waiver of personal hearing would arise only once the requirements of Section 124 had been explained to the Applicant and it was understood by him that he had an opportunity of being heard. Therefore, it has to be held that a reasonable opportunity of being heard was provided to the Applicant, which was waived by him.

6. On the merits, it is observed that the Applicant had concealed the offending goods inside air compressor carried by him. He had also not declared the offending goods in the Customs Declaration Form submitted by him. Even when asked orally, after being intercepted, the Applicant denied carrying any valuable goods other than the personal effects etc. This position has been admitted by the Applicant in his statement recorded under Section 108 of the Customs Act, 1962. There is nothing on record that the statement has been retracted.

7. 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 carried by him, as stipulated under Section 77 of the Act, *ibid*. Further, the modus-operandi adopted makes the intention to smuggle manifest. No documents evidencing ownership and licit purchase have also been placed on record. The Applicant has, thus, failed to discharge the burden placed on him, in terms of Section 123, *ibid*.

8.1 The question of law raised by the Applicant is that the import of gold is not 'prohibited'. The Government observes that the Hon'ble Supreme Court has, in the case of Sheikh Mohd. Omer vs Collector of Customs, Calcutta & Ors {1971 AIR 293}, 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"*. The Gold is not allowed to be imported freely in baggage. It is permitted to be imported by a passenger subject to fulfillment of certain conditions. These conditions are not even claimed to have been fulfilled in the present case. 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 (377) ELT 145 (SC)}, 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."

8.2 In the case of Malabar Diamond Gallery P. Ltd. Vs ADG, DRI, Chennai [2016 (341) ELT 65 (Mad.)], the Hon'ble Madras High Court has summarized the position on the issue, 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 the Hon'ble Madras High Court in the case of P. Sinnasamy {2016 (344) ELT 1154 (Mad.)} as well.

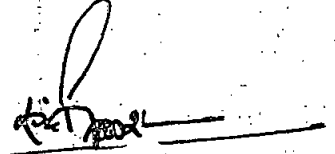
8.3 Thus, following the ratio of the aforesaid judgments, there is no doubt that the subject goods are 'prohibited goods'.

9. The original authority has denied the release of seized goods on redemption fine under Section 125 of Customs Act, 1962, which has been assailed in the revision application. 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.*" In the present case, the original authority has after appropriate consideration denied redemption for relevant and reasonable considerations, as brought out in para 19 of the OIO. Hence, the Commissioner (Appeals) has correctly refused to interfere in the matter.

10. It has been submitted that there is no finding by the original authority to justify the imposition of penalty under Section 114 AA and that the same findings of non-declaration have been entered for simultaneous imposition of penalty under Section 112 (a) and Section 114 AA. Accordingly, it has been submitted that the penalty under Section 114 AA may be set aside. However, the Government observes that the Applicant herein, though he was carrying gold, did not declare the same in the Customs Declaration Form, filed by him and thereby made and signed a false and incorrect declaration. He also orally stated that no valuables were being carried by him even though the gold was concealed in his baggage items. The declaration is required to be made in terms of Section 77 of the Act *ibid*. Therefore, there is no doubt that by making and signing false and incorrect declarations, as required to be made under Section 77 *ibid*, the Applicant has made himself liable to penalty under Section 114 AA *ibid*. It is incorrect also to contend that the penalties under Section 112 and 114 AA cannot be simultaneously imposed. 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. Therefore, it has to be held the penalty under Section 114 AA has been correctly imposed.

- 11 Keeping in view the facts and circumstances of the case and specifically the ingenious nature of concealment adopted by the Applicant herein, quantum of penalty imposed, under Section 112 (a) and Section 114 AA, is neither excessive nor harsh.
12. 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. 365/22-Cus dated 28-11-2022

Copy to:

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2. The Commissioner of Customs (Appeals), C.R. Building, P.B. No. 5400, Queen's Road Bengaluru-560001.
3. PA to AS(RA)
4. Guard file.
5. Notice board.

6. *Spare Copy*

ATTESTED


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