

SPEED POST



F.No. 373/15/B/SZ/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... 27/12/22

Order No. 405/22-Cus dated 27-12-2022 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 No. 963/2017 dated 15.11.2017, passed by the Commissioner of Customs (Appeals), Bengaluru.

Applicant : Sh. Amit Ramchand Chandwani, Ulhasnagar, Maharashtra.

Respondent : The Commissioner of Customs, Airport & Air Cargo Complex, Bengaluru.

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ORDER

A Revision Application No. 373/15/B/SZ/2018-RA dated 31.01.2018 has been filed by Sh. Amit Ramchand Chandwani, Ulhasnagar, Maharashtra (hereinafter referred to as the Applicant), against the Order-in-Appeal No. 963/2017 dated 15.11.2017, passed by the Commissioner of Customs (Appeals), Bengaluru. The Commissioner (Appeals) has, vide the impugned Order-in-Appeal, upheld the Order-in-Original No. 94/2016-17-Airport dated 17.03.2017, passed by the Additional Commissioner of Customs, Airport, Bengaluru.

2. Brief facts of the case are that the Applicant herein arrived at the Bengaluru Airport from Bangkok via Colombo, on 27.07.2016. The Applicant was intercepted by the Customs Officers while exiting through the Door Frame Metal Detector of the Customs Arrival Hall. Upon physical search using the hand held metal detector and upon repeated questioning, the Applicant herein admitted that he had concealed gold in his rectum and agreed to remove the same voluntarily. Accordingly, three packets, sealed with black insulation tape, were recovered from the Applicant, which upon further opening were found to contain one cut piece of gold bar in each packet. The three gold bars so recovered, totally weighing 371.38 gms. and valued at Rs. 11,67,990/-, were seized under Section 110 of the Customs Act, 1962. In his statement recorded, on 27.07.2016, under Section 108 of the Act *ibid*, the Applicant herein stated that he was in need of money and, therefore, purchased gold to sell for profit; that he purchased three cut pieces of gold bars from Bangkok from the money which he had carried with him from Mumbai; that he reached Bengaluru from Bangkok via Colombo and was intercepted by the Customs Officers; that he confirmed and accepted the certificate given by the gold valuer; and that he admitted that he was carrying gold in concealed manner without declaring to the Customs. In the Customs Declaration Form, the Applicant herein had declared nothing dutiable and against entries under Serial No. 9 & 10, relating to 'prohibited goods' and gold in jewelry form and gold bullion, he had ticked 'No'. He had also declared the value of goods imported as 'Nil'. The original authority, after following the principles of natural justice, ordered for absolute confiscation of the seized gold under Section 111 (d), 111(i), 112(l) and 111(m) of the Customs Act, 1962. Penalties of Rs.

4,60,000/- and Rs. 1,20,000/- were also imposed on the Applicant herein, under Section 112(a) and Section 114AA, respectively, of the Customs Act, 1962. 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 goods were recovered from the Applicant's trouser pocket; that the gold is neither restricted nor prohibited and, therefore, it should have been released on applicable Customs duty under Section 125 of the Customs Act, 1962; that in respect of goods which are not 'prohibited goods,' the redemption thereof is mandatory under Section 125; the personal penalty under Section 114AA may be dropped as there cannot be two penalties for the same offence; and that penalty under Section 112(a) may be substantially reduced.

4. Personal hearing was held, in virtual mode, on 26.12.2022. No one appeared for the Applicant nor any request for adjournment has been received. A Written Submission dated 25.12.2022 has been received from the Counsel for the Applicant, which is taken on record. Sh. Neeraj Kumar Verma, Superintendent appeared for the department and supported the Order of Commissioner (Appeals). He highlighted that this is a case of rectum concealment.

5. The Government has carefully examined the matter. The first contention of the Applicant is that the goods were not concealed by him in rectum but these were kept in his trouser pocket. However, the Government finds that the recovery of gold concealed in rectum was made in the presence of independent witnesses when the Applicant himself removed three packets sealed with black insulation tape containing three cut pieces of gold bars, in the toilet situated in the Customs Arrival Hall. In his statement dated 27.07.2016 also, the Applicant had admitted the recovery of gold and that he had concealed the gold in his rectum. Therefore, the subjection contention of the Applicant is incorrect and is nothing but an afterthought.

6.1 Another contention of the Applicant is that the gold is not 'prohibited goods'. 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."*

6.2 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.)}.

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

7. 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 *ibid*, 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 detailed examination of the case ordered for absolute confiscation of seized goods. Hence, the Commissioner (Appeals) has correctly refused to interfere with the order of absolute confiscation.

8.1 It has been contended that the penalty should not have been imposed under Section 114AA of the Act *ibid*, as two penalties cannot be imposed for the same offence. In the additional submissions dated 25.12.2022, certain decisions of the revisionary authority at Mumbai have been cited in support of this contention.

8.2 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."

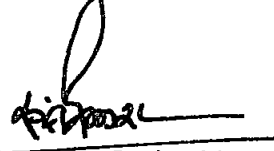
The Government observes that the Applicant was carrying gold on him but had filed a 'NIL' declaration on the Customs Declaration Slip. He had also specifically declared that he was not carrying any gold in bullion or jewellery form. This declaration was required to be made or signed, as the case may 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.

8.3 It is the contention of the Applicant that once the penalty has been imposed under Section 112(a) of the Customs Act, imposition of penalty under Section 114AA is not warranted. It is observed that the Commissioner (Appeals) has negated this contention of the Applicant by relying upon the judgment of the Hon'ble Delhi High Court in the case of Commissioner of Customs & Central Excise, Delhi vs. Achiever International {2012 (286) ELT 180 (Del.)}, wherein it has been held that penalty under Section 112 (a) and Section 114AA are imposable when both the provisions are violated, even if the violation has taken place in the course of same transaction. In the present case, it has already brought out that the Applicant had made a false and incorrect declaration and, hence, besides the penalty under Section 112(a), the penalty under Section 114AA is also merited. The Government is unable to agree with the earlier decisions cited by the Applicant herein in view of the statutory position as brought out hereinabove and the judgment of the Hon'ble Delhi High Court in the case of Achiever International (*supra*).

9. 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 the Hon'ble High Courts as above.

10. In the facts and circumstances of the case and specifically keeping in view the manner of concealment, the Government is not inclined to interfere with the quantum of penalty imposed.

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



(Sandeep Prakash),
Additional Secretary to the Government of India

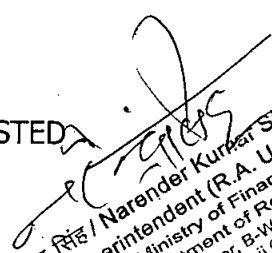
Sh. Amit Ramchand Chandwani,
Flat No. 202, Sai Deep Mahal, 2nd Floor,
Near Kali Mata Mandi, Kurla Camp, Ulhasnagar,
Thane-421004.

Order No. 405/22-Cus dated 27-12-2022

Copy to:

1. The Commissioner of Customs, Airport & Air Cargo Complex, Kempegowda International Airport, Devanahalli, Bengaluru, 560300.
2. The Commissioner of Customs (Appeals), BMTC Building, Above BMTC Bus Stand, HAL Airport Road, Domlur, Bengaluru-560071.
3. Sh. A.M. Sachwani, Advocate, Nulwala Building, Gr. Floor, 41, Mint Road, Opp. Fort, Mumbai-400001.
4. PA to AS(RA)
5. Guard file.
6. Spare Copy
7. Notice board.

ATTESTED



नरेंद्र कुमार सिंह / Narender Kumar Singh
अधीक्षक / Superintendent (R.A. Unit)
वित्त मंत्रालय / Ministry of Finance
राजस्व विभाग / Department of Revenue
Room No. 606, 6th Floor, B-Wing
14, Hudco Vishala Building, Bhikaji Cama Place
New Delhi-110066