

F. No. 380/102/B/SZ/2018-RA  
F.No. 373/306/B/SZ/2018-RA

**SPEED POST**



F. No. 380/102/B/SZ/2018-RA  
F.No. 373/306/B/SZ/2018-RA  
GOVERNMENT OF INDIA  
MINISTRY OF FINANCE  
(DEPARTMENT OF REVENUE)

14, HUDCO VISHALA BLDG., B WING  
6<sup>th</sup> FLOOR, BHIKAJI CAMA PLACE,  
NEW DELHI-110 066

Date of Issue 10/02/2023

Order No. 42-43/23-Cus dated 10-02-2023 of the Government of India passed by Shri Sandeep Prakash, Additional Secretary to the Government of India, under section 129DD of the Custom Act, 1962.

Subject : Revision Applications, filed under section 129 DD of the Customs Act 1962 against the Order-in-Appeal No. 318/2018 dated 19.09.2018, passed by the Commissioner of Customs (Appeals), Bengaluru

Applicants : Sh. Rambachan Radheshyam Yadav, Thane  
The Pr. Commissioner of Customs (Airport & ACC), Bengaluru

Respondents : The Pr. Commissioner of Customs (Airport & ACC), Bengaluru  
Sh. Rambachan Radheshyam Yadav, Thane

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**ORDER**

Revision Applications, bearing Nos. 373/306/B/SZ/2018-RA dated 12.11.2018 & 380/102/B/SZ/2018-RA dated 26.12.2018, have been filed by Sh. Rambachan Radheshyam Yadav, Thane (hereinafter referred to as the Applicant) and the Pr. Commissioner of Customs (Airport & ACC), Bengaluru (hereinafter referred to as the Department), respectively, against the Order-in-Appeal No. 318/2018 dated 19.09.2018, passed by Commissioner of Customs (Appeals), Bengaluru. Commissioner of Customs (Appeals) has, vide the impugned Order-in-Appeal, modified the Order-in-Original passed by the Additional Commissioner of Customs, Airport & ACC, Bengaluru, bearing no. 07/2018-19(AP-ADM) dated 28.04.2018, to the extent of setting aside the penalty imposed on the Applicant under Section 114AA of the Customs Act, 1962. Vide the aforesaid Order-in-Original, 04 nos of cut pieces of gold of 24 karat purity, totally weighing 515.790 grams collectively valued at Rs. 15,42,212/-, were confiscated absolutely. The adjudicating authority also imposed a penalty of Rs. 4,00,000/- & Rs. 3,00,000/- under Sections 112 & 114AA, respectively, of the Customs Act, 1962 on the Applicant.

2. Brief facts of the case are that the Applicant arrived, on 16.04.2017, at Kempegowda International Airport, Bengaluru from Dubai and was intercepted while exiting the Customs Area. On verification of his Customs Declaration Form, it was noticed that he had not mentioned anything against the value of dutiable goods being imported. On enquiry, the Applicant informed that his baggage did not contain any valuable items to declare to the Customs. After search of his person, two packets wrapped with black insulation tape were found concealed in the secret inside pocket of his trousers beneath the belt. Thereafter, upon cutting open the packets, 04 nos cut pieces of gold were recovered as mentioned above. The Applicant, in his statement dated 16.04.2017, recorded under Section 108 of the Customs Act, 1962, stated that one of his friend Sh. Lara contacted him and asked him whether he was interested in earning extra income; that as his earning was not

enough to sustain his family needs he agreed to work for him; that Sh. Lara got him a new passport and started sending him to Dubai to sell garments and bring some commercial goods in for profit; that after few visits, Sh. Lara suggested him to carry a consignment for him, if he wanted to earn more money, for which he was assured of big payout and for which he readily agreed; that Sh. Lara booked his return tickets and on 14.04.2017, he went to Dubai through IGI Airport, New Delhi, carrying some garments and stayed in Deira, Dubai; that he befriended a person who was a friend of Sh. Lara, who approached him with an offer to carry gold from Dubai to Bengaluru on commission basis of Rs. 10,000/- and deliver the same to a contact person in Bengaluru; that, on 16.04.2017, he was scheduled to fly from Dubai to Bengaluru via Goa; that the unknown person had advised him to meet him on 16.04.2017 at the departure gate before boarding the flight to Bengaluru; that he reached Dubai International Airport and met that unknown person, who handed over two packets packed with black insulation tape containing four cut pieces of gold bar and instructed him to carry the said tape containing four cut pieces of gold bar and instructed him to carry the said packets by concealing it inside his pant pocket to avoid detection by Customs authorities at Bengaluru International Airport; that thereafter, he entered the Dubai International Airport and inserted the said packets containing gold into his pockets and cleared security; and that he was aware of the fact, that carrying gold in concealed manner without declaring to the Customs department is an offence under the Customs Law.

3.1 The Applicant has filed revision application, mainly, on the grounds that the order passed by the lower authority was not in conformity with the spirit of the Baggage Rules, 1998; that his signature were taken on the statement recorded by the Customs Officers under force, duress & compulsion; that he had denied the original statement while filing the reply to the SCN; that the concealment is not ingenious concealment; that he was not a carrier of somebody else but was the actual owner of the gold; that the gold may be allowed to be redeemed on fine as the gold is not banned; and that exorbitant personal penalty of Rs. 4,00,000/- in

addition to absolute confiscation of the gold was not justified and be waived/reduced.

3.2 The department has filed revision application, mainly, on the grounds that penalty under Section 114AA of the Customs, Act, 1962 is imposable on the Applicant/Respondent as he had intentionally suppressed/not declared the actual facts and attempted to smuggle the gold.

4. In the hearing held, in virtual mode, on 09.02.2023, Sh. O.P Rohira, Advocate appeared for the Applicant and reiterated the contents of the RA filed by him. He stated that it is not a case of ingenious concealment and the Applicant is not a repeat offender. Hence, a lenient view may be taken and goods may be released on payment of RF, PP & Duty. Sh. Rohira opposed the RA filed by the department and supported the OIA to the extent it drops the penalty under Section 114AA. No one appeared for the department nor any request for adjournment has been received. Hence, it is presumed that the department has nothing to add in the matter.

5.1 The Government has carefully examined the matter. It is observed that gold was found wrapped with black insulation tape and was concealed in inside secret pocket of the Applicant's trouser beneath the belt area. Therefore, it is incorrect of the Applicant to contend that the gold was not ingeniously concealed. Further, it is on record that the Applicant had misdeclared on the Customs Declaration Form that he was not carrying any dutiable goods etc. Since such a declaration is required to be made, in terms of Section 77 of the Customs Act, 1962, it is apparent that a false declaration was made by the Applicant in transaction of business under the Act, *ibid*.

5.2 The other contention of the Applicant is that his statement had been obtained involuntarily and he had denied the original statement while filing the reply to the SCN. At the outset, it is observed that no retraction has been placed on record. Retraction, if any, as part of reply dated 09.10.2017 to show cause notice, was filed almost six months after the statement was originally recorded and, thus, indicates

afterthought rather than any genuine effort to set the record straight. Further, the factual matrix recorded in the Mahazar proceedings corroborate the admissions made in the statements made by the Applicant herein. Therefore, the Government finds that the statement made was 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.

5.3 As per Section 123 of the Act, *ibid*, in respect of gold and manufactures thereof, the burden of proof that the goods are not smuggled is on the person from whom such goods are recovered. In the present case, the Applicant has failed to produce any evidence of licit possession and ownership of the goods. Further, the manner of concealment and factum of false declaration make the intention to smuggle manifest. As such, it is held that the Applicant has failed to discharge the burden of proof, as required in terms of Section 123 *ibid*.

6.1 It is contended on behalf of the Applicant that the subject goods are not liable to absolute confiscation as these are not banned goods. In other words, it is claimed that the subject goods are not 'prohibited goods'. The Government observes that, 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 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) ELT 65 (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----."*

As correctly brought out by the Commissioner (Appeals), an identical view has been taken by the Hon'ble Madras High Court in the case of P. Sinnasamy {2016 (344) ELT 1154 (Mad.)} as well.

6.3 In this case, the conditions, subject to which gold could have been legally imported in baggage, have not been fulfilled. Thus, following the ratio of the aforesaid judgments, there is no doubt that the subject goods are 'prohibited goods'.

7. The original authority has denied the release of seized goods on redemption fine under Section 125 of the Customs Act, 1962 which has been upheld in appeal. In terms of Section 125, 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. Sinnasammy (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 reasons'*". Hon'ble Delhi High Court has, in the case of Raju Sharma Vs. UOI {2020 (372) ELT 249 (Del.)}, 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 motives.*" In holding so, the Hon'ble High Court has relied upon the judgment of Apex Court in the case of Mangalam Organics Ltd. {2017 (349) ELT 369 (SC)}. Thus, the Commissioner (Appeals) could have interfered with the discretion exercised by the original authority only if it would have been tainted by any of vices highlighted by the Hon'ble Courts. Such a case has not been made out by the Applicant. Hence, it is held that the Commissioner (Appeals) has correctly refused to interfere with discretion exercised by the original authority.

8.1 The contention of the department is that the penalty under Section 114AA is imposable in this case and the Commissioner (Appeals) has erred by dropping the same.

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 Respondent made a false declaration of the contents of baggage by filing 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.

8.3 Penalty under Section 112 is imposable for acts and omissions rendering the goods liable for confiscation under Section 111 of the Customs Act, 1962, whereas penalty under Section 114AA arises for making wrong declaration or using false documents. Hon'ble Delhi High Court has, in the case of Achiever International {2012 (286) ELT 180 (Del.)}, held that penalties under Section 112(a) and Section 114AA are imposable when both the provisions are violated, even if the violations are in the course of same transaction.

8.4 The Commissioner (Appeals) has referred to the objective of introduction of Section 114AA, as explained in the para 63 of the report of Parliament's Standing Committee on Finance (2005-06), to hold that the provisions of Section 114AA are not attracted in baggage cases. 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 and there is nothing in the plain language of Section 114AA to even remotely indicate that the provisions thereof are not applicable in baggage cases. Hence, there was no occasion for the Commissioner (Appeals) to depart from the literal rule and take recourse to other principles of interpretation to hold otherwise.

8.5 Thus, the Government holds that the Order of Commissioner (Appeals) setting aside the penalty imposed, under Section 114 AA, on the Applicant cannot be sustained and is set aside to this extent.

9. In the facts and circumstances of the case, the Government finds that the penalties imposed on the Applicant are on a higher side. Accordingly, the Government reduces the penalties imposed under Section 112 to Rs. 2,00,000/- and that under Section 114AA to Rs. 1,50,000/-.



10. The revision applications are disposed of in above terms and the impugned Order-in-Appeal is modified to the extent indicated in paras 8.4 & 9 above.



(Sandeep Prakash)

Additional Secretary to the Government of India

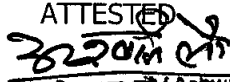
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Order No. 42-43/23-Cus dated 10-02-2023

Copy to:

1. Commissioner of Customs (Appeals), BMTC Building, Above BMTC Bus Stand, Old Airport Road, Domlur, Bengaluru- 560071.
2. Sh. O.M Rohira, Advocate, 148/301 Uphaar, 10<sup>th</sup> Road, Khar (W), Mumbai-400052.
3. PPS to AS(RA)
4. Guard File.
5. Spare Copy.
6. Notice Board.

ATTESTED



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