

SPEED POST



F. No. 373/187/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. 07/03/23.

Order No. 84/23-Cus dated 07-03-2023 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 Application, filed under Section 129 DD of the Customs Act, 1962, against the Order-in-Appeal No. HYD-CUS-000-APPP-130-17-18 dated 28.02.2018, passed by the Commissioner of Customs & Central Tax (Appeals-I), Hyderabad.

Applicant : Sh. Govindarajan Matheswaran, Thiruvannamalai, Tamilnadu.
Respondent : The Pr. Commissioner of Customs, Hyderabad.

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ORDER

A Revision Application No. 373/187/B/SZ/2018-RA dated 17.07.2018 has been filed by Sh. Govindarajan Matheswaran, Thiruvannamalai, Tamilnadu (hereinafter referred to as the Applicant), against the Order-in-Appeal No. HYD-CUS-000-APPP-130-17-18 dated 28.02.2018, passed by the Commissioner of Customs & Central Tax (Appeals-I), Hyderabad. The Commissioner (Appeals) has, vide impugned Order-in-Appeal, upheld the Order-in-Original No. 73/2017-Adjn. Cus (ADC) dated 22.09.2017, passed by the Deputy Commissioner of Customs, Hyderabad, except to the extent of reducing the penalty imposed on the Applicant herein, under Section 114AA of the Customs Act, 1962, from Rs. 6,00,000/- to Rs. 3,00,000/-.

2. Brief facts of the case are that the Applicant herein was intercepted by the officers of Customs at the exit gate of the RGI Airport, Hyderabad after passing through green channel upon his arrival at Hyderabad from Singapore, on 12.02.2017. Upon search of his baggage, two LED outdoor lights carried by him were found to conceal small black packets in each of the lights, which were in turn found to contain eight yellow metal bars. Upon further questioning, the Applicant disclosed that he had concealed 12 yellow metals bar in his rectum so as to evade detection by customs. Thereafter the officers took the Applicant to the toilet situated in the arrival hall where he ejected 04 small black coloured packets wrapped adhesive tapes which were found to contain 12 yellow metal bars. The total 20 yellow metal bars were certified by the Government approved valuer to be of 24 carat gold weighing totally 2,000 gms and collectively valued at Rs. 59,10,000/-. In his statement recorded on 12.02.2017, under Section 108 of the Customs Act, 1962, the Applicant, inter-alia, stated that he went to Singapore on 05.02.2017 and returned on 12.02.2017; that he had gone through panchnama dated 12.02.2017 and agreed with its contents; that he was given these gold bars by his brother-in-law Mr. Deen Dayal Ashok who was working as a travel agent in Singapore; and that the goods were concealed in LED outdoor lights and his rectum to hoodwink the custom officials to evade the payment of custom duty. The original authority after following the principles of natural justice ordered absolute confiscation of the gold bars under Section 111 (d), (l) & (m) of the Customs Act, 1962. Penalties of Rs. 6,00,000/- each were also imposed on the Applicant herein under Section 112 (a) and Section 114AA of the Customs Act, 1962. The appeal filed by the Applicant herein has been rejected by the Commissioner (Appeals), except to the extent of reducing the penalty imposed under Section 114AA *ibid*, as above.

3. The revision application has been filed, mainly, on the grounds that the order passed by the Commissioner (Appeals) without giving an option to redeem the subject gold is contrary to the provisions of the Customs Act, 1962; that there is no dispute about non-declaration of gold and the manner in which the subject gold was bought by the Applicant; that the option of redemption fine should be given in this case as gold is not a

prohibited item; that, therefore, impugned order is liable to be set aside and an option of redemption in lieu of confiscation be given to the Applicant who is willing to pay the custom duty and penalty as applicable; that the penalty imposed under Section 112(a) is too harsh; and that since there is no case of short levy imposition of penalty under Section 114AA need not be confirmed.

4. Personal hearing in the matter was held, in virtual mode, on 06.03.2023. Sh. Ramesh Babu, Advocate appeared for the Applicant and reiterated the contents of the RA. He submitted that option to redeem the goods ought to have been granted as the gold was not a prohibited item. No appeared for the Respondent department nor any request for adjournment has been received. Therefore, it is presumed that the department has nothing to add in the matter.

5. The revision application has been filed with a delay. Though the revision application and the COD application do not indicate the date of communication of the order impugned herein, it would appear that the Order dated 28.02.2018 was received by the Applicant on 26.03.2018. Delay, which is attributed to ill health of the Applicant, is condoned.

6. On merits, the Government has carefully examined the matter. It is admitted that the offending gold bars were brought in a concealed manner and were not declared. Therefore, their liability to confiscation is not disputed. However, it is the contention of the Applicant that the gold is not a prohibited item and, therefore, it should have been allowed to be redeemed on payment of redemption fine.

7.1 It is observed that the original authority has relied upon the judgment of the Hon'ble Supreme Court in the case of Om Prakash Bhatia vs. Commissioner of Customs {2003 (155) ELT 423 (SC)} and that of the Hon'ble Madras High Court in the case of Samyanathan Murugesan vs. Commissioner, which has been affirmed by the Hon'ble Supreme Court, as reported in 2010 (254) ELT A 15 (SC) to hold that the offending goods, in this case, are to be treated as 'prohibited goods'. The Government observes that the gold is not allowed to be imported freely in baggage. It can be imported only subject to fulfillment of certain conditions. In the present case, it is not even contended that the Applicant complied with the conditions subject which he could import gold in baggage. The Hon'ble Supreme Court has repeatedly held that if the conditions prescribed for import or export of any goods are not complied with, such goods should be considered as 'prohibited goods'. 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 it's earlier judgments in the case of Sheikh Mohd. Omer {1983 (13) ELT 1439 (SC)} and Om Prakash Bhatia (supra) to hold that "any restriction on import or export is to an extent prohibition; and the expression "any prohibition" in Section 111(d) of the Customs Act includes restriction."

7.2 In the case of Malabar Diamond Gallery P. Ltd. vs ADG, DRI, Chennai [2016(341) ELT 65 (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:

"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 condition 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.)}.

7.3 As such, the Government holds that the seized gold is 'prohibited goods', in terms of Section 2(33) of the Act, *ibid*.

8. The original authority has denied the release of offending gold on redemption fine under Section 125 of the Customs Act, 1962, which has been upheld in appeal. It is observed that 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. 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 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. In the present case, the original authority has for the relevant and reasonable considerations, recorded in para 23 of the OIO, ordered absolute confiscation. Hence, the Commissioner (Appeals) has correctly refused to interfere with discretion exercised by the original authority.

9.1 Another contention of the Applicant herein is that the penalty under Section 114AA should not be maintained as there is no short levy.

9.2 Section 114AA 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 traction of any business for purpose of this Act, shall be liable to a penalty not exceeding five time the value of goods."

The Government observes that the fact of the Respondent making a false declaration is not disputed. He failed to declare the gold carried by him even when asked to do so orally. Since a false 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 114AA is merited. There is nothing in the provisions of Section 114AA to even remotely suggest that the penalty thereunder can be imposed only in the case of short levy. Even otherwise, the Applicant admittedly attempted to smuggle the gold without any levy of customs duty at all. Therefore, the subject contention of the Applicant is entirely misconceived and without any legal basis.

10. The case laws relied upon by the Applicant in support of his various contentions are not applicable in the facts of this case, and in view of the dictum of Hon'ble Supreme Court and Hon'ble High Courts, as above.

11. In the facts and circumstances of the case and specifically keeping in view the manner of concealment, the quantum of penalties imposed is neither harsh nor excessive.

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



(Sandeep Prakash)

Additional Secretary to the Government of India

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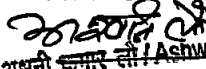
Order No. 84 /23-Cus dated 07-03-2023

Copy to:

1. The Pr. Commissioner of Customs, GST Bhavan, Lal Bahadur Stadium Road, Basheerbagh, Hyderabad-500004.

2. The Commissioner of Customs & Central Tax (Appeals-I), 7th floor, Kendriya Shulk Bhavan, L.B. Stadium Road, Basheerbagh, Hyderabad-500004.
3. Sh. Ramesh Babu, Advocate, Opp. RGIA Police Station Ground, Kothwalguda Road, Post-Shamshabad (Village & Mandal), Ranga Reddy Dist. Telangana-501218.
4. PPS to AS (RA).
5. Guard file.
- ✓ 6. Spare Copy.
7. Notice Board.

ATTESTED


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