

SPEED POST



F. No. 380/30/B/SZ/2018-RA
F.No. 373/206/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. 17/3/23

Order No. 99-100/23-Cus dated 16-03-2023 of the Government of India passed by Shri Sandeep Prakash, Additional Secretary to the Government of India, under section 129DD of the Customs Act, 1962.

- Subject : Revision Applications, filed under section 129 DD of the Customs Act 1962 against the Order-in-Appeal AIRPORT. C. Cus.I No. 04/2018 dated 30.01.2018, passed by the Commissioner of Customs (Appeals-I), Chennai.
- Applicants : Pr. Commissioner of Customs, Chennai-I
Sh. Gundluru Reddysekhar Achari, Chennai
- Respondents : Sh. Gundluru Reddysekhar Achari, Chennai
Pr. Commissioner of Customs, Chennai-I

ORDER

Revision Applications, bearing Nos. 380/30/B/SZ/2018-RA dated 26.04.2018 & 373/206/B/SZ/2018-RA dated 06.08.2018, have been filed by the Pr. Commissioner of Customs, Chennai-I (hereinafter referred to as the Department) and Sh. Gundluru Reddysekhar Achari, Chennai (hereinafter referred to as the Applicant), respectively, against the Order-in-Appeal AIRPORT. C. Cus.I No. 04/2018 dated 30.01.2018, passed by Commissioner of Customs (Appeals-I), Chennai. Commissioner (Appeals) has, vide the impugned Order-in-Appeal, upheld the Order-in-Original passed by the Joint Commissioner of Customs (Adjudication-Air), Chennai, bearing no. 112/2017-18-AIRPORT dated 27.09.2017, except 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, 10 nos of gold bits, totally weighing 254 grams collectively valued at Rs. 7,70,890/-, were confiscated absolutely, under Section 111(d) and (l) of the Customs Act, 1962. The original authority also imposed penalties of Rs. 75,000/- & Rs. 25,000/-, under Sections 112(a) & 114AA, respectively, of the Act *ibid*, on the Applicant.

2. Brief facts of the case are that the Applicant arrived, on 18.04.2017, at Anna International Airport, Chennai from Kuwait and was intercepted by the Customs officers after clearing Green Channel at the exit point of the arrival hall. On being questioned about possession of gold/gold jewellery/crude gold either in his baggage or on his person, he replied in negative. On the search of one of his checked-in bag i.e the brown colour cardboard carton box, 04 nos of yellow colour metal bits were found wrapped with coloured chocolate wrappers. On examination of his other checked-in bag i.e. the black coloured stroller suitcase, a brown colour adhesive tape was found attached to the bottom of the suitcase. Upon opening the brown colour adhesive tape, 06 nos of yellow colour metal bits were recovered. Thus, total 10 nos of yellow colour metal bits were recovered from his baggage. The Government of India approved gold assayer certified them to be gold bits of 24 carat purity, totally weighing 254 grams and totally valued at Rs. 7,70,890/-. Upon questioning the



Applicant, as to whether he was in possession of any valid permit/licence/document for legal import of the recovered gold, he replied in negative. The Applicant, in his statement, recorded under Section 108 of the Customs Act, 1962, immediately after seizure, inter-alia, stated that he works in an artificial jewellery shop in Kuwait and earns around 150 Dinars in a month; that the 10 nos of gold bits do not belong to him and were given to him by Sh. Sameer, who was his former roommate in Kuwait, and who offered him Rs. 5,000/- for giving the gold to one person named Sh. Razak outside Chennai airport; that he brought the said gold into India by way of concealment and non-declaration for monetary benefit; that he was aware that bringing gold without valid documents, concealing and not declaring to Customs is an offence.

3.1 The Applicant has filed revision application, mainly, on the grounds that he was not allowed to declare the goods under Section 77 of Customs Act; that he did not cross the customs barrier and under that circumstances the import itself was not completed; that baggage is not confined merely to bonafide baggage within the meaning of Section 79 of the Customs Act or to the personal effects but includes any article contained in the baggage even though it is in commercial quantities; that he purchased the gold for his sister's wedding; that gold is not prohibited absolutely; and that re-export could have been allowed after redemption of goods.

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 as he had intentionally suppressed/not declared the actual facts and attempted to smuggle the gold.

4. Personal hearings in the matter were fixed on 09.02.2023, 01.03.2023 and 15.03.2023. No one appeared for either side. The request of the applicant for adjournment of hearing fixed on 15.03.2023 was not accepted as the grounds urged for adjournment were unsupported and as this was the last and final opportunity. Hence, the matter is taken up for disposal based on records.



5. RA No. 373/206/B/SZ/2018-RA has been filed by the Applicant on 06.08.2018 when the Order-in-Appeal was communicated to him on 06.02.2018. Therefore, the RA has been filed with a delay of 3 months. A request for condonation of delay of 02 months and 26 days has been filed on the grounds of illness of the Applicant. This ground is unsupported by any medical certificate. Seeking condonation of delay for only 02 months and 26 days when the delay involved is of 03 months and keeping the grounds pleaded for condonation unsupported clearly indicates that condonation has been sought in a casual manner, without showing sufficient cause. As such, the request for condonation of delay is liable to be rejected and the RA is liable to be dismissed as time barred.

6.1 On merits, it is observed that gold was found to have been ingeniously concealed - wrapped with coloured chocolate wrappers in the carton box and wrapped in a brown colour adhesive tape attached to the bottom of the suitcase. Further, the Applicant was intercepted by the Customs officers after clearing Green Channel at the exit point of the arrival hall. Therefore, it is incorrect of the Applicant to contend that he was not allowed to declare the goods under Section 77 of the Customs Act, 1962 and he did not cross the customs barrier and therefore the import itself not completed. Furthermore, it is on record that the Applicant on being questioned about possession of gold/gold jewellery/crude gold either in his baggage or on his person, replied in negative. 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*.

6.2 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*.



7.1 It is contended on behalf of the Applicant that import of gold is not 'prohibited'. The Government observes that, in the case of Sheikh Mohd. Omer vs Collector of Customs, Calcutta & Ors {1971 AIR 293}, the Hon'ble 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, these conditions have not been fulfilled. 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."*

7.2 In the case of Malabar Diamond Gallery P. Ltd. Vs ADG, DRI, Chennai [2016(341) ELT 65 (Mad.)], the Hon'ble Madras High Court (i.e. the Hon'ble jurisdictional 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----."

7.3 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'.

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8. 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 {2016 (344) ELT 1154 (Mad.)}, 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 ordered absolute confiscation and refused redemption for the relevant and reasonable considerations, specifically recorded in para 9 of the OIO. Hence, the Commissioner (Appeals) has correctly refused to interfere with discretion exercised by the original authority.

9.1 As regards the prayer for permitting re-export of the offending goods, the Government observes that a specific provision regarding re-export of articles imported in baggage is made in Chapter-XI of the Customs Act, 1962, by way of Section 80. The said Section 80 reads as follows:

"Temporary detention of baggage. - Where the baggage of a passenger contains any article which is dutiable or the import of which is prohibited



and in respect of which a true declaration has been made under Section 77, the proper officer may, at the request of the passenger, detain such article for the purpose of being returned to him on his leaving India and if for any reason, the passenger is not able to collect the article at the time of his leaving India, the article may be returned to him through any other passenger authorised by him and leaving India or as cargo consigned in his name”

9.2 On a plain reading of Section 80, it is apparent that a declaration under Section 77 is a pre-requisite for allowing re-export. Hon’ble Allahabad High Court has, in the case of Deepak Bajaj vs Commissioner of Customs (P), Lucknow {2019(365) ELT 695(All.)}, held that a declaration under Section 77 is a *sine qua non* for allowing re-export under Section 80 of the Act, *ibid*. In this case, as already brought out in para 6.1, the Applicant had not made a true declaration under Section 77. It is also to be observed that the Hon’ble Delhi High Court has, in the case of Jasvir Kaur vs. UOI {2009 (241) ELT 621 (Del.)}, held that re-export is not permissible when article is recovered from the passenger while attempting to smuggle it.

9.3 Hence, the question of allowing re-export, in the present case, does not arise.

10.1 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.

10.2 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.”



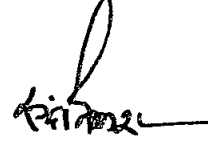
The Government observes that the Applicant made a false declaration by orally denying the possession of gold when specifically asked about the same. This declaration was required to be made or signed, as the case may be, under Section 77 *ibid*. Since a false and incorrect declaration was made, and which 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.

10.3 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 since in the present case smuggled goods had physically crossed the border. 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 suggest that the provisions thereof are not applicable in case smuggled goods had physically crossed the border. 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.

10.4 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.

11. In the facts and circumstances of the case, the Government finds that the penalties imposed on the Applicant by the original authority are just and fair.

12. In view of the above, RA No. 380/30/B/SZ/2018-RA filed by the department is allowed and the Order-in-Appeal impugned herein is modified to the extent of restoring the penalty imposed under Section 114AA ibid. RA No. 373/206/B/SZ/2018-RA is rejected for the reasons aforesaid.



(Sandeep Prakash)

Additional Secretary to the Government of India


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2. Sh. Gundluru Reddysekhar Achari
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Order No. 99-100 /23-Cus dated 16.03.2023

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3. PPS to AS(RA)
4. Guard File.
5. Spare Copy.
6. Notice Board.

ATTESTED


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