

SPEED POST



F. No. 373/341/B/SZ/2019-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. 10/01/24.

Order No. 11/24-Cus dated 10-01-2024 of the Government of India passed by Smt. Shubhagata Kumar, Additional Secretary to the Government of India, under Section 129DD of the Customs Act, 1962.

Subject : Revision Application filed, under Section 129 DD of the Customs Act 1962 against the Order-in-Appeal 124/2019 dated 05.07.2019 passed by the Pr. Commissioner of Customs (Appeals), Bengaluru.

Applicant : Shri Vinod Mangaturam Vasita, Thane

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

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ORDER

A Revision Application, bearing No. 373/341/B/SZ/2019-RA dated 05.09.2019, has been filed by Shri Vinod Mangaturam Vasita, Thane (hereinafter referred to as the Applicant), against the Order-in-Appeal No. 124/2019 dated 05.07.2019, passed by the Pr. Commissioner of Customs (Appeals), Bengaluru. The Commissioner (Appeals) has upheld the Order-in-Original of the Deputy Commissioner of Customs, Kempegowda International Airport, Bengaluru, bearing no. 45/2018-19 dated 22.02.2019, except to the extent of setting aside the penalty of Rs. 3,70,000/- imposed on the Applicant under Section 114AA of the Customs Act, 1962.

2. The Deputy Commissioner of Customs, Kempegowda International Airport, Bengaluru vide Order-in-Original No. 45/2018-19 dated 22.02.2019 had ordered absolute confiscation of one crude gold Kada, weighing 233.360 grams and valued at Rs. 7,26,916/- seized from the Applicant under Section 111(d), 111(i), 111(l) and 111(m) of the Customs Act, 1962 (hereinafter referred as the Act). He also imposed a penalty of Rs. 3,70,000/- under Section 112(a) of the Act and also imposed a penalty of Rs. 3,70,000/- under Section 114AA of the Act on the Applicant.

3. Brief facts of the case are that the Applicant arrived from Sharjah at Kempegowda International Airport, Bengaluru, on 09.09.2017, and was intercepted by the officers of Air Intelligence Officers of Customs, Bengaluru at the customs arrival hall. The Applicant was carrying one black coloured handbag with marking "Trust" as hand baggage. The baggage was scanned and only personal effects were found as mentioned by the Applicant. Subsequently, a body search was conducted with the hand held scanner which beeped when held near the right hand of the Applicant. On persistent query and thorough check of the Applicant, it was seen that he had worn a crude gold kada on his right hand which was concealed under the sleeve of his shirt. He handed over the same to the officers. The crude gold kada recovered from the Applicant were subjected to purity check and it was certified by Sh. C.N. Badrinath, Approved Gold Appraiser/Valuer, that the said impugned gold kada was of 24 carat purity and it weighed 233.360 grams valued at Rs. 7,26,916/-.

The said gold was undeclared and was attempted to be smuggled into India through concealment by the Applicant. The impugned gold item was seized under Section 110 of Customs Act, 1962 under a mahazar dated 09.09.2017 read with statement dated 09.09.2017 recorded under Section 108 of Customs Act, 1962. Further, after due process, the lower adjudicating authority vide above mentioned Order-in-Original no. 45/2018-19 dated 22.02.2019 confiscated the impugned gold kada and imposed penalty of Rs. 3,70,000/- each under Sections 112(a) and 114AA of the Customs Act, 1962. Aggrieved, the Applicant filed an appeal before the Pr. Commissioner of Customs (Appeals), Bengaluru, who has upheld the above order of lower adjudicating authority except to extent of setting aside the penalty of Rs. 3,70,000/- imposed on the Applicant under Section 114AA of the Customs Act, 1962.

4. The instant revision application has been filed, mainly, on the grounds that the order passed by the lower authority was not in conformity with the spirit of the Baggage Rules, 1998. Hence, the same deserves to be set aside in the interest of justice. The Applicant was not a carrier for somebody else but he was the actual owner of all the gold & he had not implicated anybody in any manner whatsoever. The unjustified penalty cannot be imposed u/s 112 of Customs Act, 1962 & hence the same deserves to be set aside or atleast drastically reduced. Therefore, the gold kada absolutely confiscated should be released under Section 125 of Customs Act, 1962 on payment of redemption fine particularly when gold is not banned under the Baggage Rules, 1998.

5. Personal hearing in the matter was fixed on 13.12.2023. Sh. Om Prakash Mohanlal Rohira, Advocate appeared on behalf of the Applicant and reiterated the submissions made in the revision application and submitted that the applicant is not a habitual offender, the gold kada was not concealed and prayed for allowing the impugned gold to be redeemed. He also sought reduction in penalty as the value of goods was not much and the quantum of penalty was too high. No one appeared from the department's side nor has any request for adjournment been made. Therefore, it is presumed that the department has nothing to add in the matter.

6. The Government has carefully examined the matter. It is observed that the Applicant was intercepted at the arrival hall. It is observed that the Applicant is not eligible to import gold into India and did not possess any valid document/permit for the said import. The impugned gold kada was undeclared and was attempted to be smuggled into India through concealment by the Applicant. As regard contention of the Applicant that he is owner of the impugned gold; but he had not produced any invoice/documents at the time of seizure. His statement under section 108 of the Customs Act, 1962 makes it clear that he was aware that bringing impugned gold item and attempt to smuggle it by way of concealment, non-declaration to Customs, without possession of any valid permit/license/document, is an offence. No material has been placed on record to support the allegation that his statement was recorded under threat or coercion. As such, the claim to this effect is untenable. Further, the entire proceedings have been covered under a Mahazar in presence of independent witnesses which also corroborates the sequence of events. Hence, this contention of the Applicant is not sustainable. Furthermore, it is on record that the Applicant on being questioned about possession of gold/gold jewellery on his person, replied in the negative. Since, a truthful 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 Further, the Applicant claimed that he was not given a personal hearing by the original authority. The above contention of the Applicant does not appear to be correct, as it is recorded in para 10 of the said Order-in-Original that "the counsel further stated that the notice does not desire a personal hearing in the matter".

7. It is observed that the gold is not allowed to be imported freely in baggage and it is permitted to be imported only subject to fulfillment of certain conditions. In the present case, it is contended that the Applicant was an eligible passenger. However, no evidence has been produced to substantiate this claim. Further, in terms of notification no. 12/2012-Cus dated 17.03.2012, the eligible passenger is allowed to import gold upto 01 Kg, at concessional rate of duty, if he had made a declaration in this regard and subject to payment of applicable duty in foreign currency. Therefore, it is evident that the Applicant

did not comply with the conditions subject to which he could have imported gold in his baggage.

8. As per Section 123 of the Act, *ibid*, 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 impugned goods, as stipulated under Section 77 of the Act, *ibid*. No documents evidencing ownership and licit purchase have been produced. The Applicant has, thus, failed to discharge the burden placed on him, in terms of Section 123, *ibid*. Keeping in view the facts and circumstances of the case and as the Applicant has failed to discharge the onus placed on him in terms of Section 123, the Government concurs with the lower authorities that the impugned goods were liable to confiscation under Section 111 *ibid* and that the penalty was imposable on the Applicant.

9.1 The Applicant has contended is that the import of gold is not 'prohibited'. However, the Government observes that this contention of the Applicant is against several judgements of the Hon'ble Supreme Court in which it has been held that the goods, import/export whereof is allowed subject to certain conditions, are to be treated as 'prohibited goods' in case such conditions are not fulfilled. 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 fulfilment of certain conditions. In the present case, as correctly brought out by the lower authorities, the Applicant herein had not fulfilled the conditions specified in this behalf. 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."*

9.2 In the case of *Malabar Diamond Gallery P. Ltd. Vs ADG, DRI, Chennai [2016(341) ELT65(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----."

9.3 Moreover, the Hon'ble High Court of Delhi in its order dated 23.11.2023 in Writ Petition No. 8976 of 2020 in the matter of *Kiran Juneja Vs. Union of India & Ors.* has held that *"A fortiori and in terms of the plain language and intent of Section 2(33), an import which is effected in violation of a restrictive or regulatory condition would also fall within the net of "prohibited goods".* Hence, there is no doubt that the goods seized in the present case are to be treated as "prohibited goods", within the meaning of assigned to it under Section 2(33) of the Act, *ibid.*

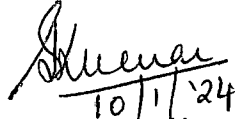
9.4 In view of the above, the contention of the Applicant that the offending goods are not 'prohibited goods', cannot be accepted.

10. The Government observes that the original authority had denied the release of gold items on payment of redemption fine, under Section 125 of Customs Act, 1962. It is settled by the judgment of 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.)]*, that the option to release 'prohibited goods' on redemption fine is discretionary. Hon'ble Delhi High Court has, in the case of *Raju Sharma [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*

motive. Further, the Hon'ble Delhi High Court in its order dated 21.08.2023 in W.P. (C) Nos. 8902/2021; 9561/2021; 13131/2022; 531/2022; & 8083/2023 held that ".....an infraction of a condition for import of goods would also fall within the ambit of Section 2(33) of the Act and thus their redemption and release would become subject to the discretionary power of the Adjudging Officer". Therefore, keeping in view the judicial pronouncements above, the Commissioner (Appeals) has correctly refused to interfere with the discretion exercised by the original authority.

11. In view of the facts and circumstances of the case, there is no ground to interfere with order of Commissioner (Appeals) regarding absolute confiscation of impugned gold kada. However, the Government finds that some relief is merited in respect of the penalty imposed. As such, the penalty imposed on the applicant is reduced to Rs. 2,00,000/- (Rupees Two Lakh only) under section 112(a) of the Customs Act, 1962.

12. The revision application is disposed of in above terms.


10/11/24
(Shubhagata Kumar)


Additional Secretary to the Government of India

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S/o Shri Mangaturam Pachuram Vasita,
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Order No. 11/24-Cus dated 10-01-2024
Copy to:

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2. The Pr. Commissioner of Customs, Airport & Air Cargo Complex, Air India SATS, Air Freight Terminal, Kempegowda, Bengaluru-560300.
3. Shri Om Prakash Mohanlal Rohira, Advocate, 148/301 Uphaar, 10th Road, Khar (W), Mumbai -400052.
4. PA to AS(RA)
5. Guard File
6. Spare Copy
7. Notice Board.

ATTESTED


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