

SPEED POST



F. No. 373/418/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. 09/08/24..

Order No. 61 /24-Cus dated 09-08- 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 No. CAL-EXCUS-000-APP-296-2019 dated 30.05.2019 passed by the Commissioner (Appeals), Central Tax, Central Excise & Customs, Kochi.

Applicant : Shri Abbobacker Sidhique Othaya Mangalam, Kozhikode, Kerala

Respondent : The Commissioner of Customs (Preventive), Cochin.

ORDER

A Revision Application, bearing No. 373/418/B/SZ/2019-RA dated 14.10.2019, has been filed by Shri Abbobacker Sidhique Othaya Mangalam, Kozhikode, Kerala (hereinafter referred to as the Applicant), against the Order-in-Appeal No. CAL-EXCUS-000-APP-296-2019 dated 30.05.2019, passed by the Commissioner (Appeals), Central Tax, Central Excise & Customs, Kochi. The Commissioner (Appeals) has upheld the Order-in-Original of the Additional Commissioner, Central Excise, Customs & Service Tax, Calicut, bearing no. 81/2016-17 dated 31.03.2017, except to the extent of setting aside the penalty of Rs. 4,00,000/- imposed on the Applicant under Section 114AA of the Customs Act, 1962.

2. The Adjudicating Authority vide above O-I-O No. 81/2016-17 dated 31.03.2017 has confiscated 12 pieces of gold totally weighing 1398 gms valued at Rs. 34,14,615/- (Tariff value) and Rs. 38,44,500/- (Market value) seized from the Applicant under Sections 111(d), 111(i), 111(j), 111(l) 111(m), 111(o) and 111(p) of the Customs Act, 1962 (hereinafter referred as the Act), imposed penalties of Rs. 4,00,000/- each under Section 112(a) & (b) & Section 114AA of the Act, respectively on the Applicant and also imposed a penalty of Rs. 4,00,000/- on one Shri Ashraf Kunnoth under Section 112(a) of the Customs Act, 1962.

3. Brief facts of the case are that the Applicant arrived from Sharjah at Calicut International Airport, by Air India Flight IX 354, on 25.04.2015, and was intercepted by the Superintendent of Customs (Intelligence Unit) at the exit gate of the Airport. It was seen that the Applicant was carrying one black colored back bag. When asked by the Superintendent as to whether he was in possession of any non-duty paid gold or any other valuables, he replied in the negative. The Superintendent then retrieved the Customs Gate Pass (Declaration form) handed over by the Applicant to the Customs Gate officer. His Customs declaration was found to bear his name, flight no., date of arrival, the value of dutiable goods imported shown as Rs. 5000/- and the same had been signed by him. Thereafter, the Superintendent and party guided the Applicant and two independent witnesses to the Air Intelligence Unit Office in the International Arrival Hall of the Airport.

Then the Superintendent informed the Applicant and the witnesses that since he has reasonable belief that the Applicant has concealed gold or other valuable materials in his body/ in his baggage, his baggage and person were to be searched. Then, the Applicant was subjected to personal search and as a result of which 12 Tola bars, weighing 116.5 gms each, with "AL-ETHIHAD, DUBAI-UAE, 10 TOLA, 999.0" engraved on them (totally weighing 1398 gms) were recovered from the underwear pocket of the Applicant. Further, a purse containing Rs. 600/- Indian rupees recovered from the pants pocket of the Applicant and the same was returned to him. The said 12 Tola bars were subjected to purity test/check and after verification, it was certified that all the 12 bars were made of gold, totally weighing 1398 grams and all were of 24 carat purity. The same were seized by the Superintendent under Mahazar dated 25.04.2015, in the presence of independent witnesses on the reasonable belief that the said items are liable for confiscation under the Customs Act, 1962. The Applicant was arrested on 25.04.2015 at Calicut International Airport, Karipur, under Section 104 of the Customs Act, 1962 and was released on bail by the Superintendent of Customs under the provisions of Customs Act, 1962 after fulfilling conditions of bail.

4. A statement of the Applicant was recorded after the seizure, by the Superintendent of Customs, under Section 108 of the Customs Act, 1962, at the Air Intelligence Unit office. As per his request the statement was type-written by Shri K.R. Sajeev, Inspector, Air Intelligence Unit. In the statement the applicant submitted that he is 25 years old; that he studied upto 10th class; that he can read and write Malayalam; that on 24.04.2015 he boarded Air India flight IX 354; departed from Sharjah at 7 P.M. and arrived at Kozhikode Airport at 11:20 P.M.; that while he was going out through green channel in Customs Baggage Hall with his hand baggage, the Superintendent of Customs and party intercepted him at the exit gate on suspicion that he had concealed gold in his body/hand bag and upon detailed examination of his body before two independent witnesses, seized the impugned gold which was concealed in his underwear pocket under a Mahazar dated 25.04.2015. When asked to explain the circumstances in which the said gold was concealed by him on his body and about his intention to smuggle the impugned gold through Kozhikode International Airport without declaring and without payment of

Customs duty, he replied that Nissar, one of his friends and neighbor at Abu Dhabi, had introduced him to one Shri Salim, a native of Kannur, who had connections with smuggling of gold to India; that Salim offered him a remuneration of Rs. 30,000/- and a flight ticket to Kozhikode, if he could carry 1.5 kg gold to his native place and so he decided to bring gold to India; that Salim had come to his room and handed over him an air ticket for 24.04.2015 from Sharjah to Kozhikode by Air India flight IX 354 and had instructed to reach Sharjah Airport for boarding the said flight; that Salim had further told him that one Ashraf who would be travelling in the same flight would hand over him the gold in the flight; that accordingly he boarded the flight from Sharjah on 24.04.2015; that his seat No. was 24E; that when the flight was about to land at Kozhikode, a person who was travelling at Seat No. 24C had approached him and handed over the said gold; that he was further directed to keep the said gold over the Lift near Gate No. 1 of Kozhikode Airport, after receiving the instructions over mobile phone on his landing at Calicut Airport; that he was also told that their people would approach him outside the Airport and would give his remuneration of Rs. 30,000/-; that but he could not keep the gold over the Lift because of the presence of Customs officers near the Lift and he had not got any instructions through mobile phone; that hence he concealed the gold inside his underwear pocket and came to the Customs Hall, after immigration clearance; that he was not aware of the phone number or any other details of Nissar and Salim; that he had neither declared the gold at the Customs Counter nor shown in the Customs Declaration as he had the intention to smuggle the gold without paying duty; that he had no foreign currency to pay the duty; that he had no investment in the above said gold; that he was aware that he was not eligible to bring the said gold as he had not stayed abroad for 6 months; that he tried to smuggle the gold for some financial benefit due to his poor financial condition and that earlier he had not attempted to clear anything without payment of Customs duty and this statement was given by him under his freewill without any threat or coercion.

5. As per the statement of the Applicant, the person who handed over him the gold in the Aircraft was later identified as Shri Ashraf Kunnoth, KP VIII/212 E, Baith Zair, Kottayampoyil P.O. Pathayakunnu, Kannur -670691 (Passport No. M-4623558). A follow

up search was conducted by the Superintendent of Customs, Customs Preventive Unit, Thalasseri on 05.05.2015, at the residential premises of Shri Ashraf Kunnoth, but no contraband or incriminating documents/ material evidence were recovered or seized from the premises. Shri Ashraf Kunnoth was summoned vide Summons No. 47/2015 dated 01.05.2015 and 56/2015 dated 19.05.2015, to appear before the Superintendent (AIU), Karipur Airport and record his statement. He did not respond to the summons but moved a Bail Application before the Hon'ble High Court on 03.06.2015.

6. The adjudicating authority adjudicated the matter vide above said O-I-O No. 81/2016-17 dated 31.03.2017. Thereafter, the Applicant filed appeal before the appellate authority who decided the case vide Order-in-Appeal No. CAL-EXCUS-000-APP-296-2019 dated 30.05.2019. Aggrieved by this order, the Applicant has filed the instant Revision Application.

7. This Application has been filed mainly on the grounds that the statement of the Applicant was obtained forcefully; that the Mahazar did not contain the pre-requisite that the searching officer had reason to believe that the goods seized were liable to confiscation under the Customs Act and that this fact was missed by the original authority; that the right of the Applicant to be searched before a Magistrate or a Gazetted officer was flouted; and that the gold bars were properly declared and if the goods could not be cleared, the same should have been detained for re-export under Section 80 of the Customs Act, 1962. It is prayed that the order for absolute confiscation of impugned gold and penalty imposed under Section 112 of the Customs Act, 1962 may be set aside/ reduced.

8. Personal hearings in the matter were fixed on 23.02.2024 and 06.03.2024. But, none appeared either from the Applicant's side or from the Respondent's side. Also, no any request for adjournment has been received. Therefore, the matter is taken up for decision based on available records.

9. The Government has carefully examined the matter. It is on record that the applicant had filled the value of dutiable goods as Rs. 5000/- in his Customs Declaration Form which bore his name, flight no., date of arrival etc. and which was signed by him. Thus not only did he violate section 77 of the Customs Act, 1962 but also made a false declaration to evade payment of Customs duty. Even after being questioned by Customs, the Applicant denied having any gold or valuables with him. Further, the sequence of events has been recorded in the Mahazar dated 25.04.2015 in the presence of two independent witnesses, corroborating the chain of events. The Applicant has admitted to his role in smuggling the impugned gold due to the lure of money and also has been unable to produce any document evidencing licit purchase of the impugned gold at the time of arrival. Also, he had no foreign currency to pay the duty and was not an eligible passenger as he had not stayed abroad for 6 months. Hence, the contentions of the Applicant that he relied upon documents contained a lot of fabrications and the right of the Applicant to be searched before a Magistrate or a Gazetted officer was flouted are not acceptable.

10. Another contention of the Applicant is that his statement was obtained forcefully and is not voluntary. In this connection, the Applicant has admitted his involvement in the case of smuggling by concealing the same in his innerwear during his statement to Customs under Section 108 of the Customs Act, 1962. It is also noted that the original authority has noted in para 13 of his order that no police complaint was made by the applicant immediately after the incident. A copy of OP ticket dated 26.04.2015 from KMCT College, where medical examination took place, does not mention anything in support of his allegation that he was beaten and manhandled. It is noted that 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. 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. Thus, there is no evidence to support the contention that the statement tendered was not voluntary and therefore this contention appears to be only an afterthought.

11. As per Section 123 of Customs Act 1962, 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 gold items, as stipulated under Section 77 of the Act, *ibid*. No documents evidencing ownership and licit purchase were produced at the time of interception. Further the Applicant exhausted the options to declare as he was intercepted near the exit gate of the Customs Baggage Hall. Moreover, the impugned gold was ingeniously concealed. Hence, the intent to smuggle is obvious. 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 is in agreement with the lower authorities that the seized gold items were liable to confiscation under Section 111 *ibid* and, consequently, the Applicant is liable to penalty.

12.1 The applicant has contended that the gold bars should have been permitted for clearance on payment of appropriate duty since the 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 Supreme 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*". In the case of 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"*. In its judgment, 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."*

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"*.

12.2 In view of the above, the contention of the Applicant that the impugned gold items are not 'prohibited goods', cannot be accepted.

13. The Government observes that the original authority had denied the release of seized 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 option to release 'prohibited goods' on redemption fine is discretionary. 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)], 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.*" Now in the latest judgment 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 and the facts of the case, the Commissioner (Appeals) has correctly refused to interfere with the discretion exercised by the original authority.

14. Further, as far as re-export of offending goods is concerned, the Government observes that a specific provision regarding re-export of baggage articles has been made

under Section 80 of the Customs Act, 1962. On a plain reading, it is apparent that a declaration under Section 77 is a pre-requisite for allowing re-export in terms of Section 80 *ibid*. Hon'ble Allahabad High Court has, in the case of Deepak Bajaj {2019 (365) ELT 695 (All.)}, held that a declaration under Section 77 is a *sine qua non* for allowing re-export under Section 80. In this case, the Applicant had made no declaration in respect of the subject goods. Further, the Hon'ble Delhi High Court has, in the case of Jasvir Kaur vs. UOI {2019 (241) ELT 521 (Del.)}, held that re-export "cannot be asked for as of right-----". The passenger cannot be given a chance to try his luck and smuggle Gold into the country and if caught he should be given permission to re-export." Hence the option of re-export also cannot be given.

15. 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 in the instant case, the Applicant was well aware that he was in possession of gold and was also aware that he was smuggling the same into India which was against the law. Yet he filed a false declaration in Customs Declaration Form and denied possession of the same when specifically asked by Customs officers. Thus a false and incorrect declaration was made, whereas on a plain reading of Section 77 of the Customs Act, 1962, the imposition of penalty under Section 114 AA is merited.

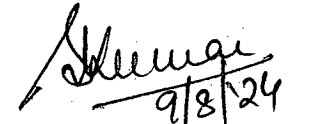
16. The Commissioner (Appeals) has referred to the objective of introduction of Section 114AA, as explained in the para 63 of the report of Parliament's Standing Committee on Finance (2005-06), to hold that the provisions of Section 114AA are not attracted since in the present case smuggled goods had '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.

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

18. 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.

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


9/8/24
(Shubhagata Kumar)

Additional Secretary to the Government of India

Shri Aboobacker Sidhique Othaya Mangalam,
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Order No. 161 /24-Cus dated 09-08-2024

Copy to:

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2. The Commissioner of Customs (Preventive), Cochin, 5th Floor, Catholic Centre, Broad Way, Cochin - 682031.
3. PPS to AS(RA)
4. Guard File
5. Spare Copy
6. Notice Board.

ATTESTED



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