

**SPEED POST**



F. No. 373/323/B/SZ/2019-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. 19/01/24

Order No. 22/24-Cus dated 19-01-2024 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 No. CAL-EXCUS-000-APP-236-2019 dated 20.05.2019 passed by the Commissioner (Appeals), Central Tax, Central Excise & Customs, Kochi.

Applicant : Shri Nittoor Valappil Farshad, Kozhikode

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

.....

**ORDER**

A Revision Application, bearing No. 373/323/B/SZ/2019-RA dated 07.08.2019, has been filed by Shri Nittoor Valappil Farshad, Kozhikode (hereinafter referred to as the Applicant), against the Order-in-Appeal No. CAL-EXCUS-000-APP-236-2019 dated 20.05.2019, passed by the Commissioner (Appeals), Central Tax, Central Excise & Customs, Kochi. The Commissioner (Appeals) has upheld the Order-in-Original of the Joint Commissioner of Central Excise & Customs, Calicut, bearing no. 54/2015-16 dated 21.02.2016, except to the extent of setting aside the penalty of Rs. 2,30,000/- imposed on the Applicant under Section 114AA of the Customs Act, 1962.

2. The Joint Commissioner of Central Excise & Customs, Calicut has absolutely confiscated gold bars weighing 816.41 grams having tariff value of Rs. 20,08,238/- and market value of Rs. 23,22,686/-, seized from the Applicant under Section 111(d), 111(l) and 111(m) of the Customs Act, 1962 (hereinafter referred as the Act), imposed a penalty of Rs. 2,30,000/- under Section 112(a) of the Act and also imposed a penalty of Rs. 2,30,000/- under Section 114AA of the Act on the Applicant.

3.1 Brief facts of the case are that on the basis of specific information that the Applicant would be arriving on the Air India flight from Dubai on 18.06.2014 at the Calicut International Airport, Karipur and would be smuggling gold biscuits concealed on his body, the Superintendent of Customs, Customs Preventive Unit, Malappuram and team along with witnesses kept surveillance outside the exit gate of the arrival hall of the airport on 18.06.2014. The Applicant, identified from his travel documents, came out through the exit gate. On being questioned, he replied that he had not brought any dutiable goods, nor declared anything to Customs or paid any duty and that he had walked through the green channel. The Applicant was brought along with the witnesses to the Air Intelligence room in the arrival hall of the airport and his baggage was examined in detail but no smuggled goods or incriminating documents were recovered from the said baggage. Thereafter, on physical examination of the Applicant, suspicion arose that metal pieces were concealed in his rectum and when he was asked, he admitted that he had concealed

seven gold biscuits in his rectum subsequently the seven gold biscuits were recovered from his body, cleaned and handed over to the officers. The gold biscuits bore the markings "ARGOR HERAEUSSA Switzerland 10 TOLAS, MELTER (AH) ASSAYER 999.0". The seven gold biscuits were subjected to purity check and the goldsmith certified them to be of 24 carat purity. The gold biscuits were seized for violation of provisions of the Customs Act, 1962, under a mahazar dated 18.06.2014 in the presence of independent witnesses.

3.2 The Applicant in his voluntary statement dated 18.06.2014 recorded under Section 108 of the Customs Act, 1962, inter-alia stated that he had studied upto 9<sup>th</sup> standard but he could not write Malayalam properly and sought help of a person to write his statement; he was working as coolie in his hometown; that he had gone to Dubai in search of a job on a visiting visa on 10.06.2014 and returned on 18.06.2014 alongwith impugned gold kept concealed as per instructions of one Mujeeb, who met the Applicant at Dubai and offered a remuneration of Rs. 30,000/- along with return ticket, if he smuggled the impugned gold as a carrier and handed over the same to a person who would recognize and received the gold from the Applicant. He narrated the sequence of events leading to the seizure of the gold biscuits concealed in his rectum and the events recorded in the mahazar. The Applicant arrived at Calicut International Airport, Karipur on 18.06.2014 from Dubai with the impugned gold concealed in his rectum and was leaving the airport after taking his baggage when the officers intercepted him; that the person who was to collect the gold did not approach him; that he did not know any details about Mujeeb including his address or native place; that the said Mujeeb had neither given him a bill for the gold nor foreign currency to pay Customs duty and that he also did not possess any foreign currency. On verification, it was revealed that he had not mentioned anything about the gold biscuits in his customs declaration form and had declared the total value of dutiable goods imported as NIL. The impugned gold biscuits were then seized under a mahazar dated 18.06.2014. The Applicant was arrested on 19.06.2014 under Section 104 of the Customs Act, 1962 for having committed an offence punishable under Section 135 of the Customs Act, 1962 and let off on bail the same day. Follow up search was conducted at the residential premises of the Applicant on 20.06.2014, but no incriminating material or evidence was recovered.

4. The revision application has been filed, mainly, on the grounds that both the adjudicating authority and appellate authority were wrong in ordering absolute confiscation of the gold treating as 'prohibited goods' citing various case laws; that gold is not prohibited goods and cannot be confiscated absolutely; that the Order-in-Appeal of Commissioner (Appeals), Kochi should be modified by ordering release of the confiscated gold on payment of nominal fine and duty at the appropriate rate and the penalty imposed on the Applicant under Section 112(a) should be reduced.

5. Personal hearing in the matter was fixed on 04.12.2023 and 20.12.2023 respectively. But, none appeared either from the Applicant's side or the Respondent's side. Also, no request for adjournment has been received from either side. However, Shri C. Mitra Prasad, Advocate vide email dated 18.12.2023 reiterated the submissions made in the Revision Application. Therefore, the matter is taken up for decision based on the available records.

6. The Government has carefully examined the matter. It is observed that the Applicant has not declared the possession of impugned goods in his Customs declaration form and it is only through persistent enquiry and examination of the Applicant, that the ingenious concealment in his body came to light. It is clear that body concealment was done to evade custom duty and he is not the owner of impugned gold. It is also noted that, the Applicant in his voluntary statement dated 18.06.2014 recorded under Section 108 of the Customs Act, 1962, has admitted his guilt. Thus, he was fully aware that bringing impugned gold items and attempting to smuggle it in by way of ingenious concealment, non-declaration to Customs, and without possession of any valid permit/license/document, is a violation of the Customs Act, 1962. Hence, the impugned goods cannot be considered as bonafide baggage. Further, the entire proceedings have been covered under a Mahazar in presence of independent witnesses, which corroborates the sequence of events. This is a signed statement which has not been retracted by the Applicant. It is also found that the Applicant was not eligible for import of the impugned gold in terms of Notification No. 12/2012-Cus dated 17.03.2012 (as amended) due to non-fulfilment of the conditions of

the notification such as non-completion of six months stay abroad and non-possession of adequate convertible foreign currency to pay duty on the gold.

7. 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 adjudicating & appellate authorities that the impugned goods were liable to confiscation under Section 111 *ibid* and that the penalty was imposable on the Applicant.

8.1 The Applicant has contended that the import of gold is not 'prohibited'. However, the Government observes that this contention of the Applicant flies in the teeth of several judgments 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 in this case did not fulfil 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."*

8.2 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----."*

8.3 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.*

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

9. 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.

10.1 The Government also observes that the Commissioner (Appeals) has set aside the penalty imposed by the lower adjudicating authority under Section 114AA of the Act, *ibid* on the ground that no penalty is imposable under Section 114AA of the Customs Act, 1962 as these provisions are not attracted in the baggage cases. On this issue, the Government observes that Government vide its order GOI order No. 57-64/23-Cus dated 17.02.2023 in the case of Hamid Ali & Others, in para 6.3 has held that “*the words of Section 114AA are absolutely clear and unambiguous. Hence, it has to be held that there was no occasion for the Commissioner (Appeals) to depart from the literal rule of interpretation and take recourse to other principles of interpretation*”. The ratio of the judgment cited (*supra*) is squarely applicable to this case.

From the provisions of Section 114AA, it is very much clear that a person who intentionally declares something, which is factually incorrect for the purposes of Customs Act, 1962 is liable for penalty. There is nothing in the plain language of Section 114AA to even remotely suggest that the provisions thereof are not applicable in baggage cases. Hence, it has to be held that reliance placed by the Commissioner (Appeals) upon an order which departed from the literal rule of interpretation, without any cause and in the teeth of law settled by the Apex Court was erroneous. 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. Hence, it has to be held that there was no occasion for the Commissioner (Appeals) to depart from the literal rule of interpretation and take recourse to other principles of interpretation.

10.2 It is observed that Section 112 and Section 114AA are two independent provisions and they refer to different violations. Therefore, when in a case both violations are present, penalty under both the Sections can be imposed. Further, there is no provision in the Customs Act which ousts the imposition of penalty under Section 114AA, if a penalty under Section 112 has been imposed. The Hon'ble Delhi High Court has, in the case of *Commissioner of Customs and Central Excise, Delhi-IV vs. Achiever International* {2012 (286) ELT 180 (Del.)}, decided on the same lines. The Government observes that in this case, the Applicant was not an eligible passenger in terms of the Baggage Rules, 2016, and had brought in gold and gold jewellery valued at more than Rs. twenty lakh, which does not constitute bona-fide baggage. He failed to discharge the onus on him to establish that the impugned gold and gold jewellery brought by him was not smuggled into India in terms of Section 123 of the Act *ibid*. Moreover, the Applicant made an incorrect declaration, when asked by the Customs authorities as to whether he was carrying any dutiable/prohibited goods thereby contravening the provisions of Section 77 the Act *ibid*. Since an incorrect declaration was made for transaction of business as per Section 77 *ibid*, the imposition of penalty under section 114AA by the original adjudicating authority was correct.

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

12. In view of the above, the ingenious concealment of the impugned gold and false declaration that the Applicant was not carrying any dutiable goods when questioned by the Customs, the revision application does not merit consideration. In view of the facts and circumstances of the case, the penalty imposed by the original authority, on the Applicant, under Section 114AA, is also restored.



13. The revision application is disposed of on the above terms.

*Shubhagata Kumar*  
19/1/24

(Shubhagata Kumar)

Additional Secretary to the Government of India

Shri Nittoor Valappil Farshad,  
S/o Shri Moidu,  
Nittoor Valappil House,  
Customs Road, Vatakara Beach (P.O.),  
Kozhikode-673103

Order No. 27-24-Cus dated 19-01-2024

Copy to:

1. The Commissioner of Central Tax, Central Excise & Customs (Appeals), Central Revenue Building, I.S. Press Road, Kochi -682018.
2. The Commissioner of Customs (Preventive), 5<sup>th</sup> Floor, Catholic Centre, Broadway, Cochin -882031.
3. Shri C. Mithra Prasad, Consultant, H.No. 5/469-B, Sasthrinagar, Eranhipalam, Calicut-673006.
4. PA to AS(RA)
5. Guard File
6. Spare Copy
7. Notice Board.

ATTESTED

*Shailendra Kumar Meena*  
19/1/24  
(शैलेन्द्र कुमार मीना)  
(Shailendra Kumar Meena)  
अनुभाग अधिकारी / Section Officer  
वित्त मंत्रालय (राजस्व विभाग)  
Ministry of Finance (Deptt. of Rev.)  
भारत सरकार / Govt. of India  
नई दिल्ली / New Delhi