

SPEED POST



F. No. 373/213/B/2019-RA
F. No. 380/63/B/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..16.11.23

Order No. 277-278/23-Cus dated 16-11-2023 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. 67 & 68/2019 dated 30.04.2019 passed by the Commissioner of Customs (Appeals), Bengaluru.

Applicant : Sh. Farqaleet Ahmed Kazia, Bhatkal
The Commissioner of Customs, Panambur, Mangaluru

Respondent : The Commissioner of Customs, Panambur, Mangaluru
Sh. Farqaleet Ahmed Kazia, Bhatkal

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ORDER

Revision Application Nos. 373/213/B/2019-RA dated 01.07.2019 & 380/63/B/2019-RA dated 14.08.2019, have been filed by Sh. Farqaleet Ahmed Kazia, Bhatkal (hereinafter referred to as the 'Applicant') and the Commissioner of Customs, Panambur, Mangaluru (hereinafter referred to as the 'Department'), against the Order-in-Appeal No. 67 & 68/2019 dated 30.04.2019, passed by the Commissioner of Customs (Appeals), Bengaluru. The Commissioner (Appeals) has partially upheld the Order-in-Original, passed by the Additional Commissioner of Customs, Mangaluru, bearing no. 42/2018-ADC dated 27.12.2018 to the extent that the penalty of Rs. 1,90,000/- imposed upon the Applicant under Section 114AA of the Customs Act, 1962 has been set aside. Vide the aforesaid Order-in-Original, gold sheet in rolled form, totally weighing 408.300 grams and valued at Rs. 12,61,647/-, was recovered from the Applicant and confiscated absolutely under Section 111(d), (i), (l) and (m) of the Customs Act, 1962. Besides, penalties of Rs. 3,75,000/- & Rs. 1,90,000/- were also imposed on the Applicant under Section 112(a) & 114AA, respectively, of the Act *ibid*.

2. Brief facts of the case are that the Customs officers intercepted the Applicant on 14.02.2018 upon his arrival at Mangaluru International Airport while he attempted to pass through the Customs Green Channel without declaring the impugned items to Customs. Upon being specifically asked, the Applicant stated that he was not in possession of any dutiable/contraband goods either in his accompanied baggage or upon his person. When the personal belongings of the Applicant were scanned, the image of one of the shoes bearing the brand name "Adidas" showed some dense material in the inner sole portion. On thorough examination of that shoe, a silver-coloured metallic sheet in rolled form was found secreted in the inner sole portion. Scratching the metallic plate revealed yellow coloured metal beneath the silver-coloured coating. Thereafter, the Jewellery Valuer examined and certified the said silver coloured metallic sheet in rolled form to be made of 24 carat purity gold, weighing 408.300 grams in net and coated with rhodium and valued it to be at Rs. 12,61,647/-. It was noticed that the Applicant was not in possession of any documents evidencing the purchase of the said gold sheet in rolled form. In his statement dated 14.02.2018, tendered under Section 108 of Customs Act, 1962, the Applicant stated

inter-alia that he was not carrying enough foreign currency to pay applicable duty; that he had attempted to smuggle the impugned goods into India without declaring to Customs; that he concealed the said impugned goods in rolled form by secreting these inside his right shoe; and that he had not come forward to declare about the possession of any dutiable goods in the Customs Declaration Form provided at the Customs counter. The original authority, vide the aforesaid Order-in-Original dated 27.12.2018, absolutely confiscated the seized gold sheet in rolled form under Section 111(d), 111(i), 111(l) & 111(m) of the Customs Act, 1962 and imposed penalties of Rs. 3,75,000/- & Rs. 1,90,000/- on the Applicant under Section 112(a) & 114AA, respectively, of the Act *ibid*. Aggrieved, the Applicant filed an appeal before the Commissioner (Appeals), which has been modified as above.

3. The Applicant has filed revision application mainly on the grounds that the Applicant had not attempted to pass through the Green Channel with an intent to evade payment of Customs duty; that the Applicant was under an impression that gold upto 5 Kgs could be brought into the country duty-free and hence he made no declaration in the Customs form; that the impugned goods do not fall within the category of 'prohibited goods'; that there was no intent to evade payment of customs duty; and that the gold may be allowed to be re-exported without imposing any fine and penalty.

4. The Department has filed revision application mainly on the grounds that penalty under Section 114AA is imposable in the matter; and that penalty under Section 112(a) of the Customs Act, 1962, upto 50% of the value of the goods should be imposed as the penalty of Rs. 3,75,000/- is less than 50%.

5. Personal hearing was fixed on 30.10.2023. The hearing was conducted, in virtual mode, wherein Sh. Farqaleet Ahmed Kazia i.e. the Applicant himself appeared and submitted that the impugned gold was bought by him from his own money which were his earnings and gratuity etc. & that he is not into any kind of illegal business and that he also submitted the invoice for purchase of the gold to the Customs authorities and Commissioner (Appeals). He submitted that he had bought the gold for his own marriage

and that a lenient view should be taken; that goods should be allowed to be redeemed upon RF and setting aside of penalty imposed. None appeared for the department, however, vide email letter dated 01.11.2023, Commissioner of Customs, Mangaluru has informed that due to a technical issue at their end, the department could not attend the personal hearing and requested that orders may be passed on the basis of facts on record.

6. The Government observes that this is a case of ingenious concealment with an intent to evade duty, as the Applicant has tried to smuggle gold by covering it in a silver-coloured sheet having Rhodium coating and secreting it inside his shoe and he has also admitted to the same. Thus, the intent to smuggle is obvious.

7. In terms of 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. In the present case, the Applicant has clearly attempted to smuggle gold through ingenious concealment. Not only has he been unable to produce any proof of licit purchase of the gold at the time of interception, but he has admittedly tried to smuggle the gold by concealing it in his shoe and not declaring it to Customs, as required under Section 77 of Customs Act, 1962. The Applicant has, thus, failed to discharge the burden placed on him, in terms of Section 123, *ibid*.

8. Further, it has been claimed by the Applicant that the gold is purchased by him and he has furnished the copy of the invoice to this effect. In this connection it is noticed that the copy of the said invoice pertains to 3.5 TT Bar gold, which is different from the gold confiscated in this case. Secondly, the impugned gold was coated with Rhodium and concealed by the Applicant in his shoe. Had he not been apprehended by Customs he would have been able to clear Customs undetected as the gold was not declared by him as required under Section 77 of the Customs Act, 1962. Hence, it is an inescapable conclusion that the Applicant intentionally covered the gold in rhodium coating and concealed it with the intent to evade Customs duty, which establishes malafide on part of the Applicant.

9.1 The Applicant has contended that the gold ought to have been released to him since the import of gold is not 'prohibited'. However, the Government observes that this contention of the Applicant flies in the teeth of several judgements of Hon'ble Supreme Court. {Ref. Sheikh Mohd. Omer vs Collector of Customs, Calcutta & Ors 1983(13)ELT 1439(SC)}, M/s. Om Prakash Bhatia vs Commissioner of Customs, Delhi {2003(155) ELT 423(SC)}. In the recent case of UOI & Ors vs. M/s Raj Grow Impex LLP & Ors (2021-TIOL-187-SC-CUS-LB), the Hon'ble Supreme Court has espoused 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 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 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 this case, since the conditions, subject to which gold could have been legally imported, have not been fulfilled, there is no doubt that the subject goods are 'prohibited goods'.

10. The original authority has denied the release of impugned goods on redemption fine under Section 125 of Customs Act, 1962. The Government observes that, in terms of Section 125 of the Customs Act, 1962, 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 Commissioner of Customs (Air), Chennai-I Vs P. Sinnasamy {2016(344)ELT1154 (Mad.)}, the Hon'ble Madras High Court has held that *"non-consideration or non-application of mind to the relevant factors, renders exercise of discretion manifestly erroneous and it causes for judicial interference."* Hon'ble Delhi High Court has, in the case of Raju Sharma [2020 (372) ELT 249 (Del)], relying upon the judgment of Apex Court in Mangalam Organics Ltd. [2017 (349) ELT 369 (SC)], 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."* In the present case, the order of the original authority does not suffer from any of these vices. Rather, the original authority has, after due application of mind, ordered absolute confiscation for the relevant and reasonable considerations brought out in para 25.7 to 25.8 of the Order-in-Original. Thus, the Commissioner (Appeals) has correctly refused to interfere in the matter.

11. On a plain reading of Section 80 of the Customs Act, 1962, 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 written declaration in respect of the subject goods and made a false declaration when asked specifically whether he had anything to declare. 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 question of allowing re-export also does not arise.

12. The Applicant has contended that gold upto 5 Kgs could be brought into the country duty-free and hence he made no declaration in the Customs form. In this connection, as per Notification No. 12/2012 dated 17.03.2012, as amended, the term

'eligible passenger' is defined as a passenger of Indian origin or a passenger holding a valid passport, issued under the Passports Act, 1967 (15 of 1967), who is coming to India after a period of not less than six months of stay abroad; and short visits, if any, made by the 'eligible passenger' during the aforesaid period of six months shall be ignored if the total duration of stay on such visits does not exceed thirty days and such passenger has not availed of the exemption under this notification or under the notification being superseded at any time of such short visits. Further, as per the benefit given by this notification gold could be brought at concessional rate of duty and not duty free. Moreover, the adjudicating authority has noted in para 12 of the OIO that the Applicant departed from India to UAE on 19.01.2018 and hence he has not fulfilled the condition of six months of stay abroad. Hence, this contention of the Applicant is not acceptable.

13.1 The contention of the department is that the Applicant is liable to penalty under Section 114AA and the Commissioner (Appeals) has erred by dropping the same.

13.2 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 in the instant case, the Applicant was well aware that he was in possession of gold and was also aware that he was bringing the same into India from Dubai which was against the law. Yet he concealed the impugned goods in his shoe and denied possession of the same when specifically asked by Customs officers. Thus a false and incorrect declaration was made with an intent to evade duty, whereas on a plain reading of Section 77 of the Customs Act, 1962, the imposition of penalty under Section 114 AA is merited.

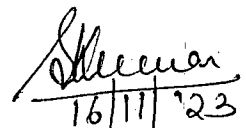
13.3 The Commissioner (Appeals) has referred to the objective of introduction of Section 114AA, as explained in the para 63 of the report of Parliament's Standing Committee on

Finance (2005-06), to hold that the provisions of Section 114AA are not attracted in the instant case as the Applicant had not made any false or incorrect declaration or statement in the transaction of any business. The Government observes that the Applicant had indeed made a false declaration when he was specifically asked whether he had any dutiable item to declare to which he replied in the negative. Passengers travelling on international flights are required to fill Customs Declaration Form in case they are carrying dutiable goods and not making such declaration to Customs when in fact carrying dutiable goods amounts to making a false declaration. Hence, there appears to be no reason for the Commissioner (Appeals) to have granted waiver of the penalty under Section 114AA of the Act, *ibid*.

13.4 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.

14. 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.

15. In view of the above, RA No. 373/213/B/2019-RA is rejected and RA No. 380/63/B/2019-RA succeeds and is allowed.



(Shubhagata Kumar)

Additional Secretary to the Government of India

1. Sh. Farqaleet Ahmed Kazia
S/o Sh. Mohammed Saleem Kazia,
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Bhatkal, Karwar-581320
2. The Commissioner of Customs,
New Customs House, Panambur,
Mangaluru-575010.

Order No. 277-278/23-Cus dated 16-11-2023

Copy to:

1. The Commissioner of Customs (Appeals), BMTC Building, Above BMTC Bus Stand, Old Airport Road, Domlur, Bengaluru-560071.
2. Sh. Akash B. Shetty & M. Nagendra Murthy, 'Anveshana Advocates', No. 7/1, 'B' Street, 1st Main Road, Sheshadripuram, Bengaluru-560020.
3. PPS to AS(RA).
4. Guard file.
5. Spare Copy.
6. Notice Board.

ATTESTED


16/11/2023

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