

SPEED POST



F. No. 373/345/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. 30/01/24

Order No. 28/24-Cus dated 30-01-2024 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. 123/2019 dated 04.07.2019 passed by the Pr. Commissioner of Customs (Appeals), Bengaluru.

Applicant : Shri Haresh Sewaldas Bijlani, Thane

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

ORDER

A Revision Application, bearing No. 373/345/B/SZ/2019-RA dated 05.09.2019, has been filed by Shri Haresh Sewaldas Bijlani, Thane (hereinafter referred to as the Applicant), against the Order-in-Appeal No. 123/2019 dated 04.07.2019, passed by the Pr. Commissioner of Customs (Appeals), Bengaluru. The Commissioner (Appeals) has upheld the Order-in-Original of the Additional Commissioner of Customs, Airport and Air Cargo Complex, Bengaluru, bearing no. 40/2018-19 (AP-ADM) dated 21.02.2019, except to the extent of setting aside the penalty of Rs. 2,68,564/- imposed on the Applicant under Section 114AA of the Customs Act, 1962.

2. The Additional Commissioner of Customs, Airport and Air Cargo Complex, Bengaluru has confiscated three numbers of ten tola gold biscuits of 24 karat purity, weighing 349.920 grams valued at Rs. 10,74,255/- 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), confiscated the material objects used to conceal impugned gold items viz. black carbon paper and black insulation tape under Section 119 of the Act, imposed a penalty of Rs. 2,68,564/- under Section 112(a) of the Act and also imposed a penalty of Rs. 2,68,564/- under Section 114AA of the Act on the Applicant.

3. Brief facts of the case are that the Applicant arrived from Dubai at Kempegowda International Airport, Bengaluru, on 20.09.2017, and was intercepted by the Customs officers in the Customs arrival Hall at Bengaluru International Airport. The Applicant had not mentioned any value against dutiable goods imported in the Customs Declaration Form. The Applicant was carrying one blue coloured back pack and a laptop bag as hand baggage. The baggage was scanned and only some used clothes and 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 buttocks of the passenger. On persistent query, the Applicant admitted that he had concealed gold in his rectum. Subsequently, he handed over three pieces of 10 tola gold biscuits to the officers. The approved gold appraiser/valuer Shri C.N. Badrinath certified that the three pieces of 10 tola gold biscuits weighed 349.920 grams and valued at Rs. 10,74,255/-. The said gold was

undeclared and was attempted to be smuggled into India through ingenious concealment by the Applicant. The impugned gold was seized under Section 110 of Customs Act, 1962 under a mahazar dated 20.09.2017 read with statement of the Applicant dated 20.09.2017 recorded under Section 108 of the Customs Act, 1962, wherein the Applicant admitted to the smuggling and concealment and also that he was aware that it is a punishable offence under Customs law to smuggle the gold. The matter was adjudicated vide the aforementioned order dated 21.02.2019. Aggrieved, the Applicant filed appeal before the Commissioner (A) which was modified as mentioned above.

4. The revision application has been filed, mainly, on the grounds that 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; that the gold is not a prohibited item; that the gold under absolute confiscation be released under Section 125 of the Customs Act, 1962 on fine particularly when the gold is not banned under the Baggage Rules, 1998; the personal penalty imposed under Section 112 of Customs Act, 1962 be ordered to be waived/reduced.

5. Personal hearing in the matter was fixed on 13.12.2013. Shri Om Prakash Rohira, Advocate appeared on behalf of the Applicant and reiterated his written submissions in the matter and sought a lenient view. He prayed for reduction in penalty. No one appeared from the Respondents' side and no request for adjournment has been made. Therefore, the matter is taken up for decision based on 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, it was revealed that he had concealed the impugned gold in his rectum. Subsequently, the Applicant in his voluntary statement dated 20.09.2017 has admitted his guilt. He was aware that bringing impugned gold items and attempt to smuggle it by way of ingenious concealment, non-declaration to Customs, without possession of any valid permit/license/document, is an offence. Hence, the impugned goods cannot be considered as bonafide baggage. Further,

no material has been placed on record to support the allegation that his statement was recorded under threat or coercion. Further, the entire proceedings have been covered under a Mahazar in presence of independent witnesses which also corroborates the sequence of events. He has also accepted his offence in his voluntary statement dated 20.09.2017 recorded under Section 108 of the Customs Act, 1962. This is a signed statement which has not been retracted.

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 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 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 ration 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 is liable for imposition of penalty under this section who intentionally declares something, in writing or verbally, which is factually incorrect for the purposes of Customs Act, 1962. 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

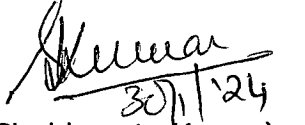
foremost rule of interpretation is the literal rule of interpretation {M/s. Hiralal Ratanlal vs. STO, AIR 1973 SC 1034 & B. Premanand & Ors. Vs. Mohan Koikal & Ors. (2011) 4SCC 266}. Where the words of a statute are absolutely clear and unambiguous, recourse cannot be had to other principles of interpretation {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. two crores, 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. 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 Applicant is liable for penalty under Section 114AA. As

such, penalty of Rs. 1,00,000/- is imposed upon the Applicant under Section 114AA and penalty under Section 112(a) is reduced from Rs. 2,68,564/- to Rs. 1,00,000/-.

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


30/1/24
(Shubhagata Kumar)

Additional Secretary to the Government of India

Shri Haresh Sewaldas Bijlani,
S/o Shri Sewaldas Varaldas Bijlani,
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Order No. 28/24-Cus dated 30-01-2024

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, 148/30.1 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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