

SPEED POST



F. No. 373/143/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 29/12/23

Order No. 298/23-Cus dated 29-12-2023 of the Government of India passed by Ms. 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. 385/2018 dated 30.11.2018, passed by the Commissioner of Customs (Appeals), Bengaluru.

Applicants : Sh. Mohammad Mohideen, Ramanathpuram.

Respondent : Commissioner of Customs (Airport), Bengaluru.

* * *

ORDER

A Revision Application No. 373/143/B/2019-RA dated 06.05.2019 has been filed by Sh. Sh. Mohammad Mohideen, Ramanathapuram (hereinafter referred to as the 'Applicant'), against the Order-in-Appeal No. No. 385/2018 dated 30.11.2018, passed by the Commissioner of Customs (Appeals), Bengaluru. The Commissioner (Appeals) vide the impugned Order-in-Appeal, has modified the Order-in-Original passed by the Additional Commissioner of Customs , Kempegowda International Airport, Bengaluru, bearing O-I-O No. 11/2018-19(AP-ADM) dated 31.07.2018. Vide the aforementioned Order-in-Original, six pieces of gold bars weighing one Kg each (99.9% purity), two cut pieces of gold bars weighing 100 Gms. each (99.9% purity), collectively valued at Rs.1,80,42,000/- and 11 Nos. of assorted gold ornaments studded with stones weighing 255.790 grams of 18 Carats/75 % purity gold valued at Rs. 26,48,857/- (total items weighing 6455.790 grams collectively valued at Rs.2,06,90,857/-) recovered from the Applicant herein were confiscated along with the insulation tapes used for concealment. Penalty of Rs. 60,00,000/- was imposed on the Applicant herein under Section 112(a) of Customs Act,1962 & a penalty of Rs. 40,00,000/- under Section 114 AA of Customs Act,1962 was also imposed. Vide the impugned OIA, Commissioner (Appeals) has set aside the penalty imposed under Section 114 AA and upheld the rest of the order passed by the original authority.

2. Briefly stated, on 10.04.2017, acting on a specific information that one passenger by the name of Mr. Mohammad Mohideen (the Applicant herein) may be carrying some contraband goods with him, Customs officers along with two independent witnesses followed the Applicant after he de-boarded flight No FD 137 arriving from Bangkok. Thereafter the Applicant entered the toilet situated at Customs international arrival hall. Subsequently, the Customs officers along with the independent witnesses entered the toilet area and searched the toilets. During the search of the toilets and the room meant for 'diaper change', the Customs officers found four black colour packets wrapped with black insulation tapes and one white coloured packet wrapped with white colour insulation tape. Thereafter, the applicant was intercepted at the arrival hall and was asked by the Customs officers as to whether he was carrying any dutiable/prohibited goods. The

applicant answered in negative and he also told the customs officers that he was not possessing any baggage declaration form too. During the Examination of the baggage in hand and body search of the Applicant, nothing incriminating was found. Four black coloured Packets and one white coloured packet recovered from the toilets were opened. 4 gold bars of 1 kg. each and 2 cut pieces of gold bars weighing 100 grams each were found in the four black coloured packets. 10 fancy bracelets and 1 gold chain all studded with stones, having a collective weight of 255.79 grams were found in the white coloured packet. On persistent inquiry, the Applicant admitted that the said black and white colour packets having the recovered gold and gold items were brought by him and thereafter kept by him in the tissue box in the toilet of Customs international arrival hall. The Applicant's statement was recorded under Section 108 of the Customs Act, 1962, in which, the Applicant admitted inter-alia that the five packets containing gold and gold items, recovered by the Customs Officers from the toilet, were brought by him and he hid the same in the toilet to avoid detection by Customs. After due process of law, the lower adjudicating authority vide O-I-O No. 11/2018-19(AP-ADM) dated 31.07.2018, absolutely confiscated 6 pieces of gold bars weighing 1 Kg each (99.9% purity), 2 cut pieces of gold bars weighing 100 Gms. each (99.9% purity), collectively valued at Rs.1,80,42,000/- and 11 Nos. of assorted gold ornaments studded with stones weighing 255.790 grams valued at Rs. 26,48,857/- recovered from the Applicant, imposed penalty of Rs. 60 Lakhs under Section 112(a) and Rs.40 Lakhs under section 114AA respectively of the act *ibid*. In the Appellate proceedings of the Appeal filed by the Applicant before the Commissioner(Appeals) the said OIO was modified to the extent that the penalty imposed by the LAA under Section 114AA was set aside and rest of the OIO was upheld vide the impugned OIA.

3. The Revision Application has been filed, mainly, on the grounds that the Order-in-Original passed by the original authority is not a speaking order; that the statement relied upon was a coerced statement and therefore had no evidentiary; that gold is not prohibited under Customs Act, 1962, and therefore no penalty can be imposed. Further the Applicant has challenged the seizure by claiming that the seizing officer did not have the reasonable belief at the time of seizure that the goods seized were smuggled goods

and hence liable for confiscation. A request for allowing re-export has been made in the revision application.

4. In the Personal hearing held on 23.08.2023, Shri V R Balasubramani, Advocate appeared for the Applicant and stated that he has made detailed written submissions already, explaining his case. He submitted that the OIA is not a speaking order, and that Commissioner(Appeals) has relied only on the statements of his clients. He further stated that the valuation report and the Mahazar according to him do not contain the words "reasonable belief". He submitted that the seizure took place in baggage hall; that the Applicant's 17 years stay abroad has not been considered by the adjudicating authority; that the gold is not a prohibited item; that although his client claims ownership of the impugned gold, the seizing authority has not explained as to how the same came to be brought to the baggage hall from the washroom where his client had left it. He quoted several judgments in support of his case and prayed for a lenient view as his client is prepared to pay the duty etc.

5.1. The Government has carefully examined the matter. The Applicant has contended in the instant revision application that the statement, on which the LAA has placed reliance as also by the appellate authority, was a coerced one. On this contention it is seen from the facts placed on record and as per the finding recorded by the LAA in para 22.3 of the O-I-O No. 11/2018-19(AP-ADM) dated 31.07.2018, it has come to fore that the voluntary statement dated 10.04.2017 was recorded under Section 108 of the act *ibid*, in which the Applicant stated and admitted that he was handed over the impugned gold by one Sh. Khader in Thailand with instructions to place the same in the tissue box at the extreme end of the toilet, meant for diaper change, in the Customs Arrival Hall, on arrival at Bangalore International airport; and that he brought the impugned gold into India for a monetary consideration of Rs.1,00,000/-. At the end of the statement he also admitted that he had made a big mistake by bringing the impugned gold by concealment without declaring it so as to avoid detection by Customs and to avoid payment of Customs duty. In the concluding Paragraph of the said statement, he stated that his statement was given by him of his free will without any force, threat or coercion. It is further observed that the

Applicant has not retracted the said statement. It is also observed that the Applicant in his first reply to the notice issued to him, before the lower adjudicating authority, claimed that the impugned gold was not recovered from him; that he had nothing to do with the seized impugned gold and gold jewelry, but during the personal hearing he accepted that by mistake he left the said gold and gold jewelry in the tissue box in the diaper change station in the toilet. Thus, the Government finds that the Applicant has contradicted himself. First he associated himself with the impugned gold and gold jewelry during the seizure, then he disassociated himself from the same in the reply to the notice issued to him and thereafter again associated himself with the impugned gold and gold jewellery during the personal hearing before the lower adjudicating authority. Even though during the adjudication process the Applicant alleged that the statement was obtained from him under coercion, no material has been placed on record which could substantiate this allegation. Thus, as correctly observed by the Commissioner (Appeals) in para 10 of the impugned OIA, the claim of the applicant is nothing but an afterthought to camouflage his wrong doing. It is also noted that though he claimed that the impugned gold did not belong to him and he had nothing to do with the matter, he states that the gold be released to him as he is now prepared to pay the duty.

5.2 The Applicant has contended that Gold is not prohibited under Customs Act, 1962, hence, no penalty is leviable. On this contention, the Government observes that that import of gold and articles thereof, in baggage, is allowed subject to fulfillment of certain conditions. In the present case, it is not even contended that these conditions were fulfilled by the Applicant herein. The issue is no longer *res-integra* in light of various judgments of Hon'ble Supreme Court that goods, in respect of which conditions subject to which their import/export is allowed are not fulfilled, are to be treated as 'prohibited goods'. [Ref: Sheikh Mohd. Omer {1983 (13) ELT 1439 (SC)}, Om Prakash Bhatia {2003 (155) ELT 423 (SC)} & Raj Grow Impex LLP {2021 (377) ELT 145 (SC)}]. Further, the Hon'ble Madras High Court has, in the cases of Malabar Diamond Gallery P. Ltd. {2016 (341) ELT 465 (Mad.)} and P. Sinnasamy {2016 (344) ELT 1154 (Mad.)}, taken this view specifically in respect of import of gold in baggage. Hence, there is no doubt that the goods seized in the present case are to be held to be 'prohibited goods'. In view of the

above, the contention of the Applicant that the offending gold item is not 'prohibited goods', cannot be accepted.

5.3. The Applicant has challenged the seizure by claiming that the seizing officer did not have the reasonable belief at the time of seizure that the goods seized were smuggled goods and hence liable for confiscation. On this issue, the Government observes that Paragraph 6 of the Mahazar dated 10.04.2017 drawn in presence of independent witnesses and placed on record starts with "*Thereafter, the Superintendent informed us that the said gold bar, cut pieces of gold and assorted gold jewellery brought by Mr. Mohammad Mohideen Mohamad Sathakathulla by way of concealment in the tissue box situated in the toilet without declaring to the Customs is in violation of the baggage rules, 1998 read with the provisions of Customs Act, 1962 and therefore it amounts to smuggling and accordingly, the same is liable for confiscation. Hence, the said gold bar cut pieces of gold and assorted gold jewellery brought by Mr. Mohammad Mohideen Mohamad Sathakathulla, are liable for confiscation and therefore, they seized the said Gold bar/cut pieces under the provisions of Customs Act, 1962*". This is the version of the independent witnesses present during the seizure proceeding of the impugned gold and gold jewellery and recorded in the Mahazar drawn on the spot. The same Mahazar has been signed by the Applicant too. Thus, it is very clear that the impugned gold and gold jewellery was seized on a reasonable belief that they were smuggled into India. Therefore, challenge to seizure by the Applicant is unfounded, without any basis and accordingly is un-sustainable.

6. Finally, the Applicant has requested this revisionary authority to consider allowing re-export of the impugned gold and gold jewellery. On this request of the Applicant, the Government observes that a declaration under Section 77 is a pre-requisite for allowing re-export in terms of Section 80 of the Act, *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 to do so orally. 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.

7.1 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 penalty under this section is imposable on a person 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}.

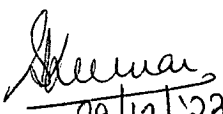
7.2 It is observed that Section 112 and Section 114AA are two independent provisions and they refer to different violations. Therefore, when in a case both violations are

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 the instant matter, 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; and the Applicant also 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 he was 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.

8. In view of the above, the Government sets aside the impugned O-I-A and restores the O-I-O.

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


29/12/23
(Shubhagata Kumar)

Additional Secretary to the Government of India

Sh. Mohammad Mohideen,
S/o Sh. Mohamed Sathakathulla,
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Order No. 298 /23-Cus dated 29-12-2023

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. Sh. V.R. Balasubramani, Advocate, Sri Vinayak Associates, No. 244, 1st cross, BSK III Road Satage, IIIrd Phase, IIInd Block,, Bengaluru-560085.
4. PPS to AS(RA).
5. Guard File.
- ✓ 6. Spare Copy.
7. Notice Board.

ATTESTED


29/12/22

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