

SPEED POST



F. No. 373/312/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. 29/12/23

Order No. 300/23-Cus dated 29-12-2023 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 CAL-EXCUS-000-APP-158-2019 dated 19.03.2019 passed by the Commissioner of Central Tax, Central Excise & Customs (Appeals), Cochin.

Applicant : Shri Jagadeesh Piratyallam, Kannur

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

ORDER

A Revision Application, bearing No. 373/312/B/SZ/2019-RA dated 07.07.2020, has been filed by Shri Jagadeesh Piratyallam, Kannur (hereinafter referred to as the Applicant), against the Order-in-Appeal No. CAL-EXCUS-000-APP-158-2019 dated 19.03.2019, passed by the Commissioner of Central Tax, Central Excise & Customs (Appeals), Cochin. The Commissioner (Appeals) has upheld the Order-in-Original of Joint Commissioner, Central Excise, Customs & Service Tax, Calicut, bearing no. 39/2016-17 dated 23.02.2017, except to the extent of setting aside the penalty of Rs. 60,000/- imposed on the Applicant under Section 114AA of the Customs Act, 1962.

2. The Joint Commissioner of Central Excise, Customs & Service Tax has confiscated six gold bars weighing 243 grams valued at Rs. 6,06,618/- (Tariff value) and Rs. 6,63,147/- (Market value) seized from the Applicant under Section 111(d), 111(i), 111(j), 111(l), 111(m) and 111(o) of the Customs Act, 1962 (hereinafter referred as the Act), confiscated the material objects viz. two shoe polish tins and four tiger balm containers used to conceal impugned gold items under Section 119 of the Act, imposed penalty of Rs. 60,000/- under Section 112(a) & (b) of the Act and also imposed a penalty of Rs. 60,000/- under Section 114AA of the Act on the Applicant.

3. Brief facts of the case are that the Applicant arrived from Dubai at Calicut International Airport, on 18.10.2015, and was intercepted by the officers of Air Intelligence Unit, Calicut at the exit gate of Customs Baggage Hall after having opted Green Channel clearance. The Applicant was carrying two carton boxes and one black coloured hand bag. Upon questioning as to whether he was carrying any gold/contraband either in his baggage or on his person, he replied in the negative. Upon examination of his baggage, six round shaped gold sheets were recovered from the Applicant which were kept concealed in two shoe polish tins and four tiger balm containers. The six yellow coloured metallic sheets were subjected to purity check and it was certified by Shri N. V. Unnikrishnan, an approved gold assayer, that the said metallic pieces are gold bars of 24 carat purity totally weighing 243 grams valued at Rs. 6,06,618/- (Tariff value) and Rs.

6,63,147/- (Market value). The Applicant did not declare the impugned gold to Customs. The Applicant has deposed that the said gold items were handed over to him by one Vinod at Dubai, for handing over to his family at Thalassery. He after reaching Karipur Airport, had tried to leave the Customs hall through the green channel without declaring the gold to Customs, whereupon he was intercepted by officers of Customs near the exit gate. The Applicant admitted that whatever stated in the Mahazar dated 18.10.2015 are true and correct; that he was totally unaware of the fact of concealment of gold in it and he came to know about the gold inside the said packet only after the Customs officers had found the gold sheets from the containers and he was under the impression that the said packet contained shoe polish and balm only; that he was deceived by the said Sh. Vinod by not disclosing the facts; that Sh. Vinod had not handed over him any Indian or foreign currency for payment of Customs duty for the said gold at Calicut Airport; that at the time of seizure of said gold by officers he was in possession of 1250 UAE Dirhams only for his expenses. Thus, he has brought the gold sheets as a carrier only. The Applicant admitted that he is not the owner of the said gold sheets recovered from him, nor could he produce any invoice/documents at the time of seizure by the Customs officers under Mahazar dated 18.10.2015. Subsequently, SCN No. 12/2016 dated 05.04.2016 was issued to the Applicant and the same was adjudicated by the lower adjudicating authority vide Order-in-Original No. 39/2016-17 dated 23.02.2017. The Commissioner (Appeals) vide Order-in-Appeal No. CAL-EXCUS-000-APP-158-2019 dated 19.03.2019, has upheld the said order of lower adjudicating authority except to the extent of setting aside the penalty of Rs. 60,000/- imposed on the Applicant under Section 114AA of the Customs Act, 1962. Aggrieved, the Applicant filed the instant Revision Application for consideration.

4. The revision application has been filed, mainly, on the grounds that he is an eligible passenger to import gold; that gold is not prohibited goods, that option ought to have been given for the release of impugned goods under Section 125 of the Customs Act, 1962 on payment of redemption fine. As such, it has been prayed that the impugned O-I-A may be modified by allowing the redemption of the impugned gold items on payment of nominal fine and appropriate duty and also reducing the penalty imposed on the Applicant.

5. Personal hearing in the matter was fixed on 01.12.2023. Sh. C. Mitra Prasad, Consultant appeared on behalf of the Applicant and reiterated the submissions made by email on 29.11.2023. He stated that the Applicant was eligible to import gold; that it was only 243 grams gold; and he prayed for a lenient view and reduction in penalty besides giving an option for redemption upon payment of fine etc. Sh. C. Mitra Prasad vide his email dated 29.11.2023 reiterated the submissions made in Revision Application and prayed for release of the confiscated goods upon payment of redemption fine and reduce the penalty.

6. The Government has carefully examined the matter. It is observed that the Applicant was intercepted at the exit gate. In his statement dated 18.10.2015, he himself had admitted to the recovery of impugned gold sheets from his baggage and that he intended to clear the gold by way of concealment. The impugned gold items did not belong to the Applicant and he could not produce any invoice/documents at the time of seizure of the impugned goods. He was aware that bringing impugned gold items and attempt to smuggle it by way of concealment, non-declaration to Customs, without possession of any valid permit/license/document, is an offence.

7. It is observed that the gold is not allowed to be imported freely in baggage and it is permitted to be imported only subject to fulfillment of certain conditions as laid down in Baggage Rules, 2016. In the present case, it has been contended that the Applicant was an eligible passenger. However, no evidence has been produced to substantiate this claim. Further, in terms of notification no. 12/2012-Cus dated 17.03.2012, an eligible passenger is allowed to import gold upto 01 Kg, at concessional rate of duty, if he had makes a declaration in this regard and pays the applicable duty in foreign currency. Therefore, it is evident that the Applicant did not fulfil or comply with the conditions subject to which, he could have imported gold in his baggage.

8. 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.

9.1 Another contention of the Applicant is that the import of gold is not 'prohibited'. However, the Government observes that this contention of the Applicant is against several judgments of Hon'ble Supreme Court wherein 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 fulfillment of certain conditions. In the present case, as correctly brought out by the lower authorities, the Applicant in this case had not fulfilled 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 the case of *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 (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-----."

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

10. 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.

11.1 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.

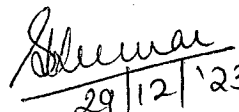
From the provisions of Section 114AA, it is very much clear that a person is liable for imposition of penalty under this section who intentionally declares something, in writing or verbally, which is factually incorrect for the purposes of Customs Act, 1962. There is nothing in the plain language of 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.

11.2 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.

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 of Rs. 60,000/- 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.


29/12/23
(Shubhagata Kumar)

Additional Secretary to the Government of India

Shri Jagadeesh Piratyallam,
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Order No. 300 /23-Cus dated 29-12-2023

Copy to:

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2. The Commissioner of Customs (Preventive), 5th 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


29/12/2023

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