

SPEED POST



F. No. 373/19/B/2019-RA
F. No. 380/28/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 06/02/24

Order No. 32-33/24-Cus dated 05-02-2024 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. 407/2018 dated 24.12.2018 passed by the Commissioner of Customs (Appeals), Bengaluru.

Applicant : Smt. Lavanya Subramanya, Mysuru.
Pr. Commissioner of Customs, Bengaluru.

Respondent : Pr. Commissioner of Customs, Bengaluru.
Smt. Lavanya Subramanya, Mysuru.

.....

ORDER

Two Revision Application Nos. 373/19/B/2019-RA dated 04.02.2019 & 380/28/B/2019-RA dated 01.04.2019, have been filed by Smt. Lavanya Subramanya, Mysuru (hereinafter referred to as the Applicant) & Pr. Commissioner of Customs, Bengaluru (hereinafter referred to as the Department), against the Order-in-Appeal No. 407/2018 dated 24.12.2018, passed by the Commissioner of Customs (Appeals), Bengaluru. Smt. Lavanya Subramanya, Mysuru is the Applicant in the first revision application whereas Pr. Commissioner of Customs, Bengaluru is the Respondent and vice versa in the second revision application. Vide Order-in-Original No. 10/2018-19 (AP-ADM) dated 28.06.2018, one gold bar of 01 Kg and three cut pieces of gold, totally weighing 1572.370 grams, having 24 carat purity and collectively valued at Rs. 45,78,741/- recovered from the Applicant were confiscated absolutely under Section 111(d), (i), (l) and (m) of the Act *ibid*. Besides, penalties of Rs. 15,00,000/- & Rs. 10,00,000/- were also imposed on the Applicant under Section 112(a) & 114AA, respectively, of the Act *ibid*. The Commissioner (Appeals) has upheld the Order-in-Original, passed by the Additional Commissioner of Customs, Kempegowda International Airport, Bengaluru except to the extent of setting aside the penalty of Rs. 10,00,000/- imposed upon the Applicant under Section 114AA of the Customs Act, 1962.

2. Brief facts of the case are that Customs Officers intercepted the Applicant after she had arrived at Kempegowda International Airport, Bengaluru from Bangkok on 06.04.2017 while she was exiting the Customs Arrival Hall at the Door Frame Metal Detector (DFMD). On verification it was noticed that she did not possess any Customs Declaration Form and on enquiry as to whether she was carrying any prohibited/dutiable goods, she replied in the negative. Upon the search of her baggage, nothing incriminating was found, but upon the search of her person using Hand Held Metal Detector one mobile phone cover was recovered. Upon opening the mobile phone cover, a heavy material wrapped with white insulation tape was found. Upon cutting open the white insulation tape, one gold bar and three cut pieces of gold bar were recovered. Upon sustained enquiry, she admitted to having concealed the gold in her pocket inside the mobile phone cover. The Approved Gold Appraiser examined and certified the gold to be of 24 carat purity, with a total weight of 1572.370 grams and a total value of Rs. 45,78,741/-.

In her statement dated 06.04.2017, tendered under Section 108 of Customs Act, 1962, the Applicant stated *inter-alia* that she came to Bengaluru from Bangkok via Singapore; that when she came to Bangkok airport to board the flight to Bengaluru, one person named Sh. Abbas approached her outside the Airport and offered her Rs. 10,00,000/- if she could carry gold biscuits to Bengaluru on commission basis; that as she was in need of money, she readily accepted the offer; that thereafter Sh. Abbas handed over to her a black coloured mobile phone containing gold bar, which she kept in her

trouser pocket to avoid detection by the Customs Authorities; that thereafter she boarded the flight and reached Bengaluru where she was intercepted by the Customs Officers.

The original authority, vide the aforesaid Order-in-Original dated 28.06.2018, absolutely confiscated the seized gold under Section 111(d), 111(i), 111(l) & 111(m) of the Customs Act, 1962 and imposed penalties of Rs. 15,00,000/- & Rs. 10,00,000/- 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 upheld to the extent of setting aside the penalty of Rs. 10,00,000/- imposed upon the Applicant under Section 114AA of the Act, *ibid*.

3. The Applicant has filed this revision application mainly on the grounds that she was all along in the red channel and she was under the control of the officers of customs; that she sent a retraction letter; that the statement was obtained from her under coercion; that gold is a restricted item and not a prohibited one; and that the gold should be permitted for release or re-export and penalty be set aside or reduced.

4. The Department has filed revision application on the grounds that the penalty under Section 114AA was rightly imposed by the original adjudicating authority and needs to be restored as non-declaration amounts to filing of wrong declaration; that the Applicant has failed to submit proper declaration indicating the description and value of goods and the same has been duly recorded in findings by the original authority; and that the Applicant intentionally suppressed the correct information and not made proper declaration of the actual contents of the baggage and attempted to smuggle the said goods as bonafide baggage in violation of provisions of Customs Act, 1962 with deliberate intention to evade payment of customs duty.

5. Personal hearing was fixed on 14.08.2023, 20.09.2023 and 07.11.2023. No one appeared for either side on any of the dates. As such, it is presumed that neither side has anything to add in the matter. Hence the matter is taken up for disposal based on available records.

6. The Government observes that this is a case of ingenious concealment with an intent to evade duty wherein the Applicant has tried to smuggle gold by secreting gold inside a mobile phone cover wrapped with adhesive tape and also admitted to her role in smuggling activity in her statement recorded under Section 108 of the Customs Act, 1962. The retraction mentioned in the Applicant's RA is not on record and neither has it been sent along with the RA application.

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 inside a mobile phone cover wrapped in adhesive tape. Not only has she been unable to produce any proof of licit purchase of the gold, but she has admittedly tried to smuggle the gold. Hence the gold was not declared by the Applicant to the Custom officers, as required under Section 77 of Customs Act, 1962. The Applicant has, thus, failed to discharge the burden placed on her, in terms of Section 123, *ibid*. As such the culpability of the Applicant is established beyond doubt.

8.1 The Applicant has contended that the gold ought to have been released to her since 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. {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 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 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 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'.

9. 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."* Further, *"when discretion is exercised under Section 125 of the Customs Act, 1962, ----- the twin test to be satisfied is "relevance and reason"."* 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 22.3 to 22.7 of the Order-in-Original. Further, the original authority in para 22.8 has noticed that the Applicant was also involved in an earlier case of gold smuggling and was also arrested by Mumbai Customs along with two other passengers. Thus, the Applicant is a habitual offender and is involved in smuggling activities. Thus, the Commissioner (Appeals) has correctly refused redemption of the impugned gold.

10.1 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."*

10.2 Hence, the question of allowing re-export also does not arise.

11.1 The contention of the department is that the penalty under Section 114AA is merited in this case and the Commissioner (Appeals) has erred by dropping the same.

11.2 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 she was in possession of gold and was also aware that she was bringing the same into India from Bangkok which was against the law. Yet she concealed the impugned goods and denied possession of the same when specifically asked by Customs officers. Thus, a false and incorrect declaration was made contrary to the provisions of Section 77 of the Customs Act, 1962. Therefore, the imposition of penalty under Section 114 AA is merited.

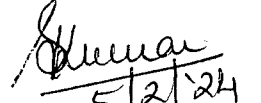
11.3 The Commissioner (Appeals) has relied upon an earlier Order of the Revisionary Authority wherein the Authority referred to the objective of introduction of Section 114AA, as explained in the para 63 of the report of Parliament's Standing Committee on Finance (2005-06), to hold otherwise. It is trite 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. There is nothing in the plain language of Section 114AA to even remotely suggest that the provisions thereof are not applicable in baggage cases. Revisionary Authority, Delhi vide its order 143/23-Cus dated 03.04.2023 also held the non-imposition of penalty under Section 114AA to be incorrect as the Applicant in that case was found to have made an incorrect declaration. In the instant case, the Applicant has failed to submit proper declaration indicating the description and value of goods as required under the Customs Act and the same has been duly recorded in findings by the original authority. Further the applicant intentionally suppressed the correct information and did not make a proper declaration of the actual contents of the baggage; rather she attempted to smuggle in the impugned gold as bonafide baggage in violation of provisions of Customs Act, 1962 with a deliberate intent to evade Customs duty. Hence, it has to be held that the Commissioner (Appeals) erred in his judgment.

11.4 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.

12. The Government finds that the penalties imposed on the Applicant by the original authority are on a higher side in light of the facts and circumstances of the case. Accordingly, the penalty imposed under Section 112 (a) is reduced from Rs. 15,00,000/- to

Rs. 10,00,000/- and penalty of Rs. 5,00,000/- is imposed upon the Applicant under Section 114AA.

13. In view of the above, RA No. 380/28/B/2019-RA filed by the department is partially allowed and the Order-in-Appeal impugned herein is modified to the extent of restoring the penalty imposed vide the Order-in-Original under Section 114AA ibid. RA No. 373/19/B/2019-RA is rejected for the reasons aforesaid.


5/2/24
(Shubhagata Kumar)

Additional Secretary to the Government of India

1. Smt. Lavanya Subramanya
D/o Sh. Subramanya Dalipathayya
No. 26, LIG-1, 5th Main
Bagodi 2nd Stage
Mysuru-570023
2. Pr. Commissioner of Customs,
3rd Floor, AI SATS Cargo Terminal
Air Cargo Complex
Devanahalli, Bengaluru-560300..

Order No. 32-33/24-Cus dated 05-02-2024

Copy to:

1. The Commissioner of Customs (Appeals), BMTC Building, Above BMTC Bus Stand, Old Airport Road, Domlur, Bengaluru-560071.
2. Smt. P. Kamala Malar, Advocate, No. 10, Sunk Ram Street, Second Floor, Chennai-600001.
3. PPS to AS(RA).
4. Guard file.
5. Spare Copy.
6. Notice Board.

ATTESTED



सरबजीत सिंह / SARABJEET SINGH
अधीक्षक / Superintendent (R.A. Unit)
वित्त मंत्रालय / Ministry of Finance
राजस्व विभाग / Department of Revenue
Room No. 605, 6th Floor., B-Wing
14, Hudco Vishala Building, Bhikaji Cama Place,
New Delhi-110066