

SPEED POST



F. No. 373/313/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. 06/02/24

Order No. 34/24-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. CAL-EXCUS-000-APP-209-2019 dated 29.03.2019 passed by the Commissioner (Appeals), Central Tax, Central Excise & Customs, Kochi.

Applicant : Shri Jafar Mathath, Kozhikode

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

ORDER

A Revision Application, bearing No. 373/313/B/SZ/2019-RA dated 30.07.2019, has been filed by Shri Jafar Mathath, Kozhikode (hereinafter referred to as the Applicant), against the Order-in-Appeal No. CAL-EXCUS-000-APP-209-2019 dated 29.03.2019, passed by the Commissioner (Appeals), Central Tax, Central Excise & Customs, Kochi. The Commissioner (Appeals) has upheld the Order-in-Original of the Additional Commissioner, Central Tax & Central Excise, Calicut, bearing no. 08/2017-18 Customs dated 10.10.2017, except to the extent of setting aside the penalty of Rs. 3,00,000/- imposed on the Applicant under Section 114AA of the Customs Act, 1962.

2. The Additional Commissioner, Central Tax & Central Excise, Calicut vide the above mentioned order dated 10.10.2017, has absolutely confiscated the impugned gold bars totally weighing 1245 grams having tariff value of Rs. 30,82,060/- and Market value of Rs. 34,17,525/-, 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 material objects used for concealment of the impugned gold viz. dismantled parts of the 'transformer' and the 'computer multimedia speaker' under Section 119 of the Act; imposed a penalty of Rs. 3,40,000/- under Section 112(a) & (b) of the Act and also imposed a penalty of Rs. 3,00,000/- under Section 114AA of the Act on the Applicant.

3.1 Brief facts of the case are that the Applicant, who arrived from Sharjah on 04.06.2015 at Calicut International Airport was intercepted by the Superintendent of Customs (Air Intelligence Unit) at the exit point of the Airport. It was seen that the Applicant was carrying one carton box and one trolley bag. When asked by the Superintendent as to whether he was in possession of any non-duty paid gold or any other valuables, he replied in the negative. He had also not declared any dutiable goods or gold in his Custom Declaration Form. Thereafter, the passenger along with his luggage was taken to the Air Intelligence Unit office and upon reasonable belief that the Applicant had concealed gold or other valuable materials in his body and or baggage, the Applicant and his baggage was searched in the presence of independent witnesses. On examination of

the carton box, it was found that the Computer Multimedia speaker had some heavy metallic object concealed inside its transformer. The said Multimedia speaker was then subjected to detailed X-ray examination by the officers and thereafter it was dismantled and thoroughly examined and fifty-three (53) 'E' shaped and fifty-one (51) 'I' shaped metal sheets were recovered. After examination, it was certified that the aforesaid metal sheets were made of gold having 24 carat purity and have a total weight of 1245 grams having tariff value of Rs. 30,82,060/- and Market value of Rs. 34,17,525/-. The impugned goods were seized under a mahazar dated 04.06.2015 by the Superintendent in the presence of independent witnesses on the reasonable belief that the said items are liable for confiscation.

3.2 The Applicant in his voluntary statement dated 04.06.2015 recorded under Section 108 of the Customs Act, 1962, stated inter-alia that he went to Dubai in 2006 and since then, he was running a ladies hand bag shop; that one of his customers by the name of 'Nasar', who was a frequent visitor to his shop, was aware of his financial burden and offered him Rs. 20,000/- as remuneration and a flight ticket to go to his native place, if he could smuggle gold and hand it over to a person who would be meeting him outside the Calicut airport; that due to his financial difficulties he accepted the offer; that accordingly as per instruction he carried the above impugned goods concealed ingeniously in his baggage; that he arrived at Calicut International Airport on 04.06.2015 and proceeded along with his baggage to the exit gate of the Customs Arrival Hall; he was intercepted by the Customs officers and they recovered the impugned gold which was kept ingeniously concealed inside the transformer of the multimedia speaker in his baggage; that he admitted that whatever was mentioned in the mahazar was true and correct; that he did not know the owner of the seized gold; that the said Nasar had not given him any foreign currency for the payment of customs duty; that he knew that import of gold without payment of duty was an offence and that he attempted to smuggle the seized gold for monetary benefit. He admitted his offence and requested for pardoning the mistake committed by him. The matter was adjudicated vide order dated 10.10.2017. Aggrieved, the Applicant filed appeal before the Commissioner (Appeals) who modified the order as mentioned above.

4. The revision application has been filed, mainly, on the grounds that the impugned order of appellate authority imposing penalty on the Applicant is illegal, improper on the facts and circumstances of the case. It has been prayed that impugned Order-in-Appeal be set aside, Applicant may be exonerated from the allegation with regard to penalty on him and any other relief if deem fit on the facts and circumstance of the case.

5. Personal hearing in the matter was fixed on 04.12.2023, 18.12.2023 and 08.01.2024. Sh. Abdul Raouf, Advocate appeared on behalf of Applicant and submitted that Sections 112 (a) and (b) are not simultaneously applicable. Statement under Section 108 should not be done mechanically. The RF and PP are too high and seeks reduction. No one appeared from the Respondents' side nor has any request for adjournment been made. Therefore, it is presumed that the department has nothing to add in the matter.

6. The Government has carefully examined the matter. It is observed that the impugned gold was not declared to Customs as required under Section 77 of the Customs Act, 1962; it was ingeniously concealed in the transformer of Computer Multimedia Speaker which shows that the intention to smuggle is obvious. Moreover, he had himself stated that these items were brought into India for monetary consideration of Rs. 20,000/- and he could not produce any proof of purchase. Hence, it is clear that the impugned goods were seized upon contravention of the provisions of the Customs Act, 1962.

7.1 As far as the contention of the Applicant that Sections 112 (a) and (b) both are not simultaneously applicable is concerned, there is no bar in the Customs Act upon simultaneous levy of penalty under Sections 112 (a) and (b). Bringing into India goods which contravene the provisions of the Customs Act and omitting to declare the same under Sections 77 of the Customs Act, 1962 are clearly covered under "*does or omits to do any act which act or omission would render such goods liable to confiscation under section 111, or abets the doing or omission of such an act*". Carrying/smuggling goods in an ingeniously concealed manner is clearly covered under Sections 112(b) of the Customs Act, 1962.

7.2 The Government also find that despite having knowing that the goods had to be declared and non-declaration is an offence under the Customs Act, 1962 and Rules & Regulations made thereunder. The Applicant had attempted to smuggle the said gold, by deliberately not declaring the same upon arrival, with the willful intent to evade Customs duty. Further, it is on record that the statement of the Applicant reveals that he is a carrier and has attempted to smuggle the impugned gold for monetary benefit. Therefore, the Applicant has committed an offence of the nature described in Section 112(a) and 112(b) of Customs Act, 1962 making him liable for penalty under both these provisions and that there appears to be no provision that precludes simultaneous imposition of penalty under Section of Section 112(a) and 112(b) when both these have been violated.

8. As per Section 123 of Customs Act 1962, 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 gold items, as stipulated under Section 77 of the Act, *ibid*. No documents evidencing ownership and licit purchase were produced at the time of interception. 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 is in agreement with the lower authorities that the seized gold items were liable to confiscation under Section 111 *ibid* and, consequently, he is liable to penalty.

9.1 The Government observes that import of gold and articles thereof in baggage is allowed subject to fulfillment of certain conditions. In the present case, the stipulated conditions have not been fulfilled by the Applicant. Hon'ble Supreme Court has repeatedly held 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. 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 assigned to it under Section 2(33) of the Act, *ibid*.

9.2 In view of the above, the impugned gold items are 'prohibited goods'.

10. The Government observes that the original authority had denied the release of seized 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 option to release 'prohibited goods' on redemption fine is discretionary. 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 P. Sinnasamy (*supra*), the Hon'ble Madras High Court has held that "*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)], 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.*" Now in the latest judgment 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 and the facts of the case, the Commissioner (Appeals) has correctly refused to interfere with the discretion exercised by the original authority.

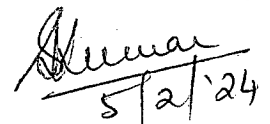
11.1 The Government also observes that the Commissioner (Appeals) has set aside the penalty imposed by the lower adjudicating authority under Section 114AA of the Act, *ibid* on the ground that no penalty is imposable under Section 114AA of the Customs Act, 1962 as these provisions are not attracted 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 ratio of the judgment cited (*supra*) is squarely applicable to this case.

From the provisions of Section 114AA, it is clear that a person renders himself or herself liable for imposition of penalty under this section if they intentionally declare something which is factually incorrect for the purposes of the 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 valued at more than Rs. Thirty lakhs, which does not constitute bona-fide baggage. He failed to discharge the onus on him to establish that the impugned gold 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 ingenious concealment of the impugned gold by the Applicant and his denial when questioned by Customs, if he was carrying dutiable goods, the revision application does not merit consideration. In view of the facts and circumstances of the case, the penalty of Rs. 3,00,000/- 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.


5/2/24

(Shubhagata Kumar)

Additional Secretary to the Government of India


Shri Jafar Mathath,
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Order No. 34/24-Cus dated 05-02-2024

Copy to:

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2. The Commissioner of Customs (Preventive), 5th Floor, Catholic Centre, Broadway, Cochin -882031.
3. Shri T.V. Abdul Raouf, Advocate, "Bengla", Near Muthappankavu, P.O., Calicut-673006.
4. PA to AS(RA)
5. Guard File
6. ~~Spare Copy~~
7. Notice Board.

ATTESTED


6/2/24

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