

**SPEED POST**



F. No. 373/322/B/SZ/2019-RA  
GOVERNMENT OF INDIA  
MINISTRY OF FINANCE  
(DEPARTMENT OF REVENUE)

14, HUDCO VISHALA BLDG., B WING  
6<sup>th</sup> FLOOR, BHIKAJI CAMA PLACE,  
NEW DELHI-110 066

Date of Issue. 06/2/24

Order No. 35/24-Cus dated 06-02-2024 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-276-2019 dated 29.03.2019 passed by the Commissioner (Appeals), Central Tax, Central Excise & Customs, Kochi.

Applicant : Shri Muhammad Shafi E.T., Kozhikode

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

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**ORDER**

A Revision Application, bearing No. 373/322/B/SZ/2019-RA dated 19.08.2019, has been filed by Shri Muhammad Shafi E.T., Kozhikode (hereinafter referred to as the Applicant), against the Order-in-Appeal No. CAL-EXCUS-000-APP-276-2019 dated 29.03.2019, passed by the Commissioner (Appeals), Central Tax, Central Excise & Customs, Kochi. The Commissioner (Appeals) vide the aforesaid Order-in-Appeal, has upheld the Order-in-Original of the Joint Commissioner of Central Excise & Customs, Calicut, bearing no. 53/2015-6 dated 22.02.2016, except to the extent of setting aside the penalty of Rs. 2,60,000/- imposed on the Applicant under Section 114AA of the Customs Act, 1962.

2. The Joint Commissioner of Central Excise & Customs, Calicut had absolutely confiscated the impugned gold bars of 24 carat purity with a total weight of 933 grams, having a market value of Rs. 25,84,410/- and International value of Rs. 22,95,031/- seized from the Applicant under Sections 111(d), 111(l) and 111(m) of the Customs Act, 1962, imposed a penalty of Rs. 2,60,000/- under Section 112(a) of the Customs Act, 1962 and had also imposed a penalty of Rs. 2,60,000/- under Section 114AA of the Act ibid on the Applicant.

3. Brief facts of the case are that the Applicant arrived from Dubai at the Calicut International Airport, Karipur, on 14.06.2014, and was intercepted by the officers of Customs Preventive after he came out through the exit gate of the arrival hall of the airport. On being asked, he informed that he had not brought anything into India for which duty was to be paid nor had he declared anything to Customs or paid any duty. The Applicant was brought alongwith witnesses to the Air Intelligence room in the arrival of hall of the airport for examination of the person and his baggage. No smuggled goods or incriminating documents were recovered on examination of his baggage. Thereafter, in the presence of witnesses, a thorough physical examination of the Applicant was carried out using a metal detector during which a suspicion arose that metallic object were concealed in his rectum. When asked to explain, the Applicant informed that he had

indeed concealed gold biscuits in his rectum. Subsequently, he handed over eight gold biscuits which bear the markings "AL ETIHAD DUBAI-UAE 10 TOLA 999.0" and further they were assayed and weighed by the certified Goldsmith and an assay certificate to the effect that the said gold biscuits were of 24 carat purity with a total weight of 933 grams, was issued by him. The said gold was undeclared and was attempted to be smuggled into India through ingenious concealment by the Applicant. The impugned eight gold biscuits weighing 933 grams having a market value of Rs. 25,84,410/- and International value of Rs. 22,95,031/-, were seized under the Customs Act, 1962 on the reasonable belief that they were liable for confiscation under the Customs Act, 1962. In his voluntary statement recorded under Section 108 of the Customs Act, 1962 on 14.06.2014, the Applicant narrated and confirmed the facts and sequence of events leading to the seizure of impugned gold as stated in the Mahazar for the said proceedings. His last visit to Dubai was on 05.06.2014. The Applicant stated that the impugned gold biscuits had been given to him by a person in Dubai with specific directions to transport the same into India by concealing in his rectum in return for a remuneration of Rs. 40,000/- and a flight ticket to India. The impugned gold was to be collected by a person who would be waiting for him outside the Calicut Airport, Karipur. The Applicant was not been able to identify either the person who handed over the said gold to him in Dubai or the person who was to collect it from him at Karipur. The Applicant was arrested on 14.06.2014 under Section 104 of the Customs Act, 1962 for having committed an offence punishable under Section 135 of the Customs Act, 1962 and was let off on bail the same day. The matter was adjudicated vide Order-in-Original No. 53/2015-6 dated 22.02.2016. Aggrieved, the Applicant filed an appeal before the Commissioner (Appeals) which was modified as mentioned above.

4. The revision application has been filed, mainly, on the grounds that gold is not prohibited goods and cannot be confiscated absolutely; that the Order-in-Appeal of Commissioner (Appeals) should be modified by ordering release of the confiscated gold on payment of nominal fine and duty at the appropriate rate and the penalty imposed on the Applicant under Section 112(a) should be reduced.

5. Personal hearings in the matter were fixed on 11.12.2023 and 05.01.2024 respectively. Sh. C. Mitra Prasad, Advocate appeared on behalf of the Applicant and reiterated the submissions made in the Revision Application as well as vide his e-mail dated 03.01.2024. He prayed for a lenient view in the circumstances of the case and for reduction in penalty. No one appeared from the Respondents' side and no request for adjournment etc. has been received, as such, it is presumed that the respondent has nothing to add in the matter. Therefore, the matter is taken up for decision based on the available records.

6. The Government has carefully examined the matter. It is observed that the Applicant has not declared the possession of impugned gold in his Customs declaration form and it was only through persistent enquiry and examination of the Applicant, that the body concealment of the impugned gold came to light. Subsequently, the Applicant in his voluntary statement 14.06.2014 under Section 108 of the Customs Act, 1962 admitted his guilt. Thus, he was aware that smuggling of the impugned gold items and without declaring the same to Customs, without possession of any valid permit/license/document, is an offence. Hence, the impugned goods smuggled into India via ingenious body concealment cannot be considered as bonafide baggage. The entire proceedings have also been covered under a Mahazar in presence of independent witnesses which also corroborates the sequence of events.

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 once penalty has been imposed under section 112, then for the same act, a separate penalty under section 114AA of the Act is uncalled for. 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.

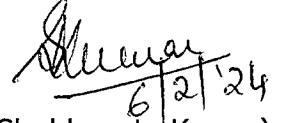
10.2 It is observed that Section 112 and Section 114AA are two independent provisions and they refer to different violations. Therefore, when in a case both violations are present, penalty under both the Sections can be imposed. Further, there is no provision in the Customs Act which ousts the imposition 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 the impugned gold via ingenious body concealment valued at more than Rs. twenty five lakhs, 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. The case laws relied upon by the Applicant, in support of his various contentions, are not applicable in view of the dictum of Hon'ble Supreme Court and Hon'ble High Courts, as above.

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 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.

  
6/2/24

(Shubhagata Kumar)

Additional Secretary to the Government of India

Shri Muhammad Shafi E.T.,  
S/o Shri Ahamad T.,  
Edayaath Thazha Kuniyil House, Kannookkara,  
Madappally College P.O.,  
Kozhikode Dist. Kerala – 673102.

Order No. 35/24-Cus dated 06-02-2024

Copy to:

1. The Commissioner of Central Tax, Central Excise & Customs (Appeals), Central Revenue Building, I.S. Press Road, Kochi -682018.
2. The Commissioner of Customs (Preventive), 5<sup>th</sup> 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

  
6/2/24

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