

SPEED POST

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F. No. 373/145/B/2018-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. 19/04/23

Order No. 151/23-Cus dated 19-04-2023 of the Government of India passed by Shri Sandeep Prakash, Additional Secretary to the Government of India, under section 129DD of the Customs Act, 1962.

Subject : Revision Application, under Section 129 DD of the Customs Act 1962 against the Order-in-Appeal No. 43/2018 dated 16.01.2018, passed by the Commissioner of Customs (Appeals), Bengaluru.

Applicant : Sh. Jairam Partabrai Manglani, Thane

Respondent : Pr. Commissioner of Customs, Airport & Air Cargo Complex, Bengaluru

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ORDER

A Revision Application No. 373/145/B/2018-RA dated 02.05.2018 has been filed by Sh. Jairam Partabrai Manglani, Thane (hereinafter referred to as the Applicant), against the Order in Appeal 43/2018 dated 16.01.2018, passed by the Commissioner of Customs (Appeals), Bengaluru. The Commissioner (Appeals) has upheld the order of the Additional Commissioner of Customs, Kempegowda International Airport, Bengaluru, bearing no. 24/2016-17 (AP-ADM) dated 31.08.2017, ordering absolute confiscation of 8 nos of cut pieces of gold, totally weighing 2300 grams and collectively valued at Rs. 67,73,500/-, under Sections 111(d), 111(l) and 111(m) of the Customs Act, 1962. Besides penalties of Rs. 20,00,000/- and Rs. 10,00,000/- were also imposed on the Applicant, under Sections 112 & 114AA, respectively, of the Act, *ibid*.

2. Brief facts of the case are that the officers of Directorate of Revenue Intelligence, Bengaluru Zonal Unit, acting on specific information, on 26.05.2016, visited Kempegowda International Airport and kept surveillance on the passengers disembarking from Air Asia Flight No. FD 137 from Bangkok and followed them towards the immigration counters. After discreet enquiries with the immigration authorities, the Applicant was intercepted at the exit gate of the Customs Arrival Hall. On verification of his Customs Declaration Slip it was found that he had declared 'NIL' value of dutiable goods imported. On enquiry about the contents of his baggage, he replied that his baggage contained some clothing and personal effects only. Upon the search of his baggage nothing incriminating was found. However, upon repeated enquiry, he admitted that he was carrying 6 small black coloured packets containing 8 cut pieces of gold approximately weighing 2300 grams in his pant pocket and agreed to remove the same and hand it over the DRI officers. Accordingly, he removed 6 packets, wrapped with black insulation tape, from his pant pocket and handed over the same to DRI officers. Thereafter, 8 cut pieces of gold were recovered from those 6 packets. Upon further enquiry, he informed that he wanted to avoid payment of Customs duties on the said cut pieces of gold and hence he concealed the same in his pant pocket and did not declare the same to Customs. The Government approved gold

valuer tested and certified the said cut pieces of gold to be of 24 carat/ 99.9% purity gold, totally weighing 2300 grams and collectively valued at Rs. 67,73,500/-. In his statement dated 27.05.2016, recorded under Section 108 of the Customs Act, 1962, he, inter-alia, stated that he does trading of readymade garments at Ulhasnagar; that he had a friend by name Sh. Deepu alias Kumar at Ulhasnagar who suggested to him that he had a friend at Bangkok Thailand, who is into trading of gold and if he carried gold from Bangkok to Mumbai he would get a return airfare along with boarding and lodging in addition to Rs. 30,000/- as commission; that upon his request, his friend Sh. Deepu got him introduced to a person by name Sh. Pankaj, over phone, who is based at Bangkok, to this business; that Sh. Deepu informed him to travel to Bangkok from New Delhi on 21.05.2016 and return from Bangkok to Bengaluru on 26.05.2016; that he met Sh. Pankaj at Bangkok and stayed at his residence at Patuna, Bangkok; that on 26.05.2016, before leaving Sh. Pankaj's residence for the airport, Sh. Pankaj, handed over to him 6 packets wrapped in black coloured adhesive tapes, containing 8 nos of cut pieces of gold weighing approximately 2300 grams and informed him to conceal the same in his pant pocket; and that he did accordingly and reached Bengaluru International Airport where he was intercepted by the DRI officers.

3. The revision application has been filed, mainly, on the grounds that the Applicant did not cross the Green Channel; that the mahazar is fabricated & manipulated by DRI officers; that gold is not a prohibited item and hence liable for release under Section 125 of the Customs Act, 1962; that the penalties be waived/reduced; and that he was not a carrier but the actual owner of the gold.

4. Personal hearing was fixed on 27.03.2023 & 19.04.2023. In the hearing held on 19.04.2023, in virtual mode, Sh. O.M Rohira, Advocate appeared for the Applicant and reiterated the contents of the RA. He highlighted that the Applicant was apprehended at the aerobridge itself and was not given any opportunity to make a declaration. An affidavit to this effect has been placed on record. No one appeared for the Respondent department

nor any request for adjournment has been received. As such, it is presumed that the department has nothing to add in the matter.

5.1 The Government has carefully examined the matter. It is observed that the Applicant was intercepted after being identified and followed by DRI officers at the exit gate of the Customs Arrival Hall. 08 cut pieces of gold were recovered from the Applicant which were not declared. Further, the sequence of events has been recorded in the Mahazar dated 27.05.2016 in the presence of two independent witnesses. Hence, the contention of the Applicant that he did not cross the Green Channel and that the Mahazar is fabricated and manipulated is not tenable.

5.2 As far as the contention of Applicant regarding the ownership of the gold is concerned, a copy of invoice dated 26.05.2016 purportedly covering the subject gold has been placed on record. However, it is observed that this invoice was not found on him at the time of his interception, which would have been the case if the gold was carried bonafide by the Applicant as the owner. However, it is only after the arrest and subsequent release on bail that the claim of ownership was made. Therefore, subject contention appears to be merely an afterthought.

6. As per Section 123 of the Act, *ibid*, in respect of gold and manufactures thereof, the burden of proof that the goods are not smuggled is on the person from whom such goods are recovered. In the present case, the factum of false declaration makes the intention to smuggle manifest. It has also been admitted by the Applicant, in his statement, that the gold was smuggled for monetary gain. As such, it is held that the Applicant has failed to discharge the burden of proof, as required in terms of Section 123 *ibid*.

7.1 It is contended on behalf of the Applicant that import of gold is not 'prohibited'. The Government observes that, in the case of *Sheikh Mohd. Omer vs Collector of Customs, Calcutta & Ors* {1971 AIR 293}, the Hon'ble 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, these conditions have not been fulfilled. 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."

7.2 In the case of Malabar Diamond Gallery P. Ltd. Vs ADG, DRI, Chennai [2016(341) ELT 65 (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----."

The Commissioner (Appeals) has also correctly pointed out that the Hon'ble Madras High Court has taken an identical view in the case of P. Sinnasammy {2016-TIOL-2544-HC-MAD-CUS}.

7.3 In this case, the conditions, subject to which gold could have been legally imported in baggage, have not been fulfilled. Thus, following the ratio of the aforesaid judgments, there is no doubt that the subject goods are 'prohibited goods'.

8. The original authority has denied the release of seized goods on redemption fine, under Section 125 of the Customs Act, 1962, which has been upheld in appeal. In terms of Section 125 *ibid*, the option to release 'prohibited goods', on redemption fine, is discretionary. This position has been affirmed 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 *P. Sinnasammy (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 reasons'*". Hon'ble Delhi High Court has, in the case of *Raju Sharma Vs. UOI* {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 motives.*" In holding so, the Hon'ble High Court has relied upon the judgment of Apex Court in the case of *Mangalam Organics Ltd.* {2017 (349) ELT 369 (SC)}. Thus, the Commissioner (Appeals) could have interfered with the discretion exercised by the original authority only if it would have been tainted by any of vices highlighted by the Hon'ble Courts. Such a case is not made out. Hence, the Commissioner (Appeals) has correctly refused to interfere with discretion exercised by the original authority.

9. Further, Section 112 and Section 114 AA are two independent provisions as they refer to different violations. Therefore, when in a case both provisions are violated, penalty under both the Sections can be imposed. There is no provision in the Customs Act which ousts the imposition of penalty under Section 114 AA if penalty under Section 112 has been imposed. The Hon'ble Delhi High Court has, in the case of *Commissioner of Customs & Central Excise, Delhi-IV vs. Achiever International* {2012 (286) ELT 180 (Del.)}, held on the same lines. Therefore, the Commissioner (Appeals) was correct in

upholding the penalties imposed upon the Applicant, under Section 112 as well as Section 114AA.

10. Keeping in view facts and circumstances of the case, the penalties imposed are just and fair.

11. In view of the above, the revision application is rejected.



(Sandeep Prakash)

Additional Secretary to the Government of India

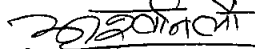
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Order No. 151 /23-Cus dated 19-04-2023

Copy to:

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2. Pr. Commissioner of Customs, 3rd Floor, AI SATS Cargo Terminal, Air Cargo Complex, Devanahalli, Bengaluru-560300.
3. Sh. O.M Rohira, Advocate, 148/301 Uphaar, 10th Road, Khar (W), Mumbai-400052.
4. PPS to AS(RA).
5. Guard file.
6. Spare Copy.
7. Notice Board.

ATTESTED



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