

SPEED POST



F. No. 375/54/B/2021-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... 8/7/22

Order No. 216/22-Cus dated 08-07-2022 of the Government of India passed by Sh. Sandeep Prakash, 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. CC(A)Cus/D-I/Air/207/2021-22 dated 18.08.2021 passed by the Commissioner of Customs (Appeals), New Delhi.

Applicant : Ms. Qudsia Shirzad, Kabul, Afghanistan.

Respondent: The Commissioner of Customs (Airport), New Delhi.

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ORDER

A Revision Application No. 375/54/B/2021-RA dated 17.11.2021 has been filed by Ms. Qudsia Shirzad, Kabul, Afghanistan (hereinafter referred to as the Applicant) against the Order-in-Appeal No. CC(A)Cus/D-I/Air/207/2021-22 dated 18.08.2021 passed by the Commissioner of Customs (Appeals), New Delhi. The Commissioner (Appeals) has rejected the appeal filed by the Applicant against the Order-in-Original passed by the Additional Commissioner of Customs, IGI Airport, New Delhi, bearing no. 206/ADJ/19 dated 16.08.2019, wherein, assorted gold jewellery, collectively weighing 890 gms, valued at Rs. 22,66,875/- recovered from Applicant were confiscated absolutely. Penalty of Rs. 4,00,000/- was also imposed on the Applicant under Section 112 & 114AA of the Customs Act, 1962.

2. Brief facts of the case are that, the Applicant arrived, on 13.06.2019, at IGI Airport, New Delhi, from Kabul. She was intercepted by the Customs officers at the exit gate of the Arrival Hall after she had already crossed the Green Channel. During the personal search of the Applicant, assorted jeweller gold, collectively weighing 890 gms, valued at Rs. 22,66,875/-, was recovered from the possession of the Applicant. In her statement dated 13.06.2019, tendered under Section 108 of Customs Act, 1962, the Applicant

admitted the recovery of subject goods and further stated that the gold jewellery belonged to her mother which she had received as gift on her engagement and some of them she had purchased from her savings; that she did not have any documentary evidence in support of the legal possession of the gold jewellery; that though she was visiting for her medical treatment but she did not have any documentary evidence pertaining to her medical history. She also requested for waiver of show cause notice and requested that her case may be decided on merit. The original authority, vide the aforesaid Order-in-Original dated 16.08.2019, confiscated absolutely, the seized gold jewellery under Section 111(d), 111(i), 111(j), 111(l), 111(m) and 111(o) of the Act, *ibid* and imposed a penalty of Rs. 4,00,000/- on the Applicant under Section 112 and 114AA. Aggrieved, the Applicant filed an appeal before the Commissioner (Appeals), which has been rejected.

3. The instant revision application has been filed, mainly, on the grounds that the gold jewellery was worn by the Applicant and there is no concealment; that she had no intention of smuggling the gold into the country; that neither any show cause notice was issued nor any RUD handed over to the Applicant; that import of gold is not prohibited; and, hence, it should be released on payment of

redemption fine under Section 125 of the Customs Act or its re-export should be allowed and, that a token penalty may be imposed

4. Personal hearing was fixed on 06.06.2022, 20.06.2022 and 08.07.2022. In the personal hearing held on 08.07.2022, in virtual mode, Ms. Kanika Goswami, Advocate, appeared for the Applicant and reiterated the contents of the revision application. Ms. Goswami clarified that the Applicant had not made a declaration under Section 77 of the Customs Act, 1962 due to ignorance. None appeared for the respondent department nor any request for adjournment has been received. Since sufficient opportunities have been granted, it is presumed that the department has nothing to add in the matter.

5. The Government has carefully examined the matter. It is observed from the Orders of the authorities below that the gold jewellery was recovered during the personal and baggage search of the Applicant and was not worn by her, as claimed now. It is also contented that the no show cause notice has been issued in the case. However, from the records, it is observed that the Applicant had herself waived the show cause notice.

6. 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 failed to produce any evidence that the assorted gold jewellery recovered from her was owned by her or was licitly procured. The Applicant has, thus, failed to discharge the burden placed on her, in terms of Section 123, *ibid.*

7.1 It is contended on behalf of the Applicant that the import of gold is not 'prohibited'. However, the Government observes that this contention of the Applicant is in the teeth of law settled by a catena of judgments of Hon'ble Supreme Court. 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 and gold jewellery 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.

7.2 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."*

7.3 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----."

7.4 In this case, since the conditions, subject to which gold jewellery could have been legally imported, have not been fulfilled, there is no doubt that the subject goods are 'prohibited goods'.

8.1 The original authority has denied the release of offending 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.)].

8.2 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.”

8.3 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, as specifically brought out in para 14.2 of the Order-in-Original. Thus, the Commissioner (Appeals) has correctly refused to interfere in the matter. The case laws relied upon by the Applicant are not applicable, in view of the dictum of Hon'ble Supreme Court and Hon'ble High Courts, as above.

9. A request for re-export has also been made. The Government observes that, in terms of Section 80, the re-export can be permitted only when a declaration in terms of Section 77 has been made. Hon'ble Allahabad High Court has, in the case of Commissioner of Customs (Preventive), Lucknow vs. Deepak Bajaj [2019(365)ELT695 (All.)] held that a declaration as required under Section 77 is the sine-qua-non for extending the benefit under Section 80. In the present case, the declaration under Section 77 not having been made, re-export also cannot be allowed.

10. Keeping in view facts and circumstances of the case, the penalty imposed is just and fair.

11. In view of the above, the impugned Order of the Commissioner (Appeals) does not merit revision and the revision application is rejected.



(Sandeep Prakash)

Additional Secretary to the Government of India

Ms. Qudsia Shirzad,
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Order No. 216/22-Cus dated 08-07-2022

Copy to:

1. The Commissioner of Customs, IGI Airport, New Delhi.
2. The Commissioner of Customs (Appeals), NCH, New Delhi.
3. Ms. Kanika Goswami, Advocate, WZ-258 A, Street No. 4, Sri Nagar, Rani Bagh, Delhi - 110034.
4. PA to AS(RA).
5. Guard File.
6. Spare Copy.

ATTESTED

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