

REGISTERED
SPEED POST



F.No. 375/54/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. 22/10/21....

Order No. 234/21-Cus dated 22-10-2021 of the
Government of India passed by Shri Sandeep Prakash, Additional
Secretary to the Government of India, under section 129DD of the
Custom 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/306/2019-20 dated
21.08.2019, passed by the Commissioner of
Customs (Appeals), New Delhi.

Applicant: Ms. Bagul Aymyradova, Turkmenistan.

Respondent: Commissioner of Customs, IGI Airport, New Delhi.

ORDER

A Revision Application No.375/54/B/2019-RA dated 18.09.2019 has been filed by Ms. Bagul Aymyradova, Turkmenistan (hereinafter referred to as the Applicant) against the Order-in-Appeal No. CC(A)/Cus/D-I/Air/306/2019-20 dated 22.08.2019, passed by the Commissioner of Customs (Appeals), New Delhi whereby Commissioner (Appeals) has upheld the Order-in-Original No. 249/Adjn./2018 dated 30.11.2018 passed by the Additional Commissioner of Customs, IGI Airport, New Delhi, vide which one gold chain and one gold bracelet, collectively weighing 928 grams valued at Rs. 24,50,829/-, have been confiscated absolutely under Sections 111(d), 111(i), 111(j), 111(l), 111(m), and 111(o) of the Customs Act, 1962. A penalty of Rs. 4,90,165/- has also been imposed on the Applicant under Section 112 and 114AA of the Act *ibid*.

2. The brief facts of the case are that the Applicant arrived on 04.05.2018, at the IGI Airport, New Delhi, from Istanbul and was intercepted near the exit gate of the arrival hall. She did not declare anything for customs purposes. On scanning of her hand baggage some suspicious images were noticed. When she said that she could neither understand English nor Hindi, an interpreter was called. Thereafter, on search of her hand baggage after completion of legal formalities, one gold chain consisting of multiple gold rings, intertwined and given the shape of a chain and one gold bracelet, collectively weighing 928 grams and valued at Rs. 24,50,829/-, were recovered and seized. The Additional Commissioner of Customs, IGI Airport,

vide Order-in-Original dated 30.11.2018, confiscated absolutely the gold items and imposed penalty, as above. Aggrieved, the Applicant preferred an appeal before the Commissioner (Appeals) who, vide the impugned Order-in-Appeal, rejected the appeal and upheld the Order-in-Original.

3. The revision application has been filed, mainly, on the grounds that there was no concealment of the gold items; that the gold was bought by the Applicant from her personal savings; that the Applicant was not aware of the prevalent laws and procedure of payment of duty as she was a foreigner; that her statement was recorded under pressure; and that import of gold ornaments is not prohibited under the Baggage Rules. It has been prayed that redemption for re-export may be allowed and penalty may be waived or reduced.

4. Personal hearing, in virtual mode, was held on 21.10.2021. Ms. Kanika Goswami and Sh. Samar Sareen, Advocates, appeared for the Applicant and reiterated the contents of revision application. Sh. Rajnish Kumar, Superintendent appeared for the Respondent department and supported the orders of the lower authorities.

5. The Government has carefully examined the case. Gold items were not declared by the Applicant, even on specific query by the customs officers on her arrival, in violation of Section 77 of the Customs Act, 1962. In her statement tendered under Section 108 of Customs Act, 1962, she admitted that she had been a regular visitor to India and had brought gold earlier also without paying duty. She was aware that import of gold without declaration to Customs was not

allowed. There is nothing on record to evidence that the statement was retracted. Hence, the contention that her statement was recorded under duress is not acceptable.

6. Section 123 of Customs Act 1962 reads as follows:

"123. Burden of proof in certain cases.

(1) Where any goods to which this section applies are seized under this Act in the reasonable belief that they are smuggled goods, the burden of proving that they are not smuggled goods shall be—

(a) in a case where such seizure is made from the possession of any person,—

(i) on the person from whose possession the goods were seized; and

(ii) if any person, other than the person from whose possession the goods were seized, claims to be the owner thereof, also on such other person;

(b) in any other case, on the person, if any, who claims to be the owner of the goods so seized.

(2) This section shall apply to gold and manufactures thereof watches, and any other class of goods which the Central Government may by notification in the Official Gazette, specify."

Hence, 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 failed to produce any evidence that the gold jewellery, recovered from her, was not smuggled. The jewellery was not declared by her to the custom officers, as required under Section 77 of Customs Act, 1962. She admitted that she

had intentionally not declared the gold items at the red channel to evade customs duty. The Applicant has, thus, failed to discharge the burden placed on her, in terms of Section 123, *ibid.*

7.1 The Applicant has contended that the import of gold is not 'prohibited'. The Government observes that Hon'ble Supreme Court, in the case of Sheikh Mohd. Omer vs Collector of Customs, Calcutta & Ors [1971 AIR 293], 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 case of M/s Om Prakash Bhatia Vs. Commissioner of Customs, Delhi [2003(155) ELT423(SC)], the Apex 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) 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----."

7.3 The original authority has correctly brought out, in paras 11.3 to 11.5 of the Order-in-Original, that the gold is allowed to be imported subject to certain conditions and that, in this case, the conditions, subject to which gold could have been legally imported, 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 adjudicating authority has denied the release of impugned goods on redemption fine under Section 125 of Customs Act, 1962. In terms of Section 125, 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 present case, the original authority has refused to grant redemption as the Applicant attempted to smuggle the goods by concealment, with intent to evade Customs Duty and in the background of the Government's policy objectives. 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; and has to according to the rules of reason and justice; has to be based on relevant considerations". In the case of Commissioner of Customs (Air), Chennai-I Vs P. Sinnasamy {2016(344) ELT1154 (Mad.)}, the Hon'ble Madras High Court, after extensive application of several judgments of the Apex 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'*". It is observed that the original authority has, in the instant case, after appropriate consideration, passed a reasoned order refusing to allow redemption in the background of attempted smuggling by concealment and in the context of Government's policy objectives in the matter. Thus, the discretion exercised by the original authority could not have been interfered with.


9. Section 80 of the Customs Act, 1962, reads as follows:
"Temporary detention of baggage. - Where the baggage of a passenger contains any article which is dutiable or the import of which is prohibited and in respect of which a true declaration has been made under Section 77, the proper officer may, at the request of the passenger, detain such article for the purpose of being returned to him on his leaving India and if for any reason, the passenger is not able to collect the article at the time of his leaving India, the article may be returned to him through any other passenger authorised by him and leaving India or as cargo consigned in his name"

As the Applicant had not declared the gold at the time of her arrival, the request that the gold items may be allowed to

be re-exported, cannot be acceded to, in the light of the provisions of Section 80 ibid.

10. The penalty imposed also appears to be just and fair in the facts and circumstances of the case.

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

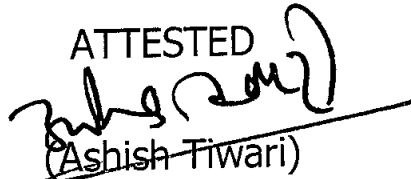
Ms. Bagul Aymyradova,
C/o Smt. Kanika Goswami, Advocate,
1758, 1st Floor, Laxmi Narayan Street, Chuna Mandi,
Pahar Ganj, New Delhi-110 055.

Order No. 234/21-Cus dated 22-10-2021

Copy to:

1. The Commissioner of Customs, IGI Airport, New Delhi.
2. The Commissioner of Customs (Appeals), IGIA, New Delhi.
3. PA to AS(RA).
4. Guard File.
5. Spare Copy.

ATTESTED



(Ashish Tiwari)

Assistant Commissioner (RA)