

SPEED POST



**F. No. 375/22/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 *06/12/21*

Order No. 276 /21-Cus dated 06-12-2021 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-1/Air/240/2017 dated 21.06.2017 passed by the Commissioner of Customs (Appeals), New Delhi.

Applicant : Ms. Nizhat Ameen, New Delhi.

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

ORDER

A Revision Application No. 375/22/B/2019-RA dated 18.04.2021 has been filed by Ms. Nizhat Ameen, New Delhi (hereinafter referred to as 'the Applicant') against the Order-in-Appeal No. CC(A)Cus/D-1/Air/240/2017 dated 21.06.2017 passed by the Commissioner of Customs (Appeals), New Delhi. Commissioner (Appeals) has, vide the impugned Order-in-Appeal, upheld the Order-in-Original No. NGK/JC/ACE/19/2016 dated 04.04.2016, passed by the Joint Commissioner of Customs, IGI Airport, New Delhi, wherein three (03) Gold Bars, weighing 3000 Grams and valued at Rs. 77,03,610/-, were confiscated absolutely under Section 111(d), 111(i), 111(j), 111(l), and 111(m) of the Customs Act, 1962. A penalty of Rs. 20 Lakh was also imposed on the Applicant under Sections 112 and 114AA of the Customs Act, 1962.

2. Brief facts of the case are that the Applicant arrived, on 09.05.2014, at IGI Airport, New Delhi from Bangkok. She was intercepted by the Customs Officers near the Exit Gate of Arrival Hall after she had crossed the Green Channel. On search of her person, three (03) gold bars weighing 3000 Grams, concealed in the pocket of the 'Jeans Pant' worn by her underneath the 'Saree' that she was wearing, were recovered. The value of the recovered gold was appraised at Rs. 77,03,610/-. The offending goods were confiscated absolutely by the original authority, vide the said Order-in-Original dated 04.04.2016. Penalty of Rs. 20 Lakh was also imposed on the Applicant. Aggrieved, the Applicant filed an appeal before

the Commissioner (Appeals), who vide the impugned Order-in-Appeal dated 21.06.2017, rejected the same.

3. The instant Revision Application has been filed, mainly, on the grounds that an ex-parte Order was passed in violation of principles of natural justice by the Commissioner (Appeals); that the Order-in-Original was passed by original authority, beyond his jurisdiction; that the seized goods are not 'prohibited goods'; that it is not a case of concealment and that cross examination of the identified Customs Officers may be permitted. Accordingly, it has been prayed that the goods may be allowed to be re-exported.

4. The personal hearing was fixed on 05.10.2021, 20.10.2021 and 29.10.2021. Sh. Rajnish Kumar, Superintendent appeared for the respondent department but none appeared on behalf of the Applicant on these dates. In the personal hearing held on 03.12.2021, none appeared for the Applicant, despite request for further adjournment having been rejected. Sh. Charan Singh, Superintendent appeared for the respondent department and supported the orders of the lower authorities. As sufficient opportunities have been granted, the matter is taken up for final hearing and disposal.

5. The Government has carefully examined the matter. On merits, it is observed that the Applicant has not produced any evidence to show that she had

declared the subject gold items to the customs officer on her arrival from Bangkok. To the contrary, the original authority has recorded that the Applicant had not declared any value in Col. 9 and 'No' in Col. 10 (ii) and 10 (iii) of the customs Indian Customs Declaration Form. Further, the Applicant in her statement dated 09.05.2014, tendered under Section 108 of Customs Act, 1962, had admitted the concealment of seized gold bars in the pocket of the 'Jeans Pant' put on by her underneath the 'Saree' that she was wearing. The Applicant also admitted the fact of intentional non-declaration to earn quick money and as such goods were not for her personal use. It was also admitted that she was not in possession of any documentary evidence to show licit possession of the smuggled gold bars in question. In another statement dated 31.05.2014, the Applicant admitted and stated that the statement given by her on 09.05.2014 was correct and true. The position stated before the department, during investigation, was also accepted in the personal hearing held before the original authority. Thus, the facts as brought out by the lower authorities were also admitted in the adjudication proceedings. In this light, there is no justification for the request for cross examination of the officers.

6. The Applicant has raised two preliminary objections- (i) the impugned OIA has been passed ex-parte in contravention of the principles of natural justice and (ii) the Order-in-Original was passed by the original authority beyond his jurisdiction. In respect of (i), the Government observes that the Applicant herein

was granted four opportunities for personal hearing by the Commissioner (Appeals), but the Applicant did not avail of these opportunities. It is only thereafter that the Commissioner (Appeals) decided the case on the basis of written submission made by her. The Government observes that Commissioner (Appeals) has granted sufficient opportunities for hearing in terms of sub-section (1A) of the Customs Act, 1962. Therefore, the grievance raised by the Applicant, on this count, is inadmissible. As regards issue (ii), the Government observes that, in terms of notification no. 78/2014-Customs (NT) dated 16.09.2014, the Additional Commissioners or Joint Commissioners, working under the control of Commissioner of Customs, Air Cargo Complex (Export), New Delhi have concurrent jurisdiction with the Additional Commissioners or Joint Commissioners working under the control of Commissioner of Customs (Airport), Delhi. Hence, no fault can be found with the Joint Commissioner of Customs, Air Cargo Complex (Exports), New Delhi taking up the adjudication of this case.

7. 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 Bars recovered from her were not smuggled. The Gold Bars were 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 these 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*.

8.1 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.*"

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 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 The original authority has correctly brought out, in paras 4.2 to 4.5 of the Order-in-Original 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'.

9. The original authority has denied the release of offending goods on payment of redemption fine under Section 125 of Customs Act, 1962 and has ordered absolute confiscation thereof. The Government observes that the option to release 'prohibited goods', on payment of 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 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 be 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 Adjudicating Authority could not have been interfered with.

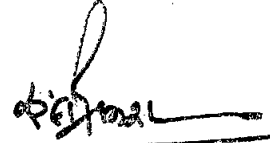
10. Section 80 of the Customs Act, 1962, reads as follows:

"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 seized gold at the time of her arrival, the request for re-export thereof cannot be acceded to, in the light of the provisions of Section 80, *ibid*.

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. Nizhat Ameen, W/o Sh. Sadiq Ameen
R/o 702/4, Shajahanabad, C.G.H.S,
Sector-11, Dwarka, New Delhi - 110023.

Order No. 276 /21-Cus dated 06-12-2021

Copy to:

1. The Commissioner of Customs, (A&G), New Customs House, Near IGI Airport, New Delhi - 110037.
2. The Commissioner of Customs (Appeals), New Customs House, Near IGI Airport, New Delhi - 110037.
3. Sh. Sadiq Ameen, Authorised Representative/ Husband of Ms. Nizhat Ameen, R/o 702/4, Shajahanabad, C.G.H.S, Sector-11, Dwarka, New Delhi – 110023.
4. PA to AS(RA).
- ✓ 5. Guard File.
6. Spare Copy.

ATTESTED



(लक्ष्मी राघवन)
(Lakshmi Raghavan)
अनुभाग अधिकारी / Section Officer
वित्त मंत्रालय (राजस्व विभाग)
Ministry of Finance (Dept. of Rev.)
भारत सरकार / Govt. of India
नई दिल्ली / New Delhi