

SPEED POST



F. No. 375/62/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.....24/12/21

Order No. 303 /21-Cus dated 24/12/ 2021 of the Government of India passed by Sh. Sandeep Prakash, Additional Secretary to the Government of India, under Section 129DD of the Custom Act, 1962.

Subject : Revision Application filed, under Section 129DD of the Customs Act 1962 against the Order-in-Appeal No. CCA(A)/Cus/D-I/Air/327/2019-20 dated 20.09.2019 passed by the Commissioner of Customs (Appeals), NCH, New Delhi

Applicant : Ms. Maya Garayeva, Ashkhabad, Turkmenistan.

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

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ORDER

A Revision Application No. 375/62/B/2019-RA dated 31.10.2019 has been filed by Ms. Maya Garayeva, Ashkhabad, Turkmenistan. (hereinafter referred to as the Applicant) against the Order-in-Appeal No. CCA(A)Cus/D-I/Air/327/2019-20 dated 20.09.2019, passed by the Commissioner of Customs (Appeals), New Delhi. The Commissioner (Appeals) has upheld the order of the Additional Commissioner of Customs, IGI Airport, New Delhi, bearing no. 253/Adj/18 dated 30.05.2018, wherein multiple gold rings intertwined, crudely given the shape of a gold chain and one gold bracelet, collectively weighing 1004 grams having purity 916 and totally valued at Rs. 26,51,544/-, which were recovered from the Applicant, were confiscated absolutely under Section 111(d), 111(i), 111(j), 111(l), 111(m) and 111(o) of the Customs Act, 1962. Besides, a penalty of Rs. 5,30,300/- was also imposed on the Applicant by the original authority, under Sections 112 & 114AA of the Customs Act, 1962, which has been maintained in appeal.

2. The brief facts of the case are that the Applicant arrived, on 04.05.2018, at IGI Airport, New Delhi from Istanbul and was intercepted near the exit gate after she had crossed the Customs Green Channel. On being asked by the Customs officers whether she had anything to declare, she replied in negative. Her baggage search resulted in the recovery of multiple gold rings intertwined, crudely given the shape of a gold chain and one gold bracelet, collectively weighing 1004 grams having purity 916 and totally valued at Rs. 26,51,544/-. The Applicant, in her statement dated 04.05.2018, tendered under Section 108 of the Customs Act, 1962, admitted the recovery of above-mentioned gold items from her hand baggage during her personal/ baggage scanning/ search proceedings and produced the Invoice No. 012584 dated 03.05.2018 issued by M/s Simay Gold, claiming ownership of the confiscated goods. She further stated that the gold belonged to her and it was her fifth visit to India; that she came to India for her treatment and during her visits she came to know that there is good profit in gold business i.e., carrying gold from Turkmenistan and selling the same in India; that therefore in the greed of earning money she brought the confiscated goods; that

during her last visit she brought 1150 Gms gold and she did not declare the gold at Red Channel of customs to evade payment of Customs Duty.

3. The revision application has been filed, mainly, on the grounds that there was no concealment of the confiscated goods and the Applicant was wearing the same around her neck and in her hand; that Applicant is a foreign national and the owner of the confiscated gold items; that gold ornaments are not prohibited items for import into India; and that her statement was recorded under pressure and false promise. Accordingly, re-export or redemption on payment of redemption fine in terms of Section 125 of the act, *ibid* for home consumption has been prayed for. It is also prayed that only token penalty may be imposed.
4. Personal hearing was fixed on 25.10.2021 and 08.12.2021 but, at the request of Applicant, third opportunity was granted on 24.12.2021. However, no one appeared for the Applicant nor any request for adjournment has been received. Applicant has submitted the written submissions via email dated 24.12.2021. Sh. Charan Singh, Superintendent appeared for the Respondent department and supported the orders of the lower authorities. Since sufficient opportunities have been granted to the Applicant, the matter is taken up for disposal based on written submissions.
5. The Government has carefully examined the matter. It is observed that the Applicant did not declare the gold brought by her as stipulated under Section 77 of Customs Act, 1962, to the customs authorities at the airport. Further, the Applicant admitted the recovery of gold from her and the fact of non-declaration in her statement dated 04.05.2018, tendered under Section 108 of Customs Act, 1962. It is also admitted by the Applicant that it was her fifth visit to India and further that during her last visit she brought 1150 Gms gold. The contention that the offending goods were not concealed but were worn by the Applicant is negated by the facts recorded in the

Panchnama witnessed by the independent witnesses. Another contention that the statement was recorded under pressure appears to be an afterthought since during the adjudicating proceedings no effort was made to prove the same by way of cross examination of the recording officer.

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 such goods are recovered. The Applicant did not make any declaration regarding carriage of gold. Further, the Applicant had crossed the Green Channel when she was intercepted. Though an invoice was produced after interception, the intent to smuggle is evident from the factum of Applicant failing to make the requisite declaration under Section 77 *ibid* and from her act of crossing the Green Channel. . The Applicant has, thus, failed to discharge the burden placed on her, in terms of Section 123, *ibid*.

7.1 The Applicant has claimed that the import of gold ornaments is not 'prohibited'. The Government observes that in the case of Sheikh Mohd. Omer vs Collector of Customs, Calcutta & Others [1971 AIR 293], the Hon'ble Supreme 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*". The Additional Commissioner has, in paras 11.3 & 11.5 of the Order-in-Original dated 30.05.2018, brought out that the Gold in any form is not allowed to be imported freely in baggage. It is permitted to be imported by a passenger subject to fulfilment of certain conditions. 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 its judgment dated 17.06.2021, 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, 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 that, in this case, the conditions subject to which gold in any form including ornaments, 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 authority has denied the release of impugned goods on redemption fine under Section 125 of Customs Act, 1962. The Government observes that, in terms of Section 125 *ibid*, the option to release seized 'prohibited goods', on redemption fine, is discretionary {Ref. Garg Woollen Mills (P) Ltd vs. Additional Collector of Customs, New Delhi [1998 (104) E.L.T. 306 (S.C.)]}. In the case of UOI & Ors vs. M/s Raj Grow Impex LLP & Ors (*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 based on the relevant considerations*". Similarly, in the case of Commissioner of Customs (Air), Chennai-I Vs P. Sinnasamy {2016(344) ELT1154 (Mad.)}, the Hon'ble Madras High Court has, relying upon several judgments of the Apex Court, 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."*" In the present case, the original authority has refused to grant redemption in the background of attempted smuggling with intent to evade Customs Duty as also in the context of the Government's policy objectives on the issue. It has also been observed that the Applicant is a repeat offender. Thus, the Order of the original authority, upheld by the Commissioner (Appeals), being a reasoned Order based on relevant considerations, does not merit interference.


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 offending goods at the time of her arrival, the request that these may be allowed to be re-exported, cannot be acceded to, in the light of the aforesaid provisions of Section 80, *ibid*.

10. Penalty imposed is just and fair in the facts and circumstances of the case.
11. In view of the above, the revision application is rejected.



(Sandeep Prakash)

Additional Secretary to the Government of India


Ms. Maya Garayeva,
C/o Shri Amit Kumar Dabas, Advocate
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Order No. 303 /21-Cus dated 24/12 2021

Copy to:

1. The Commissioner of Customs (Appeals), New Customs House, New Delhi-110037
2. The Commissioner of Customs, IGI Airport, New Delhi
3. Advocate Kanika Goswami, WZ-258A, Street No. 4, Srinagar, Rani Bagh, Delhi 110034.
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 (Deptt. of Rev.)
भारत सरकार / Govt. of India
नई दिल्ली / New Delhi