

SPEED POST



F. No. 375/80/B/2019-RA  
GOVERNMENT OF INDIA  
MINISTRY OF FINANCE  
(DEPARTMENT OF REVENUE)

14, HUDCO VISHALA BLDG., B WING  
6<sup>th</sup> FLOOR, BHIKAJI CAMA PLACE,  
NEW DELHI-110 066

Date of Issue 02/02/22

Order No. 34/22-Cus dated 01-02-2022 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/Airport/843/2019-20 dated 19.11.2019, passed by the Commissioner of Customs (Appeals), NCH, New Delhi

Applicant : Ms. Gozel Ishakulyyeva, Ashkhabad, Turkmenistan.

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

**ORDER**

A Revision Application No. 375/80/B/2019-RA dated 17.12.2019 has been filed by Ms. Gozel Ishakulyyeva, Ashkhabad, Turkmenistan (hereinafter referred to as the Applicant) against the Order-in-Appeal No. CCA(A)Cus/D-I/Airport/843/2019-20 dated 19.11.2019, passed by the Commissioner of Customs (Appeals), New Delhi. The Commissioner (Appeals) has upheld the order of the Joint Commissioner of Customs, IGI Airport, New Delhi, bearing no. 271/Adj./18 dated 07.06.2018, wherein gold medallions, multiple gold rings intertwined and crudely given the shape of a gold chain, collectively weighing 1070 grams and totally valued at Rs. 30,26,742/-, 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. A penalty of Rs. 11.70 Lakh was also imposed on the Applicant by the original authority, under Sections 112 & 114AA of the Act, *ibid*, 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 Ashgabat 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 personal search resulted in the recovery of the gold medallions, multiple gold rings intertwined and crudely given the shape of a gold chain, weighing 1070 grams and valued at Rs. 30,26,742/-. 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 possession but could not produce any documents evidencing licit possession of the confiscated goods. She stated that the gold belonged to her and it was her sixth visits to India; that during her last visit she brought 1000 Gms gold valued at Rs. 28,28,730/- and earned reasonable goods profit by selling the same in open market in New Delhi; that in the greed of earning profit, she brought again gold in the form of chain and medallions weighing 1070 Gms; and that she intentionally had not declared the gold at the Customs red channel of customs to evade payment of Customs Duty.

3. The revision application is filed, mainly, on the grounds that there was no concealment of the confiscated goods and the same was worn by the Applicant around her neck and in her hand; that Applicant is a foreign national; that gold ornaments are not a prohibited item for import into India; that her statement was recorded under pressure and false promise; and that re-export on payment of redemption fine may be allowed in terms of Section 125 of the act, *ibid*.

4. Personal hearing, in virtual mode, was held on 31.01.2022. Ms. Kanika Goswami, Advocate appeared for the Applicant and requested that Additional Submissions emailed on 31.01.2022 may be taken on record. She reiterated the contents of the revision application and the Additional Submissions. No one appeared for the department nor any request for adjournment has been received. Therefore, the case is being taken up for final decision.

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 items 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 sixth visit to India and further that during her last visit she brought 1000 Gms gold valued at Rs. 28,28,730/- and earned reasonable good profit by selling the same in open market in New Delhi. It is also observed that the offending goods were actually multiple gold rings intertwined and crudely given the shape of a gold chain. Thus, the intention appears to have been to wear the crude chain so shaped to pass it off as jewellery of personal use. As such, the contention that offending goods were not concealed is of no help to the Applicant's case. Another contention that the statement was recorded under pressure appears to be an afterthought since during the adjudication proceedings no effort was made to prove the same by way of cross examination of the recording officer. Further, the

Hon'ble Supreme Court has, in the case of *Surjeet Singh Chhabra vs. UOI* {1997 (89) ELT 646 (SC)}, held that a confession statement made before Customs officer, though retracted within six days, is an admission and binding on the person who has made the confession. On the other hand, the judgment of Hon'ble Madras High Court, in the case of *Jet Unipex vs. Commissioner of Customs, Chennai* {2020 (373) ELT 649 (Mad.)}, has been relied upon by the Applicant. The Government observes that the case before the Hon'ble Madras High Court related to evasion of duty, by alleged undervaluation whereas the judgment of Apex Court is in a case of smuggling of gold kara. Thus, the judgment in *Surjeet Singh Chhabra* (supra) besides being a judgment of a superior court is also rendered in respect of a case with facts similar to those in the present case. Thus, the Government respectfully follows the ratio of *Surjeet Singh Chhabra* and holds that the statement made by the Applicant is binding upon her.

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 instant case, the intention to smuggle is manifest by the fact of non-declaration as well as by failure of the Applicant to produce any documents to evidence licit possession. The Applicant has, thus, failed to discharge the burden placed on her, in terms of Section 123, *ibid*.

7.1 It is the contention of the Applicant that the import of gold ornaments, in baggage, 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 Joint Commissioner has, in paras 11.3 to 11.5 of the Order-in-Original dated 07.06.2018, 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, 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. Thus, the Order of the original

authority, upheld by the Commissioner (Appeals), being a reasoned Order based on relevant considerations, does not merit interference. The case laws relied upon by the Applicant are of a period prior to Raj Grow Impex (supra) and Sinnasamy (supra) or have been decided without noticing these pronouncements.

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 aforesaid provisions of Section 80, *ibid*.

10. The 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. Gozel Ishakulyyeva,  
D/o Atamurat Ishankhuliv,  
R/o Ashkhabad, St. Vakhuchin,  
2/21, Turkmenistan

Order No. 34/22-Cus dated 01-02-2022

Copy to:

1. The Commissioner of Customs (Appeals), New Customs House, New Delhi-110037
2. The Commissioner of Customs, New Customs House, IGI Airport, New Delhi - 110037.
3. Ms. Kanika Goswami Advocate, WZ-258A, Street No. 4, Sri Nagar, Rani Bagh, Delhi - 110034.
4. PA to AS(RA)
5. ~~Guard file.~~
6. Spare Copy.

ATTESTED

*Poonam Guggal*  
*22/02/22*

*(Poonam Guggal)*  
*Supdt. RA*