

**REGISTERED**  
**SPEED POST**



F. No. 375/36/B/2020-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...02/03/2022

Order No. 69 /22-Cus dated 02-03-2022 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/Airport/886/2019-20 dated 21.02.2020 passed by the Commissioner of Customs (Appeals), New Delhi.

Applicant : Sh. Furqan, Delhi.

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

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**ORDER**

A Revision Application No. 375/36/B/2020-R.A. dated 08.05.2020 has been filed by Sh. Furqan, Delhi (hereinafter referred to as the Applicant) against the Order-in-Appeal No. CC(A)CUS/D-I/Airport/886/2019-20 dated 21.02.2020 passed by the Commissioner of Customs (Appeals), New Delhi. The Commissioner (Appeals) has upheld the Order-in-Original No. 310/2016-17 dated 07.04.2017, passed by the Assistant Commissioner of Customs, IGI Airport, Terminal-3, New Delhi, vide which two 24K gold bars, weighing 116 gms and valued at Rs. 3,24,4028/-, were absolutely confiscated under Section 111(d), 111(j), 111(l) & 111(m) of the Customs Act, 1962 and a penalty of Rs. 65,000/- was imposed on the Applicant under Section 112 of the Act, *ibid*.

2. Briefly stated, the Applicant had arrived at IGI Airport, New Delhi on 01.11.2016, from Dubai. He was intercepted by the customs officers after he had crossed customs green channel and diverted for detailed examination. During his personal search, two gold bars weighing 116 grams, valued at Rs. 3,24,402/-, were recovered which were concealed in his rectum. In his statement dated 01.11.2016, tendered under Section 108 of the Customs Act, 1962, the Applicant admitted the recovery of the gold from his rectum and also stated that he had not declared the gold bars at the Red Channel deliberately to evade Customs duty. The original authority confiscated absolutely the gold items and also imposed a penalty of Rs. 65,000/- on the Applicant. Aggrieved, the Applicant filed an appeal before the Commissioner (Appeals) which was rejected vide the impugned OIA.

3. The revision application has been filed, mainly, on the grounds that the offending gold items may be released on payment of redemption fine as the import of gold is not prohibited and the penalty may be reduced.

4. Personal hearing, in virtual mode, was held on 02.03.2022. Sh. S.S. Arora, Advocate, appeared for the Applicant and stated that gold may be allowed to be

redeemed on payment fine and appropriate rate of duty. He also requested for penalty to be reduced. None appeared for the department nor any request for adjournment has been received. Therefore, the matter is taken up for disposal based on records.

5. The Government has carefully examined the matter. It is evident from records that the Applicant had concealed the offending gold in his rectum and had crossed Green Channel when he was intercepted. The Applicant has admitted the factual position in his statement tendered before the Customs 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 goods are recovered. In the present case, the gold bars were not declared by the Applicant to the customs officers, as required under Section 77 of Customs Act, 1962. He admitted that he had intentionally not declared the gold items to avoid customs duty. No documents evidencing licit possession of gold bars have also been placed on record. In any case, the manner of concealment, i.e., in rectum makes the intention to smuggle, apparent. The Applicant has, thus, failed to discharge the burden placed on him, in terms of Section 123, *ibid.*

7.1 The Applicant has contended that the import of gold is not 'prohibited'. Hon'ble Supreme Court has, in the case of Sheikh Mohd. Omer vs Collector of Customs, Calcutta & Ors [1971 AIR 293], 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 gold is allowed to be imported, in baggage, subject to certain conditions and, as correctly brought out by the original authority in paras 7 and 8 of his Order dated 07.04.2017, 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 Applicant has prayed for release of the gold bars 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 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*". Further, 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*". The Hon'ble High Court has further held that "*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 allow redemption keeping in view the ingenious manner of concealment as well as object of Government policy restricting import of gold. Hence, the Government holds that the original authority has exercised his discretion for relevant and reasonable considerations. As such, no grounds are made out to interfere with the discretion exercised by the lower authority as upheld by the Commissioner (Appeals)

9. The penalty imposed also appears to be justified, specifically considering the ingenious method of concealment in rectum by the Applicant.

10. In view of the above, the revision application is rejected.



(Sandeep Prakash)

Additional Secretary to the Government of India

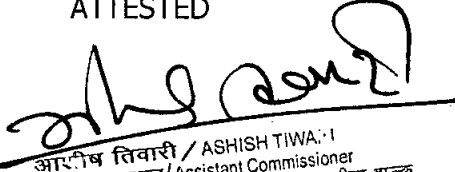
Sh. Furqan,  
S/o Sh. Nawabuddin,  
R/o 2164, Gali Kalyanpura,  
Turkman Gate, Delhi – 110006.

Order No. \_ 69\_22-Cus dated 02-03-2022

Copy to:

1. The Commissioner of Customs, IGI Airport, Terminal-3, New Delhi – 110037.
2. The Commissioner of Customs (Appeals), New Customs House, Near IGI Airport, New Delhi – 110037.
3. Sh. S.S. Arora, Advocate, BI/71, Safdarjung Enclave, New Delhi – 110029.
4. PA to AS(RA)
- ✓ 5. Guard File.
6. Spare Copy.

ATTESTED

  
आशीष तिवारी / ASHISH TIWARI  
सहायक आयुक्त / Assistant Commissioner  
केन्द्रीय वस्तु एवं सेवा कर, केन्द्रीय उत्पाद एवं सीमा शुल्क  
CGST, Central Excise & Customs  
राजस्व विभाग / Department of Revenue  
वित्त मंत्रालय / Ministry of Finance  
भारत सरकार / Government of India  
नई दिल्ली / New Delhi