

F.No. 380/171/B/2016-R.A.

F.No. 380/171/B/2016-R.A.
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...14/9/18

Order No. 154/18-Cus dated 11-9-2018 of the Government of India passed by Shri R. P. Sharma, Principal Commissioner & 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-I/Air/740/2016 dated 29/8/16, passed by the Commissioner of Customs (Appeals), Delhi

Applicant : Commissioner of Customs, Delhi

Respondent : Mr. Mohd. Iqbal Abubakar Limbuwala, Thane

ORDER

A Revision Application No. 380/171/B/2016-R.A dated 1/12/16 is filed by the Commissioner of Customs, Delhi (herein after referred to as the applicant) against the Order-in-Appeal No. CC(A)Cus/D-I/Air/740/2016 dated 29/8/16, passed by the Commissioner of Customs (Appeals), Delhi, , whereby the respondent has been given an option to redeem the confiscated gold bars weighing 609.76 grams valued at Rs. 16,23,446/- brought from Bangkok on payment of Custom duty, redemption fine of Rs. 4.5 lakhs under Section 125 of Customs Act, 1962 and personal penalty of Rs.2.43 lakhs under Sections 112 and 114A of Customs Act.

2. The Revision Application has been filed mainly on the grounds that since the respondent was not entitled to import gold in India in terms of Notification No. 12/2012-Cus dated 17.03.2012 (Condition 35) read with Baggage Rules, 1998, the gold bars brought by the respondent from Bangkok were prohibited goods, he had tried to smuggle the gold bars by not declaring the same to the custom officers on his arrival at Delhi Airport and accordingly the gold bars were liable for absolute confiscation.

3. Personal hearing was held on 06.08.2018 but it was not availed by the applicant and the respondent. No request was also received from them for any other date of personal hearing from which it is implied that they are not interested in availing personal hearing in this matter. The respondent has not filed any reply also in reference to the revision application by the applicant.

Accordingly the case is taken up for disposal on the basis of the records available.

4. Government has examined the matter and it is found that there is no dispute regarding the fact that the respondent had violated the Section 77 of Customs Act, 1962 by not declaring gold bars to the Custom authorities and the gold was liable for confiscation under Section 111 of the Customs Act, 1962. Accordingly the Commissioner (Appeals) has also confiscated the same but allowed the respondent to redeem the confiscated gold bars on payment of customs duty, redemption fine and penalty. The revenue has challenged the Commissioner (Appeal)'s order mainly for the reason that the gold brought by the respondent by concealing it in his shoes cannot be released on payment of redemption fine and customs duty and the same should have been absolutely confiscated as gold is prohibited goods because respondent was not an eligible passenger to bring any quantity of gold as per Notification number 12/2012-Cus dated 17.03.2012 and thus an option for redemption of confiscated gold is not permissible. But the government is not impressed by this ground of revision for the reasons that Notification no. 12/2012-Cus is only an exemption notification and it does not stipulate anywhere that gold is a prohibited goods and the eligibility of the respondent for the concessional rate of duty given in respect of gold under the said notification is not an issue at all in this case as the respondent never claimed it. Thus, Notification No. 12/2012-Cus is not relevant at all in the present case. The relevant provision in the context of

prohibited goods is Section 11 of the Customs Act and it is not the case of the applicant that the gold has been notified as prohibited goods either absolutely or subject to some conditions. No other legal provision is also mentioned in the Revision Application by which import of the gold has been prohibited. Even Baggage Rules do not prohibit the importation of gold and its purpose is only to extend the facility of exemption from duty by way of providing free allowances in respect of bonafide baggage goods which are generally household goods and the goods of personal use by a passenger. Therefore, non-coverage of any goods under Baggage Rules such as gold only means that free allowance and exemption from duty is not allowed on such goods. The Supreme Court in the case of Om Prakash Bhatia Vs Commissioner of Customs, Delhi, 2003(155)ELT423(S.C) has held in reference to Section 2(33), 11 and 113(d) of the Customs Act, 1962 that prohibition of importation or exportation can be subject to certain prescribed condition to be fulfilled before or after clearance of goods and if conditions are not fulfilled it may render the goods as prohibited goods. The said case was decided in the context of over invoicing of exported readymade garments. But in the instant case neither a case of absolute prohibition of imported gold has been established nor a case of any prescribed condition not fulfilled by the respondent has been made out in the revision application because of which the gold brought by the respondent can be termed as prohibited goods as defined in Section 2 (33) of the Customs Act, 1962 as enunciated by the Supreme Court in the above referred case. Thus,

except citing some decisions of the High Courts/tribunals, no concrete basis has been revealed in the revision application to consider the gold as prohibited goods in this case. The applicant has heavily relied upon the High Court's decision in the case of Commissioner of Customs V/s Samynathan Murugesan, [2009 (247) E.L.T. 21(Mad.)] wherein it is held that since the appellant did not fulfill the basic eligibility criteria under Notification No. 31/2003-Cus, the gold brought by the appellant were was rightly confiscated absolutely by the Commissioner in view of the concealment adopted by the appellant to bring in the gold. But it is not elaborated as to how the non-eligibility of a passenger under Notification No. 31/2003-Cus would mean that the gold is prohibited. Instead the Government has noticed that the Notification No. 31/2003-Cus provided concessional rate of duty of customs on fulfilment of specified conditions and did not prohibit the importation of gold by specifying any condition. Therefore, the impact of non-availability of exemption from customs duty on account of not being eligible was only that the person would be liable to pay customs duty at tariff rate. But despite of the fact that the said notification No. 31/2003-Cus did not declare the gold as prohibited goods, it has been held that the imported gold became prohibited goods in the event of the concerned passenger was found not eligible to import the gold under Notification No. 31/2003-Cus. Thus, Hon'ble Madras High Court's and subsequently the Apex court's conclusion in the case of Samynathan Murugesan[2010 (254) E.L.T. A15(S.C.)] that the gold ornaments are

prohibited goods is not actually founded on Notification No. 31/2003-Cus or any other legal provision. Therefore, the decision in the case of Samynathan Murugesan cannot be followed as a precedent. Further, the Hon'ble Madras High Court, in its later decision in the case of T. Elavarasan Vs CC(Airport), Chennai, 2011(266)E.L.T.167(Mad.), has held that gold is not prohibited goods and a mandatory option is available to the owner of the goods to redeem the confiscated gold on payment of fine under Section 125 of Customs Act, 1962. Even the Hon'ble High Court of Andhra Pradesh in the case of Shaikh Jamal Basha Vs GOI, 1997(91)E.L.T.277(A.P), has also held that as per Rule 9 of Baggage, Rules, 1979 read with Appendix-B, gold in any form other than ornament could be imported on payment of Customs Duty only and if the same was imported unauthorisedly the option to owner of the gold is to be given for redemption of the confiscated gold on payment of fine. The Hon'ble High Court of Bombay in the case of Union of India Vs Dhanak M Ramji [2003(248) ELT 128 (Bom.)] and the Apex Court in the case of Sapna Sanjiv Kohli Vs Commissioner of Customs, Mumbai [2010(253) ELT A52 (SC)] has also held that gold is not prohibited goods and accordingly the gold jewellery was allowed to be redeemed on payment of fine and duties. Notification 12/2012-Cus also, which is relevant in the present case, does not prohibit the importation of goods in any manner and it only specifies the eligibility criteria only for the purpose of exemption from Custom duty in respect of the imported goods which is not the issue in the present proceeding. The

respondent certainly violated Section 77 of the Customs Act by not declaring the gold immediately when he landed on the Airport and for that the gold has been confiscated by the original adjudicating but as the gold is not proved to be prohibited goods by the applicant, the option given by the Commissioner (Appeals) to the respondent to redeem the gold on payment of duty of Customs and fine cannot be faulted. Above all, even for prohibited goods also the adjudicating officers has been given discretion under Section 125 of the Customs Act to give an option for redemption of confiscated goods on payment of fine and the same has been exercised by the Commissioner (Appeals) in this case. So even if it is assumed that gold is prohibited goods as claimed by the applicant, then also the adjudicating officers in this case had the discretion to allow the redemption of goods and the same was been exercised by Commissioner (Appeals). Even the original adjudicating authority and the Commissioner (Appeals) have held in several cases earlier that gold is not prohibited goods and accordingly they released the confiscated gold on payment of fine etc. For example, the Additional Commissioner in his order no. 91/2015 dated 19/08/2015 in the case of Rabia Khatoon confiscated the gold but allowed the passenger to redeem the gold on payment of redemption fine and penalty and the Commissioner (Appeals) has maintained this view in the orders-in-appeal nos. CC(A)/Cus/D-I/Air/126/2016 dated 2/3/16 in the case of Nadira Ahaidi, CC(A)CUS/D-I/AIR/629/2016 dated 14.07.2016 in the case of Mohd. Khalid Siddiqui and CC(A)CUS/D-I/AIR/823/2016 dated 3/10/16 in the

case of Vinay Gupta. As per records available with this section no appeal/revision application was filed by the concerning Commissioner against these orders. Therefore, the government does not find any fault in the order passed by the Commissioner (Appeals) to the above extent of allowing the respondent to redeem confiscated gold on payment of fine etc. However, the Government finds that the fine of Rs. 4.5 lakhs for redemption of the confiscated gold of Rs. 16,23,446/- is very low considering the amounts of redemption fine imposed in other cases by the Commissioner (Appeals) and by the Government of India and no convincing reason is adduced to justify such small amount of redemption fine. Generally in such cases of smuggling of goods redemption fine is imposed more than 35% of the value of confiscated gold by taking into account the quantity, method of concealment of the gold and the gravity of violations perpetrated by the passengers. For example the same Commissioner (Appeals) in the above cited order-in-appeal no. CC(A)/Cus/D-I/Air/126/2016 dated 2/3/16 in the case of Nadira Ahaidi released the confiscated gold of Rs. 54,94,230/- on payment of redemption fine of Rs. 25 lakhs and penalty of Rs. 7.5 lakhs and thus the redemption fine in this case was imposed @ 45%. Since the method of smuggling of the gold in the present case is also identical, rather the gold was concealed in this case in more unusual manner, the government considers it just and appropriate to enhance the redemption fine from Rs. 4.5 lakhs to Rs. 6.5 lakhs and penalty from Rs.

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2.43 lakhs to Rs. 4 lakhs to make the redemption fine and penalties deterrent in nature.

5. The Revision Application is disposed of in the above terms.

(R. P. SHARMA)

R. P. Sharma
11-9-18

ADDITIONAL SECRETARY TO THE GOVERNMENT OF INDIA

Commissioner of Customs,
Terminal-3, IGI Airport,
New Delhi-110 037(Airport)

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Copy to:-

1. Mohd. Iqbal Abubakar Limbuwala, Flat No. 101, 1st Floor Wing, Amar Garden, Near Shireen Villa, Kausa Mumbra, District Thane-400 612.
2. The Commissioner (Appeals), New Customs House, New Delhi-37.
3. PS to JS (Revision Application)
4. Guard File
5. Spare Copy.

ATTESTED

R. P. Sharma
(Ravi Prakash)
OSD (RA)