

REGISTERED

SPEED POST



F. No. 375/29/B/2017-R.A.
375/30/B/2017-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. ^{158459/18-60} Cus dated 11-9-2018 OF THE GOVERNMENT OF INDIA, PASSED BY SHRI R. P. SHARMA, ADDITIONAL SECRETARY TO THE GOVERNMENT OF INDIA, UNDER SECTION 129DD OF THE CUSTOMS ACT, 1962.

SUBJECT : Revision Application filed under Section 129DD of the Customs Act, 1962 against the Order-in-Appeal No. CC (A) CUS/D-I/Air/195-196/2017 dated 23/05/2017, passed by the Commissioner of Customs (Appeals), NCH, Near IGI Airport, New Delhi.

APPLICANT : 1. Swaraj Sharma
2. Rajesh Kumar Sharma

RESPONDENT : Commissioner of Customs, New Delhi

ORDER

Revision Applications Nos. 375/30/B/2017-R.A. and 375/29/B/2017-R.A., both dated 17/08/2017 have been filed by the Mr. Swaraj Sharma (hereinafter referred to as the first applicant) and Mr. Rajesh Kumar Sharma (hereinafter referred to as the second applicant) against the Commissioner (Appeals)'s Order No. CC (A) CUS/D-I/Air/195-196/2017 dated 23/05/2017 whereby the order of the Additional Commissioner of Customs, New Delhi, confiscating absolutely gold items weighing 3335 grams valued at Rs. 81,14,722/- and imposing a penalty of Rs. 12 lakhs on the first applicant and Rs. 4 lakhs on the second applicant, has been upheld.

2. The first applicant has filed the revision application mainly on the ground that upholding of absolute confiscation of the gold articles by the Commissioner (Appeals) is erroneous as the gold is not prohibited goods and the same should be allowed to be redeemed on payment of duty, fine, reasonable. While the second applicant has filed the revision application on the ground that the penalty on him is not supported by either Section 112 or Section 114AA of the Customs Act and the same, therefore, needs to be set aside.

3. A personal hearing was held on 10/07/2018 and it was attended by applicants, Sh. Swaraj Sharma and Sh. Rajesh Sharma, who reiterated the grounds of revision already pleaded in their revision applications. However, inspite of availing the hearing on 10/07/2018 itself, the applicants vide their letter dated 12/07/2018 requested for one more personal hearing to plead their case for the reason that their earlier advocate had appeared on their behalf even when he was no more their advocate. Although the said reason for seeking second hearing was not found justifiable as no advocate had appeared in their case earlier, yet to allay any doubt

in their mind, both were given another hearing on 14/08/2018 which was attended by the applicants themselves and they mainly pleaded that a lenient view may be taken as it was their first mistake committed due to ignorance of law and financial crisis. However, no one appeared on behalf of respondent on both the occasions from which it is implied that they are not interested in availing any hearing in the matter.

4. From the revision application it is evident that the first applicant does not dispute the Commissioner (Appeals)'s order regarding confiscation of the goods which were brought by him illegally from Bangkok in violation of Customs Act, 1962 and the Foreign Trade (Development and Regulation) Act, 1992 and his request is limited to a point that the confiscated gold may be released on payment of redemption fine and penalty.

5. Government has examined the matter and it is found that the Commissioner (Appeals) has upheld Additional Commissioner's order of absolute confiscation of gold on the premise that the gold brought by the applicant had become prohibited when it was sought to be smuggled in by hiding the same in mobile cover and whisky box. But he has not cited any legal provision under which the import of gold is expressly prohibited and has only stated that the applicant was not an eligible passenger to bring any quantity of gold as per Notification No. 12/2012-Cus (N.T.) dated 17.03.2012 and hence an option for redemption of confiscated gold could not be given. Whereas the Government has found that the said Notification is only a general exemption notification and gold is one of many goods in respect of which concessional rate of duty is provided on fulfilment of condition Number 35. Thus, under this Notification eligibility of the passenger is relevant only for determining the

admissibility of concessional rate of duty and not for deciding the eligibility to import or not to import gold. The exemption from customs duty was never the issue in this case and it could not be extended because the applicant did not declare the importation of gold at all and rather used mobile cover and whisky box for hiding gold bars with clear intention to evade customs duty. While the Government is fully convinced that unusual method of concealment of gold is a very relevant factor for determining the quantum of fine and penalty, it does not agree with the Commissioner (Appeals) that the gold had become prohibited only because of its unusual concealment even when the gold is not notified as prohibited goods under Section 11 of the Customs Act, 1962 or any other law. Prohibited goods is a distinct class of goods which can be notified by the Central Government only and the goods cannot be called as prohibited goods simply because it was brought by any person in violation of any legal provision or without payment of custom duty. Further there is a difference between the prohibited goods and general regulatory restrictions imposed under the Customs Act or any other law with regard to importation of goods. While prohibited goods are to be notified with reference to specified goods only which are not allowed to be imported in any circumstance, regulatory restrictions with regard to importation of goods is generally applicable to general goods like goods will not be imported without declaration to the Customs and without payment of duty leviable thereof etc. Such restriction is clearly a general restriction/regulation, but it cannot be stated that the imported goods become prohibited goods if brought in contravention of such restriction. Commissioner (Appeals) has merely placed reliance on Supreme Court's decisions in the cases of Om Prakash Bhatia Vs Commissioner of Customs, Delhi [2003(155) ELT 423 (SC)]

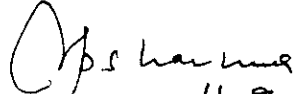
and Sheikh Mohd. Omer Vs Collector of Customs, Calcutta [1983(13) ELT 1439(SC)], to support his view. But no reason is given as to how these decisions cover the present case. On examination of the decision in the case of Om Prakash Bhatia it is observed that the issue involved in this case was regarding confiscation of goods exported/attempted to be exported in violation of various legal provisions and allowing of redemption of such goods on payment of fine and penalty. But it is nowhere held in this case that any goods exported or imported in contravention of legal provision will become prohibited goods as is envisaged under Section 11, Section 111(i) and Section 125 of the Customs Act, 1962 and the goods will be liable for absolute confiscation only. In fact in this case redemption of confiscated goods had been allowed on payment of fine etc. and it has been upheld by the Apex Court. The issue in the case of Sheikh Mohd. Omer was also totally different and dealt with the import of live animal for which importation was prohibited under Import Control Order, 1955. Apparently because such goods when imported in violation of specified legal provisions are also liable for confiscation under Section 111 of the Customs Act, the Apex Court held in the above mentioned case of Om Prakash Bhatia that importation of such goods became prohibited in the event of contravention of legal provisions or conditions. But it is nowhere held that the goods become prohibited goods in such cases if all goods brought in India in contravention of any legal provision are termed as prohibited goods, as envisaged in Section 125 of Customs Act, then all such goods will become prohibited and other category of non-prohibited goods for which option of redemption is to be provided compulsorily will become redundant. Thus while any goods imported without payment of duty and in violation of any provision of the Customs Act, 1962 are certainly liable for confiscation under

Section 111 of the Customs Act, but confiscated goods are not necessarily to be always prohibited goods. While there is no dispute in this case that the gold bars brought by the applicant from Bangkok are liable for confiscation because he did not follow the proper procedure for import thereof in India and attempted to smuggle it without payment of customs duties, it is beyond any doubt that the gold is not notified as prohibited goods under Customs Act. The Hon'ble Madras High Court, in its decision in the case of T. Elavarasan Vs CC(Airport), Chennai [2011(266)ELT 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) ELT 277(AP)] has also held that as per Rule 9 of Baggage Rules, 1979 read with Appendix B, gold in any form other than ornaments 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. In fact the Commissioner (Appeals), Delhi and the Government of India have consistently held the same view in a large number of cases that gold is not prohibited goods as it is not specifically notified by the Government. For example, the Commissioner (Appeals) in his order-in-appeal no. CC(A)Cus/D-I/Air/629/2016 dated 14/07/2016 in the case of Mohd. Khalid Siddique has clearly held that gold is not prohibited as it is not notified by the government as prohibited goods. Therefore, the Commissioner (Appeals) has taken a totally different stand by upholding absolute confiscation of gold in this case. Accordingly the Commissioner (Appeals) should have provided an

● option to the applicant under Section 125 of the Customs Act, 1962 to redeem the confiscated goods on payment of customs duties, redemption fine and penalty.

6. In view of the above discussions the Government allows the applicant to redeem the confiscated gold within 30 days of this order on payment of customs duty, fine of Rs. 32 lakhs and penalty of Rs. 10 lakhs. The penalty in this case is reduced from 12 lakhs to Rs. 8 lakhs mainly for the reason that the earlier penalty of Rs. 12 lakhs has been imposed under Section 112 and Section 114AA of the Customs Act even when Section 114AA is not found attracted in this case. The penalty under Section 114AA can be imposed only when a person resorted to some false declaration/statement/document in the transaction of any business which was not used in the present case at all. On the contrary department's case is that the applicant had not declared the gold to the customs authorities for which the penalty is imposable under Section 112 of the Customs Act. Since penalty of Rs. 12 lakhs was imposed collectively under two sections, reasonable reduction in the said penalty amount is warranted when it is found that the penalty under Section 114AA is not attracted in this case. As regards the penalty of Rs. 4 lakhs imposed on the second applicant, the Government finds no reason to interfere with the Commissioner (Appeals)'s order upholding the same as his complicity in the offence of smuggling of gold with first applicant is well established and no case is made out by the second applicant that he was not involved in this case along with the first applicant.

7. In terms of the above discussion, the order-in-appeal is modified and the revision applications are allowed to the above extent.


11.9.18
(R. P. SHARMA)

ADDITIONAL SECRETARY TO THE GOVERNMENT OF INDIA

1. Mr. Swaraj Sharma,
S/o Sh. Mukesh Sharma,
26(New No. 148), Warren Ganj,
PS Sipri Bazar, Jhansi, UP.
2. Mr. Rajesh Sharma,
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New Delhi- 110 012

ORDER NO/58-159//8 -Cus dated 11-9-2018

Copy to:-

1. The Commissioner of Customs (Appeals), New Custom House, New Delhi-37
2. The Commissioner of Customs, New Custom House, New Delhi-37
- ✓ 3. Guard File.

ATTESTED

(NIRMALA DEVI),
Section Officer

N Devi
11/9/18