

REGISTERED

SPEED POST



F.No. 372/ 01/B/2017- 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.....

Order No. 164/2018-6w dated 11-8-18 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 129DD OF THE CUSTOMS ACT, 1962 against the Order-in-Appeal No. KOL/ CUS/ (Airport)/ AA/ 258/ 2016 dated 31.10.2016, passed by the Commissioner of Customs (Appeals), Kolkata.

Applicant : Ms Jayvanti Porwal.

Respondent : Commissioner of Customs (Airport & Admin), NSCBI Airport, Kolkata-700052.

ORDER

A Revision Application F.No. 372/ 01/ B/ 2017- RA dated 30.01.2017 has been filed by Ms Jayvanti Porwal (hereinafter referred to as the applicant) against the Commissioner (Appeals)'s Order No KOL/ CUS/ (Airport)/ aa/ 258/ 2016 dated 31.10.2016 whereby the order of the Joint Commissioner of Customs, Air Intelligence Unit Cell, NSCBI Airport, Kolkata-700052, confiscating absolutely 6 gold chains weighing 729.300 grams valued at Rs. 19,03,475/- and imposing a penalty of Rs. 2 lakhs on the applicant has been upheld.

2. The applicant has filed the Revision Application mainly on the ground that upholding of absolute confiscation of the gold chains 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 reasonable redemption fine and penalty or re-export of the gold chains be allowed.

3. Personal Hearing in this case was granted to the applicant on 08.08.2018. But the applicant did not appear for the hearing and no request was received for any other date of hearing for any genuine reason from which it is implied that the applicant is not interested in availing the hearing. Hence, the Revision Application is taken up for a decision on the basis of available case records.

4. From the revision application it is evident that the 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 her request is limited to a point that the confiscated gold may be released on payment of redemption fine and penalty and it should be allowed to be re-exported.

5. As regards confiscation of gold chains, it is observed by the Government that the Commissioner (Appeals) has upheld Joint 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 by hiding it under her garments. But she 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 her garments for hiding gold chains 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 customs 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 or allowed on specified conditions, 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. The lower authorities have 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 its 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 afore 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 11, Section 111 (i) and 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 the 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, confiscated goods are not necessarily to be always prohibited goods. Accordingly, while there is no dispute in this case that the gold chains brought by the applicant from Bangkok are liable for confiscation because she 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

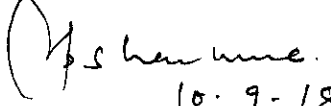
is not notified as prohibited goods under Customs Act. The Hon'ble Madras High Court, in its decision in the case of T. Elavarasan Vs CC(Airport), Chennai [2011(266)ELT 167(Mad)] has held that gold is not prohibited goods and a mandatory option is available to the owner of the goods to redeem the confiscated 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. Subsequently Commissioner of Customs (Appeals), New Delhi maintained the same view in his Order-in-Appeal No. CC (A) Cus/ D-I/ Air/ 126/ 2016 dated

02.03.2016 and Order-in-Appeal No. CC (A) Cus/ 823/ 2016 dated 03.10.2016 in the case of Mr. Vinay Gupta. Therefore, the Commissioner (Appeals) has taken a different stand by upholding absolute confiscation of gold in this case and instead 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. However, the Government has noted that the applicant is a habitual offender also as a similar case had been booked against her afterwards also vide Seizure F. No. SI (VII)-45/ 2015 AIU dated 24.02.2015 and her confidence in doing this kind of business is clearly reflected in the very fact that she brought gold chains at Kolkata Airport even when she is resident of Chennai. Therefore, it is a fit case for a deterrent fine. As regards applicant's request for re-export of confiscated goods, it is not found acceptable as her case is not covered under Section 80 of the Customs Act under which re-export of goods can be allowed under specified circumstances only like true declaration of the goods is made at the arrival in India and the person return back after a short stay in India. But in this case no such criteria is satisfied as she had not declared the goods at the time of her arrival in India, she is a habitual offender and she is not even citizen of Thailand

from where the gold had been illegally brought by her purely for the purpose of evasion of customs duties.

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. 9 lakhs and penalty of Rs. 2 lakhs which was originally imposed by the Joint Commissioner of Customs, IGI Airport, T-3, New Delhi and upheld by the Commissioner of Customs (Appeals), NCH, New Delhi.

7. In terms of the above discussion, the order-in-appeal is modified and the Revision Applications is allowed to the above extent.


10.9.18

(R.P.Sharma)

Additional Secretary to the Government of India

Ms Jayvanti Porwal.

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Vyasarpadi, Chennai- 600039.

Order No. 164/18-WS dated 11-9-18

Copy to:

1. Commissioner of Customs (Airport & Admin), NSCBI Airport,
Kolkata-700052.
2. Commissioner of Customs (Appeals), Kolkata.
3. Joint Commissioner of Customs, Air Intelligence Unit Cell, NSCBI
Airport, Kolkata-700052.
4. PS to AS(RA)
5. Guard File.

ATTESTED



(Ravi Prakash)

OSD (REVISION APPLICATION)