

REGISTERED

SPEED POST



F. No. 375/31/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... 7.12.18

9c

ORDER NO. 214/2018 - Cus dated 5-12-2018 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-198/2017 dated 25.05.2017, passed by the Commissioner of Customs (Appeals), New Delhi.

APPLICANT : Mr. Manoj Kumar, Rohtak.

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

ORDER

A Revision Application No. 375/31/B/2017-R.A. dated 28.08.2017 has been filed by Mr. Manoj Kumar, R/o, H.No.719-220/B-3, Kila Mohala, Rohtak-124001 (hereinafter referred to as the applicant) against the Commissioner (Appeals)'s Order No. CC(A)Cus/D-I/Air-198/2017 dated 25.05.2017 whereby the order of the Additional Commissioner of Customs, IGI Airport, Terminal-III, New Delhi, confiscating gold bars, weighing 4503.96 grams valued at Rs. 1,10,44,070/-, and imposing a penalty of Rs.20,00,000/- on the applicant, has been upheld.

2. The applicant has filed the revision application mainly on the grounds that upholding of confiscation of the gold bars by the Commissioner (Appeals) is erroneous as the gold is not prohibited goods, therefore, the same should have been allowed on payment of redemption fine and penalty is too high.

3. Personal hearing was offered on 29.11.2018 and Smt. Harsimran Kaur, Advocate, availed the hearing on behalf of the applicant who reiterated the above mentioned grounds of revision already pleaded in their application. She specially emphasised that gold is not prohibited goods and should be released on Redemption Fine etc. under Section 125 of the Customs Act. She also relied upon two orders of Government of India's order No.358/05 dated 06.12.2005 in the case of Shri Subhash Muljimal Gandhi and order No.336/2012-Cus dated 08.08.2012 in the case of Mohd. Zia Ul Haque whose copies were also given. However, no one appeared for the respondent and no request for any other date of hearing was also received from which it implied that the respondent is not interested in availing personal hearing. Accordingly, the case is taken up for disposal on the basis of the records available.

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 Hongkong in violation of Section 77 of the Customs Act by not declaring the gold to the Custom Officers at his arrival in India, Section 7 of the Foreign Trade (Development and Regulation) Act, 1992 as per which no person can import goods without having Import-Export Code from DGFT and his request is limited to a point that the confiscated gold should be released on payment of custom duty, redemption fine and penalty.

5. Government has examined the matter and it is observed that the applicant had not declared the gold brought from Hongkong to the Customs officers at the Red Channel Counter and thus Section 77 of the Customs Act was not complied with the sole intention to evade customs duties. Besides, the Commissioner (Appeals) has also held in his order that the applicant was not an eligible passenger as defined in the Notification No. 12/2012-Cus dated 17.03.2012 and consequently the gold imported in this case was prohibited goods in the light of Hon'ble Supreme Court's decision in the case of Mr. Om Prakash Bhatia vs Commissioner of Customs, Delhi, as reported in 2003(155) ELT 423(SC). While the government does not have any doubt that the gold brought by the applicant with the sole intention to evade customs duties cannot be termed as bonafide baggage and Section 7 of the Foreign Trade (Development and Regulation) Act, 1992 is contravened by bringing gold without obtaining Import Export Code from the DGFT to render the goods liable to confiscation, it does not agree with the Commissioner(Appeals)'s view that the gold become prohibited merely for the reason that the applicant was not eligible passenger under Notification No. 12/2012-Cus dated 17.03.2012. In fact, Notification No.

12/2012-Cus dated 17.03.2012 is a General Exemption Notification under which concessional rate of duty is provided for gold along with other several goods on fulfilment of conditions specified therein. Thus this notification is relevant only where the concessional rate of duty is claimed by the passenger, but it has no bearing for the purpose of determining whether the gold is prohibited goods or not. Prohibited goods are notified under Section 11 of the Customs Act or the Foreign Trade (Development and Regulation) Act, 1992, etc. But no such notification has been mentioned either in the Order-in-Original or Order-in-Appeal whereby the gold has been notified as prohibited goods. The Commissioner (Appeals) has also not explained as to how the above mentioned decision of the Hon'ble Supreme Court cover the present case as in the case of Om Prakash Bhatia vs Commissioner of Customs, Delhi, as reported in 2003(155)ELT 423(SC), the Hon'ble Supreme Court dealt the issue regarding confiscation of textile goods which were attempted to be re-exported in violation of some legal provisions and the Hon'ble Supreme Court held that the Departmental authorities had power to confiscate such goods and release the same on payment of fine etc. But the Hon'ble Court has nowhere held that such goods are to be confiscated absolutely only. The Government finds that 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 either not allowed at all or allowed to be imported on specified conditions only,

regulatory restrictions with regard to importation of goods is generally applicable like goods will not be imported without declaration to the Customs Authorities 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. 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 which are liable for confiscation. If all the goods brought in India in contravention of any legal provision are termed as prohibited goods as envisaged in Section 11, Section 111(i) and 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 under Section 125 of the Customs Act will become redundant. Thus while the Government does not have any doubt that the goods imported in violation of any provision of the Customs Act, 1962 or any other Act are also certainly liable for confiscation under Section 111 of the Customs Act, confiscated goods are not necessarily to be always prohibited goods. Accordingly there is no dispute in this case that the gold bars brought by the applicant from Hongkong are liable for confiscation because he did not follow the proper procedure for import thereof in India. But at the same time, the fact cannot be overlooked that the gold is not notified as prohibited goods under Customs Act. The Government of India has earlier also in its order No. 358/05 dated 06.12.2005 in the case of Shri Subhash Muljimal Gandhi and No.336/2012-Cus dated 08.08.2012 in the case of Mohd. Zia Ul Haque, which

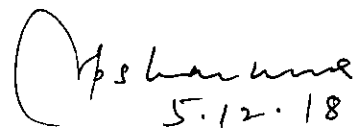
are relied upon by the applicant during the personal hearing, has held that the gold is not prohibited goods and the same were allowed for redemption for this reason. Further it is also found that the Hon'ble Madras High Court, in its decision in the case of T. Elavarasan Vs CC(Airport), Chennai [2011(266)ELT 167(Mad)] has also 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 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 (2009(248)ELT 127(Bom.)) and the Apex Court in the case of Sapna Sanjiv Kohli Vs. Commissioner of Customs, Mumbai(2010(253)ELT A52(SC) have also held that gold is not prohibited goods. In addition, 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. The Commissioner (Appeals) has placed reliance on the Supreme Court's decision in the case of M/s Sheikh Umar Vs. Collector of Customs, Calcutta, 1983(13)ELT 1439(SC). But he has not elaborated in his order as to how this decision is relevant for present case. When this decision was examined by the Government it was found that the aforesaid decision is not applicable to the present proceedings as it did not deal with the importation of Gold in the context of liberalized policy of Government from 1992 with regard to import of

gold and rather the said decision dealt with the importation of live animal which was not freely importable during the relevant period. In the light of the above facts, the Government is convinced that the Commissioner (Appeals) should have provided an option to the applicant under Section 125 of the Customs Act, 1962 to redeem the confiscated gold on payment of customs duties, redemption fine and penalty and because it was not done so earlier, the Government now allows the applicant to redeem the confiscated gold within 30 days of this order on payment of customs duty and redemption fine of Rs.40 lakhs. The Commissioner(Appeals)'s observation in his order that the confiscated gold cannot be released to the applicant for the reason that the gold did not belong to the applicant is not found tenable in the light of clear text of Section 125 of the Customs Act,1962 as per which an option for redemption of confiscated goods is to be given to the owner of the non prohibited goods or where such owner is not known the said option is to be given to the person from whose possession or custody such goods were seized. In the instant case while it has been concluded by the lower authorities that the applicant is not the owner of the confiscated gold and he is mere carrier only, they have not identified the real owner at all. Moreover, no person has come forward to claim ownership of the gold and the fact can not be denied that the confiscated gold was seized from the possession/custody of the applicant only. Therefore, redemption of the confiscated gold is to be given to the applicant even when it is accepted for a while that the applicant is not real owner of the goods. This view is also supported by the Bombay High Court decision in the case of Union of India Vs. Dhanak M Ramji (2009(248)ELT 127(Bom.) wherein the gold was released to the person who claimed ownership of the gold when no other person had claimed the ownership of the gold. The departmental

SLP filed in the Hon'ble Supreme Court against the said decision was also dismissed has reported at 2010(252)ELT A102(SC).

6. The Government also finds it as a fit case for reduction of penalty from 20 lakhs to 15 lakhs on the ground that the combined penalty of Rs. 20 lakhs is imposed under Section 112 & 114 AA of the Custom Act even when Section 114AA is not applicable here as was pleaded by the applicant. Section 114AA is applicable only where a person knowingly or intentionally makes, signs or uses any declaration, statement or documents which is false or incorrect in any material particular in the transaction of any business. But no such case of making, signing or using any declaration, statement or documents has been made by the department in this case and on the contrary the departmental case is that the applicant had not declared importation of gold for which the penalty is attracted under Section 112 of the Act.

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


5.12.18

(R. P. SHARMA)

ADDITIONAL SECRETARY TO THE GOVERNMENT OF INDIA

Mr. Manoj Kumar,
R/o, H.No.719-220/B-3,
Kila Mohala, Rohtak-124001

ORDER NO. 214/2018-Cus dated 5-12-2018


Copy to:-

1. The Commissioner of Customs (Appeals), New Customs House, Near IGI Airport, Terminal-III, New Delhi-110037.
2. The Commissioner of Customs, IGI Airport, Terminal-III, New Delhi-110037.
3. P.S. to A.S.
4. Smt. Harsimran Kaur, Advocate, S S Arora & Associates, B-1/71, Safdarjung Enclave, New Delhi.
5. Guard File

ATTESTED

(ASHISH TIWARI)
ASSISTANT COMMISSIONER (REVISION APPLICATION)

Received copy of the order for self &
party


(S.S. Arora) Advocate
7/12/2018