

REGISTERED

SPEED POST



F. No. 372/09/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...13/12/18

ORDER NO. 230/2018-Cus dated 10-12-2018 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. KOL/Cus(Airport)/AA/132/2017 dated 02.03.2017, passed by the Commissioner of Customs (Appeals), Kolkata.

APPLICANT : Mr. Sabarathnam Neelamegam, Chennai.

RESPONDENT : Commissioner of Customs, Kolkata.

ORDER

A Revision Application No. 372/09/B/2017-R.A. dated 21.04.2017 has been filed by Mr. Sabarathnam Neelamegam, Chennai (hereinafter referred to as the applicant) against the Commissioner (Appeal)'s Order No. KOL/Cus(Airport)/AA/132/2017 dated 02.03.2017, whereby the order of the Joint Commissioner of Customs, Kolkata, absolutely confiscating gold ornaments weighing 396.00 grams valued at Rs. 10,29,600/- and imposing penalty of Rs. 1 lakh on the applicant has been upheld.

2. The revision application has been filed mainly on the ground that the gold jewellery brought by the applicant was for personal use, there was no concealment, the absolute confiscation of the gold items by the Commissioner (Appeals) is erroneous and the same should be allowed to be re-exported.

3. A personal hearing was fixed for 19.09.2018 which was availed by Mr. K. Mohamed Ismail, Advocate, on behalf of the applicant who reiterated grounds of revision already pleaded in their application. He also emphasized that in case re-export of goods is not allowed, the gold ornaments may be released on payment of modest fine and penalty as gold is not prohibited goods. But no one appeared for the respondent and no request has been 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.

4. On examination of all the relevant records, the Government finds that it is not in doubt that the gold ornaments were brought by the applicant after coating them with silver colour and were not declared as per Section 77 of the Customs Act, 1962 with a clear intention to evade customs duties and accordingly these were correctly

held liable for confiscation by the lower authorities. As regards the applicant's request that the confiscated goods may be allowed for re-export, the Government finds that the re-export of the goods is allowed under Section 80 of the Customs Act, 1962, only to a person entering India who had declared these goods under Section 77 of the Customs Act to the customs authorities and the same were detained temporarily to enable the said person to take them back after his stay in India. But the applicant has not made out any such case that he had declared the gold articles at the time of his arrival and he had come to India only for a short visit like a tourist from where the detained goods could be taken to the other country for his personal use. Instead, it is evident from the facts of the case that the applicant had not declared these goods while he arrived from Yangon via Bangkok, he is an Indian citizen only and he is not permanently settled in Yangon where he wants to re-export the confiscated goods. Above all, he has requested for re-export of the goods to avoid payment of customs duty only for which he had smuggled the gold articles originally. Thus, the applicant's case is not covered within the preview of Section 80 of Customs Act for allowing re-export of the confiscated goods.

5. Coming to the main issue whether the gold is prohibited goods or not, the Government finds that the Commissioner (Appeals) has upheld the Joint Commissioner's order of absolute confiscation of gold ornaments on the premise that the applicant was not eligible person to import gold on concessional rate of duty under notification No.3/2012-cus dated 16/01/2012. But the Government is not impressed with this reason as notification No. 3/2012-cus dated 16/01/2012, issued under section 25 of the custom Act, is only an exemption notification and it does not stipulate anywhere that gold is a prohibited goods. The applicant also never claimed

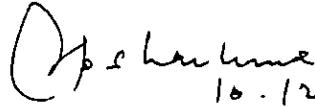
concessional rate of duty under the said notification in respect of gold brought by him and thus notification 3/2012-Cus is not relevant at all in present case. The relevant provision in the context of prohibited goods is Section 11 of the Customs Act and it is not the case of the applicant that the 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 Order-in Appeal because of which the gold brought by the applicant 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. The Commissioner (Appeals) 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 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. 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. 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 3/2012-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 applicant 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 commissioner (appeals) its absolute confiscation is not justifiable under section 125 of the customs Act as per which it is mandatory for the adjudicating officer to give an option for redemption of non-prohibited goods. Even the original adjudicating authorities and the Commissioner (Appeals) in Delhi customs have held in several cases that gold is not prohibited goods and accordingly they released the confiscated gold on payment of fine etc. For example, the Additional Commissioner of Customs, Delhi 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 office no appeal/revision application was filed by the concerning Commissioner against these orders. Accordingly, the

Commissioner (Appeals) Kolkata, also 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 and because it was not done so earlier the Government now allows the applicant to redeem the confiscated gold on payment of customs duty, fine of Rs. 3.50 lakhs and penalty of Rs.1 lakh which was imposed by the original adjudicating authority and upheld by the Commissioner (Appeals). The Government considers this penalty quite reasonable and appropriate in the context of the serious nature of offence committed by the applicant by importing gold without declaration and does not merit any reduction.

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


10.12.18
(R. P. SHARMA)

ADDITIONAL SECRETARY TO THE GOVERNMENT OF INDIA


Mr. Sabarathnam Neelamegan,
S/o Mr. Neelamegan, No. 909 A,
28th Street, Bakthavachalam Colony Vaysarpadi,
Chennai-600039

ORDER NO. 230/2018 - Cus dated 10-12-2018

Copy to:-

1. The Principal Commissioner of Customs, (Airport), NSCBI Airport, Kolkata.
2. The Commissioner of Customs (Appeals), 3rd Floor, Custom House, 15/1, Strand Road, Kolkata-700001.
3. P.S. to A.S.
4. K. Mohamed Ismail, B.A.B.L., Advocate & Notary Public, No. 102, Linghi Chetty Street, Chennai-600001.
5. Guard File

ATTESTED


(ASHISH TIWARI)

Assistant Commissioner(Revision Application)