

REGISTERED

SPEED POST



F. No. 375/124/B/2018-R.A.  
GOVERNMENT OF INDIA  
MINISTRY OF FINANCE  
(DEPARTMENT OF REVENUE)

14, HUDCO VISHALA BLDG., B WING  
6<sup>th</sup> FLOOR, BHIKAJI CAMA PLACE,  
NEW DELHI-110 066

Date of Issue.. 18/12/18

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ORDER NO. 238/18 -Cus dated 14/12/2018 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-539/2018 dated 06.11.2018, passed by the Commissioner of Customs (Appeals), New Delhi.

APPLICANT : Mr. Deepak Sath, NOIDA.

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

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**ORDER**

A Revision Application No. 375/124/B/2018-R.A. dated 29.11.2018 has been filed by Mr. Deepak Sadh, R/o, H.No.87, Sector-4, Noida Gautam Budh Nagar(UP) (hereinafter referred to as the applicant) against the Commissioner (Appeals)'s Order No. CC(A)Cus/D-I/Air-539/2018 dated 06.11.2018 whereby the order of the Additional Commissioner of Customs, IGI Airport, Terminal-III, New Delhi, confiscating gold bars, weighing 3233.28 grams valued at Rs. 76,38,624/-, and imposing penalty of Rs.15,00,000/- on the applicant, has been rejected.

2. The applicant has filed the revision application mainly on the grounds that rejection 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 to be either re-exported or redeemed on payment of fine and penalty may be reduced which is too high.

3. Personal hearing was offered on 13.12.2018 and Shri Dalip Singh, Advocate, availed the hearing on behalf of the applicant who reiterated the above mentioned grounds of revision already pleaded in their application. He also relied upon the orders of CESTAT, West Zonal Bench, Mumbai's order No.2009(237)E.L.T.280(Tri.-Mumbai) in the case of Dhanak Madhusudan Ramji Vs. Commissioner of Customs(Airport), Mumbai and decision in the case of Yakub Ibrahim Yusuf Vs. Commissioner of Customs, Mumbai, 2011(263)ELT 685 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. Government has examined the matter and it observed that there is no dispute over the fact that the applicant had not declared the gold brought from Dubai to the Customs officers at the Red Channel Counter and thus Section 77 of the Customs Act was not complied with. Accordingly the Commissioner (Appeals) has held that the gold smuggled by the applicant does not qualify as passenger baggage and would constitute prohibited baggage. He has further 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 as he had malafide intention to evade customs duty by not declaring the gold to the customs authorities at the time of arrival. While the government does not have any doubt that the gold brought by the applicant cannot be termed as bonafide baggage and the goods are liable for confiscation, it does not agree with the Commissioner(Appeals)'s view that the gold became prohibited merely for the reason that the baggage was not bonafide and 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 which is not the case here. But it has no bearing for the purpose of determining whether the gold is prohibited goods or not. Similarly the fact of it not being a bonafide baggage has also the immediate effect of taking the goods out of the domain of 'baggage' for which some relaxations are given. But the goods do not become prohibited by virtue of this reason as contemplated in Section 11 and 125 of the Customs Act. In fact, prohibited goods are to be specifically notified

under Section 11 of the Customs Act or the Foreign Trade (Development and Regulation) Act, 1992, etc. or specific conditions with regard to importation are imposed. But no such notification or condition has been mentioned either in the Order-in-Original or Order-in-Appeal whereby the gold has been notified as prohibited goods or its import has been restricted. Thus the 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 general legal provision or without payment of customs duty. There is a clear 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 case of Mr. Om Prakash Bhatia Vs Commissioner of Customs, Delhi, [2003(155) ELT 423(SC)] 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

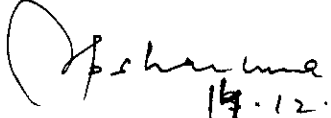
will become prohibited and other category of non-prohibited goods for which option of redemption is to be provided compulsorily under Section 125 of the Customs Act will become redundant. Thus while the Government does not have any doubt that the goods imported in violation of any provision of the Customs 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 items brought by the applicant from Dubai 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 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 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 unauthorizedly the option to owner of the gold is to be given for redemption of the confiscated gold on payment of fine. Further 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 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), Delhi, 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 categorically held that gold is not prohibited goods. Therefore, the Commissioner (Appeals) has taken a totally different stand by upholding absolute confiscation of gold in this case. Commissioner (Appeals)'s reliance on a decision in the case of Malabar Diamond Gallery Pvt. Ltd. Vs ADG, DRI, Chennai, (2016(341)E.L.T. 65(Mad.) is completely misplaced as the issue before the Hon'ble High Court was whether the smuggled goods could be seized and the Adjudication Officer was liable to allow provisional release of such goods. On the contrary, the Hon'ble High Court clearly held that gold is not enumerated as prohibited goods and it is nowhere stated that gold cannot be released after confiscation on payment of duty and fine. Moreover, the said case did not concern baggage and it is relating to town seizure of gold. As already discussed above, the applicant has certainly violated the provisions of Section 77 and other Sections of the said Act with an intention to evade Customs duty because of which the gold is certainly liable for confiscation in this case, but it is not convincingly made out that the gold is prohibited goods in the sense that its redemption can be denied under Section 125 even when the applicant is ready to pay Customs duty, fine and penalty. The other case mentioned as Commissioner of Customs(Air) [2018-TIOL-2000HC-Mad-Cus] cited by the Commissioner(Appeals) to support his order is also not found relevant in as much as in this case the Hon'ble High Court has not held that gold is prohibited goods and the redemption of gold found in the domestic flight was denied to the claimant on the sole ground that his ownership of the gold had not been established. Considering the above legal position and the case laws, 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. 27 lakhs.

5. The Government also finds it as a fit case for reduction of penalty from 15 lakhs to Rs. 9 lakhs on the ground that the combined penalty of Rs. 15 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.

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

  
17.12.18  
(R. P. SHARMA)

ADDITIONAL SECRETARY TO THE GOVERNMENT OF INDIA

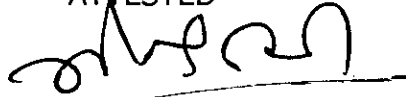
Mr. Deepak Sath,  
R/o, H.No.87, Sector-4,  
Noida, Gautam Budh Nagar(UP)

ORDER NO. 238/2018-Cus dated 14/12-2018

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. Shri Dalip Singh, Advocate, C/o S S Arora & Associates, B-1/71, Safdarjung Enclave, New Delhi.
5. Guard File

ATTESTED



(ASHISH TIWARI)

ASSISTANT COMMISSIONER (REVISION APPLICATION)