REGISTERED

SPEED POST

F. No. 375/20/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 8.01.19

ORDER NO. 251/18-Cus dated 24/01/2018 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-140/2017 dated 24.03.2017, passed by the Commissioner of Customs (Appeals), NCH, Near IGI Airport, New Delhi.

APPLICANT : Mrs. Minakshi Sharma, Karnal.

RESPONDENT : Commissioner of Customs, New Delhi

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ORDER

A Revision Application No. 375/20/B/2017-R.A. dated 13.06.2017 has been filed by the Mrs. Minakshi Sharma, Karnal (hereinafter referred to as the applicant) against the Commissioner (Appeals)'s Order No. CC (A) CUS/D-I/Air-140/2017 dated 24/03/2017 whereby the order of the Additional Commissioner of Customs, New Delhi, confiscating absolutely gold items weighing 1166.4 grams valued at Rs. 30,56,528/- and imposing a penalty of Rs. 6 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 bars by the Commissioner (Appeals) is erroneous as gold is not prohibited goods and the same should be allowed to be redeemed on payment of fine and penalty may be reduced.

3. A personal hearing was held on 11.12.2018 and it was availed by Ms. Harsimran Kaur, Advocate, on behalf of the applicant who reiterated the grounds of revision already pleaded in their revision application. However, no one appeared on behalf of respondent and no request has been received for a personal hearing on any other date 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 applicant does not dispute the Commissioner (Appeals)'s order regarding confiscation of the gold which was brought by her illegally from Abu Dhabi in violation of 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 her request is limited to a point that the confiscated gold may be released on payment of redemption fine and penalty may be reduced as Section 114 AA of Customs Act, 1962 is not applicable to her case.

5. Government has examined the matter and it is observed that the applicant had not declared the gold brought from Abu Dhabi to the Customs officers at the Red Channel Counter and thus Section 77 of the Customs Act was not complied with. ~~and consequently~~ 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 as she had malafide intention to evade customs duty by not declaring the gold to the customs authorities at the time of arrival. He further concluded that the gold was not part of bonafide baggage and, therefore, it became prohibited in the light of the fact that its import is subject to a lot of restrictions including the necessity to declare the gold at the time of arrival and payment of leviable customs duty. While the government does not have any doubt that the gold brought by the applicant 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 confiscations, it does not agree with the Commissioner(Appeals)'s view that the gold became 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 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 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 Abu Dhabi are liable for confiscation because she 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 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 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. Accordingly, 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. 12.5 lakhs. As regards her other contention that Section 114 AA is not applicable to their case and penalty should be reduced accordingly, the government finds merit in this argument also as Section 114 AA is applicable only where there is making or signing or using a false declaration or statement etc. which is not the case in the present proceeding. On the contrary, the departmental case is that the applicant did not declare the gold items and concealing the same in her rectum while she arrived at Delhi airport from Abu Dhabi for which the penalty is attracted under Section 112 of the Customs Act only. Therefore, the penalty under Section 112 is only imposable in this case and accordingly the combined penalty of Rs. 6 lakhs imposed under Sections 112 and 114 AA is reduced to Rs. 4 lakhs as a penalty under Section 112 only.

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

26.12.18

(R. P. SHARMA)
ADDITIONAL SECRETARY TO THE GOVERNMENT OF INDIA

Mrs. Minakshi Sharma,
Kothi No. 3444, Gali No. 5,
Shiv Colony, Karnal-132 001.

ORDER NO. 251/18-Cus dated 26/1/2018

Copy to:-

1. The Commissioner of Customs (Appeals), New Custom House, New Delhi-37
2. The Addl. Commissioner of Customs, IGI Airport, Terminal-III, New Delhi-37.
3. P.S. to A.S.
4. Ms. Harsimran Kaur, Advocate, B-1/71, Safdarjung Enclave, New Delhi-29.
5. Guard File

ATTESTED

(Ashish Tiwari)
Assistant Commissioner