REGISTERED

SPEED POST

F. No. 372/24/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 4.1.19

ORDER NO. 260/18 – Cus dated 27/12/2018 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/37/2017 dated 09.02.2017, passed by the Commissioner of Customs (Appeals), Kolkata.

APPLICANT : Mr. Harpal, Nashik.

RESPONDENT : The Commissioner of Customs, Kolkata.

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ORDER

A Revision Application No. 372/24/B/2017-R.A. dated 25.08.2017 has been filed by Mr.Harpal, S/o Girdharila Tekchand Chatwani, Manoharnagar, B-Wing, Flat No. 305, Opp. Inayat Café, Nashik-422001 (hereinafter referred to as the applicant) against the Commissioner (Appeals)'s Order No. KOL/Cus(Airport)/AA/37/2017 dated 09.02.2017 whereby the order of the Joint Commissioner of Customs, AIU, NSCBI, Airport, Kolkata-700052, confiscating absolutely gold bangles and chain, weighing 380.00 grams valued at Rs.10,10,800/-, and imposing a penalty of Rs.1,00,000/- 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 articles by the Commissioner (Appeals) is erroneous and the same should be allowed on Redemption fine and penalty may be reduced.

3. Personal hearing was held on 27.11.2018 and Shri Abhishek Sarkar, Advocate, availed the hearing on behalf of the applicant who reiterated the above mentioned grounds of revision already pleaded in their application. However, no one appeared for the respondent and instead a letter dated 09.11.2018 has been sent by the respondent conveying that they agree with the Order-in-Appeal and nothing more is required to be added. Accordingly, the case is taken up for disposal on the basis of the records available.

4. The Government has examined the matter and it is observed 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 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 may be released on payment of redemption fine and penalty may be reduced.

5. It is also observed that the applicant had not declared the gold brought from Bangkok to the Customs officers at the Red Channel Counter and thus Section 77 of the Customs Act was not complied with. 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 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 Bangkok 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 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. 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. 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, redemption fine of Rs. 4 lakh and penalty of Rs. 1 lakh already imposed by the Joint Commissioner of Customs.

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

27.12.18

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

Mr.Harpal, S/o Girdharila Tekchand Chatwani,
Manoharnagar, B-Wing,
Flat No. 305, Opp. Inayat Café,
Nashik-422001

ORDER NO. 260/18 – Cus dated 27/12/2018

Copy to:-

1. The Commissioner of Customs (Appeals), 3rd Floor, Custom House, 15/1, Strand Road, Kolkata-700001.
2. The Commissioner of Customs, (Airport & Admn), Custom House, Kolkata-700001.
3. P.S. to Additional Secretary.
4. Mr. Abhishek Sarkar, Advocate, 3, C.K. Daphtry Lawyers Block, Tilak Lane, New Delhi-110001.
5. Guard File

ATTESTED

(ASHISH TIWARI)
ASSISTANT COMMISSIONER (REVISION APPLICATION)