

F.No. 380/131/B/2016-R.A.
F.No. 372/04/B/16-RA

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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... 6/7/18

Order No. 76-77/18-Cus dated 04-7-2018 of the Government of India passed by Shri R. P. Sharma, Principal Commissioner & Additional Secretary to the Government of India under section 129DD of the Customs Act, 1962.

Subject : Revision Application filed under section 129 DD of the Customs Act 1962 against the Order-in-Appeal No. Kol/Cus/App/153/2016 dated 10.06.2016, passed by the Commissioner of Customs (Appeals), Kolkata

Applicant : Commissioner of Customs, Kolkata and Smt. Uma Gupta

Respondent : Smt. Uma Gupta and Commissioner of Customs, Kolkata

A Revision Application No. 380/131/B/2016-R.A dated 28.07.2016 is filed by the Commissioner of Customs, Kolkata (herein after referred to as the applicant) against the Order-In-Appeal No. Kol/Cus/App/SS/153/2016 dated 23.06.2016, passed by the Commissioner of Customs (Appeals), Kolkata, whereby the gold ornaments earlier confiscated by the original adjudicating authority are ordered to be released to Smt. Uma Gupta, the respondent, for the reason that the department has failed to prove the same were of foreign origin. Smt. Uma Gupta is also not satisfied with this order and has filed revision application No. 372/04/B/16-RA dated 05.09.2016 with regard to the O-I-A upholding the O-I-O ordering absolute confiscation of the gold coins.

2. The Revision Application has been filed by the revenue mainly on the grounds that since the respondent was not entitled to import gold in India in terms of Notification No. 12/2012-Cus dated 17.03.2012 (Condition 35) read with Baggage Rules, 1998, the gold ornaments brought by the respondent from Dubai were prohibited goods, she had tried to smuggle the gold ornaments by not declaring the same to the custom officers on her arrival at Kolkata Airport and accordingly the gold ornaments were liable for absolute confiscation. Whereas Smt. Uma Gupta has challenged the order of Commissioner (Appeals) on the ground that their request for re-export of the gold coins was not considered by the Commissioner (Appeals) and further the case was adjudicated by the adjudicating authority on the basis of market value despite the fact that the purchase receipts were submitted to the department.

3. A Personal hearing was held on 24.04.2018 and Sh. Barinder Singh, Consultant, appeared on behalf of the respondent and furnished written

submissions dated 24.04.2018 which are almost reiteration of above mentioned grounds only. However, no one from the applicant appeared for personal hearing and no request for any other date of hearing was also received from which it is implicit that the applicant is not interested in availing the personal hearing.

4. Government has examined the matter in the context of both the revision applications and it is found that there is no dispute regarding the fact that the respondent had violated the Section 77 of Customs Act, 1962 by not declaring gold coins to the Custom authorities. Accordingly, Commissioner (Appeals) has rightly upheld the Order-In-Original to the extent of confiscating the gold coins which were brought from Dubai with the intention to evade custom duty. However, he has ordered to release the gold ornaments to the respondent on the ground that the applicant failed to prove that the ornaments were of foreign origin and he was satisfied on the basis of the Income tax returns etc. that the ornaments were owned by the respondent in India itself. The applicant has challenged this portion of the order of Commissioner (Appeals) on the ground that gold is prohibited goods because respondent was not an eligible passenger to bring any quantity of gold as per Notification number 12/2012-Cus dated 17.03.2012 and thus an order to release gold ornaments is erroneously passed by the Commissioner (Appeals). However, the applicant has not adduced any material evidence to counter the Commissioner (Appeal)'s finding that the foreign origin of gold ornaments is not established in this case.

Thus, the very basis of O-I-A for releasing the ornaments to the respondent is not denied by the applicant also and accordingly there is no basis for filing the present revision application by the revenue as the fact of importation of the gold ornaments itself is not established. As regards gold coins, their absolute confiscation is upheld by the Commissioner (Appeals) on the ground that the respondent was not eligible passenger to import the same under Notification No. 12/12- Customs dated 17.03.2012 and accordingly these were prohibited goods which could not be released on redemption fine. But the government is not impressed by this rationale of the Commissioner (Appeals) for the reasons that Notification no. 12/2012-Cus is only an exemption notification and it does not stipulate anywhere that gold is a prohibited goods and the eligibility of the respondent for the concessional rate of duty given in respect of gold under the said notification is not an issue at all in this case as the respondent never claimed it. Thus, Notification No. 12/2012-Cus is not relevant at all in the 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 revenue 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 O-I-A 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 coins 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 ready made garments. But in the instant case neither a case of absolute prohibition of imported gold coins has been established nor a case of any prescribed condition not fulfilled by the respondent has been made out in the revision application because of which the gold coins brought by the respondent 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. Thus, except citing the above decision of the Supreme Court, no concrete basis has been revealed in the O-I-A to consider the gold coins as prohibited goods in this case. Even though the proper reference of the case law is not mentioned, yet from the number of special leave to appeal No. 22072 of 2009 in the Order-in-Appeal it is evident that the Commissioner (Appeals) has relied upon the Supreme Court's decision in the case of Samynathan Murugesan V/s Commissioner of Customs, [2010 (254) E.L.T. A15(S.C.)] wherein, relying upon the above referred

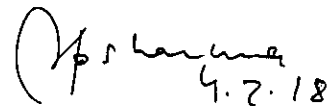
decision of Supreme Court in the case of Om Prakash Bhatia, it is held that since the appellant did not fulfill the basic eligibility criteria under Notification No. 31/2003 - Cus, the gold brought by the appellant were prohibited goods. But it is not elaborated as to how the non-eligibility of a passenger under Notification No. 31/2003-Cus would mean that the gold coins are 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 apex court's conclusion in the case of Samynathan Murugesan that the gold ornaments are prohibited goods is not actually founded on Notification No. 31/2003-Cus or any other legal provision. Therefore, the decision in the case of Samynathan Murugesan is apparently per incuriam and hence these cannot be followed as a precedent. 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 a 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)E.L.T.277(A.P), 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. Notification 12/2012-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. Moreover, in the case of Samynathan Murugesan the appellant had brought 7.075 Kgs of gold ornaments for commercial purpose by ingenious concealments in T.V and had not declared the same in spite of repeated inquiries made by the Custom Authorities at the airport. Whereas in the present case the respondent has brought 5 pieces of gold coins weighing 40 gms only, no ingenious concealment is established and she had declared them to the Custom Officer immediately when she was confronted by the Custom Officers with a question whether she was carrying dutiable goods in her baggage or in her person. Thus the factual matrix of the two cases are substantially different and gravity of the present case is also far lesser than the case of Samynathan Murugesan. Moreover, the

Commissioner (Appeals) has himself held in two identical cases of Mr. Pawan Kumar Singh and Mr. Deepak Kumar, vide his O-I-A No. Kol/Cus/Airport/SS/135/2016 dated 12.05.2016 and O-I-A No. Kol/Cus/Airport/SS/205/2016 dated 19.07.2016 respectively, that gold is not prohibited goods and gold articles were allowed to be redeemed on payment of fine and customs duties. Thus, the Commissioner (Appeals) order in this case is entirely different and discriminatory too. As already pointed out above, the respondent has certainly violated Section 77 of the Customs Act by not declaring the gold coins immediately when she landed on Airport and for that the confiscation thereof has already been upheld by the Commissioner (Appeals). But as the gold is not proved to be prohibited goods by the applicant, the order of Commissioner (Appeals) upholding absolute confiscation of the gold coins is not found supported by Section 125 of the Customs Act or any other legal provision. Under Section 125 of the Customs Act, 1962 an option to the owner of the goods to redeem confiscated goods is mandatory in case of non prohibited goods and accordingly an option should have been given to the respondent to redeem the confiscated gold coins on payment of Customs duties and appropriate fine. Since it was not given earlier, the Government now allows Mrs. Uma Gupta to redeem the confiscated gold coins within 30 days of this order on payment of full customs duties and fine of Rs. 40,000/-. Penalty of Rs. 50,000/- against the total value of Rs. 1,03,500/- is also found on higher side and it is, therefore, reduced to Rs. 35,000/-. But the request of

Mrs. Uma Gupta to allow her to re-export the said confiscated gold coins is not found legally tenable as under Section 80 re-export of the detained imported goods can be permitted only if these were honestly declared at the time of arrival in India and passenger actually returned from India to the foreign country after a brief stay and thereby it is explicit that returning of the PAX to the foreign country along with detained goods after a short visit to India as a tourist or otherwise is a crucial condition for re-export of such goods. But in the instant case, the respondent had gone to Dubai only for a short visit and there is no clue that she was either a citizen of UAE or working there on long term basis and she actually returned to Dubai. On the contrary the respondent is an Indian citizen and resided permanently in Kolkata. Otherwise also the re-export of the gold coins does not sound to be rational in this case as the respondent had brought the gold items with intention to evade custom duty and on being caught she has requested for re-export of goods again to avoid payment of customs duty only which can not be allowed in such case.

5. Accordingly, the Revision Application filed by the department is rejected and the Revision Application of Smt. Uma Gupta is allowed to the above extent.


4.7.18
(R.P. SHARMA)

Additional Secretary to the Government of India

1. Commissioner of Customs (Airport)
NSCBI Airport,
Kolkata – 700052
2. Smt. Uma Gupta
80-B, Dr. Sundari Mohan Avenue,
Kolkata 700014

Order No. 76-77/18-Cus dated 04-7-2018

Copy to:-

1. The Commissioner (Appeals), Customs House, Strand Road, Kolkata 700001
2. The Joint Commissioner of Customs, NSCBI Airport, Kolkata 7000052
3. PS to RS (Revision Application)
4. Guard File
5. Spare Copy.

ATTESTED

P
04/07/18

(Ravi Prakash)
OSD (RA)