

REGISTERED  
SPEED POST



F.No. 375/21/B/18-RA  
GOVERNMENT OF INDIA  
MINISTRY OF FINANCE  
(DEPARTMENT OF REVENUE)

14, HUDCO VISHALA BLDG., B WING  
6<sup>th</sup> FLOOR, BHICAJI CAMA PLACE,  
NEW DELHI-110066

Date of Issue.. 31.8.18..

Order No. 84/18-Cus dated 01-8-2018 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 Custom Act, 1962.

Subject : Revision Application filed under section 129 DD of the Customs Act 1962 against the Order-in-Appeal No.CC(A)Cus/D-1/Air/38/2018 dated 19.02.2018, passed by the Commissioner of Customs (Appeals), New Custom House, New Delhi

Applicant : Ms. Deepika Sadh, Delhi

Respondent : Commissioner of Customs, New Delhi

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**ORDER**

A Revision Application No. 375/21/B/16-RA dated 22.03.2018 has been filed by Ms. Deepika Sadh (hereinafter referred to as the applicant) against the Order No. CC(A)Cus/D-1/Air/38/2016 dated 19.02.2018, issued by the Commissioner of Customs (Appeals), New Delhi, whereby the Order-in-Original No. 133/Adj/2016 dated 10.09.2016 of the Additional Commissioner of Customs, IGI Airport, New Delhi, absolutely confiscating the gold bars of value of Rs. 42,67,833/- and imposing penalty of Rs. 4,24,000/-, was upheld.

2. The revision application is filed mainly on the grounds that she had brought the gold bars for self use only, gold is not prohibited goods and, therefore, the Commissioner(Appeals) has passed wrong order by upholding the Order-in-Original.
3. A personal hearing was held in this case on 10.07.2018 and Sh. S.S. Arora, Advocate, appeared on behalf of the applicant who reiterated the grounds of revision already stated in the revision application. However, no one appeared for the respondent.
3. From the revision application it is evident that the applicant does not dispute the Commissioner (Appeals)'s order regarding confiscation of the goods which were brought by her illegally from Dubai in violation of Customs Act and the Foreign Trade (Development and Regulation) Act 1992 and her request is limited to a point that the confiscated gold may be released on payment of redemption fine and reasonable penalty.
4. Government has examined the matter and it is found that there is no dispute regarding the fact that the applicant had violated the Section 77 of Customs Act, 1962 by not declaring gold bars to the Custom authorities on her arrival at Airport

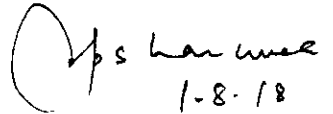
from Dubai. Accordingly, Commissioner (Appeals) has rightly upheld the Order-In-Original to the extent of confiscating the gold bars which were brought from Dubai with the intention to evade custom duty. However, the Commissioner (Appeals) has upheld Additional Commissioner's order of absolute confiscation of gold on the premise that the gold brought by the applicant had become prohibited when it was sought to be smuggled in by hiding the same in Denim Short worn under legging. But he has not cited any legal provision under which the import of gold is expressly prohibited and has only stated that the applicant was not an eligible passenger to bring any quantity of gold as per Notification No. 12/2012-Cus (N.T.) dated 17.03.2012 and thus an option for redemption of confiscated gold could not be given. But Government find that the said Notification is only a general exemption notification for several goods and gold is also one of many goods in respect of which concessional rate of duty is provided on fulfilment of condition Number 35. Thus, under this Notification eligibility of the passenger is relevant only for determining the admissibility of concessional rate of duty and not for deciding the eligibility to import or not to import gold. The exemption from customs duty was never the issue in this case and it could not be given because the applicant did not declare the importation of gold at all and rather used her denim short worn under her legging for hiding gold bars with clear intention to evade customs duty. While the Government is fully convinced that unusual method of concealment of gold is a very relevant factor for determining the quantum of fine and penalty, it does not agree with the Commissioner (Appeals) that the gold had become prohibited only because of its hiding in the denim short worn under legging even when the gold is not notified as prohibited goods under Section 11 of the Customs Act, 1962 or any other law. 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 custom duty. Further there is a difference between the prohibited goods and general legal or procedural 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 irrespective of the individual case like goods will not be imported without declaration to the Customs 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, 1962, the Apex Court in the case of Om Prakash Bhatia Vs Commissioner of Customs, Delhi, 2003(155)ELT423(S.C) has held that importation of such goods became prohibited in the event of contravention of legal provisions or conditions. If the goods brought in India in contravention of any legal provision are termed as prohibited goods, as envisaged in Section 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 will become redundant. Thus while any goods imported without payment of duty and in violation of any provision of the Customs Act is also certainly liable for confiscation under Section 111 of the Customs Act, but confiscated goods is not necessarily to be always prohibited goods. While there is no dispute in this case that the gold brought by the applicant from Dubai is liable for confiscation because she did not follow the proper procedure for import thereof in India and attempted to smuggle it without payment of custom duties, it is beyond any doubt that the gold is not a prohibited item under Customs Act. The Commissioner (Appeals) has heavily 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, it is held that since the appellant did not fulfil the basic eligibility criteria under Notification No. 31/2003 - Cus, the gold brought by the appellant were prohibited goods. But it is not detailed as to how the non-eligibility of a passenger under Notification No. 31/2003-Cus would mean that the gold ornaments 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 thus not actually founded on Notification No. 31/2003-Cus or any other legal provision. Therefore, the decision in the case of Samynathan Murugesan apparently per incuriam and hence it cannot be followed as a precedent. Further the Hon'ble Madras High Court, in its 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. 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) in his Order-in-Appeal no. CC(A)Cus/D-I/Air/629/2016 dated 4.07.2016 in the case of Mohd. Khalid Siddique has clearly held that gold is not prohibited as it is not notified by the Government as 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 provide an option to the applicant under Section 125 of the Customs Act 1962 to redeem the confiscated goods on payment

of custom 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. 16,50,000/- within 30 days from the date of issue of this order. Regarding penalty also the applicant has pleaded that it has been wrongly imposed under Section 114AA of the Customs Act. The Government agree with this claim of the applicant as penalty under Section 114AA is imposable only when a person resorted to some false declaration/misstatement/documents in his transaction of business. But no such case has been made by the Department in this case. On the contrary the Department's case is that the applicant did not declare the goods to the Customs authorities on her arrival for which penalty under Section 112 of the Act is imposable. Since collective penalty of Rs. 4,24,000/- was imposed by the Additional Commissioner under both Sections 112 and 114 AA and now it is found that penalty under Section 114AA is not maintainable in this case, reasonable reduction of penalty is warranted in this case. Therefore, penalty is reduced from Rs. 4,24,000/- to Rs. 3,00,000/- and it will be considered to have been imposed under Section 112 of the Customs Act, 1962 only.

5. Accordingly, the revision application is disposed and the Commissioner (Appeals)'s order is modified in above terms.

  
1-8-18

(R.P.Sharma)

Additional Secretary to the Government of India

Ms. Deepika Sadh,  
C-87, Sector 4, Noida  
Gautam Budh Nagar, U.P

Order No. 84/18-Cus dated 01-8-2018

Copy to:

1. Commissioner of Customs, IGI Airport Terminal-3, New Delhi-110037
2. Commissioner of Customs (Appeals), New Custom House, Near IGI Airport, New Delhi
3. Additional Commissioner of Customs, IGI Airport, New Custom House, New Delhi

4. Mr. S. S. Arora, B-1/71, Safdarjung Enclave, New Delhi 110029
- ✓ 5. PA to AS(RA)
6. Guard File.
7. Spare Copy

ATTESTED



(Nirmla Devi)

Section Officer (REVISION APPLICATION)