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SPEED POST



F.No.380/27/B/15-RA
F.No. 380/23/B/15-RA
GOVERNMENT OF INDIA
MINISTRY OF FINANCE
DEPARTMENT OF REVENUE
(REVISION APPLICATION UNIT)

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

Date of Issue...22/1/2016

ORDER NO. 2-3/2016-CUS DATED 22.01.2016 OF THE GOVERNMENT OF INDIA, PASSED BY Smt. RIMJHIM PRASAD, JOINT SECRETARY TO THE GOVERNMENT OF INDIA UNDER SECTION 129 DD OF THE CUSTOMS ACT, 1962.

Subject : Revision applications filed under Section 129 DD of the Customs Act, 1962 against the orders-in-appeal No. C.CUS I No.331/2015, dated 24.06.2015 and No. C.Cus-I No. 400/2015 dated 06.08.2015 passed by the Commissioner of Customs (Appeals-I) Chennai

Applicant : Commissioner of Customs, Chennai-I, Chennai Zone.

Respondent : Smt. Shaik Shamim Banu

ORDER

These revision applications are filed by the Commissioner of Customs Chennai-I (hereinafter referred to as the Department) against the Order-in –Appeal No. 331/2015 dated 24.06.2015 passed against the appeal of Smt. Shaik Shamim Banu (hereinafter referred to the respondent) and Order-in-Appeal No.400/2015 dated 06.08.2015 passed against the Department appeal, by Commissioner of Customs, Chennai(Appeal-I) with respect to Order-in-Original No. 17/2015 dated 20.04.2015 passed by Joint Commissioner of Customs(Adjudication). The Hon'ble High Court of Chennai in W.P. No 22438 of 2015 filed by the respondent directed that the Revisionary Authority dispose of the revision application against Order-in-Appeal No.331/2015 date 24.06.2015 after following due process of law within a period of eight weeks from the date of receiving the order. Government also takes up revision application against Order-in-Appeal No.400/2015 dated 06.08.2015 as both pertain to a common Order-in-Original No.17/2015 dated 20.04.2015.

2. Brief facts of the case are that on 14.05.2014 the respondent passenger by the name Smt. Shaik Shamim Banu, wife of Shri Shaik Mujeeb, holder of Indian passport number F2057845 issued at Hyderabad, arrived at Chennai Airport from Kuwait by Kuwait Airways flight no. KU 343 dated 13.05.2014. She was intercepted on reasonable suspicion, while walking through green channel for the exit by Customs Officer. The said passenger was asked specific question as to whether she was carrying any gold/contraband goods either in her baggage or on her person to which she replied in negative. Upon noticing that the passenger became nervous, she was brought along with her baggage for its detailed examination and her personal search. Before commencement of the same, she was once again questioned as to whether she was in possession of gold/contraband goods to which she replied, she was having some food stuff and toiletries valued at Rs.4000/- and used clothes only. A detailed examination of her three checked-in bags and one hand bag was conducted, in the presence of witnesses, but nothing incriminating was found. Thereafter, a notice under Section 102 of the Customs Act, 1962 was served upon her for the personal search. Before the personal search was taken she was made to understand the provisions of said Section. She agreed for the personal search to be conducted in presence of gazetted lady officer and witnesses. During the personal search four numbers of yellow coloured metal cut bars weighing 337.5grams, 162 grams, 316 grams and 100grams and two numbers of yellow coloured crude bangles weighing 242.5 grams and 217 grams suspected to be gold, totally weighing 1375 grams wrapped in white tissue paper and transparent polythene cover, kept inside the white colour bra worn by her were recovered. The Government approved gold appraiser was called upon to examine the recovered gold in the presence of witnesses and the said passenger and on examining the yellow metal cut bars and bangles, he certified them as made of gold of 24 carat purity and

totally weighing 1375 grams and appraised the total value of the gold at Rs 41,11,250 at the rate of Rs 2,990/- per gram on the date of seizure. As Smt. Shaik Shamim Banu was not in possession of any valid permit/licence/documents issued by the competent authority for the licit import of gold and she had attempted to smuggle the impugned gold by not declaring the same to Customs by way of concealment inside her bra worn by her, the said gold totally weighing 1375 grams was seized for further action under Section 110 of the Act, *ibid*, read with Foreign Trade (Development & Regulations) Act, 1992. Besides the above recovered gold, the following viz. Air ticket, issued by TVS Travel Tours, Kuwait city; Kuwait Airways boarding pass stub issued in her name and her Customs declaration card on which she declared the goods as used personal clothes/effects and food stuff totally valued at Rs. 4000/- along with white colour bra worn by her which was used to conceal gold were seized under the *mazhar* as material objects. Rest of her personal effects worth Rs. 4000/- were returned to her in the presence of witnesses.

2.1 The passenger Smt. Shaik Shamim Banu, in her statement dated 14.5.2014 recorded under Section 108 of the Customs Act, 1962 *inter-alia* stated; that her husband Shri Shaik Mujeeb is working in Kuwait as driver for the past 30 years and earning Rs 30,000/- per month; that she visited Kuwait last month; that the day before she was leaving for Chennai, her husband gave her 4 gold cut bars and 2 nos. gold bangles totally weighing 1375 grams and asked her to conceal them in her bra by wrapping the gold in a white tissue paper and polythene cover and to take to India without declaring to Customs; that one Shri Shaik Mahaboob Basha would come to their home in India and would give her Rs.100,000/- and she should in turn hand over gold to him; that as she needed money for her daughter's marriage, she agreed to smuggle the impugned gold into India; that she did not have any legal documents which support the import of the impugned gold; that she admitted, it was an offence bringing gold by concealing and not declaring to Customs and did the same for monetary benefit and requested to be pardoned.

2.2 On a reasonable belief that Smt. Shaik Shamim Banu was guilty of an offence punishable under Sections 132 & 135 of the Act, *ibid* she was arrested on 14.05.2014 and was produced before the Hon'ble Judicial Magistrate, Alandur, Chennai, who sent her to judicial custody. Before the Magistrate, she retracted her statement tendered earlier before the Customs on the grounds that it has been recorded applying duress and coercion upon her. A Show Cause Notice under Section 124 of the Customs Act, 1962 was issued to Smt. Shaik Shamim Banu, for her alleged offence of contravening Sections 77 & 79 of the Act, *ibid*, proposing as to why the impugned gold should not be confiscated under Section 11(d) & (l) of Customs Act, 1962 and why the material used to conceal the said gold should not be confiscated under Section 119 of the Act, *ibid* and as to why the penalty under Section 112 (a)&(b) of the Act *ibid* be imposed on her.

2.3 After due process of law the case was adjudicated by the adjudicating authority by passing Order-in-Original No. 17/2014 dated 20.4.2015, ordering the following:-

- (i) The impugned gold totally weighing 1375 grams re-valued at Rs 35,30,821/-(International price of gold) was confiscated under Section 111(d) & (l) of the Customs Act, 1962 with an option to redeem the same for re-export on payment of fine of Rs 17,50,000/- under Section 125 of the Act, ibid.
- (ii) Imposed a penalty of Rs. 2,50,000/-(Two lakhs fifty thousand only) on Smt. Shaik Shamim Banu under Section 112(a) &(b) of the Customs Act, 1962.

3. Being aggrieved by the said Order-in-Original, both Smt. Shaik Shamim Banu and the Department filed their respective appeals against the Order-in-Original No. 17/2014 dated 20.4.2015 before the Commissioner of Customs, Chennai (Appeals-I) who decided the appeal of Smt. Shaik Shamim Banu vide Order-in-Appeal No. 331/2015 dated 24.06.2015 and Department's appeal vide Order-in-Appeal No.400/2015 dated 06.08.2015. Commissioner of Customs (Appeals -I) with regard to the appeal of Smt. Shaik Shamim Banu modified the impugned Order-in-Original dated 20.04.2015 by reducing redemption fine to Rs. 7,00,000/-(seven lakhs only) from Rs. 17,50,000/-(seventeen lakhs fifty thousand only) and penalty to Rs. 1,00,000/-(one lakh only) from Rs. 2,50,000/-(Two lakhs fifty thousand only). Whereas, Department's appeal for setting aside the impugned Order-in-Original and confiscating the goods absolutely as the passenger was not the genuine owner of the goods but a carrier and is not entitled to redemption fine was later set aside by the Commissioner(Appeals) vide its Appellate order No. 400/2015 dated 06.08.2015 as infructuous on the ground of merger.

4. Being aggrieved by both the above impugned Orders-in-Appeal, the Department has filed these revision applications under Section 129DD of Customs Act, 1962 before the Central Government on the following common grounds:

4.1 That the Orders-in-Appeal are neither legal nor proper in as much as the passenger had attempted to smuggle the gold by way of concealment and by way of non-declaration knowing well that she was not an eligible passenger to import gold and thus had a culpable mind to smuggle them into India without payment of duty.

4.2 That the passenger has not declared to the Customs officer, the possession of gold which was concealed under brassier worn by her. The passenger, has contravened Sections 77 and 11 of Customs Act, 1962 read with Regulation 3(1) of Foreign Exchange Management (Export and import of Currency Regulations 2000 which made the smuggled gold liable for absolute confiscation under Section 111(d)

and (l) of the Customs Act, 1962. The appellate authority without considering the following aspects has given an option to redeem the gold on payment of redemption fine of Rs.7,00,000/- and penalty of Rs.1,00,000/- for re-export.

4.2.1 That the eligibility of a passenger to clear the gold imported by him is covered under Notification No. 12/2012-Cus dated 17.3.2012. The said notification states that the passenger of Indian origin or a passenger holding a valid Indian Passport issued under the Passport Act, 1967 who is coming to India after a period of stay not less than six months of stay abroad and short visits, if any, made by this eligible passenger during the above said period of six months shall be ignored if the total duration of stay on such visit does not exceed thirty days can bring gold upto 1 kg. and the duty has to be paid @ 10% on the value of the gold and the duty has to be paid in foreign currency.

4.2.2 That Rule 6 of Baggage Rules, 1998 states that a passenger who stayed abroad for more than one year can bring gold jewellery (22 carat) to an extent of Rs. 1 lakh(female passenger) and to an extent of Rs. 50,000/-(male passenger) and the same can be cleared from Customs without payment of duty.

4.2.3 That in the present case, the passenger did not declare the gold possessed by her under Section 77 of the Customs Act, 1962 and was not in possession of Foreign Currency for the payment of duty and that the passenger has not fulfilled the conditions stipulated under Notification No. 12/2012 and Baggage Rules. That the passenger was ineligible to import the gold and accordingly the Order-in-Appeal permitting the ineligible passenger to re-export the smuggled gold is incorrect in law.

4.3 That the decision of the appellate authority to allow the re-export of goods on payment of redemption fine is not acceptable as the passenger with an intention to smuggle did not declare the gold in her possession and mis-declared the same in the Customs Declaration Card as 'Personal effects' of worth Rs. 4000/- only and attempted to smuggle the gold out of the Airport by adopting ingenious modus operandi of concealment. In support of the contention, the following case laws are relied upon:-

- Hon'ble Apex Court in the case of Om Prakash Bhatia Vs Commissioner of Customs reported in 2003 (155) ELT 423 (SC) has held that if there is any prohibition of import or export of goods under the Act or any other law subject to certain conditions prescribed are not complied with it would be considered to be prohibited goods.
- The Hon'ble Supreme Court in the case of Samynathan Murugesan Vs Commissioner of Customs reported in 2010 (254) ELT A15 (SC) has held that as the passenger did not fulfil the basic eligibility criteria, which makes the imported item a prohibited goods.

4.4 That the appellate authority in his order has stated that ownership of the gold is established in para 21 of the Order-in-Original is not acceptable as the passenger herself in her voluntary statement given under Section 108 of Customs Act, 1962 has stated that her husband gave her 4 gold cut bars and 2 nos. bangles weighing 1375 grams and asked her to conceal them in her bra by wrapping the gold in a tissue paper and polythene cover and to take them out to India without declaring to Customs, to be handed over to Shri Mahaboob Basha who would come to their home in India and he in turn would give her Rs. 1,00,000/-. She needed the money for her daughter's marriage. The gold did not belong to her or her husband and she did not carry any money (foreign currency to pay duty) since she intended to smuggle the gold by way of concealment. She also replied that she did not have any bill or document for the purchase of the gold. Hence, the passenger is a carrier of smuggled gold and not the owner. The Board vide Circular No.6/2014-CUS dated 06.03.2014 in para 3 (iii) has cited as under:

" (iii) Wherever possible, the field officer, may inter alia, ascertain the antecedents of such passengers, source of funding for gold as well as duty being paid in foreign currency, person responsible for booking of tickets etc. so as to prevent the possibility of the misuse of the facility by unscrupulous elements who may hire such eligible passengers to carry gold for them. "

However, both the original and appellate authority failed to examine the above aspect which are vital to prove the ownership of gold by producing documentary evidence regarding the source for funding of gold as well as duty to be paid in foreign currency.

4.5 Once the passenger is ineligible to bring/import the gold or gold jewellery, which is restricted item, as discussed above, and if the same is still attempted to be smuggled by him, then it becomes prohibited from bringing/importing by such ineligible passenger. Hence, the Order-in-Original passed by the lower adjudicating authority allowing the re-export of the gold (which is prohibited for the subject passenger), instead of ordering for the absolute confiscation, is not correct, especially when the passenger acted as carrier and when he is not the owner of the seized gold. In such cases, the seized gold should invariably be confiscated absolutely and Re-export option should not be given by the Adjudicating Authority or by the Appellate Authority.

4.6 In support of the contents following case laws relied upon:-

4.6.1 Hon'ble Tribunal vide order no. 1980-1995/09 dated 24.12.2009 in the case of G.V. Ramesh and others Vs CC(Air) Chennai reported in 2010 (252) (T.Mad.) wherein the Hon'ble Tribunal has held that the impugned goods and foreign currency cannot be allowed to be redeemed by them on payment of fine and duty as the same do not belong to them but to someone else. The case laws is squarely applicable to this case since the passenger is not the owner of the gold.

4.6.2 The Hon'ble High Court in the case of UOI Vs Mohammed Aijaj Ahmed in WP No. 19.01.2003 decided on 23.07.2009 reported in 2009(244) ELT 49 (Bom) has set aside the order of the CESTAT allowing the redemption of gold and upheld the order passed by the Commissioner of Customs ordering absolute confiscation of gold, as the gold did not belong to the passenger, who acted as a carrier of gold. The said order of Bombay High Court was upheld by Hon'ble Supreme Court in its decision reported in 2010 (253)ELT E-83 (SC).

4.6.3 In the case of S. Faisal Khan Vs The Joint Commissioner on 13.09.2010, WP no. 34102 of 2003- Madras High Court has held that "-----*The order passed by the original authority, appellate authority and the Revisionary Authority are cogent and supported by reasons. The authorities recorded the voluntary statement under Section 108 of the Customs Act, 1962 wherein the petitioner had categorically admitted that he was taking the currency clandestinely on behalf of one Abdullah for monetary consideration. This particular evidence was held to be acceptable and cannot be brushed aside and there is no record to show that the statement of the petitioner was recorded under duress/pressure and the same was not voluntary. It is settled legal proposition that statement recorded under Section 108 of the Act, is admissible unlike a statement recorded by a Police officer.*"

4.6.4 That in a recent judgement delivered by Hon'ble High Court of Delhi in the case of Ramkumar Vs Commissioner of Customs decided on 16.01.2015 in Review Petition No. 429 of 2014 in WP NO. (C) No. 4563 of 2013, reported in 2015 (320) ELT 368 (Del) it was held that benefit of Section 125 of Customs Act, 1962 is not entitled as the applicant was mere carrier of goods and the same did not belong to him.

4.6.5 Accordingly, the Appellate Authority's order to release the goods who is not owner of the goods is totally bad in law.

4.6. That re-export of goods is covered in Section 80 of the Customs Act, 1962. That as per the said Act, where the baggage of the passenger contains any article which is dutiable or import of which is prohibited and in respect which a true declaration has been made under the Section 77, the proper officer may, at the request of the passenger, detain such article for the purpose of being returned to him on his leaving India. That in this case, the passenger has not filed true declaration and hence the appellate authority's order to allow the re-export of the gold is not in order.

4.7 That the Commissioner of Customs (Appeal-I) vide Order-in-Appeal C.Cus No.343/2015 dated 29.06.2015, 296/2015 dated 24.06.2015 and 342/2015 dated 29.06.2015 has set aside order of lower adjudicating authority wherein passenger has been allowed to redeem gold for re-export and allowed Department's appeal for absolute confiscation of gold.

4.8 Without considering the above facts, the Appellate Authority vide his Order-in-Appeal C.Cus. 331/2015 dated 24.06.2015, in party's appeal filed on 16.06.2015, has erroneously passed order by not only upholding the Re-export Order of the lower adjudicating authority but also reduced the fine to Rs.7,00,000/- and the penalty to Rs.1,00,000/-, which is not sustainable as per law, against which, the Department has filed Revision Application.

4.9 That the order of the appellate authority has the effect of making smuggling an attractive proposition, since the passenger retains the benefit of redeeming the offending goods even when caught by Customs which totally works against deterrence.

4.10 Even in the Department's appeal filed on 09.07.2015 also, the Appellate Authority failed to examine the above aspects/facts and did not verify the issue on merit, but simply dismissed Department's appeal as "In fructuous" on the ground of merger, which is not correct and legally not sustainable for the following reasons:

4.10.1 In party's appeal filed on 16.06.2015, the grounds were that the Redemption fine and Penalty imposed by the lower adjudicating authority were excessive and the passenger prayed for reduction of the same. The passenger did not contest the re-export option given by the lower adjudicating authority and the Appellate Authority has passed Order vide Order-in-Appeal C.Cus. 331/2015 dated 24.06.2015 by reducing the fine to Rs.7,00,000/- and the penalty to Rs.1,00,000/- without going into the merit of the case.

4.10.2 Whereas, being aggrieved by the same order of the lower adjudicating authority, the department has filed an appeal before the Commissioner of Customs (Appeal-I) on 09.07.2015 on the ground that the order of the lower adjudicating authority giving re-export option to the passenger is wrong and the prayer of the department was that the subject gold attempted to be smuggled by the passenger, who was a carrier for monetary consideration, should be absolutely confiscated and to set-aside the order of the lower adjudicating authority allowing re-export on payment of the redemption fine and penalty. But the Appellate authority, vide Order-in-Appeal C.Cus No.400/2015 dated 06.08.2015, simply dismissed Department's appeal as "In fructuous" on the ground of merger.

4.10.3 From the above, it is clear that the grounds and the prayer of the passenger and the Department in the Appeals before Commissioner (Appeals) are entirely different, which was not appreciated by the Appellate Authority. For the same reason, he should have examined the issues on merits in toto and given his findings on the grounds raised by the Department in the appeal,

which he has not done but simply dismissed the Departmental appeal as infructuous on the ground of merger, which is not legally correct.

4.10.4 Since, the appeals filed by the passenger and the Department are on different grounds and prayer, the question of merger of Order-in-Original No.17/2015-16 dated 20.04.2015 with the Order-in-Appeal No.C.Cus.331/2015 dated 24.06.2015 does not arise. Hence, the Order-in-Appeal C.Cus No.400/2015 dated 06.08.2015 passed by the Appellate Authority dismissing the departmental appeal is neither legal nor proper.

4.11 That in view of the above, it is prayed that the order of the appellate authority allowing the re-export of the gold on payment of redemption fine be set aside or pass any such order as deemed fit.

5. Show Cause Notices dated 10.08.2015 and 07.08.2015 were issued to the respondent under Section 129DD of the Customs Act, 1962 to enable the respondent to file their counter reply in the case of Department's Revision Applications. The respondent vide their reply dated 26.08.2015 to the Show Cause Notice dated 10.08.2015 submitted that the grounds raised by the Revision Applicant are not maintainable since the Order-in-Appeal speaks for itself and an opportunity for hearing be given. Meanwhile, respondent filed WP No. 22438 of 2015 in the High Court of Madras under Article 226 of the Constitution of India to issue writ of Mandamus directing the Government authority to implement the order passed by the Commissioner(Appeals-I) Chennai, No. 331/2015 dated 24.06.2015. The Hon'ble High Court disposed off the Writ Petition vide its order dated 29.06.2015 which was received in this office on 26.11.2015 with the direction to the petitioner to place all their submissions as to substantiate their case before Revisionary Authority and upon hearing them, Revisionary authority would pass the order within eight weeks of receiving the order.

6. In compliance of Hon'ble High Court's order, personal hearing was scheduled in these cases on 18.12.2015,13.01.2016 and 18.01.2016.

6.1 Shri T. Chezhiyan, Advocate, appeared on behalf of the respondent. He made another written submission to the Show Cause Notice mainly stating that under Section 129DD, Government can only annul/modify the order passed under Section 128A and cannot traverse beyond it. Also no new ground can be invoked in the revision stage beyond the scope of the Show Cause Notice wherein grounds mentioned for confiscation of goods are Section 111(d) & (l) of the Act. The goods are not prohibited in nature and have rightly been allowed for re-export on reduced fine and penalty. With regard to hearing held for revision of Order-in-Appeal No.400/2015 dated 06.08.2015, he also stated that the original order and appellate order have already merged with earlier Order-in-Appeal No.331/2015

dated 24.06.2015, therefore, Department's appeal has rightly been dismissed. A written submission dated 13.01.2016 was also made reiterating once again that a new ground cannot be invoked at the revision stage and that Show Cause Notice itself proposes respondent as owner as it did not propose penalty on anybody else.

7. Government has carefully gone through the relevant case records and perused the impugned Order-in-Original, both the Orders-in-Appeal and the order of the Hon'ble High Court dated 31.08.2015.

8. On perusal of the records, Government observes that it is an undisputed fact that respondent imported impugned 24 carat gold cut bars and bangles weighing 1375 grams and attempted to walk through green channel to smuggle the same out by way of concealment, by keeping it wrapped in white tissue paper and transparent polythene cover inside the bra worn by her and did not declare the same to the Customs under Section 77 of the Act, *ibid* as required. The gold was recovered in presence of lady Gazetted officer and mazhar witnesses, when the personal search of the respondent was conducted after following due process of law. A statement of respondent was recorded under Section 108 of the Act, *ibid* in which she *inter-alia* admitted that she went to Kuwait to meet her husband who is working in Kuwait for past 30 years; that the gold did not belong to her or to her husband and that she was not carrying any money for payment of Customs duty; that her husband had given the gold to her to deliver the same to one Shri Shaik Mahaboob Basha who would visit their home and in return he would give her Rs. 1,00,000/- ; that as she needed money for the marriage of her daughter, she readily agreed to carry the impugned goods for monetary gain. She admitted it is an offence bringing gold by concealing and not declaring to Customs and requested for the leniency as it was her first offence. The original adjudicating authority ordered for confiscation of the impugned gold revalued at Rs.35,30,821/- with an option to redeem the same for re-export on payment of Rs.17,50,000/- under Section 125 of the Act, *ibid*. A personal penalty of Rs. 2,50,000/- under Section 112 (a) & (b) was also imposed. An appeal was filed against the Order-in-Original before Commissioner of Customs Chennai(Appeal-I) by the respondent as well as the Department. The respondent's appeal was decided by Order-in-Appeal No.331/2015 dated 24.06.2015 allowing re-export of the impugned gold on reduced redemption fine of Rs.7,00,000/- and personal penalty of Rs.1,00,000/-. The Department's appeal on the other hand was dismissed vide Order-in-Appeal No.400/2015 dated 06.08.2015 as infructuous as it was filed after issue of Order-in-Appeal No. 331/2015 dated 24.06.2015 and wherein it is held that apparent remedy to this seems to be under Section 129 DD *ibid*. Aggrieved by both the impugned Orders-in-Appeal, the Department has filed the Revision Applications on grounds stated in para 4.

9. At the outset, Government observes that the Department's appeal against the impugned Order-in-Original before Commissioner (Appeals) pleading for absolute confiscation of the impugned gold was not considered on merits on the grounds of merger as passenger's appeal against the impugned Order-in-Original had already been decided by Order No.331/2015 dated 24.06.2015. The Commissioner(Appeals) also held that the issue of Order-in-Appeal on passenger's appeal and subsequent filing of appeal by the Department has led to this situation and the apparent remedy lies under Section 129DD viz Revision Application. The Department on the other hand has contended that the Commissioner (Appeals) has failed to appreciate that the grounds and prayer of the passenger and that of the Department in their respective appeals before him are entirely different. While the passenger had filed the appeal for reduction of fine and penalty, the prayer of the Department was that absolute confiscation of the goods be ordered.

9.1 Government finds merit in the contention of the Department that question of merger does not arise as the issue on which the impugned Order-in-Original is challenged by them was not a matter of consideration in Order-in-Appeal 331/2015 date 24.06.2015. In this regard, Government finds support in several judicial pronouncements. The CESTAT in the case of CCE, Bhavnagar vs. Ultratech Cement Company Limited 2010 (20) STR 244 (Tri. Ahmed) by majority view held that doctrine of merger would not apply as subject matter of Revenue and assessee's appeal was quite different and Tribunal can adjudicate upon the matter on merits. The CESTAT, Principal Bench in the case of CCE, Delhi-I vs. Pearl Drinks 2011 (273) ELT held that as in earlier appeal proceedings, the issue sought to be raised now by the Department was not dealt with nor arose for consideration, appeal was held maintainable and merger not acceptable. Further, the Apex Court in the case Mauria Udyog Ltd. Vs. CCE, Delhi-III 2002 (146) ELT 37 (SC) has held that principle of merger will have no applicability as Revenue's appeal is restricted to reduction of penalty whereas assessee's appeal challenged entire impugned order. Government also notes that facts of the case laws relied upon by Commissioner (Appeals) are different from the present case.

9.2 Government, therefore, holds that as the Department and passenger appealed against the Order-in-Original on distinct grounds, the doctrine of merger is not attracted as it would tantamount to points raised by Department remaining unanswered. The Commissioner (Appeals) has thus erred in rejecting Department's appeal as infructuous on ground of merger and the same cannot be held as legal and proper. Therefore, Government now proceeds to decide both the Revision Applications filed by the Department on merits.

10. Government observes that the Commissioner (Appeals) has held that the passenger has no previous offence registered against her and therefore, allowed re-export on reduced redemption fine and penalty. The Department on the other

hand has contested that it cannot be ignored that it is a fact on record that the passenger who is not eligible to import gold walked through the green channel at the Airport and had she not been intercepted she would have walked away with the impugned goods without declaring the same to Customs. The main contention of the Department is that the passenger has accepted that she was carrying the gold for monetary consideration and had obviously concealed the gold inside her bra and the same had not been declared in the Customs declaration card. The passenger has also not fulfilled the conditions stipulated under Notification No. 12/2012-Cus dated 17.03.2012 as amended and Rule 6 of the Baggage Rules. Therefore, it is pleaded that the passenger was not eligible to import the gold and accordingly the impugned orders of the lower authorities allowing redeeming of the goods on re-export are unlawful and has the effect of making smuggling an attractive proposition and be set-aside.

11. Government observes that it is an uncontested fact that the goods were not declared to the Customs under Section 77 of the Act and the passenger passed through the green channel. Even upon being questioned repeatedly if she had anything to declare, she answered in the negative before her personal search was conducted. However, upon her personal search 1375 grams of gold was recovered and the passenger admitted in her statement that she was carrying the gold for someone else for monetary consideration. However, she later claimed that seized gold belonged to her as it was handed over to her by her husband. The passenger has also not fulfilled the conditions of Notification 12/2012-Cus dated 17.03.2012 nor was she entitled to import the impugned gold under Rule 6 of the Baggage Rules (which allows import of 22 carat personal gold jewellery upto Rs. 100,000/- for female passenger)

12. As regards, whether the import of the impugned good is prohibited or not, Government notes that prohibited goods have been defined in Section 2(33) of the Customs Act, 1962 as under:-

2(33) – Definition – "Prohibited goods" means any goods the import or export of which is subject to any prohibition under this Act or any other law for the time being in force but does not include any such goods in respect of which the conditions subject to which the goods are permitted to be imported or exported have been complied with.

12.1 The Apex Court in the case of Om Prakash Bhatia Vs. Commissioner of Customs Delhi reported in 2003(155) ELT 423 (SC) has categorically held that if there is any prohibition of import or export of goods under the Customs Act, 1962 or any other law for the time being in force the goods would be considered to be prohibited goods and this prohibition would also operate on such goods the export or import of which is subject to certain prescribed conditions if the conditions are not fulfilled. Further in the case of Samyanathan Murugesan Vs Commissioner reported in 2010(254) ELT A15 (SC) the Hon'ble Supreme Court has held that where the

passenger did not fulfil the eligibility criteria it makes the imported gold prohibited goods.

12.2 The respondent was not eligible to import gold either in terms of Notification 12/2012-Cus dated 17.03.2012 nor under Rule 6 of Baggage Rules *ibid*. She also did not declare the impugned goods that were in a substantial/ commercial quantity. Hence, the same cannot be treated as *bona fide* baggage in terms of Section 79 of the Act *ibid*. The said gold is imported in violation of Foreign Trade provisions of Sections 77,79,11 of Customs Act, 1962; para 2.20 of Exim Policy of 2009-14 and provisions of Section 3(3) and 11(1) of Foreign Trade (Development & Regulation) Act,1992. The same would thus appropriately constitute "prohibited goods" liable to confiscation under Section 111(d) and (l) of the Customs Act, 1962.

12.3 Therefore, Government upholds the Department's contention that absolute confiscation is legally warranted keeping in view the facts and circumstances of the case.

13. Another issue of contention is whether given the facts of the case, the respondent is the owner or carrier of the impugned gold. Based on the admission statement recorded under Section 108 of the Customs Act, 1962, the Department has contended that the respondent is nothing but a carrier of gold for monetary consideration. Government finds that there is no dispute about the fact that in her statement recorded on 14.05.2014, the respondent has clearly admitted that she imported 1375 grams of 24 carat gold which was given to her by her husband who asked her to conceal it in her bra by wrapping it in a tissue paper and polythene cover and take them to India without declaring to Customs, to be handed over to Shri Shaik Mahaboob Basha who would come to their home in India and in turn would give her Rs.1,00,000/-. Therefore, it is clear from her statement that respondent is not the owner of the goods and has acted as a carrier merely for a consideration.

14. In this regard, Government also notes that the statement recorded before the Customs officers is valid evidence. Hon'ble Supreme Court has held in the case of Surjeet Singh Chhabra Vs. Union of India 1997(89) ELT 646 (SC) that statement made before Customs officers though retracted within six days is an admission and binding since Customs officers are not police officers under Section 108 of Customs Act 1962. A similar view has been taken by the Apex Court in Naresh J. Sukhawani vs Union of India 1996(83) ELT 258(SC) holding that statement before a Customs Officer under Section 108 of the Customs Act 1962 is a material piece of evidence. Further, same stand was taken by the Hon'ble High Court of Madras in the case of S. Faisal Khan vs. Joint Commissioner of Customs (Airport) Chennai 2010 (259) ELT 541 (Mad). So the statement given before Customs is valid evidence and

any subsequent submission is only an afterthought in an attempt to get goods released on payment of fine.

15. Further, the claim regarding retraction by the applicant of her admission of guilt in the statement before the Customs officers on ground of duress is not borne out by any evidence. Had the passenger desired to import the gold on payment of duty, she merely had to declare it before the Customs authorities under Section 77 of the Customs Act which she failed to do. Besides, the retraction is clearly an afterthought as she has not produced any evidence in support of her plea that the statement was recorded under duress.

16. Further, Government notes that Hon'ble High Court of Bombay in its judgment dated 23-07-2009 in the case of UOI Vs Mohammed Aijaj Ahmed (WP No.1901/2003) reported as 2009 (244) ELT 49 (Bom.) has set aside the order of CESTAT ordering to allow redemption of gold and upheld the absolute confiscation of gold ordered by Commissioner of Customs. In this case the gold did not belong to passenger Mr. Mohammed Aijaj Ahamed who acted as carrier of gold. The said order of Bombay High Court was upheld by Hon'ble Supreme Court in its decision reported in 2010 (253) ELT E83 (SC). Further the Hon'ble High Court of Chennai in the case of S. Faisal Khan vs. Joint Commissioner of Customs (Airport) Chennai 2010 (259) ELT 541 (Mad) upheld absolute confiscation of goods carried on behalf of someone else for a monetary consideration. In the case of Ram Kumar vs. Commissioner of Customs 2015 (320) ELT 368 (Del) also the Hon'ble High Court of Delhi has held that carrier is not entitled to benefit of Section 125 of Customs Act, 1962. Government, therefore, holds that in the present case the gold imported by the passenger as a carrier is liable for absolute confiscation as rightly pleaded by the Department.

17. Government further finds that the provision for re-export of baggage is available under Section 80 of the Customs Act, 1962. However, this Section is applicable only to cases of bonafide baggage declared to Customs, which the applicant failed to do. Thus the applicant is not eligible for re-export of impugned goods. In similar circumstances, Central Government has denied re-export of goods in the case of Hemal K. Shah 2012(275) ELT 266 (GOI). Further, the Apex Court in the case of CC Kolkata Vs Grand Prime Ltd 2003 (155) ELT 417 (SC) has supported the view that the goods which are liable for confiscation cannot be allowed to be re-exported. There is force in Department's contention that allowing redeeming of offending goods and allowing re-export even when caught by Customs has the effect of making smuggling an attractive proposition. Hence, the Government is of the view that the order of Commissioner (Appeals) allowing and upholding the request of the respondent for re-export of goods is not legal and proper and cannot be allowed.

18. Government also finds no force in the plea of the respondent that the confiscation of the impugned goods is not valid as any Show Cause Notice for confiscation of the goods is to be issued under Section 124 only and present notice mentions 111(d) & (l), as the Show Cause Notice clearly mentions in the beginning and in the concluding para that it is issued under Section 124 of the Customs Act, 1962.

19. In view of the above discussions, Government holds that both the original and appellate authorities have erred in allowing re-export of the impugned goods on payment of redemption fine and therefore, allows Department's appeal for absolute confiscation of the impugned gold. Considering the gravity of the offence, the penalty of Rs.2,50,000/- imposed on respondent under Section 112 of the Customs Act, 1962 by the original authority is also restored and upheld. The impugned Orders-in-Appeal are set aside, Order-in-Original is modified to this extent and the Revision Applications allowed.

20. The Revision Applications thus succeed in terms of above.

21. So, ordered.


(RIMJHIM PRASAD)

Joint Secretary to the Government of India

✓ Commissioner of Customs Chennai-I
(Airport and Aircargo)
New Customs House, GST Road
Meenambakkam,
Chennai-600 027.

ATTESTED


(SHAUKAT ALI)
UNDER SECRETARY (RA)

शौकत अली
Shaukat Ali
अंडर सेक्रेटरी (ए आर)
Under Secretary (RA)

ORDER NO. 2-3/2016-CUS DATED 22.01.2016

Copy to:-

1. Smt. Shaik Shamim Banu, W/o Shri Shaik Mujeb, Piler Road, T. Sundupally, Distt. Kadappa, Chennai.
2. Commissioner of Customs(Appeals-I), Chennai-I Commissionerate, New Customs House, Meenambakkam, Chennai- 600 027.
3. Shri T. Chezhiyan, Advocate, No.8 Edams Road, Alwarpet, Chennai- 600 018.
4. PA to JS (RA).
5. Guard File.
6. Spare Copy.

ATTESTED



(SHAUKAT ALI)
UNDER SECRETARY (RA)

शौकत अली
SHAUKAT ALI
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Under Secretary (RA)