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GOVERNMENT OF INDIA
MINISTRY OF FINANCE
(DEPARTMENT OF REVENUE)
8th Floor, World Trade Centre, Centre - I, Cuffe Parade,
Mumbai-400 005

F.No. 380/32/B/15-RA/1912

Date of Issue 12.03.2021

ORDER NO. 54/2021-CUS (SZ)/ASRA/MUMBAI DATED 05.03.2021 OF THE GOVERNMENT OF INDIA PASSED BY SHRI SHRAWAN KUMAR, PRINCIPAL COMMISSIONER & EX-OFFICIO ADDITIONAL SECRETARY TO THE GOVERNMENT OF INDIA, UNDER SECTION 129DD OF THE CUSTOMS ACT, 1962.

Applicant : Commissioner of Customs, Chennai.

Respondent : Shri Varadharajan

Subject : Revision Application filed, under Section 129DD of the Customs Act, 1962 against the Order-in-Appeal C.CUS-I No. 192/2015 dated 24.04.2015 passed by the Commissioner of Customs (Appeals-I), Chennai.

ORDER

This revision application has been filed by the Commissioner of Customs, Chennai. (herein referred to as Applicant) against the order C. CUS-I No. 192/2015 dated 24.04.2015 passed by the Commissioner of Customs (Appeals-I), Chennai.

2. Briefly stated facts of the case are that the Officers of Customs intercepted Shri Varadharajan at the Anna International Airport, Chennai on 14.02.2015 at the green channel. He was found carrying a gold chain under his belt weighing 60 grams valued at Rs. 1,48,756/- (Rupees One lac Forty eight thousand Seven hundred and fifty six).

3. After due process of the law vide Order-In-Original No.125/2015-Batch D dated 14.02.2015 the Original Adjudicating Authority ordered absolute confiscation of the gold under Section 111 (d) (e) (l) (m) and (o) of the Customs Act, 1962 and imposed penalty of Rs. 5,000/- (Rupees Five thousand) under Section 112 (a) of the Customs Act, 1962.

4. Aggrieved by this order the Respondent filed an appeal with the Commissioner of Customs (Appeals), The Commissioner (Appeals) vide his order C. CUS-I No. 192/2015 dated 24.04.2015 allowed the gold to be redeemed for re-export on payment of Rs. 40,000/- (Rupees Forty thousand) as redemption fine without making any changes in the penalty imposed and partially allowed the appeal of the Respondent.

5. Aggrieved with the above order the Applicant department has filed this revision application interalia on the grounds that;

5.1 The passenger has contravened the section 77 and 11 of the Customs Act, 1962 read with regulations 3(1) of Foreign Exchange Management (Export and Import of Currency) Regulations 2000 and thereby liable for absolute confiscation under section 111 (d) and (l) of Customs Act, 1962. Whereas the Appellate Authority, without considering the following aspects, given an option to redeem the gold on payment of redemption fine of Rs. 40,000/- for re-export and penalty of Rs. 5,000/-.

5.2 The eligibility of a passenger to clear the gold imported by him is covered under notification No. 12/2012 as amended. In terms of the said Notification The passengers of Indian Origin 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 such visits 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.

Further, Rule 6 of the Baggage Rules, 1998 as amended stipulates that "*A passenger who stayed abroad for more than one year can bring gold jewelry (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 without payment of duty.*"

5.3 In the present case the passenger did not declare the gold possessed by him under section 77 of the Customs Act, 1962 and was not in possession of foreign currency for the payment of duty and he has stayed abroad only for one day and hence he has not fulfilled the conditions stipulated under notification No. 12/2012 and Baggage Rules. Therefore 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.

5.4 Further, the re-export of goods is covered under section 80 of the Customs Act, 1962. As per the said Act, where the baggage of the passenger contains any article which is dutiable or the import of which is prohibited and in respect of which a true declaration has been made under 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. In this case the passenger has not filed any declaration. Hence the Appellate Authority's order to allow the re-export of the gold is not in order. Moreover in para 4 of the Order-in-Appeal, the appellate authority has observed that the passenger is a frequent traveller and has kept the gold chain weighing 60 grams in his belt pocket and on search, the gold was recovered and that the passenger has a stay of one day. The Appellate Authority has also acknowledged that the act of non-declaration is definitely an offence.

5.4 In this regard it is pertinent to mention herein the Board's circular no. 06/2014-Cus dated 06.03.2014 wherein vide para 3(iii) of the said circular, it is clearly mentioned as

" (iii) Whenever possible , the field officer may interalia, ascertain the antecedents of such passengers, source of funding for gold as well as duty being paid in foreign currency, person responsible for booking 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 the Appellate authority failed to examine the above aspects which are vital to prove the ownership of the gold by producing documentary evidence regarding the source of funding for gold as well as duty to be paid in foreign currency.

5.5 The order of the Appellate authority allowing redemption of the gold for re-export is neither legal nor proper is as much as the passenger had attempted to smuggle the gold by way of concealment and by way of non declaration knowing well that he was not an eligible passenger to import gold and thus had a culpable mind to smuggle them into India without payment of duty.

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

5.7 In view of the above the Revision Applicant cited case laws in support of their contention and prayed that the order of the Appellate authority allowing the redemption of gold for re-export on payment of redemption fine be set aside and the order of the LAA may be restored or such an order be passed as deemed fit.

6. The Respondent meanwhile filed a Writ Petition No. 17967 of 2016 before Hon'ble High Court of Madras for issuance of a writ of mandamus directing the respondent (Applicant department) to release the gold and give effect to the impugned order in Appeal. In reply the Applicant department informed that the Hon'ble High Court of Madras that a Revision Application has been filed before the Revision Authority in this regard and awaiting orders. The Hon'ble High Court of Madras issued the following orders:-

(a) " The Writ petition is disposed of directing the respondent to release the goods (gold) for purpose of re-export subject to the petitioner complying with the conditions imposed in the order passed by the Commissioner (Appeals) i.e., payment of redemption fine for re-export and personal penalty and also giving an undertaking to comply with the order in original, in the event the Department succeeds in the revision, with a period of two weeks from the date of receipt of a copy of this order.

(b) In the event there is no stay in the Revision Petition that has been preferred by the respondent, then it is hereby directed that the main revision petition shall be disposed of within period of eight weeks from the date of receipt of a copy of this order. No costs."

7. In view of the above, personal hearings in the case were scheduled on 22.10.2018, 19/20.11.2018 and 28.08.2019. Nobody attended the hearing on behalf of the Applicant department or Respondent. The case is therefore being decided on merits based on the records of the case.

8. The Government has gone through the case records. It is observed that the respondent did not declare the gold chain as required under section 77 of the Customs, Act, 1962 and had opted for the green channel. Non-declaration of the gold jewelry and attempt to escape from the law without payment of duty or appropriate accountal of the gold jewelry makes it liable to confiscation. Therefore the confiscation of the gold jewelry is justified.

9. The impugned gold was in jewelry form ie it was a gold chain. There are no allegations that the gold was ingeniously concealed. The quantity of the gold under import is small. Under the circumstances and dispossessing the Respondent of the gold jewelry would be unreasonably harsh. In the case of Commr. Of Customs Vs Samynathan Murugesan reported at 2010 (254) ELT A15 (S.C.) referred to in the order of the Appellate Authority is not applicable as in the stated case gold ornaments seized were ingeniously concealed in a TV set and were in commercial quantity.

10. Further, there are a number of judgments wherein the discretionary powers vested with the lower authorities under section 125(1) of the Customs Act, 1962 requires it to be exercised. The Hon'ble High Court of Andhra Pradesh in the case of Sheikh Jamal Basha vs GOI 1997 (91) ELT 277 (AP) has stated held that under section 125 of the Act is mandatory duty to give option to the person found guilty to pay fine in lieu of confiscation. The High Court of Kerala in the case of Vigneswaran vs U01 in W.P. 6281of 2014 (I) dated 12.03.2014 has directed the revenue to unconditionally return the gold to the petitioner, observing that only because of not declaring the gold, the absolute confiscation is bad under law, further stating, the only allegation is that she did not declare the gold. Under the circumstances, absolute confiscation in the case is harsh and unjustifiable. The

Appellate authority in its order has stated that " *The fact of non declaration is definitely an offence. Hence there is no infirmity in the order of the LAA confiscating the impugned gold. However I find that the ownership of the gold is not disputed. I also find that the Appellant has not concealed the impugned goods in any ingenious manner. Hence I feel that absolute confiscation is unwarranted. The option of redemption under section 125 of the Customs Act, 1962 should have been extended by the Lower authority.*" Accordingly the Appellate authority has set aside absolute confiscation and allowed redemption of the gold. Considering overall circumstances of the case, Government, agrees with the findings of the Appellate authority and opines that facts of the case do not warrant absolute confiscation of the gold chain.

11. However as the gold jewelry merited confiscation the Appellate authority has rightly taken a reasonable view in the matter and allowed the gold on redemption fine and penalty. The redemption fine of Rs. 40,000/- (Rupees Forty thousand) on the gold chain valued at Rs. 1,48,756/- (Rupees One lac Forty eight thousand Seven hundred and fifty six) and penalty of Rs. 5,000/- (Rupees Five thousand) is appropriate. The Appellate order is therefore liable to be upheld.

12. Revision application is accordingly dismissed.

Shrawan
5/2/21

(SHRAWAN KUMAR)
Principal Commissioner & ex-officio
Additional Secretary to Government of India

ORDER No. 54/2021-CUS (SZ) /ASRA/

DATED 05.03.2021

To,

1. The Commissioner of Customs, Chennai -I Commissionerate, New Custom House, Meenambakam, Chennai-600 027.
2. Shri Varadharajan, S/o Muthu, 207/170 Pavalakara Street, GPO, Chennai 600 001.

Copy to:

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4. Sr. P.S. to AS (RA), Mumbai.
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