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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. 380/100/B/14-RA

Date of Issue 31/08/2018

ORDER NO. ⁶³⁵/2018-CUS (SZ) / ASRA / MUMBAI/ DATED 03.08.2018 OF THE
GOVERNMENT OF INDIA PASSED BY SHRI ASHOK KUMAR MEHTA, PRINCIPAL
COMMISSIONER & EX-OFFICIO ADDITIONAL SECRETARY TO THE
GOVERNMENT OF INDIA, UNDER SECTION 129DD OF THE CUSTOMS ACT,
1962.

Applicant : Commissioner of Customs, Cochin

Respondent : Shri Shibin Thomas

Subject : Revision Application filed, under Section 129DD of the
Customs Act, 1962 against the Order-in-Appeal No. COC-
CUSTM-000-APP-264-14-15 dated 17.07.2014 passed by
the Commissioner of Customs (Appeals), Cochin.



ORDER

This revision application has been filed by Commissioner of Customs, Cochin (herein referred to as Applicant) against the order no COC-CUSTM-000-APP-264 dated 17.07.2014 passed by the Commissioner of Customs (Appeals), Cochin .

2. Briefly stated the facts of the case are that the Respondents, Shri Shibin Thomas (herein referred to as the respondent) arrived at Cochin International Airport on 19.01.2014. He was intercepted in the green channel and two gold chains totally weighing 348.790 gms valued at Rs. 8,82,976/- were recovered from him.

3. After due process of the law vide Order-In-Original No. 08/2014 Air Cus dated 19.01.2014 the Original Adjudicating Authority ordered absolute confiscation of the gold weighing under Section 111 (d), (l), (m) and (o) of the Customs Act read with Section 3 (3) of Foreign Trade (Development & Regulation) Act and imposed penalty of Rs. 1,50,000/- under Section 112 (a) of the Customs Act,1962.

4. Aggrieved by the said order, the respondent filed appeal before the Commissioner (Appeals) who vide Order-In-Appeal No. COC- CUSTM-000-APP-264-14-15 dated 17.07.2014 held that the respondent and his family made a declaration of all the gold ornaments worn by him before their visit to Sharjah and obtained an export certificate for 426.5 grams from the proper officer of customs prior to departure and whereas he had brought only 348.79 gms in exchange. The Appellate authority therefore set aside the absolute confiscation of the gold and allowed the Respondent to redeem the gold on applicable duties and a redemption fine of Rs. 50,000/-. The penalty of Rs. 1,50,000/- was also set aside.

5. The applicant has filed this Revision Application interalia on the following grounds that

5.1 The order of the Commissioner (Appeals) is neither legal and proper nor sustainable under law; The passenger went abroad only for a period of 26days; In the case of Commissioner of Customs (AIR), Chennai-I vs Samyanathan Murugun reported in 2009(247) ELT 21(MAD) has upheld absolute confiscation of the gold brought concealed, and the Hon'ble Supreme Court has upheld the judgement; The Commissioner (Appeals) has upheld confiscation and set aside the penalty is therefore bad in law and not legal and proper; As the goods have become liable for confiscation under section 111 for non declaration penalty has to be imposed on the passenger mandatorily under section 112; The hon'ble Supreme Court in the case of UOI vs Dhamendra Textile Processors has held that willful concealment or Menrea is not an essential ingredient for



civil liability and quantum of penalty; The Applicants avers that the passenger is aware that he has to obtain export certificate of gold taken abroad but ignorant that he has to declare the gold in his possession cannot be accepted as being ignorant but the same was intentional; thus setting aside the penalty is not legal and proper.

5.4 The Revision Applicant cited case laws in their defense and prayed for setting aside the order in Appeal, and pass such order as deem fit in the interest of justice.

6. In view of the above, the Respondent was called upon to show cause as to why the order in Appeal should be annulled or modified as deemed fit. In his written submission the Respondent submitted that When travelling abroad the Applicant had made a declaration of the gold ornaments carried by him and obtained an export certificate for 426.5 grams of gold; He exchanged the gold for new and brought in 348.79 grams, under the bonafide belief that the gold brought back was much less he did not declare the gold; But the gold was seized; The Commissioner (Appeal) has held that the act of commission /omission on the part of the respondent was more out of ignorance of law; The case laws referred by the applicants are not applicable in this case as there is active concealment and fraud in all the cases; Import of gold is allowed under EXIM policy therefore the Appellate authority was right in modifying the original order. Prohibited goods refer to goods which cannot be imported by any one; The rational for permitting redemption of the goods is well founded and based on solid grounds; Revision Application be dismissed and the Order in Appeal be upheld and the confiscated gold be returned.

7. Accordingly a personal hearing in the case was held on 25.07.2018 , Ms. M. R. Jayalatha and Ms. Aniya Nair both advocates, attended the hearing on behalf of the Respondent, they re-iterated the submissions made in the order in Appeal and pleaded that the Revision Application be dismissed. Nobody from the department attended the personal hearing.

8. The Government has gone through the facts of the case. The gold was declared when taken out of India by the respondents, and in exchange lesser amount of gold was brought at the time of their return to India. These facts are not disputed by the respondents. An export certificate is issued as per Circular No. 02/2002-Cus-VI dated 08.01.2002. For issuance of the export certificate the passenger has to give a declaration that the articles under export are personal private property and are for personal use and not merchandise for sale. The government however notes that by exchanging the gold, taken abroad, the respondents have rendered the export



certificate useless. Moreover, Section 20 of the Customs Act, 1962, governing re-importation of the goods, is very clear that goods re-imported are liable to duty and are subject to all conditions and restrictions to which like goods are subject. In view of the above discussion the gold has to be brought as such, for claiming exemption from import duty on re-importation.

9. A written declaration of goods was not made by the Respondent as required under Section 77 of the Customs Act, 1962. The respondent has thus erred in this respect and therefore confiscation of the goods is justified. The Government however notes that there is no allegation of any ingenious concealment. Ownership of the gold is not disputed. There are no previous offences registered against the respondent and there was no concerted attempt at smuggling these goods into India. Absolute confiscation in such instances appears to be a harsh option, and unjustifiable. The CBEC Circular 09/2001 gives specific directions to the Customs officer in case the declaration form is incomplete/not filled up, the proper Customs officer should help the passenger record to the oral declaration on the Disembarkation Card. This exercise should have been carried out, thus mere non-submission of the declaration cannot be held against the Applicant.

10. The Appellate authority in its order has set aside the penalty and reduced the redemption amount. The imposition of redemption fine implies that the goods are liable for confiscation. The order thus runs contrary to the law. Penalty becomes mandatory when goods are liable for confiscation. The Applicants have rightly pointed out that once the goods are held liable for confiscation under section 111 ibid, penalty has to be imposed on the offender mandatorily. The setting aside of the penalty in the Appellate order, when goods are held liable for confiscation is therefore contrary to the law. There are a catena of judgments which align with the view that the discretionary powers vested with the lower authorities under section 125(1) of the Customs Act, 1962 have to be exercised. Absolute confiscation in the order in original in such instances also appears to be a harsh option, and unjustifiable. The impugned Order in Appeal therefore needs to be set aside and the order in original is modified and the gold is liable to be allowed on payment of redemption fine and penalty. However a lenient view may be taken while imposing penalty.

11. The impugned Order in Appeal therefore is set aside and the order in original is modified as below. The absolute confiscation of the gold is set aside. Government allows redemption of the confiscated gold in lieu of fine. The impugned gold weighing 348.790 gms valued at Rs. 8,82,976/- (Rupees Eight lakhs eighty two thousand Nine hundred and Seventy six) is ordered to be redeemed on payment of



redemption fine of Rs. 3,50,000/- (Rupees Three Lakhs Fifty thousand) under section 125 of the Customs Act, 1962. The penalty of Rs. 1,50,000/- (Rupees One lakh Fifty thousand) imposed on the Applicant under section 112(a) of the Customs Act,1962 is reduced to Rs. 70,000/- (Rupees Seventy thousand). The customs duty and charges as applicable under section 125(2) shall be payable as per law.

12. Revision application is partly allowed on above terms.

13. So ordered.

(ASHOK KUMAR MEHTA)

Principal Commissioner & ex-officio
Additional Secretary to Government of India

ORDER No. ⁶³⁵/2018-CUS (SZ) /ASRA/Mumbai.

DATED 03.08.2018

To,

1. The Commissioner of Customs,
CustomHouse,
Willingdon Island,
Cochin 682 009.

2. Shri Shibin Thomas
Elanjeryil House,
Elamakkara (PO)
Ernakulam 682 026.

Copy to:

1. The Commissioner of Customs (Appeals), Cochin.
2. Sr. P.S. to AS (RA), Mumbai.
3. Guard File.
4. Spare Copy.

ATTESTED

[Signature]
21/8/18
SANKARSAN MUNDA
Asstt. Commissioner of Custom & C. Ex.

