
(2021) 05 CESTAT CK 0001

In the Customs, Excise And Service Tax Appellate Tribunal

Case No : Customs Appeal No. 60114 Of 2020

Aadil Majeed Banday

APPELLANT

Vs

C.C. Amritsar

RESPONDENT

Date of Decision : 06-05-2021

Acts Referred:

Customs Act, 1962 — Section 2(25), 2(33), 111, 112, 123, 129A(1)(d)
Narcotic Drugs and Psychotropic Substances Act, 1985 — Section 35, 54

Citation : (2021) 05 CESTAT CK 0001

Hon'ble Judges : Ashok Jindal, J

Bench : Single Bench

Advocate : Sudhir Malhotra, Rajeev Gupta, H. S. Brar, Swati Chopra

Final Decision : Allowed

Judgement

1. The appellant is in appeal against the impugned order wherein the gold recovered from the appellant has been absolutely confiscated and penalty of

Rs. 10,000/- has been imposed under Section 112 of the Customs Act, 1962.

2. The brief facts of the case are that the appellant was travelling by air from Jammu in domestic flight No. AI-821 to Srinagar on 23.04.2018. At

Srinagar Airport, the appellant was checked at the exit point of Airport by Customs Preventive Staff and one gold biscuit bearing marks "PAMP

SUISSE 100g FINE GOLD 999.9 C107781" was recovered. The said gold was seized on the reasonable belief that same is liable for confiscation

and the gold is a notified item under section 123 of Customs Act 1962. The gold was seized absolutely and penalty of Rs. 10,000/- was imposed under

section 112 of Customs Act. Against the said order, the appellant is before me.

3. A preliminary objection was raised by the Ld. AR that as per proviso to section 129A (1) (d), the appeal is not maintainable before this Tribunal

being baggage as any goods imported or exported as baggage, the appeal is not maintainable before the this Tribunal. The Ld. AR further submitted

that as it is a case of baggage goods, therefore, the appeal is not maintainable before this Tribunal.

4. The Ld. AR was heard and the issue arose whether the goods i.e. the gold in question is imported or exported goods as baggage or not?

5. The admitted fact of the case is that the appellant is boarded the flight from domestic Airport at Jammu for Srinagar. The appellant was never

travelling from abroad to India, in that circumstances, it is to be seen that whether the goods in question is imported goods or not ? Section 2(25) of the

Act defines imported goods means any goods brought into India from a place outside India, but, does not include goods which have been cleared for

home consumption. Admittedly in the case in hand, the goods were travelling by the appellant from Jammu to Srinagar. Both the places are located

within India, therefore, the impugned goods is not having the character of the imported goods. In that circumstances, a preliminary objection raised by

the Ld. AR is not acceptable and is against the spirit of law. Therefore, I hold that this Tribunal is having jurisdiction to hear the appeal.

6. On merit, the Ld. Counsel for the appellant submits that gold biscuit bearing marks as explained Para 2 herein above was recovered from him and

in the Adjudication order allegations were made against the appellant that to ascertain the present market value of the seized gold biscuit, market

inquiry was made from the M/s Rajesh Jeweller, Srinagar and M/s Kewal Ornaments, Srinagar who has opined that the current market price of the

seized gold biscuit is Rs. 3,22,000/- and it was concluded that it is evident that the appellant was in possession of one gold biscuit of foreign origin, as

per details given above and he has failed to produce any valid documents to discharge the burden of proof under section 123 of the Act. Therefore, it

appears that the said gold biscuit has been smuggled into India without following the proper import procedure and without payment of appropriate

customs duty.

7. In counter, the contention of the Ld. Counsel is that the market enquiry was conducted in respect of valuation of impugned goods. There was no

test of gold was conducted nor any report is placed on record. There are neither any expert opinion nor any market enquiry was conducted to

establish that the gold in question is of Foreign Origin. Further, there is no evidence referred in order-in-original and the impugned order to substantiate that impugned gold are of foreign origin. The appellant in his statement never deposed that the goods are of foreign origin. It is his submission that the decision of this Tribunal in the case of Sudip Saha Vs. CC 2019 (369) ELT 1039 (T) relied upon by the revenue is not applicable to the facts of this case, as in the said case, the carrier and the owner admitted that the goods are of foreign origin. He further submits that the decision of Honâ??ble Madras High Court in the case of Malabar Diamond Gallery pvt. Ltd. Vs. Addl. Director General of Revenue Intelligence 2016 (341) ELT 65 (Mad) relied upon by revenue is not applicable in this case, as in the said case the appellant admitted that the gold jewellery smuggled from Singapore. It is his submission that there is no allegation that appellant alighted from International Flight and took domestic flight. He further submitted that the impugned gold is freely available in Indian market and on website www.indiamart.com. Sales the gold of the mark mentioned in Paragraph 2 herein above in India and the same has not been controverted by the Revenue. In that circumstances, the order of absolute confiscation is bad in law. He further submits that no specific provision of section 111 & 112 of Customs Act has been invoked, therefore, the gold cannot be confiscated. Consequently, no penalty can be imposed as held by the Honâ??ble Apex Court in the case of Amrit Foods Vs. CCE 2005 (190) ELT 433 (SC). He further submitted that the Honâ??ble Punjab and Haryana High Court in the case of CCE Vs. Max G.B. Ltd. 2008 (221) ELT 491 (P & H) also held that show cause notice is vague on specific violation not sustainable. He also relied on the decision of this Tribunal in the case of Delco Precitone Jewellers (P) Ltd. vs. CC 2000 (124) ELT 1105 (T) wherein it has been held that imposing penalty without arriving at any specific finding with reference to clause (a) or (b) of section 112 of Customs Act is not sustainable. He also relied on the decision of Honâ??ble Madras High Court in the case of B.Lakshmichand vs. Government of India 1983 (12) ELT 322 (Mad).

8. He further submitted that the adjudicating authority has erred in upholding that the appellant has not discharged the burden under Section 123 of Customs Act, 1962. It is his submission that the section 35 of NDPS Act cast reverse burden of proof like section 123 of Customs Act and the

Honâble Apex Court while dealing with section 35 & 54 of the NDPS Act, 1985 in the case of Hanif Khan @ Annu Khan Vs. Central Bureau of

Narcotics â" 2019-TIOL-387-SC-NDPS has held that the prosecution under the NDPS Act carries a reverse burden of proof with a culpable mental

state of the accused. He is presumed to be guilty consequent to recovery of contraband from him, and it is for the accused to establish his innocence

unlike the normal rule of criminal jurisprudence that an accused is presumed to be innocent unless proved guilty. But that does not absolve the

prosecution from establishing a prima facie case only where after the burden shifts to the accused. By relying on the decision of Hanif Khan (supra),

he submits that as the gold was seized on the reasonable belief that said goods is liable to confiscation under section 111 of customs Act. The initial

burden of forming reasonable belief has not been discharged. There was neither testing of gold done nor there is any evidence brought on records that

the seized gold is of foreign origin, therefore, the provisions of Section 123 of Customs Act are not applicable to the facts of this case. It is his

submission that in terms of Section 2 (25) of the Customs Act, 1962, the goods in question are not imported goods. Therefore, burden lies on the

revenue to prove that the goods in question are imported goods. Therefore, he prayed that the impugned order is to be set-aside.

9. On the other hand, the Ld. AR submits that in terms of Section 123 of the Customs Act, the appellant has failed to discharge the burden that the

goods in question are not imported goods or have been imported. Therefore, she further submitted that the document dated 14.04.2015 of Shah

jewellers, produced is a mere estimate and not a valid document in support of the appellant as the gold is a prohibited item under Section 2 (33)

readwith Circular 34/2013 dtd. 04.09.2013 and as per harmonious construction of the Customs Act, any smuggled goods can be seized anywhere in

India and legal proceedings initiated by the Customs against persons from whose possession the smuggled goods are recovered.

10. The Id. AR also produced the report of market inquiry on record which only said on eye estimation that the gold in question is of 999.9% and its

market value is Rs. 3,22,000/- She also relied on the decision of Malabar Diamond Gallery (supra) and Sudip Saha (supra).

11. Heard the parties and considered the submissions.

12. On hearing the parties, it is a fact on record that the gold in question has been seized when the appellant was travelling in domestic flight from Jammu to Srinagar, in that circumstances, the goods in question cannot be said as imported goods. The revenue is heavily relying on Section 123 of the Customs Act say that when any goods on the reasonable belief that they are smuggled goods, the burden of proving that they are not smuggled goods shall be on the appellant. Admittedly, if revenue is having a reasonable belief that they are smuggled goods, then the burden of proof that the goods are not imported lies on the appellant. But firstly, there should be a reasonable belief that the gold in question is smuggled one is to be established by the revenue to invoke Sec. 123 of the Customs Act. In the impugned order as well as adjudication order, nowhere it has been established that there was a reasonable belief that the goods in question are smuggled goods which is the bone contention to invoke Section 123 of the Customs Act, 1962. Further, the appellant has also brought on record that the marking on gold in question is freely available in the Indian market and at the website www.indiamart.com, the goods can be purchased by any Indian.

13. In that circumstances, revenue has failed to discharge that they are initial burden that on reasonable belief that the goods in question are smuggled goods. Further, it has been found that only market enquiry was done for valuation and purity of the goods in question. No fact has been brought on record by way of testing of the goods in question that the marking made on the goods are genuine or not. As no such investigation has been done to establish that the goods in question are of foreign origin, therefore, the provision of Section 123 of the Customs Act is not applicable to the facts of this case.

14. Further, the appellant has never admitted that the goods are of foreign origin or has been smuggled. The case laws relied by the Ld. AR are not applicable to the facts of this case as in those cases, the person from whose custody the gold/jewellery has been recovered has been recovered have admitted that the goods are of foreign origin and brought in India through illicit means. In that circumstances, the absolute confiscation of the gold in question is bad in law.

15. Further, on perusal of record, the show cause notice is vauge as no particular provisions of Section 111 of the Customs Act for confiscation of the

gold and no provisions of Section 112 of the Customs Act for imposing penalty has been brought on notice. Therefore, the show cause notice is also

vague as held by the Honâ??ble Apex Court in the case of Amrit Foods(supra). Further, in the case of Max G.B. Ltd. (supra), the Honâ??ble

Jurisdictional High Court had also held that the show cause notice is vague on specific violation is not sustainable.

16. In the above discussion, I hold that the proceedings against the appellant are bad in law. Consequently, the impugned order is not sustainable,

hence is set-aside.

17. In result, the appeal is allowed with consequential relief, if any.

(Order pronounced on 06.05.2021)