CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL
SZB, CHENNAI

REGIONAL BENCH : COURT No.-1

APPEAL No. C/40253 /2020-SM

(Arising out of Order-in-Appeal C. Cus. II No. 233-236/2020 dated 06.02.2020 passed by the Commissioner of Customs & (Appeals-II), Chennai).

Shri M.S. Alaudeen Appellant
No.13/39, K.M.P. Koil Street,
Ayanavaram, Chennai-600 023.

Vs.

The Commissioner of Customs Respondent
Custom House, No. 60, Rajaji Salai,
Chennai-600 001.

APPEARANCE

FOR APPELLANT : Shri A.K. Jayaraj, Advocate,
FOR RESPONDENT : Shri S. Balakumar, AC, Authorized Representative

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Hon'ble Shri P. DINESHA, MEMBER (JUDICIAL)

Date of Hearing: **17.03.2021**
Date of Pronouncement: **30.03.2021**

FINAL ORDER Nos. 41452/2021

By this appeal the appellant has challenged the First Appellate Authority's Order C. Cus. II No. 233-236/2020 dated 06.02.2020, whereby the Commissioner (Appeals) has only interalia reduced the redemption fine and penalty. The facts as presented during hearing as also stated in the statement of facts of the appeal memorandum are briefly summarized as under:-

- The appellant had taken a place for rent and was running lathe business of smelting and melting gold used melting furnace.
- Appellant had a lot of customers.
- A search was conducted on 12.12.2018 which resulted in seizure of Seven Ring shaped gold, three square shaped strip of gold and one half cut piece of 100 grams of gold bar (foreign marked) to an extent weighed 2.810 gram.
- On the very same day the appellant was taken to the Customs office, severely beaten, threatened and dictated to give statement.
- The appellant chose to retract vide his communication dated 13.12.2018 ie., the very next day, his statement made on 12.12.2018.
- A writ petition in W.P.No.8527 of 2019 was filed for a direction seeking to return the seized gold. The Hon'ble High Court vide order dated 24.06.2019 disposing the above writ petition, however, interalia directed the appellant to make an application for provisional release.
- Another writ petition No. 22333/2019 was filed against the issue of SCN but however, the Hon'ble High Court vide its order dated 30.07.2019 disposed of the writ petition interalia directing the respondents to afford an opportunity of personal hearing, etc.

2.1 In the SCN dated 07.06.2019, it is averred by the Assistant Director as under:-

- A specific intelligence was gathered that foreign origin gold were being smuggled into India by way of concealment, cleared through Anna International Airport and brought to the premises of the appellant.
- The officers of CZU-DRI identified the premises of the appellant, entered on 12.12.2018 with a search warrant.
- The appellant after going through the search warrant had affixed its signature with date for having read the same.
- During the search the officers found interalia dismantled power tools such as Ryobi brand 6" Orbittal Buffer car cleaning machine, etc.
- One car cleaning buffer machine was found lying on the floor with the upper portion of the machine in loose condition and when the officers removed the upper portion, they found a piece of yellow coloured metal appearing to be gold, stuck inside the motor.
- Upon removal of the same, the yellow metal was found to be half cut piece of 100 gms foreign marked gold with the marking "Cambi, Suisse 100 gms Gold 999.9" with last five digits of Sl.No. 09053" visible.
- Three small square typed, yellow coloured metal appearing to be gold, amidst the pieces of steel

measuring tape strips strewn in one corner of the floor was also found and recovered.

- The officers also found a granite slab with two strings attached to the centre of the slab, which upon lifting, a sump/secret chamber with a hot furnace like machine found.
- The Govt. approved Assayer certified that the seven ring shaped gold, three square shaped strip of gold and one half cut piece of 100 grams of gold bar (foreign marked) to an extent weighed 2.810 gram valued at Rs. 91,95,725/-
- The said goods were thereafter seized under mahazar dated 12.12.2018.
- The CBEC vide Circular No. 34/2013 dated 04.03.2013 has interalia clarified that henceforth gold shall be permitted to be imported only by the agencies notified by DGFT.
- The Asst. Commissioner interalia proposed to confiscate the seized goods, under Sections 111 (d), 111(i),111(l) read with Section 123 of the Customs Act, 1962.

2.2 After affording personal opportunity to the appellant, the adjudication order was passed vide order dated 30.09.2019, whereby the authority after ordering confiscation as proposed however, gave an option to the appellant to redeem the same under Section 125 ibid on payment of redemption fine of

Rs.9,20,000/-. Penalty under Section 112 was also levied on the appellant.

3. Aggrieved by the above order-in-original, the appellant preferred an appeal before the Commissioner (Appeals) questioning interalia the confiscation of gold, redemption and also penalty imposed. Revenue also filed an appeal with a prayer to set aside the order of redemption placing reliance on the following:-

1. *Abdul Razak Vs. UOI* – 2012 (275) ELT 3000 (Ker.)
2. *CC (AIR) Chennai-1 Vs. Samynathan Murugesan* – 2009 (247) ELT 21 (Mad.)
3. *Board's Circular* No. 495/5/92-Cus.IV dated 10.05.1993

And there by questioning the adjudicating authority's order giving option of redemption instead of ordering absolute confiscation. The Commissioner (Appeals) vide impugned order dated 06.02.2020 has, however dismissed the Revenue's appeal but the appellant's appeal was partly allowed reducing substantially the redemption fine as well as penalty. This is the cause for the present appeal before this forum.

4. When the matter was taken up for hearing today learned Advocate Shri A.K. Jayaraj, took me through the facts of the case and the relevant observations of the Commissioner (Appeal) in the impugned order particularly paragraphs nos. 16, 17 & 18 and contended that for the reasons recorded in those

paragraphs the Commissioner (Appeals) should have deleted the redemption fine as well as penalty in toto.

5. Per contra, Shri S. Bala Kumar, learned Departmental Representative, supported the findings of the lower authorities.

6.1 I have considered the rival contentions and gone through the documents placed on record. Revenue entertained a doubt that the appellant had improperly imported gold into India. Section 11 deals with the power to prescribe importation or exportation of goods; (2) (f) thereunder prohibits uncontrolled import and export of gold or silver. Section 101 empowers the Revenue to search suspected persons in certain cases and the relevant portion reads as under:-

"101. Power to search suspected persons in certain other cases

> (1) Without prejudice to the provisions of section 100, if an officer of customs empowered in this behalf by general or special order of the [Commissioner of Customs] has reason to believe that any person has secreted about his person any goods of the description specified in sub-section (2) which are liable to confiscation, or documents relating thereto, he may search that person.
>
> (2) The goods referred to in sub-section (1) are the following:
> (a) gold;
> ………………"

So entertaining a belief that the import is improper, Section 101 can be invoked to search suspected persons.

6.2 Apparently based on the intelligence gathered, Revenue authorities carried out a search suspecting the appellant and they were able to seize gold in various forms as mentioned in the mahazar/SCN, from the possession of the appellant. Thus the initial burden is on the appellant in terms of Section 123 to dislodge the reasonable belief entertained by the Revenue and prove that the goods in question that was seized from his possession, were not smuggled.

6.3 A perusal of the pleadings placed on record as well as the arguments of the learned Advocate refers to the rebuttal dated 13.12.2018, whereby the appellant has mentioned interalia that he was doing job with regard to the melting of gold pieces, convert them to gold rings which was given by his customers; that the officers without verifying anything took the gold including all the gold rings to the office, etc. It is interesting to note that there is no explanation on the cut pieces of 100 gms foreign marked gold bar with the marking "Cambi, Suisse 100 gm Gold 999.9" ending with last five digits of Sl.No. 09053" that was retrieved from Ryobi brand 6" Orbittal Buffer car cleaning machine. There is also no rebuttal on maintaining a secret chamber and a hot furnace inside nor has he disputed the availability of dismantled power tools of buffer car cleaning machine, etc. More interestingly, the appellant has nowhere claimed, rather has not even admitted that he is an authorised/license holder/goldsmith to carry out the job of melting gold pieces and convert to gold items of his so called customers. After having mentioned that the gold pieces were given by his customers, he has nowhere even offered to furnish the details of such customers to whom the seized gold including the one cut piece with marking "Cambi, Suisee 100 gm Gold 999.9" belonged.

6.5 The cumulative effect of the above observations is that the initial burden cast on the appellant in terms of Section 123 ibid has not been discharged and therefore Revenue's action is justified. Strangely, the non-filing of appeal against rejection of absolute confiscation by Commissioner (Appeals) is questionable especially when an order authorising appeal against Order-in-Original granting redemption was made. Further, the Revenue has happily accepted the Commissioner (Appeals) order whereby the substantial reduction is ordered, both in terms of redemption fine as well as penalty, hence Commissioner (Appeals) order has to be upheld. For the above reasons, I do not find any merit in the appeal and therefore, the same is dismissed.

(Order Pronounced in the Open Court on **30.03.2021**)

(**P. DINESHA.)**
MEMBER (JUDICIAL)

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