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CUSTOMS. EXCISE & SERVICE TAX APPELLATE TRIBUNAL
PRINCIPAL BENCH, WEST BLOCK No.2, R.K.PURAM, NEW DELHI - 110066
CUSTOMS APPEAL BRANCH

Appeal No. C/512 /2008- CU[BR] Date 05/09/2008

Assistant Registrar
C.E.S.T.A.T, New Delhi

To : ARVIND PALAWAT, S/O SH TIKAM CHAND
PALAWAT, R/O BIRBAL KA MOHALLA, NEAR BUS
STAND, ALWAR, RAJASTHAN.

ARVIND PALAWAT Appellant

Vs

C.C. JAIPUR I Respondent

I am directed to transmit herewith a certified copy of **Final order** No.C/333/08-CUS DATED 03.09.2008

passed by the Tribunal under Section 129, (B) of the Customs Act,1962 & Financial Act 1994 relating to Service Tax

Assistant Registrar

(Customs Appeal Branch)

Copy to :

1. Respondent C.C. JAIPUR I, N.C.R.BUILDING,
STATUE CIRCLE,
"C" SCHEME, JAIPUR 302005.

2. Adv. / Consult MR.BIPIN GARG, ADV.,
B-1/1289,A-VASANT KUNJ,
NEW DELHI

3. S.D.R.
4. J.C.D.R.
5. Bar association, CESTAT, New Delhi
6. M/s. Deeparchi Publications, M-93, Marg. 46, Saket, New Delhi 110017
7. M/s Centax Publictions (P) Ltd., 1512-B, Bhishm Pitamah marg, Opp. ICICI Bank of Defence Colony, New Delhi -
8. Excise & Customs cases, B-37, Sector -1, NOIDA - 201301 Gautam Budh Nagar, (U.P.)
9. Raghuraman's 44-B, Regal Flat,Shipra Suncity, Indirapuram - 201010,Ghaziabad, DT, U.P.
10. Nidheshak publications, I.P.Estate, new Delhi
11. Taxmann Allied Service Pvt Ltd., 21/35, West Punjabi Bagh, New Delhi - 110026
12. Commercial Laws of India Pvt Ltd Post Bag No. 1033, No.70(Old No. 88), Thyagaraya Road, T. Nagar,Chennai 60017
13. Taxindiaonline.com Pvt.Ltd, B-XI/8183,Vasant Kunj, New Delhi - 110070
14. Easy Service Tax Online Dot Com Pvt. Ltd. 407A, Iscon Mall, Above Star India Bazar, Satellite Road, Ahmedabad - 15
15. Office Copy
16. Guard file

Assistant Registrar
(Customs Appeal Branch)

CUSTOMS EXCISE & SERVICE TAX APPELLATE TRIBUNAL
PRINCIPAL BENCH, COURT No.I
NEW DELHI

Customs Appeal No. 512/2008-Cust(Br)

(Arising out of order in original No. 8/2008-Commissioner dated 31.3.2008 passed by the Commissioner Customs & Central Excise, Jaipur)

Date of Hearing: 7th, 8th & 11th August, 2008
Date of Decision: 3-9-2008

For approval and signature:

Hon'ble Mr. Justice S.N. Jha, President
Hon'ble Mr. M. Veeraiyan, Member(Technical)

1	Whether Press Reporters may be allowed to see the Order for publication as per Rule 27 of the CESTAT (Procedure) Rules, 1982?	NO
2	Whether it should be released under Rule 27 of the CESTAT (Procedure) Rules, 1982 for publication in any authoritative report or not?	Yes
3	Whether Their Lordships wish to see the fair copy of the Order?	Seen
4	Whether Order is to be circulated to the Departmental authorities?	Yes

Shri Arvind Palawat — Appellant
(Rep. by Shri Bipin Garg, Advocate
Shri Mayank Garg, Advocate
Shri Atul Gupta, Advocate)

Vs

CC, Jaipur — Respondent
(Rep. by Shri Vijay Kumar, SDR)

Coram: **Hon'ble Mr. Justice S.N. Jha, President**
Hon'ble Mr. M. Veeraiyan, Member(Technical)

Final order C/333/08

Per M. Veeraiyan:

This is an appeal against order of Commissioner No. 8/2008-Commissioner dated 8.4.2008.

2. Heard both sides.

3. The relevant facts, in brief, are as follows:-

a) The appellant, Shri Arvind Palawat holding Indian Passport No. A 9649594 arrived from Sharjah on 31.7.2007 at Jaipur Air Port.

b) On the basis of intelligence, he was intercepted by the Customs officers at the Exit Gate of the Arrival Hall of the Airport after he passed through the Green channel for Customs clearance. He was carrying two pieces of checked in baggage and two pieces of hand baggage. He had declared the value of the goods brought by him as Rs.24,889/-.

c) When he was enquired by the officers, he confessed that he was carrying diamonds in his trouser pocket. He was thereupon examined in the presence of independent witnesses and it was found that he was having totally 11 packets out of which 9 packets were of diamonds and one packet of emerald (valued Rs16,374/-) and one packet of gold chain weighing 10.5 gms (valued at Rs.7854/-). The total value of the consignment was ascertained to be Rs.28,88,323/-.

d) In his statement dated 31.7.2007 tendered under Section 108 of the Customs Act, he, interalia, he stated that he, along with a friend, started a company M/s P.V. General Trading Company LLC in Dubai; that he brought the consignments of the cut and polished diamonds, emeralds, and gold chain on approval basis for Shri Ashok Doshi father of his friend Shri Pervesh Doshi at Delhi; that he had kept the said goods in his trouser pocket in order to avoid examination by the customs at the Airport; he walked through green channel with an intention to avoid customs duty and to earn some speed money. The goods were seized and he was also arrested. He deposited the involved amounting to Rs 10.24 laks on 10-08-2007 as per of the orders of the Economic Offences Court.

e) In his subsequent statements dated 13.08. 2007 and 16.10.2007, he stated that he brought these goods from five parties in Dubai with approval memos. He has also carried the diamond reports which were given to him by the suppliers in Dubai for showing the same to potential buyers for future dealing.

f) Shri Ashok Joshi and Deepak Joshi of Delhi denied that the said consignment was meant for them.

g) Show cause notice dated 22.1.2008 was issued alleging that the appellant attempted to smuggle the aforesaid goods in contravention of the provisions of Section 11 and 77 of the Customs Act and Rule 3 of Baggage Rules, 1998;

h) Commissioner vide his impugned order dated 31-3-2008 confiscated the goods valued at Rs.28,88,323/- under Section 111 m of the Customs Act but allowed the same on payment of redemption fine of Rs.7,50,00/-.; He confirmed demand of customs duty amounting to Rs.10,41,240/- and appropriated the sum of Rs.10,24,000/- which has already been deposited by the appellants on 10.8.2007; he imposed penalty of Rs.7,50,000/- on the appellant.

4. The learned Advocate made the following submissions:-

a) The goods brought by him are non-industrial diamonds; they were brought for trading purpose; the same has to be treated as merchandise/ commercial cargo classifiable under chapter 7102 and duty payable is exempted in terms of Notification No.21/ 2002 dated 27.03. 2002.

b) The diamonds are also freely importable as no license is required in terms of Exim Policy.

c) The term 'baggage' for the purpose of tariff entry 98.03 refers only to dutiable goods brought by any passenger. As the diamonds brought by the appellant are exempt from duty the same cannot be classified under heading 9803 of the Tariff.

d) The baggage declaration form applicable to incoming passengers requires only declaration of dutiable goods and there is no column for declaring non-dutiable goods. As the diamonds brought by the appellant are exempt from duty the same need not declared as baggage under heading 9803 of the Tariff. Therefore, non-declaration of the diamonds brought by the appellant cannot be treated as violation. Further, the customs authorities did not give opportunity to declare the consignment and the same were seized.

e) The appellant was a bona fide passenger; he felt that the diamonds brought by him for trading purpose were not part of his baggage as the diamonds were freely importable as the duty was unconditionally exempted; he has kept the cut and polished diamonds in his pocket and the goods were not concealed. The confiscation and imposition of penalty are not justified.

f) He relies on the ratio of the decision of the Hon'ble Supreme Court in the case of State of Maharashtra Vs Mayer Hans George reported in 1999 (110) ELT 236 (SC) to contend that the diamonds brought by the appellant should be treated as cargo and not as baggage;

g) Commissioner should have granted free allowance even if part of the baggage is held liable to confiscation as clarified in Board's Circular No.64/96-Cus.IV dated 17.12.1996.

6.1. The learned DR supports the order of the Commissioner. He draws our attention to the definition of baggage under Section 2(3) of the Customs Act according to which baggage includes unaccompanied baggage but does not include motor vehicles; he submits that an item exempted by a Notification and charged to nil duty, has to be considered as dutiable goods in terms of section 2(14) of the Customs Act;

6.2. For import of commercial cargo, a person is required to obtain I.E. code as per the Exim Policy and also requires permission of RBI for remitting foreign exchange involved in the transaction. Import of commercial cargo attracts several provisions like Section 30, 31, 32 of the Customs Act in respect the concerned persons.

6.3. The Exim Policy has also defined what is permissible as passenger baggage in para 2.20 in Foreign Trade Policy 2004-2009, which reads as follows:-

> *Bonafide household goods and personal effects may be imported as part of passenger baggage as per limits, terms and conditions thereof in Baggage Rules notified by the Ministry of Finance*
>
> *Samples of such items that are otherwise freely importable under FTP may also be imported as part of passenger baggage without an 'Authorisation*
>
> *Exporters coming from abroad are also allowed to import drawings, patterns, labels, price tags, buttons, belts, trimming and embellishments required for export, as part of their passenger baggage without an Authorisation.*

6.1. We have carefully considered the submissions from both sides. The main issue to be decided is whether the diamonds brought by the appellant has to be treated as baggage or as commercial cargo.

6.2. Baggage is invariably associated with the passenger or a crew member. In respect of import baggage, it is associated with a passenger coming into India. Whatever is brought by the passenger whether it is old clothes, or jewellery worn on person by the passenger or items carried for gifting etc are all covered by the term baggage. The motor vehicle is specifically excluded. For example, the present appellant has, in addition to diamonds, emerald and gold chains, brought eatable items like almond, cashew nuts, chocolates, dates, used personal clothes, used lap top , used cell phone and also items like LCD TV, perfumes, cigarettes, liquor etc .

6.3. The import of commercial cargo is not normally associated with a passenger. It can be brought by a ship, a plane, rail etc. or by courier, or by post, for and on behalf of various importers. In respect of such cargo, the person in charge of the vessel etc. is required to follow certain formalities. The individual importers (except those specifically exempted) are required to get an I.E. code and comply with formalities relating to remittance of foreign exchange for the value of the goods so imported.

6.4. The dividing line between the commercial cargo and the baggage is that the baggage is necessarily associated with the passenger or a crew member. The purpose for which the goods are brought by the passenger has no bearing to determine whether the goods are to be treated as baggage or commercial cargo. In certain exceptional circumstances, like some spares required for urgent repair, a passenger is permitted to bring commercial cargo but he has to declare to the customs as commercial cargo and he shall be directed by the baggage officers to assessing groups for the purpose of assessment as per law applicable to commercial cargo. Goods brought by a passenger in commercial quantity though treated as baggage the same is treated as not bonafide and subject to adjudication resulting in confiscation and imposition of penalty.

6.5. The appellant's contention that the diamonds are not dutiable is not acceptable. Dutiable goods as per section 2(14) of the Customs Act means any goods which are chargeable to duty and on which duty has not been paid. It is not a case where the non-industrial diamonds are not subject to customs duty as per the tariff. The reference to dutiable goods in Chapter 9803 of the Customs Tariff Act relating to passengers baggage should be taken to refer to all articles which are subject to customs duty under the respective chapter headings. As per the Chapter Note 1 of Chapter 98 "all goods which satisfy the conditions prescribed therein, even though they may be covered by a more specific heading elsewhere in this Schedule." Are include in Chapter 98. Chapter Note 4 also clarifies that headings 9803 not to apply to "(a) motor vehicles; (b) alcoholic drinks; (c) goods imported through courier service". As per Chapter Note 5 "Heading 9803 is to be taken not to apply to articles imported by a passenger or a member of a crew under an import licence or a Customs Clearance Permit either for his own use or on behalf of others." The wording of Chapter 98 and Chapter notes would indicate that the baggage refers collectively to all items/articles imported by a passenger in his baggage. The items referred to as dutiable should include all items brought by the passenger except items which are subject to nil rate of duty in the tariff itself. That such goods may be exempted by a notification and hence effective duty being paid is may not make them as non-dutiable goods. In other words, they are dutiable but exempted when imported as commercial cargo.

6.6. The decision of the Hon'ble Supreme Court relied by the appellant relates to drawings and designs falling under heading 4906 wherein the tariff itself provided that the import of the same is duty free and therefore, no customs duty was leviable and therefore, even if the same was imported as part of the passenger baggage no duty shall be charged. In the present case, the diamonds are not subject to nil rate of duty under the tariff. The fact that they are exempted by a exemption notification does not make them as not dutiable and take them away from 9803 when imported by a passenger. The learned DR relied on the decision of State of Maharashtra Vs Mayer Hans George reported in 1999 (110) ELT 236 (SC) wherein it has been held that Section 81 of Foreign Exchange Regulation Act, 1947 has placed an embargo on bringing or sending of gold into India without RBI permission unless it was on through transit to a place outside India and was declared in the manifest for transit as same part of cargo or transhipment cargo. In the said decision personal luggage or baggage has been distinguished from carriage of goods as cargo.

6.7. The intention of carving out a separate heading as ' Passenger's Baggage' is for the convenience of both the Customs administration and the genuine travelling public. If each of the item brought by the passenger is to be separately identified, the requirement of licence is to be ascertained, classification is to be determined, applicability of various notifications are to be examined and assessment completed, it may take hours to clear each passenger and the net result would be chaos and avoidable harassment to the genuine passengers. The international movements of flights will come to a stand still if not abandoned. Therefore a separate tariff for the' Passenger's Baggage'. The only item which has been excluded is the motor vehicle. The' Passenger's Baggage' is thus a basket items which may individually fall under any of the Tariff Item but once brought by the passenger has to treated as a single item . It may happen that in some cases the individual rates of duties could be more the rate applicable to Baggage and in other cases it may be lower. This can not be cause for upsetting the rational behind carving out a separate tariff heading for the'Passenger's Baggage'. It is also important to note that a person who has imported as baggage is not required to comply with law relating to remittance of foreign exchange.

6.8. In the present case, the appellant did not have an I.E code and has no permission for remitting foreign exchange involved in the transaction. The diamonds brought by him do not qualify to be considered as commercial cargo. It is also not the case of the appellant that he has declared the diamonds brought by him as commercial cargo and sought assessment as such. The appellant has admittedly imported a consignment from Mumbai in the name of his Dubai firm while he was in Dubai and presumed to be familiar with law and procedure relating to import and export of commercial cargo.

6.9. The appellant has arrived as a passenger from a foreign country. Whatever goods brought by him deserve to be considered only as baggage. The definition of baggage under section 2(3) of the Customs Act does not refer to dutiable or non-dutiable goods brought by the passenger. Section 77 of the Customs Act requires the owner of any baggage shall, for the purpose of clearing it make a declaration of its contents to the proper officer.

6.10. The diamonds brought by him are dutiable though duty is not payable if imported as commercial cargo in view of an exemption notification. There is warrant or justification to treat the diamonds separately from other items like emerald , gold chain , eatables, electronic equipments etc and classify as commercial cargo. The diamonds brought by him deserves to be considered only as baggage and treated accordingly for all purposes.

7. The implications of the submissions on behalf of appellant are that the diamond if imported as commercial cargo is exempted from duty and that no licence is required and therefore any amount of diamonds in commercial quantity can be brought by any passenger with out declaration. If these submissions are accepted, it would amount to legalising import of costly diamonds without making any declaration to the Customs and without the need for any assessment and without any control whatsoever on remittances involved in such illegal transactions. Acceptance of such interpretation will surely lead opening flood gates to smuggling.

8. The appellant having brought the diamonds as baggage was required to declare the same as the dutiable articles. The appellant has failed to declare the same as required under Section 77 of the Customs Act. The appellant has clearly attempted the smuggling of diamonds without declaring to the customs and he would have succeeded in his attempt but for the timely intervention by the customs authorities. Hence the order of confiscation is valid.

9. Once it is held that the goods brought by him falls under 9803, there is no need to refer to the individual Chapter headings and apply various exemption notifications to determine the tax liability. The duty demand as well as order for recovery interest is also confirmed. However, the plea for free allowance is allowed.

10. A submission has been made on behalf of the appellant that he was not allowed to declare the consignment. The fact that he was intercepted while going through the green channel at the exit gate has been confirmed in the panchnama drawn in presence of the independent witnesses. His statements recorded immediately after seizure and subsequently do not dispute this fact. Therefore we do not accept the contention that the appellant was prevented from declaring the

consignment. He was also found carrying several diamond reports said to be preparation for future dealings. He deserves imposition of penalty.

11. Order of confiscation is upheld. The demand of duty and order for recovery of interest are upheld. However, the plea for free allowance is allowed; taking the entire facts and circumstances into account, the redemption fine imposed is reduced from Rs.7.5 lakhs to Rs 5,00,000/- (Rupees Five Lakhs only); the penalty imposed is reduced from Rs.7.5 lakhs to Rs.2,50,000/- (Rupees Two Lakhs Fifty Thousands only).

12. The appeal is disposed of in the above terms.

(Order pronounced on 3-9-2008)

(Justice S.N. JHA)
President

(M. Veeraiyan)
Member(Technical)

MPS*