

**K and K Gems Vs. Cc**

**K and K Gems Vs. Cc**

**SooperKanoon Citation :** [sooperkanoon.com/12853](http://sooperkanoon.com/12853)

**Court :** Customs Excise and Service Tax Appellate Tribunal CESTAT Mumbai

**Decided On :** Feb-12-1998

**Reported in :** (1998)(76)LC117Tri(Mum.)bai

**Judge :** V T K.S., J S Murthy

**Appellant :** K and K Gems

**Respondent :** Cc

**Judgement :**

1. The Appellants imported a consignment of Rough unworked Emeralds as per their declaration in Bill of Entry dated 9.1.1997 filed in Mumbai Custom House. The value of the goods declared was Rs. 32,34,370/-.

During the examination of a drum in which the goods were packed, on removal of empty plastic bags and covers, on opaque VPS bag was found concealed at the bottom of the drum and in that bag three transparent plastic packets were found in folded condition containing pre-shaped/preformed (worked) emeralds totally weighing 774.67 gms.

valued at Rs. 10,95,122/- with duty liability of Rs. 5,69,463/-. Such worked emeralds can be imported only against specific import license which the appellants did not possess.

2. As regards the unworked emeralds imported, these on being evaluated by an expert panel and appraisers, were found to be overinvoiced. Their value was

appraised at Rs. 9,91,750/- as against declared value of Rs. 32,34,370/-. Overinvoicing amounted to Rs. 22,42,620/-.

3. In answer to the Custom House queries in this regard the Appellants produced letters from the New York suppliers stating due to a mix up in the suppliers office the VPS bag containing worked emeralds meant for Hong Kong were packed in the Appellants consignment.

4. Overinvoicing was also explained as being again due to supplier's mistake. Appellants had ordered cheaper Zambian rejection roughs against which the supplier had inadvertently shipped costlier Brazilian rough due to lack of knowledge of their temporary staff.

5. The Appellants chose to have the matter adjudicated without issue of written show cause notice and were given personal hearing by the Commissioner of Customs, Mumbai before whom they requested for re-shipment of the goods as the supplier was willing to take them back.

The Commissioner of Customs passed the present impugned order confiscating the goods as being unauthorised import and for misdeclaration and non-declaration under Section 111(d), (1) and (m) of Customs Act, 1962. The Commissioner gave the option under Section 125 of the Customs Act, 1962 to pay in lieu of confiscation a fine of Rs. 15 lakhs and allowed re-shipment of the goods. He also imposed a personal penalty of Rs. 2 lakhs on the Appellants.

6. The learned Counsel Shri V.S. Nankani appeared for the Appellants and assailed the order levying a fine for re-export of the goods. It was contended, citing the decisions of the Tribunal in Padia Sales Corporation v. Collector redemption fine while permitting re-export. The Learned Counsel also urged that penalty on the Appellant is also not justified as they were not involved in over-invoicing of the goods as they had been despatched by the supplier by mistake and the Appellants were also unaware of the existence of the quantity of worked emeralds in the consignments.

7. Shri V.K. Puri, the Ld. SDR contended that in the present case the Commissioner has found that the goods were liable to confiscation for misdeclaration and as unauthorised import and hence has ordered their confiscation. Redemption fine has been imposed as an option, the exercise of which will lift the vesting of the goods in the Government of India because of confiscation and will restore the goods to importer. The Ld. SDR pointed out that it was not levied as a condition for re-export of the goods. Hence the impugned order is in consonance with the case law cited. Re-export has been permitted in response to Appellants request.

8. The rival contentions have been carefully considered. The main contention is that redemption fine levied for re-export in this case is without jurisdiction as Section 125 of Customs Act, 1962 does not empower such a levy. The relevant portion of Section 125 reads: whenever confiscation of any goods is authorised by this Act, the officer adjudging it may, in the case of any goods the importation or exportation whereof, is prohibited under this Act...and shall, in the case of any other goods, give the owner of the goods, or where such owner is not known, the person from whose possession or custody such goods have been seized, an option to pay in lieu of confiscation such fine as the said officer thinks fit.

It is also laid down in Section 125 that the fine shall not exceed market price of the goods less duty chargeable in respect of such goods. The fine is to be paid apart from the duty and charges payable on such goods. Section 126 of the Customs Act, 1962 lays down that when any goods are confiscated under the Customs Act, 1962 such goods shall thereupon vest in the Central Government. Thus when goods are found to be offending goods and an order of confiscation is passed, then the goods shall vest in Central Government. If they are to be restored to the owner, the adjudicating authority can do so only under provisions of Section 125 which prescribes the option of a fine in lieu of confiscation. Thus Section 125 does not have a nexus with how the goods are dealt with after payment of fine in lieu of confiscation. The fine envisaged there under is only to get over the order of confiscation irrespective of whether the goods are cleared for home consumption or for re-export. When the importer makes a request for re-export it has been a general practice in Custom Houses to consider such a request having regard to

the bona fides of such request. By re-exporting the goods the importer can avoid the payment of duty but not the fine in lieu of confiscation.

9. In the Padia Sales Corporation decision of the Tribunal (supra) also it is noted that the Tribunal did not set aside the redemption fine, but only modified its terms, making it a fine in lieu of confiscation simpliciter, which is in consonance with the object of Section 125 as seen above. As for the Tribunal decision in the case of Allen Bradley India (supra) the facts, as pointed out by Id. SDR, are different from the present case. There the Collector has given a clear finding that wrong goods had been shipped because of suppliers mistake and the importer had disclosed the fact to the department even before the examination of the goods. The Tribunal therefore, held that the goods need not have been subjected to confiscation and to levy of fine in lieu of confiscation. So also in the case of Tribunal decision in Skantrons (supra), the Tribunal was of the view that the goods need not have been confiscated at all under Section 111(d) when the importer offered to produce other valid licence for the goods in the place of licence originally presented for the clearance of the goods which was found to have forged endorsement. The Tribunal observed that simultaneous imposition of two conditions namely imposition of fine in lieu of confiscation and directing re-export cannot co-exist. Here also redemption fine under Section 125 as a condition for re-export has been held to be not tenable and not fine in lieu of confiscation per se.

10. In the order portion in the present case the Commissioner, after coming to the conclusion that the overinvoiced rough emeralds and the concealed undeclared worked emeralds are liable for confiscation, has ordered such confiscation under Section 111(d), (1) and (m) of Customs Act, 1962. It is followed by the option given under Section 125 of the Act to pay fine in lieu of confiscation. The goods are thereafter allowed to be re-shipped. Personal penalty has also been imposed on the Appellants. Therefore it is clear in this case that the fine in lieu of confiscation has been imposed fully in consonance with the provisions of Section 125 of Customs Act, 1962 as an option to the importer to redeem the goods which have been confiscated. It is not made a condition for re-export, which has been allowed apparently in response to Appellants request there for recorded in the order. Such re-export, as per the plain wording of the order, is a post redemption facility

allowed to the importer at his request and hence the case law cited by the Appellants does not advance their case.

11. The fact also remains that worked emeralds worth about Rs, 11 lakhs with duty liability over Rs. 5 lakhs had been found to be concealed under empty plastic bags and covers in the drum in which rough emeralds were found. Significantly they were not mixed up with them but kept concealed separately as stated above, giving the lie to the claim that it was a supplier's mistake. Even on overinvoiced rough emeralds, the Appellants explanation fails to carry conviction, as it has been found that though the cheaper Zambian rough emeralds and costlier Brazilian roughs may be similar to some extent in colour and appearance, but can be distinguished without difficulty in their clarity and transparency.

The Appellants being concerned with such import have been rightly penalised under Section 112 of Customs Act, 1962. However, considering that rough emeralds carry nil duty liability, we reduce the redemption fine from Rs. 15 lakhs to Rs. 6 lakhs (Rupees Six lakhs only) and the penalty from Rs. 2 lakhs to Rs. 1 lakh (Rupees One lakh only).

12. The order of the Commissioner is modified only to this extent. It is otherwise upheld.

**SooperKanoon - India's Premier Online Legal Search - [sooperkanoon.com](http://sooperkanoon.com)**