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Court : Customs Excise and Service Tax Appellate Tribunal CESTAT Mumbai

Decided On : May-10-1988

Reported in : (1989)(19)ECC249

Appellant : Usaf Umar Sumbhaniya

Respondent : Collector of Customs

Judgement :

1. This appeal arises out of and is directed against Order-in-Original bearing No. 65/Addl. Collr./1987 (File No. VIII/10-168/D.C./86 dated 12-8-87 despatched on 4-11-87 passed by the Additional Collector of Customs (Prev.) Gujarat, Ahmedabad.

2. The brief facts necessary for the disposal of this appeal are : The appellant, the crew member of the vessel MSV Shade-Al-Mehboob No. BDI 724, declared a Honda Motor Cycle as his baggage, alongwith other baggage articles before the Customs Officer, Salaya. Since the motor cycle was not covered by import licence or C.C.P. the same was seized in the reasonable belief that it was liable to confiscation under the Customs Act.

3. In his statement, the appellant admitted that he has no C.C.P. but contended that the said motor cycle was received by him as gift and it was old and used motor cycle and its value would be Rs. 2500/- to 3000/- Dubai Dirhams; that he admitted the offence and he was willing to pay fine, penalty and duty on the said motor cycle. But then, the Customs Authorities issued a show cause notice as to why the motor cycle should not be confiscated and why penalty should not be

imposed.

4. After receipt of the reply to the show cause notice and after affording personal hearing, the Additional Collector ordered absolute confiscation. He, however, did not impose any penalty on the appellant.

5. During the hearing of this appeal, Shri RJ. Trivedi, the appellant's learned advocate, challenged the order of absolute confiscation. His first submission was that the motor cycle was brought as an accompanied baggage. The Baggage Rules permitted import of motor cycle as an item of baggage. But then, the duty payable was 340%. Shri Trivedi further submitted that the motor cycles imported as baggage item were released by the same Collectorate on payment of duty and only in the case of the appellant, the Additional Collector had ordered absolute confiscation.

Thus there was discrimination. Shri Trivedi also produced a photostat copy of the Baggage Receipt issued to another passenger who had imported a Hondos motor cycle as a baggage item. Shri Trivedi also placed reliance on Customs Guide Series - 2 issued by the Directorate of Publications, Customs & Central Excise, New Delhi. He particularly referred to the following found at page 3 of the said publication : The idea is that you will be requiring these articles for your own use or for your family. In addition to the above concession, you are also allowed to import your bonafide Personal and Household Effects on payment of duty. On the value of such articles which are in excess of free allowance admissible to you, on the first Rs. 2000/- the rate of duty will be 170% on the balance 240%. However, the following articles will attract duty at the rate of 340% : (iii) cigarettes, cigars or tobacco in excess of the quantity prescribed for importation free of duty under the relevant baggage rules; and The rate of Customs duty on goods of value in excess of Rs. 3250/- (i.e. goods valued upto Rs. 1250/- free of duty under the Baggage Rules plus goods valued at Rs. 2000/- at the rate of 170.) is 240% except the following articles on which the rate of duty is 340% :- (iii) cigarettes, cigars or tobacco in excess of the quantity prescribed for importation free of duty under the relevant baggage rules; and 6. Shri Trivedi further submitted that the appellant had made a true declaration and, therefore, the absolute confiscation was bad. Even if

the import was unauthorised, the Additional collector ought to have allowed redemption on payment of fine. He submitted that the order of the Additional Collector does not indicate that he was aware of the provisions of Section 125 of the Customs Act. Shri Trivedi submitted that the Additional Collector ought to have cleared on payment of duty and in any case, on payment of fine. In support of his contention Shri Trivedi placed reliance on the following two decisions :-Hargovind Das K. Joshi v. Collector of Customs (S.C.) (1937 CAR 351 (SC); 7. Shri Trivedi also, incidently, submitted that the Additional Collector ought to have gone into the valuation. But then, he had made it very clear that since he is challenging only the confiscation, he would be satisfied if the confiscation is set aside and the matter is remanded.

8. Shri S. Senthivel, appearing for the Collector, opposed this appeal and contended that import of motor cycle without C.C.P. is prohibited.

He urged that the motor cycle is specifically included in Schedule I of the Import Control Order. Therefore, the import without a licence or without C.C.P. will be unauthorised Shri Senthivel submitted that the absolute confiscation was justified since the import was in violation of the Import Control Order. He, therefore, prayed that the appeal may be rejected.

9. We have carefully considered the submissions made on both the sides and perused the available records. The short questions for our consideration are :- (1) Whether the Additional Collector committed a legal error in ordering absolute confiscation of the motor cycle which the appellant brought as his baggage.

(2) Whether the Additional Collector should have given an option to the appellant for redeeming the motor cycle on payment of fine in lieu of confiscation.

10. From the order of the Additional Collector, it is seen that the appellant, who was one of the crew members of the vessel MSV Shahe-Al-Mehboob, declared one Honda Motory Cycle, made in Japan, in his baggage declaration alongwith his other baggage articles. He was asked to produce import licence or C.C.P. He could not produce the import licence or C.C.P.11. In the adjudication order, this is what the Additional Collector had observed :- "Import of motor cycle is specifically

not allowed under Rule 4-A of the Baggage Rules, 1978 as it requires a C.C.P. or an import licence. In the instant case, no such documents has been produced.

Thus, the goods cannot be allowed to be cleared as bonafide baggage and are hence liable to confiscation." 12. Thus the reasons given by the Additional Collector for ordering, absolute confiscation are :- (i) That the import of motor cycle is specifically not allowed under Rule 4-A of the Baggage Rules, 1978.

(ii) The import of motor cycle requires a C.C.P. or an import licence.

13. Shri Trivedi had contended that both these reasons are irrelevant and the Baggage Rules did permit import of motor cycle as a baggage item on payment of higher duty and that the Baggage Rules, nowehre laid down that for import of motor cycle as a baggage item a C.C.P. or a licence was required.

14. In order to appreciate the contention of Shri Trivedi and the contention of Shri Senthivel and the validity of the findings of the Additional Collector, it is necessary' to refer to the Import Control Order, the Baggage Rules, 1978 as well as the Import and Export Policy for the period April 1985 - March 1988.

"Save as otherwise provided in this Order no person shall import any goods of the description specified in Schedule I, except under and in accordance, with the licence or a Customs Clearance Permit granted by the Central Government or by any officer specified in Schedule II." 16. As per the above provision for the import of goods specified in Schedule I to the Imports Control Order, a licence or a Customs Clearance Permit would be necessary. It is not disputed that motor cycle is specified in Schedule I to the Imports Control Order. It is item 87.09 in Chapter 87 of Schedule. Therefore, if the Imports Control Order does not make any exception then the import of motor cycles cannot be made without a licence or a Customs Clearance Permit.

17. Clause 11 of the Imports Control Order saves import of certain goods from the operation of the Imports Control Order. Clause 11(1) reads :- (g) By a person as a passenger's baggage to the extent admissible under the Baggage Rules, for the time being, in force except Quinine under heading No. 29.01/45 of Schedule 1500

tablets or 1/2 Ib powder or 100 amp. Provided that in the case of imports by tourist, articles of higher value whose export is obligatory under Rule 7 of the Tourist Baggage Rules, 1978 shall be re-exported of his leaving India, failing which they shall be deemed to be goods of which the import has been prohibited under the Customs Act, 1962 (52 of 1962).

Provided further where any goods exempted under this sub-para the exemption shall be subject to the condition that such goods shall not be sold, advertised or offered for sale or displayed in a shop, until - (a) in the case of fire arms which have been used, for a period not less than 10 years from the date of clearance by such person or passenger or member of the crew, or (b) in case of TVs, which have been used for a period not less than 5 years from the date of clearance by such person or passenger of member of the crew, or (c) in the case of other goods when market price has depreciated to less than 50% of their market price when new." 18. Now as per Clause 11(g) of the Imports (Control) Order is inapplicable to the goods imported by a person as passenger's baggage to the extent admissible under the Baggage Rules. The exempted goods are however subject to other restrictions set out in the proviso to Clause 11(g).

19. If the Baggage Rules permit import of a motor cycle as a baggage item, then the requirement of obtaining licence or C.C.P. would not be necessary having regard to Clause 11(1)(g) of the Imports (Control) Orders.

20. The Central Govt. had made the Baggage Rules, called Baggage Rules, 1978 (for short "the Rules"). Rule 2 of the Rules provide for passing of the used personal effects free of duty. Rule 3 provides for General Free Allowance allowable for the import of articles other than used personal effects. The scale of free allowance allowable differs not only between adult passengers and the passengers who are minor but also the country from which they arrive. Under Rule 4 Household articles upto an aggregate value of Rs. 1,000/- belonging to a passenger who was engaged for professional abroad for over three months are allowed import free of duty.

21. Rule 4(A) provides additional allowance for used personal effects and household articles in respect of certain categories of passenger.

Since the Additional Collector had relied on this rule we are extracting the same : In the case of a passenger holding a valid passport issued under the Passport Act, 1957 and return to India, after staying abroad, his personal effects and household articles upto an aggregate value of upto Rs. 5000/-which have been in his or in his families' possession and used abroad for a minimum period of six months, may be imported free of duties subject to the following conditions, namely :- (i) such passenger has been working abroad for a minimum period of one year and is returning to India on termination of such work; (ii) such passenger, affirms by a declaration that the goods in question have been in his or in his family's possession and use abroad for a minimum period of six months and the examination of such goods and the attendant circumstances do not indicate to the contrary.

"Nothing contained in this rule shall apply to the following articles, namely:- (e) cigarettes exceeding 200 or cigars exceeding 50 or tobacco exceedings 250 gms. and; 22. The Additional Collector interpreted this Rule as prhobiting import of motor cycle. That interpretation of the Additional Collector is erroneous. Rule 4(A) provides for additional allowance for used personal effects and household articles belonging to certain categories of passengers. It, however, further provides that additional allowance will not be allowed to motor cycle, scooters, mopeds, air conditioners, refrigerators, de-freezers, fire-arms, cigarettes exceeding 200, cigar exceeding 50 or tobacco exceeding 250 gms. and alcoholic liquor exceeding 0.95 litres.

Notwithstanding the provisions of Rules 3 and 4, the following articles shall not be imported free of duty under these rules, namely :- (iii) cigarettes exceeding 200, cigars 50 or tobacco exceeding 250 gms., and; 24. As has been seen earlier under Rule 3 of the Rules General Free Allowance is allowable in respect of articles other than personal effects brought as passengers baggage. But then, under Rule 9 of the General Free Allowance allowed under Rule 3 cannot be claimed in respect of motor cycles, scooters, mopeds, fire-arms, cigarettes exceeding 200, cigars 50 or tobacco exceeding 250 gms. and alcoholic liquor in excess of 0.95 litres.

25. From the scheme of the Baggage Rules, it is clear that the passengers are permitted to bring not only used personal effects, household articles, but other articles also. In respect of other articles, the Baggage Rules grants certain free allowance and additional allowance. But then, the general free allowance and additional allowance cannot be claimed by the passengers for motor cycles, scooters and other articles specified in Sub-rule (2) of Rule 4(A) and Rule 9. If they bring those articles they are required to pay the full duty.

26. From the scheme of the Rules, it is clear that the Baggage Rules do not prohibit import of motor cycles, scooters, mopeds, air conditioners, de-freezers, firearms, cigarettes not exceeding 200 or cigar not exceeding 50, or tobacco not exceeding 250 gms. or alcoholic liquor not in excess of 0.95 litres. If the intention of the Central Govt. who made the Rules, was not to allow motor cycles, scooters, mopeds, air conditioners, refrigerators, de-freezers, fir-arms, alcoholic liquors, cigars etc. as baggage items, then there was no need to state in Sub-rule (2) of rule 4(A) and in Rule 9 that free allowance and additional allowance are not admissible to the said articles. In the Baggage Rules, the categories of the articles that could be brought as baggage are not laid down. It mainly provides for the extent of free allowance as well as additional allowance admissible to goods and persons and the articles to which free allowance and additional allowance are inadmissible.

27. Shri Trivedi had produced a booklet entitled "Customs Guide Series - 2. Baggage Rules for Passengers Other Than Tourist" published by Directorate of Publication, Customs and Central Excise, New Delhi.

"This booklet outlines the Indian Customs requirements affecting the baggage of Indian passengers travelling abroad for pleasure or for business. It seeks to explain the concessions available to them when they arrive back in India. It is not intended to be comprehensive study of Customs procedures. If you have any doubts please contact one of the officers listed at back page for fuller details before bringing goods into India." It contains guidelines for passengers. After the heading "What Are You Allowed To Import Free Of Duty" a note is appended. It reads : "PLEASE NOTE" (iii) cigarettes exceeding 200 or cigars exceeding 50 or

tobacco exceeding 250 gms.; and It is then stated in this booklet: "You are also allowed to import some more on payment of duty. The idea is that you will be requiring these articles for your own use or for your family. In addition to the above concession, you are also allowed to import 'our bonafide. Personal and household effects on payment of duty. On the value of such articles which are in excess of free allowance admissible to you, on the first Rs. 2000/- the rate of duty will be 170% and on the balance 240%.

However, the following articles will attract duty at the rate of 340% :- (iii) cigarettes, cigars or tobacco in excess of the quantity prescribed for importation free of duty under the relevant baggage rules; and 28. From the booklet also it is clear that motor cycles and other articles mentioned under Baggage Rules 4(A) and 9 can be imported as baggage items provided the passengers are prepared to pay duty at 340%.

29. Motor cycle can be imported as a baggage item under the Baggage Rules. Therefore, having regard to Clause 11(1) (g) of the Imports (Control) Order, no. C.C.P. or licence would be required to import a motor cycle as a baggage item. It is apparently for this reason the very port, namely Salaya, had earlier cleared a motor cycle brought as baggage item on payment of duty at 340% as can be seen from the photostat copy of the baggage receipts produced by the appellant.

30. We understand to avoid adjudications delibarately rate of duty was fixed at a very high rate viz. 340%. In the case of import of motor cycles under T.R. the rate of duty is far less.

31. Shri Senthivel had contended that for import of motor cycle CCP is a must. Apparently Shri Senthivel had in mind the policy regarding import of cars and other vehicles.

32. The policy regarding import of cars and vehicles is set out in Chapter 9 of the red book Volume I April 85 March 1988. Paragraph 155(1) sets out categories of persons who could import cars, motor cycles etc. It also sets out the condition governing the import. One of the conditions was that the application for import should have been made and CCP obtained while the applicant was still abroad.

From the policy it could be said that for the import of motor cycle CCP was required. But then, the requirement of CCP is only for persons returning to India for permanent settlement, or other categories of persons mentioned in Chapter 9. The Baggage Rules are independent of Chapter 9.

32. From the imports (Control) Order as well as from the Import and Export Policy it is clear that imports can be affected in several ways.

Firstly against specific licence; secondly, against open general licence, thridly, as baggage item, fourthly through post. The Imports (Control) Order which provides for obtaining licence or CCP in respect of items specified in Schedule I of the Order is however, not applicable to the goods brought as baggage item covered by Baggage Rules and also to imports through post. But then, the import of goods permitted under Baggage Rules and through post are subject to restrictions specified in Clause (g) & (gg) of Clause 11(1) of the Imports (Control) Order.

33. The Import Policy referred to above covers only the import under T.R. and not other categories of persons, who are permitted to import under the Baggage Rules, 1978. Therefore, the restrictions contained in the Policy as to the import of motor cycle and other vehicles is inapplicable to motor cycle brought as a baggage item under the Baggage Rules, 1978.

34. For the reasons stated in the preceding paragraphs we hold that the Additional Collector committed an error in holding that Rule 4(A) of the Baggage Rules, 1978 specifically did not allow import of motor cycle and that a CCP or an import licence was required to import the motor cycle as a baggage item. We, therefore, set aside the order of confiscation.

35. Since we have set aside the order of confiscation, second question does not strictly arise. However, we may observe that in his order the Addl. Collector had not even indicated as to why he was ordering absolute confiscation. His order does not show that he was aware of the provisions of Section 125(1) of the Customs Act. In the case of Hargovind D. Joshi referred to earlier in this order the Supreme Court has observed :- "The Additional Collector of Customs who passed the order of confiscation undoubtedly had the discretion to give an option to the

appellants to pay a fine in lieu of confiscation. Presumably the Additional Collector of Customs assumed that he was bound to confiscate the goods because he has not advert to this aspect in his order. He had undoubtedly the authority under law to give an option to the imports to pay such fine as was considered appropriate by (not exceeding the full market value of the goods in question) in lieu of confiscation of the goods. We are of the opinion that since the Additional Collector of Customs who passed the order for absolute confiscation had the discretion to give the option for redemption, it was but just, fair and proper that he addressed himself to this question." 36. If we were to uphold the order of confiscation we would have remanded the matter to the Additional Collector to consider whether an option to pay fine should be given to the importer or not.

37. Having regard to our finding that the order of confiscation itself is bad in law, we allow this appeal set aside the order of the Additional Collector and direct that the motor cycle shall be released to the appellant on payment of appropriate duty. It is necessary for us to observe that for the appellant it was contended that the Additional Collector had not gone into the aspect of valuation because he was passing an order of absolute confiscation. If the Additional Collector has not gone into the question of valuation it is left to the appellant to urge this contention before the Additional Collector when duty is demanded.

38. In the result, this appeal is allowed, the confiscation order is set aside. The motor cycle shall be released to the appellant on payment of appropriate duty.

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