Pravinkumar M. JaIn Vs. Collector of Customs

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Court : Customs Excise and Service Tax Appellate Tribunal CESTAT Mumbai

Decided On : Oct-17-1988

Reported in : (1989)(24)LC193Tri(Mum.)bai

Appellant : Pravinkumar M. Jain

Respondent : Collector of Customs

Advocate for Pet/Ap. : Shri. Gujral

Judgement :
1. This appeal arises out of and is directed against the Order-in-original bearing No. 11/87 (Collector) dated 20-4-1987 passed by the Collector of Customs (Preventive) Bombay.

2. The subject of challenge in this appeal is the order of confiscation of the primary-gold weighing 1440.900 gms under Section 71 of the Gold (Control) Act and the penalty of Rs. 20,000/- imposed on the appellant under Section 74 of the Gold (Control) Act 3. Shri Gujral, appearing for the appellant, contended that the department had accepted that the primary gold found in the appellant's possession were obtained by melting the old gold ornaments given by the customers. If that position is accepted the gold belonging to the customers cannot be ordered to be confiscated and, therefore, the order of confiscation itself is illegal. In that connection Shri Gujral placed reliance on the decision of the CEGAT reported in 1985 ECR page 167 and the Supreme Court decision reported in 1987 (31) ELT page 609.

Secondly Shri Gujral submitted that if the gold is not liable for confiscation no penalty can be imposed and as such imposition of penalty under Section 74 is also bad in law. Shri Gujral vehemently urged that the appellant is a young boy of 23 years old who had just come out of the college and started the business which has started by his late father. He had not committed any offence. A few open entries found in the GS-13 which was explained later cannot be considered serious, and in the said circumstances no penalty should be imposed since the offence if any committed by the appellant is technical in nature. Shri Gujral was very harsh insofar as the order of the Collector is concerned. He submitted that the Collector did not consider the evidence on record, on the other hand, he made all inaccurate statement and observation. He, therefore, prayed that the Collector's order of confiscation may be set aside and the gold may be released and the quantum of penalty imposed on the appellant may be reduced.

4. Shri Arya, appearing for the Collector, however, supported the order. He contended that it is physically not possible to co-relate the primary gold with the gold ornaments. Further, an opportunity was given to the appellant to co-relate the two and he had failed to do the same.

Shri Arya further contended that the department had given ample opportunity to the appellant to explain the excess gold found. In spite of such opportunity the appellant was unable to give proper explanation. In the circumstances, the Collector was justified in ordering confiscation and imposing the penalty.

5. We have considered the submissions made on both the sides. To appreciate the contention it is necessary to refer to the show cause notice issued to the appellant. The charges levelled against the appellant in the show cause notice dated 13-6-1986 are the contravention of Section 42(ii) and Section 55 of the Gold (Control) Act. There is no other charge.

6. Shri Gujral did not dispute that the primary gold found in possession of the appellant exceeded the quantity prescribed under Section 42(ii). Therefore, Shri Gujral cannot seriously challenge the finding of the Collector that the allegation in the show cause notice has not been established. His contention was that even if there had been a contravention of Section 42(ii) no penalty can be imposed under

Section 74. His further contention was that even if penalty could be imposed under Section 75 the same has not been invoked either in the show cause notice or in the order passed by the Collector. As regards the contravention of Section 55 Shri Gujral submitted that the open entries bring nothing incriminatory. They only shows the receipt of the gold ornaments. The further entries would be made only if and when the new ornaments are returned to the party. We are unable to accept the contention of Shri Gujral. from the record it is clear that the appellant admitted in the first instance, that there were 18 open entries and later on he admitted that there were 25 entries. He also gave the quantity of the gold relating to those 25 entries which have exceeded the actual quantity found when the Gold Control officers visited the premises. Therefore, there was clear violation of the provision of Section 55.

7. The department did not allege that 1440.900 gms of primary gold found in the possession of the appellant was unaccounted. There was no allegation of illegal acquisition. The Collector did not examine the appellant's defence that the primary gold found in his possession form part of the melted old gold ornaments. From the records available it is seen that the department after recording the statement of the appellant questioned various customers of the appellant and their statements were also recorded. Besides those statements, the customers themselves have staked their claim with the department. It is after investigation a show cause notice was issued. If, after investigation, the department did not allege illegal acquisition and have not invoked Section 31, the inference is to be drawn that the seized gold is accounted gold. The explanation of the appellant is that the primary gold found in his possession was obtained by melting of the gold ornaments of the customers. Therefore, the primary gold becomes the gold of the customers. If that be so under proviso (b) to Section 71 the same cannot be ordered to be confiscated unless the department establishes that the customers have knowledge of the contravention of the Gold (Control) Act by the dealer or they have connived in the contravention of the provision of the Gold (Control) Act by the dealer. There is neither such an allegation in the show cause notice nor a finding in the order of the Collector. In the circumstances Shri Gujral is wholly justified in contending that the order of confiscation is illegal and bad in law. Agreeing with his contention we set aside the order of confiscation of primary gold, weighing 1440.900 gms and direct that the

same shall be returned to the appellant. The appellant shall convert the primary gold in to ornaments within a month after release of the primary gold.8. The only other aspect that remains for consideration is the imposition of penalty of Rs. 20,000/- on the appellant. As has been stated earlier we are unable to accept die contention that there was only a technical offence of not maintaining the statutory record, being the college going boy. From the records it is clear that as many as 25 entries were kept blank. If the figures given by the appellant are to be accepted then the physical stock falls short of the stock mentioned in the statutory records. Taking all aspects into consideration we reduce the penalty from Rs.20,000/- (Rupees Twenty Thousand Only) to Rs. 2500/- (Rupees Two Thousand Five Hundred Only). The appellant be granted consequential relief by way of refund of the excess penalty, if paid.