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Court : Customs Excise and Service Tax Appellate Tribunal CESTAT Delhi

Decided On : May-06-1994

Reported in : (1994)LC373Tri(Delhi)

Appellant : Mohit Thakore

Respondent : Collector of Customs

Judgement :

1. This is an Appeal against the Order-in-Original No. 2/MS/93 dated 17-8-1993 passed by the Collector of Customs (J), New Delhi.
2. Learned Advocate stated that the Appellant is a Canadian Passport Holder, NRI. He had initially come to India for getting married and was on a re-visit. At this time he had brought with him two kgs. of gold as baggage in view of liberalisation announced by the Government.
3. However, he handed over this gold and the amount of duty payable to his co-passenger who had accordingly deposited the same.
4. Learned Collector, has however, confiscated the gold and imposed a penalty on a technical ground that his present visit was within six months of the earlier one.
5. It was his submission that the Collector has referred only to Customs Notification No. 117/92 and not taken into account the Notification No. FERA 111/92 referred to in the Show Cause Notice. This notification grants general permission to import gold upto 5 kgs both to the Indian Nationals and those of

Indian origin residing abroad and imposes the condition of six months time gap only in respect of Indian nationals visiting abroad and not in respect of NRI visiting India.

Hence, in view of the fact that it is not in dispute that the duty has been paid on the said gold, although through a co-passenger, this appeal may be accepted.

6. Elaborating his arguments, the learned Counsel further emphasised that apart from notification No. FERA/111/92-RB, dated 29th Feb. 1992, we have also to take into account RBI Circular No. 15 dated March 30,1992. This circular makes it clear that the limitation of six months period is applicable only in case of passengers who were normally resident in India but were on visit abroad i.e. in only the case of such passengers that there should be a gap of minimum six months time between their visits. This restriction does not apply to passengers who were non-resident in India and were normally residing abroad. Hence, the fact that the appellant had come back to India within six months was immaterial. In the circumstances there was no violation of FERA and the fact that the declaration was not made personally by him was only a technical violation. As the purpose of declaration had been served and duty had been paid in foreign currency as required, he would request for a very lenient view in this regard.

7. Ld. JCDR stated that in addition to Notification No. FERA/111/92-RB, dated 29th Feb. 1992, we have also to look at the Customs Notification No. 117/92, dated 1-3-1992 issued under Section 25 CA 62 and the Import Trade Control Order No. 83/90-93, dated 29-2-1992 issued under Section 3 of Import Trade (Control) Act, 1947.

8. It was also his contention that in any case Notification No.FERA/111/92 must prevail over RBI Circular No. 15 of March 13,1992 which is only in the nature of an executive clarification. He emphasised that Notification No. FERA/111/92 read with aforesaid Customs Notification and Import Trade Control Order makes it clear that passengers of Indian origin or holders of Indian Passport could import gold within permissible limit without licence, subject to payment of duty in foreign currency only if they had stayed abroad for not less than six months. In the instant case, since the second visit of the Appellant is admittedly within six months,

importation was not legal and proper. Further more, admittedly the gold was not declared by the Appellant himself and such a non-declaration was a violation of the Customs Act itself. It is noteworthy that notification No. FERA/111/92 is in respect of persons of Indian origin irrespective of the fact whether they were NRI's or not i.e. it provides that in the case of a person resident outside India, the import of gold upto 5 kg is permissible on his visit to India or return to India after a stay of at least six months abroad provided he pays the import duty in foreign exchange.

9. Ld. Counsel reiterated that there was no violation of FERA in view of the position clarified by RBI Circular No. 15. Further in view of the payment of duty, it could at best be considered a case of technical breach only and therefore, a lenient view was required in the above circumstances.

10. We have considered the above submissions. We observe that Ld.

JCDR's argument that the FERA Notification No. 111/92, dated 29-2-1992 has to be read with Customs Notification No. 117/92, dated 1-3-1992 and I.T.C. Order No. 83/90-93, dated 29-2-1992, along with other relevant provisions of the Customs Act in order to comprehend the situation is correct.

11. At the same time, the Id. Advocate is correct in pointing out that the RBI Circular No. 15, dated 30-3-1992 cannot be ignored and has to be simultaneously kept in view.

12. A perusal of the above provisions show that first and foremost a passenger has been allowed to import gold as baggage subject to the limitations and conditions provided in the above notifications and Section 77 CA, 1962 casts the duty of making a declaration on the owner of the baggage in the following words "77. Declaration by owner of baggage - The owner of any baggage shall, for the purpose of clearing it, make a declaration of its contents to the proper officer." Therefore, in as much as the appellant did not make a declaration himself, there was violation of Section 77 CA, 1962.

13. In so far as the question of the conditions of the notifications are concerned, the Customs Notification grants partial exemption from duty subject to fulfilment of

the conditions mentioned therein to 'passenger of Indian origin or a person holding a valid passport issued under the Passport Act, 1967 as baggage' provided that 'such passenger is coming to India after a period of not less than six months of stay abroad.' In other words this notification does not make any distinction between non-resident Indians and Indians visiting abroad.

14. Similarly, the Import Trade Control Order No. 83/90-93 does not make any such distinction and exempts the import of gold (as baggage) from licensing restrictions subject to fulfilment of the conditions which are the same as above i.e. it also does not make any distinction between NRI and others in-view of the words "gold will be allowed to be imported as part of baggage by passengers of Indian origin or a passenger holding a valid passport...". i.e. it also does not make any distinction between NRI and others.

15. In so far as FERA Notification No. 111/92 is concerned, this Notification also grants permission (subject to conditions) to 'a passenger being a person of Indian nationality or origin as part of his baggage while coming to India subject to the condition that-such person is resident outside India or is coming to India after having stayed outside India continuously for a period of not less than six months immediately preceding his coming to India, provided that in the case of a person resident outside India he has not pursuant to the permission grant herein, brought gold within the preceding six months. This notification covers persons of Indian nationality as well as Indian origin and puts the condition of six months time gap in the case of Indian visiting abroad as well as NRI as evident from the repetition of the clause/words "persons resident outside India" in the proviso as well.

16. In other words, this provision is in harmony with the Customs and the ITC Notifications. A problem is, however, created by RBI Circular No. 15, dated 13-3-1992 which mentions that 'while in the case of non-resident the general permission is available once in six months, in the case of others the general permission is available provided their stay outside India preceding their coming has not been less than six months i.e. this circular distinguishes between NRI and others and indicate time gap of six months only in the case of latter.

17. Learned JCDR is of course right in stating that normally a section of the Act or a Rule or a Gazette Notification issued under the Act or the Rules must take precedence over an executive instruction or a circular. But in this case the circular has been issued under Section 73(3) of FERA, 1973. It has been addressed to all authorised dealers in Foreign Exchange and indicates that the amendment to the Exchange Control Manual will be revised in due course and emphasises that contravention or non-observance will be subject to penalties under the Act. Therefore, this circular cannot be lightly brushed aside as a mere execution instruction and has to be taken into account, although on the face of it, this circular does not seem to be in harmony with the FERA notification No. III /92 read with Customs Notification No. 117/92 and I.T.C. Order No. 84/90-93. Since the RBI Circular itself puts an interpretation on FERA notification and allows scope for an interpretation that the condition of six months time were not applicable in case of NRI, the appellant cannot be blamed or penalised if his act was in consonance with this circular. However, violation of I.T.C. A. and CA 62 have to be taken note of.

18. A question therefore, arises whether in the peculiar circumstances of this case, gold was rendered liable to confiscation and the appellant was rendered liable to penalty and if so was the appellant required to be visited with such severe punishment as has been inflicted by the Collector.

19. In this respect violation of Section 77 CA, 1962 cannot be taken lightly as, correct and proper declaration in accordance with this relevant sections was one of the basic premises of the Customs Act. The fact that duty had been paid by a co-passenger does not in any way affect the position that there was violation of Section 77 CA, 1962 and it could at best be pleaded as a mitigating factor.

20. At the same time, it is to be kept in view that from the admitted facts, it is evident that there was no intention on the part of the appellant to evade customs duty which was paid (although by a co-passenger on his behalf) and therefore the charge of evading Customs Duty falls through.

21. Since the duty was paid in foreign exchange, one of the essential conditions of the Customs, I.T.C. as well as FERA Notifications has been duly fulfilled and there

was no violation on that score.

22. Looking to the totality of facts and circumstances, we hold that the gold was liable to confiscation for violation of the Customs Act read with the Import Trade Control Act and order, but in the circumstances of the case absolute confiscation was not justified. We, therefore, allow it to be redeemed on payment of a fine of Rs. 25,000/- taking note of the fact that full duty has been admittedly paid. We also reduce the penalty to Rs. 5,000/-.

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