F. No. 372/04/B/2022-RA
F. No. 372/05/B/2022-RA

SPEED POST

F. No. 372/04/B/2022-RA
F. No. 372/05/B/2022-RA
GOVERNMENT OF INDIA
MINISTRY OF FINANCE
(DEPARTMENT OF REVENUE)

14, HUDCO VISHALA BLDG., B WING
6th FLOOR, BHIKAJI CAMA PLACE,
NEW DELHI-110 066

Date of Issue. 20/07/22

Order No. 236-237 /22-Cus dated 20-07-2022 of the Government of India passed by Shri Sandeep Prakash, Additional Secretary to the Government of India, under section 129DD of the Custom Act, 1962.

Subject : Revision Applications under Section 129 DD of the Customs Act 1962 against the Order-in-Appeal No. KOL/CUS/Airport/AKR/832-833/2021 dated 26.11.2021 passed by the Commissioner of Customs (Appeals), Kolkata.

Applicant : 1. Sh. Vashishth Kumar Singh, Howrah.
2. Sh. Anoop Shrinet, Gorakhpur.

Respondent : Commissioner of Customs (Airport & Admn), Kolkata.

ORDER

Two Revision Applications, bearing No. 372/04/B/2022-RA and 372/05/B/2022-RA both dated 08.02.2022, have been filed by Sh. Vashishth Kumar Singh (hereinafter referred to as the Applicant-1) and Sh. Anoop Shrinet (hereinafter referred to as the Applicant-2), respectively, against the Order-in-Appeal No. KOL/CUS/Airport/AKR/832-33/2021 dated 26.11.2021, passed by the Commissioner of Customs (Appeals), Kolkata. The Commissioner (Appeals) has upheld the order of the Additional Commissioner of Customs (Airport), Kolkata, bearing no. 83/2020/ADC dated 16.11.2020, ordering absolute confiscation of foreign currency amounting to Euro 113500 (equivalent to INR 85,18,175/), recovered from the Applicant-1 and Euro 115000 (equivalent to INR 86,30,750/-), recovered from the Applicant-2, collectively Euro 228500 (equivalent to INR 1,71,48,925/-), under Sections 113(d), 113(e) and 113(h) of the Customs Act, 1962. Besides penalty of Rs. 21,50,000/- under Section 114 of the Act, ibid was also imposed on each of the Applicants.

2. Brief facts of the case are that acting on spot intelligence, the officers of Customs Air Intelligence Unit, NSCBI Airport, Kolkata intercepted both the Applicants in the departure area of the said Airport, when they were proceeding towards the security hold area after completion of immigration formalities to depart for Bangkok from Kolkata, on 09.01.2018. The Applicants were asked specifically whether they were carrying any contraband or Indian/ Foreign currency beyond the permissible limit, to which they replied in negative. The Applicants were asked to put their leather shoes worn by them in the X-ray machine for scanning which indicated the presence of currency notes inside the cavity of the shoes and upon examination, resulted in recovery of currency notes amounting to Euro 113,500 (equivalent to INR 85,18,175/-), from the Applicant-1 and Euro 115,000 (equivalent to INR 86,30,750/-), from the Applicant-2. Thus, collectively Euro 228,500 (equivalent to INR 1,71,48,925/-) were recovered and seized under Section 110 of the Customs Act, 1962. On being enquired, no legal document or approval/ permission to carry the currency in terms of provisions of the Customs Act, 1962 read with the Foreign

Exchange Management Act, 1999 read with the Foreign Exchange Management (Export & Import of Currency) Regulation, 2000, as amended, was produced by the Applicants. The Applicant-1 in his statements dated 10.01.2018, 18.01.2018 (in judicial custody) and 08.03.2018 recorded under Section 108 of the Customs Act, 1962, stated that the recovered currency was given to him by a person named Altaf with the directions to hand over to a person named Deng in Bangkok; that he did the same kind of work previously on 28.12.2017; that he knew that such a huge amount cannot be exported without any legal documents and he accepted his mistake. The Applicant-2 in his statements dated 10.01.2018, 18.01.2018 (in judicial custody) and 08.03.2018, recorded under Section 108 of the Customs Act, 1962, stated that he was travelling with his maternal uncle Sh. Vashishth Kumar Singh; that Applicant-1 gave him sandals saying that USD 50000 was concealed in those sandals; that he was unaware that from where the recovered currency was taken by the Applicant-1 or to from whom, he received the same; that the currency would be handed over in Bangkok and he accepted his mistake which was done in greed for money.

3. The revision applications have been filed, mainly, on the grounds that the show cause notice dated 04.07.2018 was booked by Speed Post only on 11.07.2018, i.e., after expiry of six months from the date of seizure i.e. 10.01.2018; that since no notice in terms of clause (a) of Section 124 of the Customs Act, 1962, was given within a period of six months of the seizure of the foreign currency, as provided under Section 110(2), the seized foreign currency ought to have been returned to the Applicants; that the Commissioner (Appeals) has wrongly interpreted sub-section (3) of the Section 153 as the date of physical sending by registered post or speed post is the date which is relevant for calculating the six months period mentioned under Section 110(2); that the seized foreign currency is not prohibited goods; and that the judgment of the Hon'ble Supreme Court in the case of *Om Prakash Bhatia {2003 (105) ELT 423 (SC)}* is not applicable in the facts of the case. Accordingly, it has been prayed that the absolute confiscation of the foreign currency may be set aside and the same may be returned in terms of Section 110(2) as

the show cause notice dated 04.07.2018 was not given within six months from the date of seizure.

4. Personal hearing, in virtual mode, was held on 18.07.2022. Sh. Shovendu Banerjee, Advocate appeared for the Applicant and reiterated the contents of RA. He highlighted that:

(i) The SCNs in the present case were sent by post only on 11.07.2018. Therefore, the SCN was not issued within the period of six months as per Section 124. Hence the proceedings are void.

(ii) FC is not 'prohibited goods'. Hence the currency should be released on payment of redemption fine.

Sh. D.K. Ramuka, Supdt. supported the orders of lower authorities and submitted that the SCN was delivered by hand to Sh. Vashishth Kumar Singh on 05.07.2018 whereas the SCN was issued to Sh. Anoop Shrinet on 04.07.2018. He forwarded email copies of relevant documents on 18.07.2022. The comments of the Applicants in respect of the documents emailed by the department have been received on 19.07.2022.

5.1 The Government has carefully examined the matter. The preliminary issue raised by the Applicants is that the show cause notice, under Section 124, was not issued within the period of six months provided under Section 110(2). Hence, the proceedings are void and the goods should be released unconditionally.

5.2 Sub-section (2) of the Section 110 and Section 124 of the Customs Act, 1962 are reproduced as under:

> *"**110. Seizure of goods, documents and things.** – (2) Where any goods are seized under sub-section (1) and no notice in respect thereof is given under clause (a) of Section 124 within six months of the seizure of the goods, the goods shall be returned to the person from whose possession they were seized:*
>
> ***Provided** that the Principal Commissioner of Customs or Commissioner of Customs may, for reasons to be recorded in*

writing, extend such period to a further period not exceeding six months and inform the person from whom such goods were seized before the expiry of the period so specified:

***Provided** further that where any order for provisional release of the seized goods has been passed under section 110A, the specified period of six months shall not apply.*

***124. Issue of show cause notice before confiscation of goods etc. –** No order confiscating any goods or imposing any penalty on any person shall be made under this Chapter unless the owner of the goods or such person –*

(a) is given a notice in writing with the prior approval of the officer of Customs not below the rank of an Assistant Commissioner of Customs, informing him of the grounds on which it is proposed to confiscate the goods or to impose a penalty;

(b) is given an opportunity of making a representation in writing within such reasonable time as may be specified in the notice against the grounds of confiscation or imposition of penalty mentioned therein; and

(c) is given a reasonable opportunity of being heard in the matter:

***Provided** that the notice referred to in clause (a) and the representation referred to in clause (b) may, at the request of the person concerned be oral.*

***Provided** further that notwithstanding issue of notice under this section, the proper officer may issue a supplementary notice under such circumstances and in such manner as may be prescribed."*

There is no dispute that the seizure of foreign currency was made on 10.01.2018. It is also not a case where provisional release of seized goods was allowed under Section 110A. Therefore, in terms of sub-section (2) of Section 110, the show cause notice, under Section 124(a), was required to be given within a period of six months from 10.01.2018, i.e., by 10.07.2018. The Hon'ble Calcutta High Court, i.e., the jurisdictional High Court, has, in the case of Union of India vs. Kanti Tarafdar {1997 (91) ELT 51 (Cal.)}, held that in case a show cause notice is sent by registered post, the date of sending the notice would be the date of giving of notice. In the present case, it is the contention of the Applicant-1 & 2 that the notice was sent by speed post only on 11.07.2018 and was received by them on 12.07.2018 & 27.07.2018, respectively. The copies of the postal receipts indicating the date of sending as 11.07.2018 have been produced. However, it is seen from records that the SCN was delivered by hand to the Appliant-1, i.e., Sh. Vashishth Kumar Singh, on 05.07.2018. It is also the contention of the department that the SCN was issued on 04.07.2018 i.e., well within the period of six months. Thus, it is

evident that the SCN was given to Applicant-1 within the period of six months. However, in the case of Applicant-2, applying the ratio of Kanti Tarafdar (supra), the SCN appears to have been given beyond the period of six months.

5.3 The Hon'ble Supreme Court has, in the case of Harbans Lal vs. Collector of Central Excise & Customs {1993 (67) ELT 20 (SC)}, held that in case the show cause notice is not issued within the period of six months or after the expiry of extended period of six months, the owner or the person concerned is entitled to the possession of seized goods. However, in the present case, the matter has proceeded further and pursuant to the issue of show cause notice, the goods have been ordered to be absolutely confiscated and penalty has been imposed. As already held the notice was given to Applicant-1 within time but in case of Applicant-2 the contention that the seized currency should be released to him unconditionally is required to be examined further.

5.4 The Government observes that in the case of *Charan Das Malhotra {1983 (13) ELT 1477 (SC)}*, the Hon'ble Supreme Court has, in para-5 of the judgment, held that *"Section 124 provides that no order confiscating any goods or imposing any penalty on any person shall be made unless the owner of the goods or such person is given a notice in writing informing him of the grounds on which it is proposed to confiscate the goods or to impose a penalty. The section does not lay down any period, within which the notice required by it has to be given. The period laid down in Section 110(2) affects only the seizure of the goods and not the validity of the notice."* Similarly, in the case of Harbans Lal (supra), the Hon'ble Supreme Court has held that *"8. ..... In clear terms, it has thus been held that the period angle causing affectation under Section 110(2), would only pertain to the seizure of goods. The validity of notice under Section 124, for which no period has been laid within which it is required to be given is not affected. The seizure may have, after the expiry of six months or after the expiry of extended period of six months, entitled the owner or the person concerned the possession of the seized goods. This obviously is so because the matter at that stage is under investigation. On launching proceedings under Chapter XIV, Section 124 enjoins issuance of a notice for which no period has been fixed*

within which notice may be given. The difference is obvious because this goes as a step towards trial. The ratio of this Court afore-quoted in Charandas Malhotra's case, thus settles the question afore-posed and the answer is that these two Sections 110 and 124 are independent, distinct and exclusive of each other, resulting in the survival of the proceedings under Section 124, even though the seized goods might have to be returned, or stand returned, in terms of Section 110 of the Act, after the expiry of the permissible period of seizure." (emphasis supplied) Thus, it is clear that even though, in the present case, the show cause notice was apparently not given to the Appliant-2, within the period of six months from the date of seizure and, as such, seized goods ought to have been returned to the Applicant-2, the same does not in any way vitiate the proceedings for confiscation and imposition of penalty, in terms of Section 111 & 112, which were undertaken in pursuance of the show cause notice issued under Section 124(a).

5.5 The Government further observes that in a similar case where the show cause notice was given after the statutory period laid down under Section 110(2), the Hon'ble Supreme Court has upheld the position that after the order of confiscation had been passed, the question of return of goods in terms of Section 110(2) does not survive. The relevant extracts of the Apex Court's judgment in the case of *J.K. Bardolia Mills vs. M.L. Khunger, Deputy Collector {1994 (72) ELT 813 (SC)}* are reproduced as under:

> *"3. It was contended before the High Court that the goods in dispute were seized by the Customs authorities on May 29, 1969 and the notice as contemplated by Section 124(1)(a) read with Section 110 of the Act was given on December 19, 1969. The said notice, having been served on the appellant after the statutory period of six months, was invalid and illegal. It was further contended that the notice being invalid, the appellant was entitled to the return of the seized goods under Section 110(2) of the Act and further the Customs authorities were debarred from holding the adjudication proceedings in respect of the goods in dispute. In other words, it was contended that once the notice under Section 110(2) of the Act is invalid, no proceedings for confiscation of the seized goods can thereafter continue. The High Court, relying upon the judgment of this Court in Assistant Collector, Customs v. Charan Das Malhotra, 1983 (13) E.L.T. 1477 (SC) = AIR 1972 SC 689, held the show cause notice under Section 110(2) read with Section 124(1)(a) of the Act to be invalid but*

even then found the adjudication proceedings and the confiscation order to be valid on the following reasoning:

"The consequence is that the order passed by the Collector of Customs and Central Excise dated November 27, 1969 extending the period of six months provided in Section 110 by two months from November 26, 1969 is bad and illegal in view of the provisions of Section 110(2) of the Act. But the question then arises is whether the petitioner is entitled to return of the goods seized, once the order of confiscation is passed under Section 111 of the Act. So far as Section 110 is concerned it deals with the seizure of the goods and the return thereof. In other words, if the said provisions are not satisfied the goods seized have to be returned. Section 110 of the Act deals with the seizure of the goods. Section 124 of the Act deals with the confiscation and imposition of penalty. The provisions relating to the seizure of the goods and those relating to the confiscation of the goods or imposition of penalty stand on different footing. Section 124 of the Act does not lay down any period within which the notice required by it has to be given. The period laid down in Section 110(2) affects only the seizure of the goods and not the validity of the notice. In the present case after the proceedings of seizure, proceedings for confiscation and imposition of penalty were proceeded with and the proceedings ended in the order of confiscation and imposition of penalty vide order Ex. 'D'. As the goods have already been ordered to be confiscated the question of return of goods after the period of six months as mentioned in Section 110 of the Act cannot survive."

4. The High Court further noticed the provisions of Sections 110, 111, 112, and 124 of the Act and observed as under:

"These words are of widest import and they cannot be given a restricted meaning as is sought to be given by the learned advocate for the petitioner. There is nothing in these provisions to indicate that the goods in respect of which an order of confiscation or penalty can be passed under Sections 111 & 112 of the Act must be goods seized under the provisions of Section 110 of the Act. The power to seize the goods under Section 110 is distinct and separate from the power of confiscation and imposition of penalty as provided in Sections 111 & 112 of the Act. The later provisions are not absolutely dependent on the provisions of Section 110 of the Act."

5. Charan Das Malhotra's case (supra) was followed by this Court in Chaganlal Gainmull v. Collector of Central Excise & Ors., 1990 (Supp.) SCC 527. The view taken by the High Court is, therefore, unexceptionable and we uphold the same." (emphasis supplied).

In view of the above, the Government finds that, in the present case, though the seized goods ought to have been returned to the Applicant-2, as the show cause notice apparently was not given within the period of six months provided under Section 110(2),

the question of return of those goods at this stage when their confiscation has already been ordered, in pursuance of the show cause notice issued under Section 124(a), does not arise. The Government has taken an identical view in the earlier case of Sh. Bashir Ahmed, Kolkata, vide GOI Order No. 61/2022-Cus dated 23.02.2022.

6.1 On merits, the Government observes that, as per Regulation 5 of the Foreign Exchange Management (Export and Import of Currency) Regulations, 2000, as amended, "Except as otherwise provided in these regulations, no person shall, without the general or special permission of Reserve Bank, export or send out of India, or import or bring into India, any foreign currency." Further, in terms of Regulation 3(iii) of the Foreign Exchange Management (Possession and Retention of Foreign Currency) Regulations, 2000, as amended, any person resident in India could retain foreign currency not exceeding US $ 2000 or its equivalent in aggregate subject to the condition that such currency was acquired by him by way of payment for services outside India or as honorarium, gift, etc. In the present case, the Applicants have not produced any permission from the Reserve Bank of India for export of foreign currency found in their possession, as required in terms of Regulation 5 of FEMA Regulations, 2000 nor have they shown compliance with the Regulation 3 (iii), ibid.

6.2 In the case of *Sheikh Mohd. Omer vs. Collector of Customs, Calcutta & Ors [1971 AIR 293]*, the Hon'ble Supreme Court has held that for the purpose of Section 111(d) of the Customs Act, 1962, the term ""*Any prohibition" means every prohibition. In other words, all types of prohibition. Restriction is one type of prohibition*". The provisions of Section 113(d) are in pari-materia with the provisions of Sections 111(d). In the case of *Om Prakash Bhatia Vs. Commissioner of Customs, Delhi [2003 (155) ELT 423 (SC)]*, which is a case relating to export of goods, the Hon'ble Supreme Court has held that *"if the conditions prescribed for import or export of goods are not complied with, it would be considered to be prohibited goods".* In its judgment dated 17.06.2021, in the case of *UOI & Ors vs. M/s Raj Grow Impex LLP &Ors [2021-TIOL-187-SC-CUS-LB]*, the Hon'ble Supreme Court has followed the judgments in Sheikh Mohd. Omer (supra) and Om

Prakash Bhatia (supra) to hold *that "any restriction on import or export is to an extent a prohibition; and the expression "any prohibition" in Section 111(d) of the Customs Act includes restrictions."*

6.3 Thus, following the ratio of the aforesaid judgments there is no doubt that the subject goods are 'prohibited goods' as the conditions in respect of export thereof have not been complied. The contentions of the Applicants to the contrary are incorrect.

7. The original authority has denied the release of the seized foreign currency on redemption fine under Section 125 of Customs Act, 1962. The Government observes that, in terms of Section 125 of the Customs Act, 1962, the option to release 'prohibited goods', on redemption fine in lieu of confiscation, is discretionary, as held by the Hon'ble Supreme Court in the case of Garg Woollen Mills (P) Ltd vs. Additional Collector of Customs, New Delhi [1998 (104) E.L.T. 306 (S.C.)]. In the case of Raj Grow Impex (supra), the Hon'ble Supreme Court has held *"that when it comes to discretion, the exercise thereof has to be guided by law; has to be according to the rules of reason and justice; has to be based on relevant considerations."* Further, in the case of Commissioner of Customs (Air), Chennai-I Vs P. Sinnasamy {2016(344)ELT1154 (Mad.)}, the Hon'ble Madras High Court has held that *"non-consideration or non-application of mind to the relevant factors, renders exercise of discretion manifestly erroneous and it causes for judicial interference." Further, "when discretion is exercised under Section 125 of the Customs Act, 1962, ---------- the twin test to be satisfied is "relevance and reason"."* Hon'ble Delhi High Court has, in the case of Raju Sharma [2020 (372) ELT 249 (Del)], relying upon the judgment of Apex Court in Mangalam Organics Ltd. [2017 (349) ELT 369 (SC)], held that *"Exercise of discretion by judicial, or quasi-judicial authorities, merits interference only where the exercise is perverse or tainted by patent illegality, or is tainted by oblique motive."* In the present case, the Order of the original authority does not suffer from any of these vices. Thus, the Commissioner (Appeals) has correctly refused to interfere in the matter. The case laws relied upon by the Applicants are not applicable, in view of the dictum of Hon'ble Supreme Court and Hon'ble High Courts, as above.

8. In view of the above, the revision applications are rejected.

(Sandeep Prakash)
Additional Secretary to the Government of India

1. Sh. Vashishth Kumar Singh,
   S/o Sh. Satyanarayan Singh,
   R/o 44/5, Ashu Bose Lane,
   PO & PS Howrah, West Bengal-711101.

2. Sh. Anoop Shrinet,
   S/o Sh. Sanjay Singh,
   R/o Ward No. 10, Bansgaon,
   PO-Bansgaon, Gorakhpur-273403.

Order No. 236-237/22-Cus dated 20-07-2022

Copy to:

1. The Commissioner of Customs (Appeals), 3rd floor, Custom House, 15/1, Strand Road, Kolkata-700001.
2. The Commissioner of Customs (Airport & Admn), NSCBI Airport, Kolkata-700052.
3. Sh. Shovendu Banerjee, Advocate, 10 Old Post Office Street, Room No. 80D,3rd floor, Left Block, Kolkata-700001.
4. PA to AS(RA).
5. Guard file.
6. Spare Copy.

ATTESTED
20.07.22
Ashwani Kumar Lau
Superintendent (R.A. Unit)
Department of Revenue
Ministry of Finance
Room No. 609, 6th Floor, B-Wing
14, Hudco Vishala Building, New Delhi-110066