F. No. 372/14/B/2021-RA

'SPEED POST'

F. No. 372/14/B/2021-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 23/02/22

Order No. 61 /2022-Cus dated 23-02-2022 of the Government of India passed by Sh. Sandeep Prakash, Additional Secretary to the Government of India under Section 129DD of the Custom Act, 1962.

Subject : Revision Application filed under Section 129 DD of the Customs Act 1962 against the Order-in-Appeal No. KOL/CUS(AIRPORT)/AKR/221/2021 dated 02.03.2021 passed by the Commissioner of Customs (Appeals), Kolkata.

Applicant : Sh. Bashir Ahmed, Kolkata.

Respondent : The Commissioner of Customs, Airport & Admn., Kolkata.

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ORDER

A Revision Application No. 372/14/B/2021-RA dated 07.06.2021 has been filed by Sh. Bashir Ahmed, Kolkata (hereinafter referred to as the Applicant) against the Order-in-Appeal No. KOL/CUS(AIRPORT)/AKR/221/2021 dated 02.03.2021, passed by the Commissioner of Customs (Appeals), Kolkata. The Commissioner (Appeals) has upheld the Order-in-Original passed by the Additional Commissioner of Customs, AIU, NSCBI Airport, Kolkata, bearing no. 06/2020-ADC dated 16.01.2020, vide which foreign currency of UAE Dirhams 1,09,500 and Saudi Riyals 54,500, collectively equivalent to INR 29,08,325/-, recovered from the Applicant herein, has been absolutely confiscated under Section 113(d), 113(e) & 113(h) of the Customs Act, 1962. A penalty of Rs. 7,28,000/- has also been imposed on the Applicant.

2. Briefly stated, the Applicant was intercepted at the NSCBI Airport, Kolkata when he was departing for Dubai, on 01.06.2018. On being asked by the Customs officers, the Applicant replied that he was carrying UAE Dirhams 63,000 in his wallet. Thereafter, upon search, however, besides the currency kept in wallet the recovery of foreign currency notes UAE Dirhams 46,500 and Saudi Riyals 54,500/-, which were kept concealed under the hard bottom layer of his hand bag, was also made. Thus, a total UAE Dirhams 1,09,500 and Saudi Riyals 54,000, convertible value in INR of Rs. 29,08,325/-, were recovered. The Applicant could not produce any licit documents in support of legal acquisition, possession and/or legal exportation of the foreign currencies. Thus, the currency was seized under Section 110 of the Customs Act, 1962. In his statement dated 01.06.2018, recorded under Section 108 of the Customs Act, 1962, the Applicant, inter-alia, stated that he was intercepted by the Customs officers when he was departing for Dubai; that when asked by the Customs officers he declared carrying UAE Dirhams 63,000 only in his wallet but upon search of his hand bag, further amount of UAE Dirhams 46,500 and Saudi Riyals 54,500 were also recovered; and that he admitted the guilt of smuggling the foreign currency. Subsequently, a show cause notice dated 26.11.2018 was issued, which

resulted in the aforesaid Order-in-Original dated 16.01.2020, finally culminating into the impugned Order-in-Appeal.

3. The revision application has been filed, mainly, on the grounds that the show cause notice was sent to the post office only on 04.12.2018, i.e., after expiry of six months from the date of seizure i.e. 01.06.2018; 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 currencies, as provided under Section 110(2), the seized foreign currencies ought to have been returned to the Applicant; 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 there is no mandatory requirement of declaration by the international departing passenger under the Customs Law for the foreign currency carried by him; that, therefore, foreign currency is not liable to confiscation under Section 113(d) since the same cannot be considered to be smuggled goods; that the prohibition under FEMA has been rendered nugatory in the absence of a complimentary order or regulation under the Customs Act, 1962 requiring a departing passenger to declare the foreign currency carried by him; that Section 77 of the Customs Act is not applicable in the facts of this case; that the statement of the Applicant remains uncorroborated and, hence, it cannot be relied upon; that since the seized foreign currency is not liable to confiscation under Section 113 of the Customs Act, 1962, penalty cannot be also imposed under Section 114; 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 26.11.2018 was not given within six months from the date of seizure.

4. Personal hearing, in virtual mode, was held on 17.02.2022. Sh. Shovendu Banerjee, Advocate appeared for the Applicant and reiterated the contents of RA. He highlighted that the seizure in the instant case was made on 01.06.2018 whereas show cause notice was dispatched by Speed Post only on 04.12.2018, i.e., beyond the period of 06 months provided under Section 124 of the Customs Act, 1962. Hence, the seized goods should be unconditionally released. He will be submitting a legible copy of the Speed Post Movement by email immediately. Sh. Saurabh Das, Superintendent submitted that as per departmental records, the show cause notice was signed on 26.11.2018 and issued on 27.11.2018. However, Speed Post details are not immediately available. A copy of the postal booking receipt has been, subsequently, submitted by the Applicant.

5.1 The Government has carefully examined the matter. The preliminary issue raised by the Applicant is that the show cause notice, under Section 124, was not issued within the period of six months provided under Section 110(2) and, hence, 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 01.06.2018. 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 01.06.2018, i.e., by 01.12.2018. 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 that the notice was sent by speed post only on 04.12.2018 and was received by him on 05.12.2018. A copy of the postal receipt indicating the date of sending as 04.12.2018 has been produced. Thus, subject to verification, it would appear that the notice was sent after the expiry of period of six months provided under Section 110(2).

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. The question,

thus, arises whether in such a case the goods should be, at this stage, released undconditionally, as contended by the Applicant.

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."* Thus, it is clear that even though, in the present case, the show cause notice was apparently not given within the period of six months from the date of seizure and, as such, seized goods ought to have been returned to the Applicant,

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 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 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 where their confiscation has already been ordered in pursuance of the show cause notice issued under Section 124(a) does not arise.

6. The Applicant has contradicted the department's claim that he had failed to declare the entire quantum of foreign currency carried by him and has contended that the statement made by him to this effect cannot be relied upon in absence of corroborative evidence. The Government observes from the case records that the first statement of the Applicant herein was recorded under Section 108 of the Customs Act, 1962 on 01.06.2018 wherein the admission was made. He was, thereafter, arrested and released on bail. It is observed that even after he had been released on bail, the Applicant in his statements dated 25.07.2018 and 11.10.2018

admitted that his earlier statement dated 01.06.2018 was true. Further, the foreign currency was seized in the presence of independent witnesses and there is nothing on record that the Applicant herein, at any stage, challenged the seizure proceedings. In the case of *K.I. Pavunny {1997 (90) ELT 241 (SC)}*, the Hon'ble Supreme Court has held that the confessional statement of an accused if found voluntary, can form the sole basis for conviction. In the present case, the Applicant has admitted the case of misdeclaration not once but also in the two subsequent statements which were made after his arrest and release on bail, at which stage he, obviously, had the benefit of legal advise. Therefore, there is no doubt that these statements were voluntary. Even earlier in the case of *Surjeet Singh Chhabra vs. UOI {1997 (89) ELT 646 (SC)}*, the Apex Court has held that a statement can be relied upon even if it was subsequently retracted. In view of this, the present contention of the Applicant is not acceptable.

7. Another contention of the Applicant is that he was not required to declare the foreign currency in terms of Section 77 of the Customs Act, 1962. This contention is premised upon the assumption that 'baggage' is contemplated under the Customs Act only as the 'baggage' of incoming passenger. As per Section 2(3) of the Customs Act, 'baggage' is defined as under:

"(3) "baggage" includes unaccompanied baggage but does not include motor vehicles;

Thus, the definition of 'baggage' is inclusive in nature and, therefore, should be given widest amplitude. Further, there is nothing in the definition to indicate that it excludes the 'baggage' of outgoing passengers. The distinction sought to be made on the basis of Rules and Regulations made to cover the 'baggage' of incoming passengers cannot also survive as the parent statute does not support such a case. As such, this contention of the Applicant is also not acceptable.

8.1 The Government observes that as per Regulation 5 of the Foreign Exchange Management (Export and Import of Currency) Regulations, 2000, "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, 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 Respondent has not produced any permission from the Reserve Bank of India for export of foreign currency found in his possession, as required in terms of Regulation 5 of FEMA Regulations, 2000 nor has he shown compliance with the Regulation 3 (iii) ibid.

8.2 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."*

8.3 The Applicant has also contended that there is no prohibition under the Customs Act in respect of export of foreign currencies and, therefore, the prohibition

under FEMA has been rendered negatory. The Government observes that, as per Section 113(d) ibid any goods attempted to be exported, contrary to any prohibition under the Customs Act or any other law, are liable to confiscation. Thus, it is incorrect to contend that in absence of any complementary order or regulation under the Customs Act, the prohibition under FEMA has been rendered nugatory, since parent statute itself makes any goods that are attempted to be exported in contravention of any other law liable to confiscation.

8.4 Thus, following the ratio of the aforesaid judgments and in view of the discussions above, there is no doubt that the subject goods are 'prohibited goods'.

8.5 Being 'prohibited goods', the redemption thereof is discretionary, in terms of Section 125 of the Customs Act, 1962. The discretion exercised by the original authority can be interfered with only if it has not been exercised for relevant and reasonable considerations, as held by the Apex Court in Raj Grow Impex (supra). No grounds to this effect have been made out. Hence, absolute confiscation ordered by the original authority could not have been interfered with.

9. In view of the above, the revision application is rejected.

(Sandeep Prakash)
Additional Secretary to the Government of India

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Order No. 61 /2022-Cus dated 23-02-2022

Copy to:

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

ATTESTED

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