F. No. 372/19/B/2020-RA

REGISTERED
SPEED POST

F. No. 372/19/B/2020-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 08/03/22

Order No. 79 /22-Cus dated 08-03- 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 Application filed, under section 129 DD of the Customs Act 1962, against the Order-in-Appeal No. KOL/CUS(AIRPORT)/AKR/571/2020 dated 09.09.2020 passed by the Commissioner of Customs (Appeals), Kolkata.

Applicant : Ms. Malsawmdawngkimi Ralte, Aizawl, Mizoram.

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

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ORDER

A Revision Application No. 372/19/B/2020-R.A. dated 02.12.2020 has been filed by Ms. Malsawmdawngkimi Ralte, Aizawl, Mizoram (hereinafter referred to as the Applicant) against the Order-in-Appeal No. KOL/CUS(AIRPORT)/AKR/571/2020 dated 09.09.2020 passed by the Commissioner of Customs (Appeals), Kolkata. The Commissioner (Appeals) has, vide impugned Order-in-Appeal, upheld the Order-in-Original No. 43/2019/AC dated 18.10.2019, passed by the Assistant Commissioner of Customs, AIU, Kolkata whereby foreign currency of USD 9600, equivalent to Rs. 6,99,840, recovered from the Applicant herein, has been ordered to be absolutely confiscated under Section 113(d) of the Customs Act, 1962. A penalty of Rs. 6,99,840/- has also been imposed on the Applicant herein under Section 114 of the Act, ibid, which has been maintained in appeal.

2. Briefly stated, the Applicant was intercepted by the Customs officers at NSCBI Airport, Kolkata while she was proceeding for security check to board a flight for Bangkok, on 17.10.2018. On being asked whether she was carrying any contraband or Indian/foreign currency beyond the permissible limit, the Applicant replied in negative. However, upon examination of her hand and checked-in-baggage, foreign currency of USD 9600 was recovered. The Applicant failed to produce any licit documents in support of legal acquisition, possession, and/or legal exportation of the currency recovered. In her statement dated 04.01.2019 tendered under Section 108 of the Customs Act, 1962, the Applicant claimed that the US dollars recovered from her were exchanged by her friends as her mother was seriously ill; that she did not have any exchange receipt; and that she did not declare the said currency before the Customs authorities. The foreign currency, which was detained on 17.10.2018, was consequently seized under Section 110 of the Customs Act, 1962, on 08.04.2019. Thereafter, a show cause notice dated 16.04.2019 was issued. Following the principles of natural justice, the original authority absolutely confiscated USD 9600 and imposed a penalty of Rs. 6,99,840/- on the Applicant herein. The appeal filed by the Applicant has been rejected by the Commissioner (Appeals), vide the impugned Order-in-Appeal.

3. The revision application has been filed, mainly, on the grounds that the show cause notice dated 16.04.2019 was received by the Applicant on 24.04.2019, i.e., after the expiry of the period of six months from the date of seizure, i.e., 17.10.2018; that as per Section 110(2) of the Customs Act, 1962, the show cause notice under clause (a) of Section 124 has to be given within six months of the seizure of the goods; that since in the present case the show cause notice was not given within the said period of six months, the foreign currency ought to have been returned to the Applicant herein; that the Commissioner (Appeals) has erred in not

following the judgments of the Hon'ble Delhi High Court in the case of *Purshottam Jajodia vs. DRI, New Delhi {2014 (307) ELT 837 (Del.)};* that USD 9600 recovered from her were duly accounted for and were not acquired/possessed from any unauthorized sources; and that USD 2600 were covered against four valid cash memos of purchase in the name of her co-passenger Ms. Pachuau Laltha. Accordingly, it has been prayed that the seized goods may be returned to the Applicant in terms of Section 110(2) of the Customs Act, 1962 with consequential relief.

4. Personal hearing in the matter was held, in virtual mode, on 04.03.2022. Sh. Jh. Ricky Lalrautfela, Advocate appeared for the Applicant and reiterated the contents of the RA. He highlighted that since the show cause notice was not given within a period of six months, as per Section 110(2) of the Customs Act, 1962, the seized goods should be released unconditionally. Sh. D.K. Ramuka, Superintendent supported the orders of the lower authorities.

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 17.10.2018. 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 17.10.2018, i.e., by 17.04.2019. The Commissioner (Appeals) has relied upon the judgment of Hon'ble Calcutta High Court, i.e., the jurisdictional High Court, in the case of *Union of India vs. Kanti Tarafdar {1997 (91) ELT 51 (Cal.)}*, to hold 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, admittedly, the notice was sent by speed post on 16.04.2019. Thus, following the ratio of Kanti Tarafdar (supra), it has to be held that the notice was given within a period of six months provided under Section 110(2).

5.3 The Applicant has heavily relied upon the judgment of Hon'ble Delhi High Court in the case of Purushottam Jajodia (supra) to assail reliance on Kanti Tarafdar case. The Government observes that, being the judgment of jurisdictional High Court, Commissioner (Appeals) was correct in following Kanti Tarafdar (supra). In any case, even if Purushottam Jajodia (supra) was to be followed and it was to be held that the notice was not given in time, for the reasons detailed hereinafter, the relief sought by the Applicant, i.e., the return of seized foreign currency, can still not be granted.

5.4 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.

5.5 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 if, in the present case, the show cause notice was 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).

5.6 The Government further observes that in a case where the show cause notice was given after the statutory time 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, even if, in the present case, it was to be held that the show cause notice was not given within the period of six months provided under Section 110(2), and, therefore, the seized goods ought to have been returned, 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.

6.1 On merits, 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 Applicant has not produced any permission from the Reserve Bank of India for export of foreign currency found in her possession, as required in terms of Regulation 5 of FEMA Regulations, 2000. In respect of Regulation 3 (iii) ibid only a bald assertion has been made that the amount was received as gifts and honorarium, without any details forthcoming in respect of the gifts/honorarium claimed to have been received, even at this stage. Further, the Applicant had, in her statement tendered under Section 108, never claimed that the currency was received by her as gifts and honorarium or that part of the currency belonged to a co-passenger. Thus, the present contention appears to be an afterthought. Further, 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. Even earlier in the case of *Surjeet Singh Chhabra vs. UOI {1997 (89) ELT 646 (SC)}*, the Apex Court had 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 and compliance with Regulation 3(iii) ibid is also not established.

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 and in view of the discussions above, there is no doubt that the subject goods are 'prohibited goods'.

6.4 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.

7. The Government finds that the penalty imposed on the Applicant is excessive, specifically as the foreign currency has been absolutely confiscated. The penalty is, accordingly, reduced to Rs. 1,75,000/-.

8. In view of the above, the impugned OIA is upheld, except to the extent of reduction in penalty, as indicated above, and the revision application is disposed of accordingly.

(Sandeep Prakash)
Additional Secretary to the Government of India

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Order No. 79 /22-Cus dated 08-03-2022

Copy to:

1. The Commissioner of Customs (Airport & Admn.), NSCBI Airport, Kolkata – 700052.
2. The Commissioner of Customs (Appeals), Customs House, 3rd Floor, 15/1, Strand Road, Kolkata – 700001.
3. Sh. Ricky Lalrautfela, Advocate & Sh. Barinder Singh, Customs Consultant, 'Anamika', 8, Mahanirvan Road, 4th Floor, Kolkata – 700029.
4. PA to AS(RA)
5. Guard File.
6. Spare Copy.

ATTESTED

(लक्ष्मी राघवन)
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नई दिल्ली / New Delhi