CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL
MUMBAI

WEST ZONAL BENCH

Customs Appeal No: 85837 of 2016

[Arising out of Order-in-Original No: SIIB(I)/INV-38/2014-15 ACC Part I dated 5th January 2006 passed by the Principal Commissioner of Customs (Import), Mumbai.]

Joit Kumar Jain … ***Appellant***
904 B Pratiksha Tower, RS Nimkar Marg, 9th Floor
Mumbai Central, Mumbai – 400 008

versus

Commissioner of Customs (Import) …***Respondent***
Air Cargo Complex, Sahar, Andheri (E)
Mumbai – 400099

APPEARANCE:

Shri Mihir Mehta, Advocate with Shri Mohit Rawal, Chartered Accountant for the appellant

Ms Trupti Chauhan, Assistant Commissioner (AR) for the respondent

CORAM:

HON'BLE MR C J MATHEW, MEMBER (TECHNICAL)
HON'BLE DR SUVENDU KUMAR PATI, MEMBER (JUDICIAL)

FINAL ORDER NO: A/88466/2018

DATE OF HEARING: 08/11/2018
DATE OF DECISION: 08/11/2018

PER: C J MATHEW

This appeal lies against order-in-original no. SIIB(I)/INV-38/2014-15 ACC Part I dated 5th January 2016 of Principal

Commissioner of Customs (Import) and pertains to goods imported against eight bills of entry that had been seized in January 2015 and which, in response to resort to judicial remedy, were ordered to be provisionally released for re-export subject to certain conditions. The appeal contests the imposition of disproportionately harsh conditions for release of disputed goods.

2. We have heard Learned Counsel for appellant and Learned Authorised Representative.

3. The goods that had been imported, *viz.*, 'micro SD cards', were found to be defective and incapable of being loaded with any software and, for that reason, subject to restriction prescribed in Hazardous Waste (Management Handling and Transboundary) Rules, 2008.

4. Learned Authorised Representative placed on record a report of the Principal Commissioner of Customs, Air Cargo Complex to the effect that goods remain uncleared.

5. Learned Counsel for the appellant contests the continuation of the seizure in view of the failure to issue show cause notice within the time specified in section 110(2) of the Customs Act, 1962 and relies upon instruction no. 1/2017-Cus dated 8th February 2017 of Central Board of Excise and Customs with particular reference to paragraph 5

therein. Reliance is placed on the decision of the Hon'ble High Court of Punjab and Haryana in *Akanksha Syntex (P) Ltd v. Union of India [2014 (300) ELT 49 (P&H)]*, in *Rama Overseas v. Union of India [2013 (293) ELT 669 P&H)]*), of the Hon'ble High Court of Delhi in *Jatin Ahuja v. Union of India [2013 (287) ELT 3 (Del.)]* and *Auto Creaters v. Union of India [2015 (325) ELT 49 (Del.)]* and of the Hon'ble High Court of Madras in *AS Enterprises v. Commissioner of Customs, Chennai [2016 (337) ELT 321 (Mad.)]*.

6. Learned Authorised Representative submits that the show cause notice has since been issued on 12th May 2017 and placed reliance on the decision of the Hon'ble High Court of Bombay in *Jayant Hansraj Shah v. Union of India [2008 (229) ELT 339 (Bom.)]* that

> *'10. Section 110 speaks of no notice being given under clause (a) of Section 124 within six months of the seizure or confiscation of the goods. The procedure for confiscation of the goods can be resorted to if the goods are not provisionally released. If the owner in terms of Section 110A applies for provisional release and an order is passed it can be said that the goods continue to be under seizure as the order under Section 110A is a quasi judicial order. Section 110(2) would not be operative. It is only in the case where no provisional order is passed for release of the seized goods and if no notice is issued under Section 124(a) for confiscation of the goods then only would Section 110(2) apply and the respondent would be bound to release the goods.*

> *Any other reading of the Section would mean that a person whose goods are seized would seek a provisional release of the goods, get an order of provisional release, allow the authorities to proceed to believe on that basis that such person seeks to release the goods provisionally and on the expiry of the period of six months if notice is not issued under Section 124(a) then contend that the terms for provisional release of the goods are no longer binding as the period of six months has expired and no notice has been served. The period of notice is only when the respondents seek to confiscate the goods. If there be a provisional release order it is not within the jurisdiction of the respondents to proceed to issue the notice under Section 124. At the highest they can proceed under Section 110(1A) by following the procedure set out therein. In our opinion, therefore, as procedure for confiscation could not have been initiated pursuant to the order of provisional release the contention urged by the petitioners that the goods should be released under Section 124(2) has to be rejected.'*

7. We find that, in the instant case, the seized goods were ordered to be provisionally released on certain conditions which, according to Learned Counsel for the appellant, are unduly harsh considering that the goods are not permitted to be cleared for home consumption. The offer of provisional release was, therefore, not taken advantage of and the goods continue to be under seizure. It is admitted that the show cause notice was issued on 12th May 2017 which is well beyond the extended period prescribed in section 110 of Customs Act, 1962. The operation of section 110(2) of Customs Act, 1962 does not stand in the way of procedure initiated by issue of the show cause notice nor

does it concern itself with the issue of a show cause notice at any time thereafter. It merely terminates the possession over the goods that is attendant upon seizure as explained by the Hon'ble High Court of Punjab and Haryana in *re Akanksha Syntex (P) Ltd*

> *'10. The object of enacting Section 110(2) of the Act is that the officer of the Customs department may not deprive the right to property for indefinite period to the person from whose possession the goods are seized under sub-section (1) thereof. Sub-section (2) strikes a balance between the Revenue's power of seizure and an individual's right to get the seized goods released by prescribing a limitation period of six months from the date of seizure if no show cause notice within that period has been issued under Section 124(a) for confiscation of the goods. Proviso to Section 110(2) provides for extended period of limitation to validate the detention of the goods for another period of six months on grant of extension by the Commissioner of Customs. Section 110(2) of the Act nowhere envisages the period of limitation for issuing show cause notice. The Hon'ble Apex Court in Chaganlal Gainmull v. Collector of Central Excise, 1999 (109) E.L.T. 21 (S.C.) had noted as under :-*
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> > *"3. It appears to us that the consequence that flows from the failure to issue a show cause notice under Section 124(a) within the period of six months is limited to what is envisaged in sub-section (2) namely that the goods shall be returned to the person from whose possession they were seized. Section 110(2), does not prescribe a period of limitation within which a show cause notice is to be issued. But if no action by way of issue of a show cause notice is initiated under Section 124(a) within the period of six months, stipulated by Section 110(2) the effect would be that the person from whom the goods were seized would become entitled to their return.*
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> > *4. The view that commended itself to the Division Bench*

of the High Court is supported by the following observation of this Court in Assistant Collector of Customs v. Charan Das Malhotra - 1983 (13) E.L.T. 1477 (S.C.) :-

> *'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.' (Emphasis supplied)*

5. The delay beyond six months in the issue of the show cause notice goes to and affects the power to detain the seized goods beyond six months and does not denude the adjudicating authority of the power to initiate proceedings even thereafter."'

8. The decision of the Hon'ble High Court of Punjab and Haryana has also drawn upon the facts and circumstances in which the Hon'ble High Court of Bombay had rendered the decision in *re Jayant Hansraj Shah,* a decision relied upon by the Learned Authorised Representative. In that case, the provisional assessment had been ordered but the option had not been exercised and, on expiry of six months, the claim of the importer that the option itself had ceased was held to be untenable; at no stage were the condition of provisional release a matter of grievance. In the present proceedings the goods were imported in January 2015 and seized on 20th February 2015. Release sought for on 10th March 2015 was responded to only on 5th January 2016 after intervention of the Hon'ble High Court of Bombay. Hence, as on the date on which the period for issue of show cause notice stood extended, *i.e.* 6th August 2015, no order of

provisional release had been issued. The order of 5th January 2016 for provisional release did not exist at the time of issue of notice for extension of the period contemplated in section 110 of Customs Act, 1962. Therefore, in these circumstances, reliance on the decision of the Hon'ble High Court of Bombay in *re Jayant Hansraj Shah* may not be of assistance to Revenue. It is seen that the notice for extension time for issue of show cause notice was issued on 3rd August 2015, and the detailed reply and response dated 5th August 2015 was considered and disposed off on 6th August, 2015 itself.

9. It is seen that the relief sought in appeal by the appellant is for unconditional release of the goods for the purpose of re-export. It is also seen from the communication of the Principal Commissioner of Customs (Import) addressed to the Learned Authorised Representative that a reference had been made to the Maharashtra Pollution Control Board for ascertaining the categorization of 'memory cards' as 'hazardous waste' but, despite reminders, no response was available even till April 2017. The letter of the Maharashtra Pollution Control Board dated 12th April 2017 cited in the show cause notice is surprisingly not referred to in the communication dated 18th April 2017. Though it is stated that the Pollution Control Board has recommended that the goods may be subject to destruction by recycling, the letter of the Maharashtra State Pollution Control Board is not appended as evidence. We are, in consequence, not in a position

to comprehend the circumstances in which a recommendation was offered by the Pollution Control Board. Considering the said recommendation which necessarily casts the responsibility for such destruction on the Government of India, it cannot but be appropriate for the plea of re-export to be an effective alternative without such burden.

10. Accordingly, we set aside the conditions for release of the goods and allow appeal to that extent. However, the appellant shall forthwith re-export the goods.

11. Appeal is accordingly disposed off.

(Pronounced in open court)

(C J Mathew)
Member (Technical)

(Dr. Suvendu Kumar Pati)
Member (Judicial)

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