

Provisions Relating to Illegal Import, Confiscation, Penalty and Allied Provisions

Question 1

Differentiate between power to search persons under section 100 and 101 of Customs Act 1962.

Answer

Section 100 sets out the provisions in respect of power to search suspected persons entering or leaving India etc. whereas, section 101 contains the provisions in respect of power to search suspected persons in certain other cases. Search under section 100 is conducted by the proper officer of the customs, whereas search under section 101 is conducted by the officer of customs empowered by the Commissioner of Customs.

A person can be searched under section 100 if the proper officer has reason to believe that any goods liable to confiscation or documents relating thereto are secreted in his possession. However, a person can be searched under section 101 only for **certain specified goods** which are liable to confiscation or documents relating thereto. The specified goods are gold, diamonds, manufactures of gold or diamonds, watches and any other notified goods.

Section 100 applies to only the persons specified therein e.g. any person in a customs area. However, for search under section 101, there is **no restriction regarding place of such person**.

Question 2

Mr. Vasu, the assessee, was summoned under section 108 of the Customs Act, 1962, to give his statement in an inquiry. He filed the application for anticipatory bail in the District and Sessions Court which was disposed on the ground of being premature. However, he later moved to the High Court, which granted him anticipatory bail with a direction to the authorities that he should not be arrested without giving a ten days prior notice to him. The Revenue contended that the order passed by the High Court was illegal and erroneous. Explain, with the help of a decided case law, if any, whether the stand taken by the Revenue is sustainable in law?

Answer

The stand taken by the Revenue is valid. A similar issue has been dealt by the Supreme Court in the case of **Union of India v. Padam Narain Aggarwal 2008 (231) ELT 397** wherein

the Apex Court has observed that the power to arrest by a Custom Officer under section 104 of the Customs Act, 1962 is statutory in character and cannot be interfered with.

Supreme Court pronounced that the direction to issue 10 days prior notice before arrest even in case of a non-bailable offence could not be said to be legal or in consonance with law owing to **two reasons**. **Firstly**, the **order** passed by the High Court was a **blanket** one and granted protection to respondents in respect of any non-bailable offence. **Secondly**, it **illegally obstructed, interfered and curtailed the authority** of Custom Officers from exercising statutory power of arresting a person said to have committed a non-bailable offence by imposing a condition of giving 10 days prior notice, a condition not warranted by law. Hence, the order of the High Court was set aside.

Therefore, in the given case, it can be concluded that the stand taken by the revenue is sustainable in law.

Question 3

Briefly explain how is seizure effected under section 110 of the Customs Act, 1962.

Answer

An Officer of Customs can **seize any goods**, if he has **reason to believe** that the same are liable to confiscation, under the Customs Act. However, if the goods are bulky, they can be kept in possession of the owner himself and a notice be served on him that he should not remove or in any way deal with the goods as per proviso to section 110(1) of Customs Act. The proper officer may also seize **any document or things** that may be relevant to any proceedings under the Customs Act. However, the person from whom these documents are seized is entitled to make copies of the same.

The person from whom the goods are seized is **issued a show cause notice**, usually within six months. If the notice is not issued within six months, the seized goods are returned to the person from whom they were seized. However, the Commissioner of Customs, on sufficient cause being shown, can extend the time period for issue of show cause notice, by a further period of six months.

If the seized goods are **perishable or hazardous in nature** or are **prone to depreciate** in value over time or there is constraint in storage space, the Government may notify such goods and the same can be **disposed off** before the conclusion of the proceedings.

Question 4

Examine, with the help of a decided case law, whether it is mandatory for the Revenue Officers to make available the copies of the seized documents to the person from whose custody such documents were seized.

Answer

The above mentioned issue came up for consideration before the Bombay High Court in case of *Manish Lalit Kumar Bavishi v. Addl. Dir. General, DRI 2011 (272) E.L.T. 42*. The High Court

12.3 Customs and Foreign Trade Policy

held that from the language of section 110(4), it was apparent that the Customs officers were mandatorily required to make available the copies asked for. It was the party concerned who had the choice of either asking for the document/seeking extract and not the officer.

If any document was seized during the course of any action by an officer and relatable to the provisions of the Customs Act, that officer was bound to make available copies of those documents. The denial by the Revenue to make the documents available was clearly an act without jurisdiction.

Question 5

Briefly write a note on whether an exporter who has been held guilty of exporting 'prohibited goods' is entitled to an option to pay fine in lieu of confiscation under section 125 of the Customs Act, 1962.

Answer

As per **section 125** of the Customs Act, 1962, whenever confiscation is ordered, the adjudicating officer **may** provide an option to the owner of the goods **to pay redemption fine in lieu of confiscation** if the importation or exportation of goods is prohibited. However, if importation or exportation of goods is not prohibited, the option to pay redemption fine **shall** be given to the owner of goods.

Therefore, an exporter guilty of exporting prohibited goods is **not entitled as such** to an option to pay fine in lieu of confiscation under section 125 of the Customs Act, 1962. It is at **the discretion of the adjudicating officer** to give or not to give such an option to the exporter guilty of exporting prohibited goods. However, the owner of the goods importing or exporting non-prohibited goods shall be entitled to such an option.

Question 6

When a ship on its arrival from Dubai was searched by the Customs Officers, they found 2,000 biscuits of gold kept concealed in the ceiling of one of the unoccupied cabin. The Chief Cook of the ship admitted the concealing of the gold. The Captain of the ship deposed in his statement that he alongwith Chief Engineer and Chief Officer had inspected the vessel for contraband goods and inspection did not reveal anything. No evidence was also found that Captain was involved in the smuggling of gold.

Discuss whether the ship is liable to confiscation under the Customs Act.

Answer

Section 115(2) of the Customs Act, 1962 *inter alia* provides that any conveyance used as a means of transport in the smuggling of any goods or in the carriage of any smuggled goods shall be liable to confiscation. However, if the owner of the conveyance proves that the conveyance was so used without the knowledge and connivance of the owner himself, his agent, and the person in charge of the conveyance, the conveyance shall not be liable to

confiscation. As per section 2(31)(a) of the Customs Act, in case of a vessel, the master of the vessel is the person-in-charge.

Since, in the problem there is no evidence that the Captain of the ship i.e., the master of the vessel had any knowledge about the smuggling of the gold or he had connived in the smuggling of gold, **the ship would not be liable to confiscation.**

In a similar situation, the Supreme Court has set aside the order of confiscation of a truck carrying forest produce in contravention of the provisions of the Forest Act as the authorities failed to establish that the owner of the truck had any knowledge about the truck being so used. [*Forest Conservator v. Sharad Ramachandar Kale 2000 (121) E.L.T. 14 (S.C.)*]

Question 7

A Customs Officer has issued an order for confiscation of goods. However, the owner of the goods alleges that the order is not valid as no show cause notice has been issued. Examine the situation with reference to section 124 of the Customs Act, 1962.

Answer

Section 124 of the Customs Act, 1962 provides that before confiscating goods or imposing any penalty on any person, a **show cause notice [SCN]** must be issued to the owner of goods giving grounds for confiscation or imposition of penalty and he should be given an opportunity to make representation and being heard. The show cause notice can be issued only with the prior approval of the officer of customs not below the rank of Assistant Commissioner of Customs.

The notice and the representation, at the request of the person concerned, can be oral.

Question 8

When is redemption fine imposed? Whether this fine under section 125 of the Customs Act, once paid, be claimed as refund, in case the importer decides to abandon the goods?

Answer

Section 125 of the Customs Act empowers a Customs Officer adjudging the confiscation to give an option to the owner of the goods or where such owner is not known, the person from whose possession or custody such goods have been seized to pay a fine as the said officer thinks fit, in lieu of confiscation of the imported goods. The provisions in this regard are as follows:

- (a) in case of prohibited goods, the proper officer **may** give an option to pay a fine in lieu of confiscation;
- (b) in case of other goods, the proper officer **shall** give an option of payment of fine, in lieu of confiscation;
- (c) the amount of such fine cannot exceed the market price of the goods confiscated less import duty chargeable (in the case of imported goods) thereon;

12.5 Customs and Foreign Trade Policy

- (d) in addition to the fine imposed, duty and charges would also be payable in respect of such goods.

The provisions of section 125 give the importer an option to either allow the goods to be confiscated or pay redemption fine in lieu of confiscation. Hence, **the redemption fine becomes liable only in lieu of confiscation.**

However, where the importer has abandoned the goods, the scope for payment of any fine in lieu of confiscation comes to an end. Hence, the redemption fine, if already paid shall be liable to be refunded. This view has been upheld by the Madras High Court in the case of **Purfina Chemicals Pvt. Ltd v CEGAT, Madras (2004) (167) E.L.T. 145 (Mad.)**

Question 9

Write a short note on "power to arrest" with reference to the Customs Act

Answer

Power to arrest: Section 104 of the Customs Act, 1962 empowers a proper officer (who is empowered by general or special order of Commissioner of Customs) to arrest any person in India or within Indian customs waters, if the official has **reason to believe that the person is guilty of an offence** punishable under section 132 or section 133 or section 135 or section 135A or section 136 of the Customs Act.

Such a person should be informed of the grounds of his arrest and taken to the nearest Magistrate immediately. The Customs Officer is vested with the powers of an Officer-in-charge of a police station for the purpose of releasing any person on bail or otherwise.

Question 10

M/s SRT Ltd. had imported certain goods and got them cleared for home consumption. Later the Customs Department found that the goods have been improperly imported and are liable for confiscation under section 111 of the Customs Act, 1962 even though the same are cleared and not available for the seizure. The Customs Department has imposed penalty under section 112A and redemption fine under section 125 of the Customs Act, 1962. Discuss with a brief note whether the penal action and redemption fine can be legally upheld in the facts of the case.

Answer

The High Court in the case of *CCus. (Imports) v. Finesse Creation Inc. 2009 (248) ELT 122 (Bom.)* has held that redemption fine can only be imposed when the goods are available and can be redeemed. The High Court has explained that if the goods are not available, they cannot be confiscated and consequently, cannot be redeemed. Once goods cannot be redeemed, redemption fine cannot be imposed.

Therefore, the imposition of redemption fine is not legally correct in the instant case.

Penalty under section 112 can be imposed *inter alia* when a person omits to do any act which would render such goods **liable for confiscation** under section 111. Therefore, penalty can be imposed in the given case.

Question 11

Importer BOPP Ltd. imported two consignments of ethyl alcohol which were allowed to be cleared for home consumption on execution of a bond undertaking to produce licence within a month. Since appellants failed to fulfill the obligation, proceedings were initiated which culminated in confiscation of the goods under Section 111(d) of the Customs Act, 1962 and imposition of penalty on the importer under Section 112(a) of Customs Act, 1962. Examine whether provisionally released goods can be confiscated and penalty imposed thereupon?

Answer

When goods are confiscated ownership of the goods vests in the Government. Therefore, if goods are not in possession of the importer or with Government, confiscation will have no meaning.

However, when goods have been provisionally released, confiscation would be possible since release is provisional and importer gets conditional possession. The Supreme Court in the case of **Weston Components Ltd. v. CC 2000 115 ELT 278** has also held that goods released under bond can be confiscated and redemption fine can be imposed. Thus, confiscation of goods imported by BOPP Ltd. is in consonance with the provisions of the Customs Act, 1962.

Penalty under section 112 can be imposed *inter alia* when a person omits to do any act which would render such goods liable for confiscation under section 111. Thus, penalty can also be imposed on BOPP Ltd. as the confiscation of goods is justifiable.

Question 12

On the package, received as a post parcel from abroad, contents are indicated as calculators valued at ₹ 1,000. However, when the parcel was opened, it was found to contain ten mobile phones valued at ₹ 2,50,000. A show cause notice has been issued to the importer proposing to confiscate the goods and impose penalty on the importer. Examine the legality of action proposed in terms of statutory provisions under Customs Act, 1962.

Answer

The proposed action is legal. Dutiable goods which are not included in the entry are liable to confiscation under section 111(l) of the Customs Act, 1962 and as per section 82, in the case of a post parcel, any label or declaration accompanying the goods which contains description, quantity and value is deemed to be an entry for import.

Therefore in this case, goods become liable to confiscation under section 111 (l) of Customs Act, 1962 since they are not covered by the entry for import. Penalty under section 112 can be imposed *inter alia* when a person omits to do any act which would render such goods liable to

12.7 Customs and Foreign Trade Policy

confiscation under section 111. Thus, penalty can also be imposed (as the confiscation is justifiable) unless importer is able to show that he was not responsible for import. Importer becomes liable to penalty under section 112(a) unless he is able to show that he was not responsible for import.

Question 13

Mr. Henry was the managing director of a company, which had set up a unit in the Cochin Export Processing Zone for manufacture of certain equipments for 100 percent export. On the basis of the relevant notifications, the company was entitled to import capital goods and claim benefit of duty exemption on proof of total export.

With the passage of time, the business of the company fell and it went into liquidation. In the mean while, the customs authorities confiscated the capital goods in terms of Section 111(o) of the Customs Act, 1962, and imposed penalty on the company. Penalty under section 112(a)(ii) was also imposed on Mr. Henry without stating any reasons as he was in control of the affairs of the company. This was done as the Assistant Commissioner of Customs found that neither the capital goods nor the raw materials and other goods were used in the production of goods for export in terms of the relevant notification.

Briefly discuss, with reference to case law, whether the show cause notice imposing penalty on Mr. Henry under section 112(a)(ii) is sustainable in law.

Answer

No, the show cause notice imposing penalty on Mr. Henry under section 112 of the Customs Act, 1962 is not sustainable in law. The facts of the given case are similar to case of **O.T. Enasu v. UOI 2011 (272) E.L.T. 51 (Ker.)**

The High Court stated that the non-observance of the conditions of import of the goods in question gives the jurisdiction to impose an order of confiscation in terms of Section 111(o) of the Act. However, while considering the question as to whether penalty has to be imposed on any person for any commission or omission, which has rendered the goods liable for confiscation under Section 111(o), it has to be decided as to whether the goods became liable for confiscation on account of any act of omission or commission attributable to the person in question. Merely because a person is the Managing Director of a company, he would not be fastened with penalty, unless it is shown that he had, by his commissions or omissions, led the goods to be liable for confiscation.

The High Court noted that under sub-clause (ii) of clause (a) of section 112, the liability to penalty is determined on the basis of duty sought to be evaded. Therefore, the jurisdictional fact to impose a penalty in terms of section 112(a)(ii) includes the essential ingredient that **“duty was sought to be evaded”**. The concept of evading involves a conscious exercise by the person who evades. Therefore, the process of “seeking to evade” essentially involves a mental element and the concept of the status “sought to be evaded” is arrived at only by a conscious attempt to evade. The High Court, therefore, inferred that unless it is established that a

person has, by his omissions or commissions, led to a situation where duty is sought to be evaded, there cannot be an imposition of penalty in terms of section 112(a)(ii) of the Act.

The High Court, therefore held that since penalty had been imposed on the managing director without stating any reasons and without any finding that he was guilty of omissions or commission and had "sought to evade duty", the same could not be upheld.

Question 14

M/s Fast Exporters had set up a unit in export processing zone. They imported machines without payment of duty under an exemption notification upon fulfillment of certain conditions as specified in the said notification. M/s Fast Exporters however could not comply with requirements of the said notification and consequently the goods were confiscated and penalty was imposed on the company. Penalty was also imposed on Mr. Rajesh, partner of the firm under section 112 of the Customs Act, 1962.

Discuss whether separate penalty under section 112 can be imposed on Mr. Rajesh when the same has already been imposed on the partnership firm, M/s Fast Exporters.

Answer

Yes, a show cause notice for imposition of penalty on a partner is sustainable in law even when a separate penalty is imposed on the partnership firm. The High Court, in case of *Textoplast Industries v. Additional Commissioner of Customs 2011 (272) E.L.T. 513 (Bom.)*, has enunciated the principle that a separate penalty under section 112 of the Customs Act can be imposed on the partners when the same has already been imposed on partnership firm. Deeming fiction in section 140(2) making Director, Manager, Secretary or other officer of company liable to penalty, would not be confined to criminal prosecution but extends to adjudication proceeding as well.

The High Court explained that had it been otherwise, it would have led to strange situation where, for criminal prosecution, partner as well as person in charge responsible for conduct of business of partnership firm would be liable whereas for adjudication purposes, a narrower construction had to be adopted. There was no reason to exclude penalty on partnership firm, particularly when it was consistent with overall scheme and object of the Act.

Applying the same principle to the instant case, it can be inferred that a penalty can be imposed on Mr. Rajesh also besides M/s Fast Exporters under section 112(a)(ii).

Question 15

M/s. Shree Ram Traders had imported certain goods and got them cleared for home consumption. Later, the Department found that the goods had been imported in contravention of the relevant law governing import & export of the goods as application at that point of time. Consequently, the goods were confiscated under section 111(d) of the Customs Act and a penalty under section 112 of the Act was levied.

You are required to examine the case and offer your views.

12.9 Customs and Foreign Trade Policy

Answer

The facts of the case are similar to the case of *Bussa Overseas & Properties P. Ltd. v C.L. Mahar, Asstt. C.C., Bombay 2004 (163) E.L.T. 304 (Bom.)* wherein the Bombay High Court observed that once goods are cleared for home consumption they cease to be imported goods as defined in section 2(25) of the Customs Act and as per section 111(d) only 'imported' goods could be confiscated. Hence, power to confiscate the goods, after their clearance for home consumption, could be exercised only in cases where the order of clearance is revised and cancelled.

Therefore, in the given case the confiscation of the goods by the Department is illegal.

Section 112 (a) provides that any person who in relation to any goods, does or omits to do any act which act or omission would render such goods liable to confiscation under section 111, or abets the doing or omission of such act, is liable to a penalty. The High Court held that the power to impose penalty could be exercised not only when the goods are available for confiscation but when such goods are liable to confiscation. The Court held that the expression 'liable to confiscation' clearly indicates that the power to impose penalty can be exercised even if the goods are not available for confiscation. The mere fact that the importers secured such clearance and disposed of the goods and thereafter goods are not available for confiscation cannot divest Customs Authorities of the powers to levy penalty under section 112 of the Act.

Following the judgment of the High Court, penalty levied by the Department in the given case is correct in law.

Note: This ruling has been maintained by the Supreme Court in *Asstt Collector v. Bussa Overseas & Properties P. Ltd. 2004(163) ELT A160 (SC)*.

Question 16

Two trucks are intercepted by the Customs Department. The officers of the Customs Department conduct search of the vehicle in the presence of witnesses and it is found that one of the trucks has a secret compartment and 175 Kgs. of heroine and 39 Kgs. of opium of foreign origin are concealed in that chamber. During the course of investigation, the statement of 'P', the registered owner of the vehicle, is taken under section 108 of the Customs Act and 15 witnesses are examined. However, 'P' completely denies his culpability in the crime. He contends that though the vehicle is registered in his name but he has sold the truck much before the contraband goods are recovered therefrom.

You are required to examine the situation with the help of case law, if any.

Answer

The facts of the case are similar to the case of *Balwinder Singh v. Asstt. Commissioner, Customs & Central Excise 2005 (181) E.L.T. 203 (S.C.)*. In this case, the Supreme Court

stated that the registered owner of the vehicle was convicted solely for the reason that he was the registered owner of the vehicle. There was no evidence to prove that he knowingly allowed any person to use the vehicle for any illegal purpose. There was also no evidence to prove the conspiracy set up by the prosecution. The Apex Court held that though the articles were recovered from the truck, there was no evidence to show that the appellant had any control over the vehicle nor was he in possession of those drugs. Therefore, the registered owner of the vehicle was acquitted of all charges framed against him.

In the given case also, there is no evidence against 'P', the registered owner of the vehicle, and thus he shall not be prosecuted.

Question 17

Pranjal had imported certain goods. Due to some technical problems he had to pay the redemption fine. Later on, he decides to abandon the goods. So, he claims the refund of redemption fine being paid by him. Is his claim tenable in law? Discuss.

Answer

The facts of the case are similar to that of *Purfin Chemicals Pvt. Ltd. v. CEGAT Madras 2004 (167) E.L.T. 145 (Mad.)*. The High Court, in this case, asserted that provisions of section 125 of the Customs Act give an option to the importer to either allow the goods to be confiscated or pay redemption fine in lieu of confiscation. Therefore, the redemption fine becomes leviable only in lieu of confiscation. The High Court observed that in this case the importer had abandoned the goods and thus, there remained no scope for confiscation of the same. Therefore, it was held by the High Court that the fine should be refunded.

Applying the ratio of this decision in the given case, it can be said that Pranjal can claim the refund of the redemption fine.

Question 18

Champalal & Co. had smuggled rough diamonds into the country clandestinely without payment of duty. The Department issued a notice to Champalal & Co. proposing confiscation of the diamonds under clause (d) of section 111 of the Customs Act, 1962 and imposing penalties on various persons concerned.

However, the said goods were unconditionally exempted from payment of import duty vide an exemption notification. So, Champalal & Co. claimed the benefit of the said exemption notification. The Department, however, refused to grant the benefit of exemption meant for imported goods to smuggled goods.

Do you think that Department's action is valid in law?

Answer

Yes, the Department's action is valid in law. The facts of the given case are similar to the case of *CCus. (Prev.), Mumbai v. M. Ambalal & Co. 2010 (260) E.L.T. 487 (SC)*, wherein the Apex

12.11 Customs and Foreign Trade Policy

Court held that the smuggled goods could not be considered as 'imported goods' for the purpose of benefit of the exemption notification. It opined that if the smuggled goods and imported goods were to be treated as the same, then there would have been no need for two different definitions under the Customs Act, 1962.

The Court observed that one of the principal functions of the Customs Act was to curb the ills of smuggling on the economy. Hence, it held that it would be contrary to the purpose of exemption notifications to give the benefit meant for imported goods to smuggled goods.

Exercise

1. *Discuss briefly the provisions in respect of mandatory penalty for short-levy or non-levy of duty in certain cases.*
2. *Explain the provisions in respect of confiscation of a conveyance under section 115 of the Customs Act, 1962.*
3. *Write a short note on provisional release of goods, documents and things seized pending adjudication.*
4. *Enumerate the penalties in respect of improper exportation of goods under section 114 of the Customs Act.*