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Date: 23.06.2025

CESTAT Bangalore- Personal Penalty on Co-noticees Cannot Be Recovered from Refund Sanctioned to Appellant

Background: Currency Seizure and Penalties

Appellant, while traveling from Bangalore airport, was found carrying undeclared foreign currency worth ₹29.37 lakhs. The currencies included:

- US\$ 100 notes (300 Nos.),
- Euro 100 (24 Nos.), Euro 50 (163 Nos.),
- Saudi Riyals 500 (22 Nos.).

On investigation, it was alleged that these currencies were handed over to him by two individuals - and were being smuggled in violation of the Customs Act, 1962, and FEMA, 1999.

Departmental Action

The Adjudicating Authority confiscated the currencies under Sections 113(d), 113(e), 113(h) of the Customs Act and imposed:

- ₹9,00,000 penalty on the appellant,
- ₹9,00,000 penalty each on Appellant' Friends, under Sections 114 and 114AA.

Refund and Dispute Arises

After the Order-in-Appeal No. 325/2021 partially favored the appellant by allowing redemption

- Paid the required redemption fine and penalty,
- Filed a refund claim for ₹29,05,597 (foreign currency equivalent),
- However, the refund sanctioning authority adjusted ₹18,00,000 (penalties imposed on co-noticees) from the appellant's eligible refund.

CESTAT's Key Observations

1. No Legal Basis for Deduction of Co-noticees' Penalties:

- Section 142 of the Customs Act permits recovery only from the defaulter himself, not from any other related party.
- The appellant cannot be treated as a defaulter for dues of others.

2. Distinction Between Penalty in rem vs. in personam:

- Penalty under Sections 111 & 113 (confiscation) is in rem (on goods).
- Penalty under Section 114 & 114AA is in personam (on individuals).
- Citing Union of India v. Mustafa & Najibai Trading Co. (1998) and D. Bhoormall (1974), the Tribunal reaffirmed that personal penalties are not transferable liabilities.

3. Kerala High Court's Precedent in Abdul Rahiman (2009):

- Customs cannot detain goods or refund to recover penalties from a third party.

Verdict

- The Tribunal set aside the deduction of ₹18 lakhs.
- Ordered the release of full refund to Appellant.
- Declared that personal penalties on co-noticees cannot be adjusted from the sanctioned refund of an appellant.

Legal Significance

This ruling reinforces a critical safeguard for litigants:

- No vicarious liability for personal penalties under the Customs Act.
- Refunds cannot be arbitrarily withheld to recover third-party dues.
- Upholds the integrity of appeal orders and principles of natural justice.

This Article has been written by Shri Ravi Shekhar Jha, Advocate Delhi High Court based on his interpretation of the law. He can be reached at his email id intelconsul@gmail.com or on his Mobile +91-9999005379.

Source: CESTAT Bangalore

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**CUSTOMS, EXCISE & SERVICE TAX APPELLATE
TRIBUNAL
BANGALORE**

REGIONAL BENCH - COURT NO. 1

Customs Appeal No. 20429 of 2023

(Arising out of Order-in-Appeal No.49/2023 dated 21.04.2023 passed by the Commissioner of Customs (Appeals), Bangalore.)

Afsar Ulla Shariff

S/o Shri Obedulla Shariff
No.16/4, 1st Floor, 1st Cross,
Chaluvadi Palya,
Bangalore – 560 053.

Appellant(s)

VERSUS

Commissioner of Customs

Airport and Air Cargo Complex Division
Menzies Aviation Bobba Air Cargo
Terminal
Devanahalli,
Bangalore – 560 300.

Respondent(s)

APPEARANCE:

Shri Shashwath S.P. Advocate for the Appellant.

Shri H. Jayathirtha, Authorised Representative for the Respondent.

**CORAM: HON'BLE MRS. R. BHAGYA DEVI, MEMBER
(TECHNICAL)**

Final Order No. 20183 /2024

DATE OF HEARING: 31.01.2024

DATE OF DECISION: 22.03.2024

PER : R. BHAGYA DEVI

Mr. Afsar Ulla Shariff (appellant), upon examination of his baggage it was found that in one of his bags US\$ 100 (300 Nos.), Euros 100 (24 Nos.) and Euros 50 (163 Nos.) and 500 Saudi Arabian Riyals (22 Nos.) were found all bundled together and wrapped with one hand written paper along with his personal affects, total valued at Indian Rs.29,37,702/-. On enquiry, the appellant informed that these currencies were given to him by Mr. Fazal. Since these currencies were smuggled out of India in violation of Customs Act, 1962 read with the

provisions of Foreign Exchange Management Act, (FEMA), 1999. The currencies were seized under Mahazar dated 13.1.2016. On verification of records, it was found that Mr. Fazal Akrami and Mr. Mohammed S. Bahadur had handed over these currencies to the appellant. Accordingly, notice was issued to the appellant and the other two individuals referred above.

2. Upon adjudication, the adjudicating authority vide Order-in-Original No.83/2016-17 dated 23.03.2017 held that the appellant had attempted to smuggle the foreign currency out of India by way of concealment and non-declaration to the customs, the seized foreign currency are liable for confiscation under Section 113(d), 113(e) and 113(h) of the Customs Act, 1962 read with Section 11 of the Foreign Trade Development Regulation Act, 1992 as well as Foreign Exchange Management (Export and Import of Currency) Regulations, 2000 as amended. Accordingly, foreign currencies were confiscated and a penalty of Rs.9,00,000/- was imposed on the appellant under Section 114 of the Customs Act, 1962 along with penalty of Rs.6,00,000/- under Section 114AA of the Customs Act, 1962. The original authority also held that Mr. Fazal Akrami and Mr. Mohammed S. Bahadur who handed over the foreign currencies were liable for penalty under Section 114 of the Customs Act, 1962 for conspiring, aiding and abetting in smuggling the said currencies out of India and accordingly, penalty of Rs.9,00,000/- each was imposed on them. The appellant filed an appeal against the above order before the Commissioner (A). The Commissioner (A) vide Order-in-Appeal No.325/2021 dated 26.08.2021 held that the issue of absolute confiscation of foreign currency is settled and is no longer *res integra* and accordingly, he allowed the appellant to redeem the seized foreign currency on payment of redemption fine of Rs.7,35,000/- and a penalty of Rs.1,46,885/-.

3. Consequent to the Order-in-Appeal No.325/2021 dated 26.08.2021 of the Commissioner (Appeals), the appellant

paid the redemption fine and the penalty and filed a refund claim dated 27.10.2021 before the original authority.

3.1 The original authority while processing the refund claim sanctioned an amount of Rs.29,05,597/- after adjusting an amount of Rs.29,350/- towards 1% bank charges and rejecting an amount of Rs.2,755/-. However, at para (iv) of the order portion, it is stated that he has adjusted the penalty amount of Rs.9,00,000/- each imposed on Mr. Fazal Akrami and Mr. Mohammed S. Bahadur from the amount sanctioned to the appellant. Further the original authority has stated that after observing the pre-audit observation which stated the arrears arising out of Order-in-Original No.83/2016-17 dated 23.03.2017 against the other two notices, penalty of Rs.9,00,000/- imposed on Mr. Fazal Akrami and Mr. Mohammed S. Bahadur to be recovered from refund sanctioned. Against this Order-in-Original, the appellant filed an appeal before the Commissioner (A). The Commissioner (A) vide his Order-in-Original No.49/2023 dated 21.4.2023 referring to Section 142 of the Customs Act, with regard to recovery of sums due to government holds that since all the three persons have admittedly involved in the illegal act of smuggling foreign currency, thereby contravening the provisions of Section 113 of Customs Act, 1962 and Section 11 of Foreign Trade Development Regulation Act, 1992; there can be no illegality in the action taken by the refund sanctioning authority for making such deduction from the eligible refund amount of the appellant. Accordingly, he dismisses the appeal and the appellant is in appeal before us against the above order.

4. The learned counsel for the appellants states that the refund was consequent to the Order-in-Appeal No.325/2021 dated 26.08.2021 which is unconditional and has not ordered or directed for any appropriation. The department having accepted this order, it has attained finality. It is further submitted that the impugned order has overlooked the provisions of Section 142 of the Customs Act, 1962 as the personal penalties on the other

co-noticees cannot be recovered under Section 142 of the Customs Act, 1962. He relied on the following decisions to state the personal penalties cannot be recovered from him for the reasons stated in following decisions of the Hon'ble Supreme Court.

- Union of India and another vs. Mustafa & Najibai Trading Co. and others: (1998) 6 SCC 79
- Sewapujanrai Indrasanrai Ltd. vs. Collector of Customs and others: AIR (1958) SC 845
- Collector of Customs, Madras and others vs. D. Bhoormall: (1974) 2 (SCC) 544

5. The learned Authorised Representative for the Revenue reiterated the findings of the lower authorities.

6. Heard both sides. In the first round of litigation the original authority clearly held that the appellant had attempted to smuggle the foreign currencies out of India by way of concealment and on account of non-declaration to the customs, seized the foreign currency and levied penalty on the appellant. Personal penalties under Section 114 of the Customs Act, 1962 were levied on Shri Fazal and Shri Mohammad for conspiring, aiding and abetting in smuggling the said foreign currency out of India. On appeal by the appellant, absolute confiscation was set aside by the Commissioner (Appeals) on payment of redemption fine and penalty and directed the respondents to release the confiscated foreign currency to the appellant on payment of the above dues. Accordingly, refund claim was filed by the appellant after payment of the redemption fine and the penalty as per the above order which was accepted by the Revenue.

7. The original authority consequent to the Order-in-Appeal No.325/2021 dated 26.08.2021 sanctioned the refund of Rs.29,05,597/- after adjusting 1% bank charges and rejecting ₹2,755 but the order mentions "I adjust penalty of Rs.9,00,000/- imposed on Mr. Fazal Akrami and Rs.9,00,000/- imposed on Mr.

Mohammed S. Bahadur” without any cogent reasons for the so-called adjustments of the penalties imposed on the co-noticees. On appeal filed by the appellant, the Commissioner (Appeals) upholds the order of the original authority justifying the deductions of the personal penalties of the co-noticees under Section 142 of the Customs Act, 1962.

8. First of all, I find no reasoning provided by the original authority for the adjustment of the personal penalties imposed on the co-noticees from the amount to be refunded to the appellant. Secondly, the Commissioner (Appeals)’s justification of the above recoveries under Section 142 is beyond the scope of the Order-in-Original. However, one needs to examine whether Section 142 of the Customs Act 1962 allows recovery of personal penalties from the refund amount sanctioned to the appellant.

Section 142 (a) of the Customs Act 1962 reads:

SECTION 142. Recovery of sums due to Government. — (1) [Where any sum payable by any person] under this Act [including the amount required to be paid to the credit of the Central Government under section 28B] is not paid, -

(a) the proper officer may deduct or may require any other officer of customs to deduct the amount so payable from any money owing to such person which may be under the control of the proper officer or such other officer of customs; or

(b) the [Assistant Commissioner of Customs or Deputy Commissioner of Customs] may recover or may require any other officer of customs to recover the amount so payable by detaining and selling any goods belonging to such person which are under the control of the [Assistant Commissioner of Customs or Deputy Commissioner of Customs] or such other officer of customs;

Section 142 allows to recover the amounts that is due from the appellant from any money that is payable to him provided he is a defaulter but in the present case, the personal penalties of the co-noticees are being recovered as dues deeming the appellant as a defaulter which is beyond the scope of Section 142 of the customs Act 1962.

9. As rightly relied upon by the appellant the decision of the Hon’ble Supreme Court in the case of **Collector of Customs Madras and others vs. D Bhoormall** (supra) held that:

"33.It will be sufficient to reiterate that the penalty of confiscation is a penalty *in rem* which is enforced against the goods and the second kind of penalty is one *in personam* which is enforced against the person concerned in the smuggling of the goods."

10. So also in the case of **Union of India & Another vs. Mustafa & Najibai Trading Co.** (supra), the Supreme Court observed that:

"34. This distinction between the nature of the two penalties namely penalty *in rem* and penalty *in personam* has been maintained in the Act. The provisions regarding confiscation of goods contained in section 111 and 113 of the Act is a penalty *in rem* which is enforced against the goods, while the personal penalty imposed under section 112 and other provisions of the Act are in the nature of penalty *in personam* which are enforced against the person concerned."

In view of the above, the penalties being penalty *in personam* against the individuals, same cannot be adjusted against the refund sanctioned to the appellant.

11. The Hon'ble High Court of Kerala in the case **E. Abdul Rahiman Versus Union of India 2009 (235) E.L.T. 227 (Ker.)** dated on 18-12-2007 observed as follows:

"A Toyota Land Cruiser Jeep imported by the petitioner from U.A.E. was confiscated by the Customs under Sections 111(d) and 111(m) of the Customs Act and was ordered to be released on payment of redemption fine and personal penalty as provided under Section 125 of the Customs Act. The operative portion of the final adjudication order is as follows : 'I order that the confiscated Toyota Land Cruiser Jeep shall be redeemed to the importer on payment of a fine of Rs. 1,00,000/- (Rupees one lakh only) under Section 125 of the Customs Act. Duty and other charges leviable shall be paid as per the requirements. I impose a penalty of Rs. 25,000/- (Rupees twenty five thousand only) on Shri Abdul Rahman and Shri Yahoo and Rs. 50,000/- (Rupees fifty thousand only) on Shri Abdul Nazar under Section 112(a) of the Customs Act, 1962.'

The petitioner has remitted the import duty, redemption fine, other charges and the personal penalty imposed on him. However, Shri Yahoo on whom a personal penalty of Rs. 25,000/- was levied under the above order, has not remitted the same. Consequently the Customs authorities refused to release the car to the petitioner. The petitioner has filed this O.P. for a declaration that penalty imposed on Mr. Yahoo cannot be recovered from the petitioner and consequently petitioner is entitled to release of the vehicle without payment of the penalty levied on Mr. Yahoo. The question to be considered is whether penalty levied on Mr. Yahoo could be recovered from the petitioner or whether the imported vehicle could be retained by the Customs for recovery of the personal penalty levied on Shri Yahoo. It is seen from the impugned order

Ext.P1 that separate penalty is levied on the importer namely, the petitioner and two other persons against whom proceedings for penalty was initiated under Section 112(a) of the Customs Act. The personal penalty levied against Shri Yahoo under Section 112(a) of the Customs Act is for helping the petitioner to commit the offence i.e. for abetment. The penalty so levied being personal cannot be recovered from the importer or any other person. Therefore, the petitioner is not personally liable for the penalty levied on Shri Yahoo and the amount also cannot be recovered from the petitioner. The next question to be considered is whether the vehicle imported by the petitioner could be detained by the Customs until personal penalty levied on Shri Yahoo is paid or recovered. This is permissible only if the statute creates charge for the personal penalty on the imported vehicle which is not there in the statute. Release of vehicle after confiscation is covered by Section 125 of the Act which gives an option to the importer to pay the fine levied in lieu of confiscation and the import duty and other charges. Petitioner has admittedly remitted the import duty, redemption fine, personal penalty and other charges for releasing the vehicle pursuant to order issued under Section 125 of the Act. The Supreme Court has considered the nature of penalty levied under various provisions of the Customs Act in the decision in Union of India v. Mustafa & Najibai Trading Co. - 1998 (101) E.L.T. 529 (S.C.) = (1998) 6 SCC 79 whereunder the court has held as follows : "This distinction between the nature of the two penalties, viz., penalty in rem and penalty in personam, has been maintained in the Act. The provision regarding confiscation of goods contained in Sections 111 and 113 of the Act is a penalty in rem which is enforced against the goods, while the personal penalties imposed under Section 112 and other provisions of the Act are in the nature of penalty in personam which are enforced against the person concerned." Since the penalty levied on Shri Yahoo under Section 112(a) is a personal penalty, it cannot be recovered against the importer or against the goods. The O.P. is therefore allowed declaring that the personal penalty imposed on Shri Yahoo vide Ext.P1 order cannot be recovered from the petitioner or against the vehicle imported by him. It would be open to the respondents to proceed for recovery against the defaulter personally in exercise of powers conferred under Section 142 of the Customs Act."

12. In view of the above, it is undoubtedly clear that personal penalty levied on the co-noticees cannot be recovered from the amount to be refunded to the appellant. I accordingly, set aside the impugned order and allow the appeal, with consequential relief, if any, as per law.

(Order pronounced in Open Court on 22.03.2024.)

**(R. BHAGYA DEVI)
MEMBER (TECHNICAL)**