

# Supreme Court: Duty cannot be demanded under Section 124 and Section 125 of Customs Act, 1962, when option to re-deem is not exercised by the assessee

Tax Alert  
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## **Fortis Hospital Ltd vs. Commissioner of Customs, Import<sup>1</sup>**

The Hon'ble Supreme Court held that when a show cause notice was issued under Section 124 of the Customs Act, 1962 ("the Act"), for imposing fine in *lieu* of confiscation and not any duty, the demand of duty in the final order of adjudication cannot sustain. Significantly, it was held that the tax department cannot levy or demand customs duty by relying upon Section 125(2), in the event that option provided therein (of payment of redemption fine and duty to redeem the confiscated goods) is not exercised by the assessee.

### **FACTS**

1. The appellant imported cardiac catheterization laboratory with its spares/ accessories and claimed exemption from payment of customs duty in terms of Notification No. 64/88-Cus dated 01.03.1998. The said Notification *inter alia* stipulated certain post importation conditions to be fulfilled by the importer – the Hon'ble Supreme observed these are "continuing obligations".
2. The revenue authorities issued a show cause notice under Section 124 of the Act, alleging that the appellant had failed to fulfil the post-importation conditions as stipulated in Notification No. 64/88-Cus. On this basis, the show cause notice proposed to confiscate the imported goods under Section 111(o), and also levy penalty on the appellant under Section 112 of the Act.
3. After replies were filed and personal hearing granted, the adjudicating officer issued the adjudicating order, in terms of which confiscation of the goods along with penalty imposed was confirmed. The order also gave the appellant the option to pay redemption fine. Importantly, the adjudication order confirmed demand of customs duty on the imported goods, owing to the wrongful claim of the exemption.
4. In appeal, the Central Excise and Service Tax Tribunal ("Tribunal") upheld the confiscation order and penalty demand. The Tribunal however set aside the duty demand on the basis that the notice was issued under Section 124 of the Act, which did not contemplate the imposition of customs duty. The Tribunal found favour in the appellant's submission that in terms of Section 125, option is given to the importer and if such an option is not exercised, no fine is payable and when no fine is payable, duty cannot be demanded by relying on the provisions of Section 125(2). Such an eventuality has not arisen in the present case since the appellant (assessee) had not exercised this option.
5. The Hon'ble Bombay High Court set aside the order of the Tribunal on the basis that, under Section 125(2) of the Act, the duty payable on the confiscated goods has to be paid on imposition of fine in *lieu* of confiscation and it is immaterial whether such option is exercised or not.

### **JUDGEMENT**

The Hon'ble Supreme Court set aside the order of the Hon'ble High Court and endorsed the view adopted by the Tribunal. The Hon'ble Court *inter-alia* held that:

1. Section 124 mandates issuance of the show cause notice before passing any order and contemplates two actions: first relating to confiscation of the goods and second, pertaining to imposition of penalty. Pertinently, this action does not deal with payment of import duty at all.
2. When such an action of imposition of duty demand was not contemplated in the show cause notice, which even otherwise could not be done while exercising the powers under Section 124 of the Act, in the final order, there could not have been any direction to pay the duty.
3. Section 125(2) would not apply in case where option to pay fine in lieu of confiscation is not exercised by the importer. Trigger point is the exercise of a positive option to pay the fine and redeem the confiscated goods. Only when this contingency is met, the duty becomes payable.
4. The stipulation contained in the adjudicating order was only contingent in nature, which contingency would have arisen only on exercising the option by the importer to pay fine in *lieu* of confiscation and to redeem the goods. When the Department chose to take action under Section 124, it should be alive of the situation that the noticee may not exercise the option and in such case, duty

<sup>1</sup> Civil Appeal No. 1094 of 2008 (the judgement was pronounced on 24<sup>th</sup> March, 2015)

would not be payable automatically.

5. The Department is not without any remedy. If the importer is found to be violative of conditions of Notification No. 64/88-Cus, show cause notice could always be given under the said notification on payment of duty, independent of the action which is permissible under Section 124 and Section 125. Further, under certain circumstances in the said notification, the importer may be asked to execute a bond as well and in those cases, action can be taken under the bond when the conditions are violated. The Department could have taken these independent actions *de hors* Section 124 of the Act, for payment of duty, simultaneously with the notice under Section 124 of the Act or by issuing composite notice for such an action.
6. The Hon'ble High Court was not correct in observing that it is immaterial whether option under Section 125(2) of the Act is exercised or not. In this context, its reliance on the decision of the Hon'ble Supreme Court in ***Commissioner of Customs (Import), Mumbai vs. Jagdish Cancer & Research Centre***<sup>2</sup> is mis-placed as the said judgement did not deal with the issue of whether sub-section (2) of Section 125 would not be applicable even when option to pay fine in lieu of confiscation is not exercised.

## ELP COMMENTS

Per this judgement, upon the receipt of the adjudicating order issued in consequence to a notice issued under Section 124 of the Act, in the event the assessee does not exercise the option to redeem its goods, duty cannot be demanded on the basis of the adjudicating order; the notice must therefore be issued by the Revenue Department under Section 28 to demand customs duty.

Basis the above decision, adjudication orders passed in pursuance to notices issued under Section 124 of the Act can be challenged if they confirm demand of customs duty, in the event the assessee does not exercise the option to redeem the confiscated goods. This challenge will not apply to composite show cause notices issued under Section 28 and Section 124 of the Act which, in recent times, has been the practice of the revenue department. Further, as also held in the above decision, the Tax Department always has the avenue to issue a separate show cause notice under Section 28 to raised demand of duty, subject to the provisions of limitation.

This judgement will have importance for importer-assessees facing import conditions similar to the facts and law dealt with in the above decision, especially healthcare industry, aircraft operators etc.

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<sup>2</sup> 2001 (6) SCC 483.