
(2010) 09 DEL CK 0281

In the Delhi High Court

Case No : Criminal Appeal 761 of 2010 and Criminal M.A. No. 8287 of 2010

Standard Chartered Bank

APPELLANT

Vs

Directorate of Enforcement

RESPONDENT

Date of Decision : 20-09-2010

Acts Referred:

Foreign Exchange (Amendment) Act, 1999 — Section 19

Foreign Exchange Regulation Act, 1973 — Section 49, 6(4), 6(5), 68, 73(3)

Citation : (2010) 172 DLT 547 : (2010) 104 SCL 159

Hon'ble Judges : S.N. Dhingra, J

Bench : Single Bench

Advocate : Sumit Bansal, Ateer Mathur and Manish Paliwal, for the Appellant;
Sugandha, for the Respondent

Final Decision : Allowed

Judgement

Shiv Narayan Dhingra, J.—Present appeal has been preferred by the appellant bank against order dated 14th May, 2010 passed by the Appellate Tribunal for Foreign Exchange upholding an order of the adjudicating authority dated 8th December, 2004, whereby a penalty of 2,00,000/- was imposed upon the appellant for contravention of the provisions of Section 6(4), 6(5), 73(3), 49 and 9(1)(e) of Foreign Exchange Regulation Act, 1973 read with Para 29(B).8(c) of Exchange Control Manual, 1987 (as amended).

2. A show cause notice was issued against the appellant along with other noticee because of accepting foreign exchange deposit in NRI account through a person other than the account holder in the year 1992-93, alleging:

And whereas it appears that the said Mr. S. Sivakumar, a person other than an authorized dealer in foreign exchange, without the previous general or special permission of the Reserve Bank of India, otherwise acquired foreign exchange equivalent to India Rupees 38,45,792 in India being the amount of foreign exchange found deposited in cash in the NRE A/c as mentioned above, from persons not being authorized dealers in foreign exchange.

3. Section 68 of the Foreign Exchange Regulation Act, 1973 (FERA) was made part of the notice which reads as under:

Where a person committing a contravention of any of the provisions of this Act or of any rule, direction or order made there under is a company, every person who, at the time the contravention was committed, was in charge of, and was responsible to, the company for the conduct of business of the company, shall be deemed to be guilty of the contravention and shall be liable to be proceeded against and punished accordingly.

Provided that nothing contained in this sub-section shall render any such person liable to punishment if he proves that the contravention took place without his knowledge that he exercised all due diligence to prevent such contravention.

4. After the notice, adjudicating officer conducted adjudication proceedings and imposed a penalty of 2,00,000/- on the appellant bank. In appeal, the Tribunal upheld the order of the adjudicating authority. The appellant is assailing the order of the appellate authority on the ground that it did not take into consideration the judgment passed by a Division Bench of this Court in *Standard Charter Bank v. Directorate of Enforcement* in WP(C) No. 7144 of 2002 delivered on 18th December, 2009 and another judgment of this Court in *Union of India v. Citi Bank*, passed by a Division Bench on 26th March, 2009 in similar matters. It is also submitted that the alleged irregularity was committed by the bank in the year 1992-93. The Show Cause Notice was issued by the department after about 10 years in 2002. The bank was not obliged to maintain records and was not having all the records with it to present its case. The rules regarding maintenance of records, framed by Reserve Bank of India, obliged banks to maintain records only of 8 previous years. Reliance was placed on the relevant Rules, i.e. The Banking Companies (Period of Preservation of Records) Rules, 1985, notified on 29th March, 1985, wherein maximum period for maintenance of records for all kinds of registers etc. was stated to be not less than 8 years immediately preceding the current calendar year.

5. Similar Show Cause Notices were issued to several banks and persons by the department and a number of Writ Petitions were filed before this Court to decide the issue "Whether Show Cause Notices were valid Show Cause Notices or not". A Single Bench of this Court in *Citi Bank v. Union of India and Anr.* in R.P. No. 213/2007 in WP(C) No. 1211/2005, decided on 16th January, 2009, observed that prior to 31st July, 1995, when Reserve Bank of India had issued a clarificatory circular, there was no clear-cut stipulation that deposits/credits could not be made in the NRE accounts of NRI account holders in the absence of the account holders themselves. For the first time it was expressly provided by the Reserve Bank of India that the deposits were to be made by NRIs in person. This Court, therefore, disposed of the Writ Petition on 19th April, 2007, and Review Petition was dismissed on 16th January, 2009. Against the order of Single Bench of this Court dated 19th April, 2009, an LPA was preferred, being L.P.A. No. 117 of 2009 *Union of India and Ors. v. Citi Bank, N.A.*, before the Division Bench. The

Division Bench considered the Show Cause Notice and the Circular/instructions issued by the Union of India in 1995 in respect of deposits of Foreign Exchange in NRIs accounts and also considered the provisions of Exchange Control Manual and came to conclusion that the Circular dated 31st July, 2005 advised foreign exchange dealers to strictly follow instructions given therein and made it clear that prior to the Circular there was no requirement clearly pointing out that deposits in NRI accounts could not be made by a person other than the NRI account holder themselves. Vide a judgment dated 18th December, 2009 in Civil Writ Petitions preferred by Standard Chartered Bank and Bank of America N.A., in respect of similar Show Cause Notices, a Division Bench of this Court made following observations:

13. Mr. Chandhiok also submitted that the circular dated 31.07.1995 was only a clarificatory circular and it only clarified something which was already there in paragraph 13B.22. Thus, according to him, the circular dated 31.07.1995 and the amendment introduced in paragraph 13B.22 did not make any difference and nothing new was added.

14. Mr. Chandhiok also argued and submitted that now that the show cause notices had culminated into adjudication orders, the petitioners, have the alternative remedy of filing appeals u/s 19 of the Foreign Exchange Amendment Act, 1999.

15. Insofar as the aforesaid two submissions made by Mr. Chandhiok are concerned, we are of the view that the Division Bench in Union of India and Ors. v. Citi Bank, N.A. (supra), had considered all aspects of the matter before it rendered its decision. Even at the sake of repetition, we may point out that the Division Bench specifically set out the provisions of the circular as well as the amended and unamended provisions of paragraph 13B.22 and then came to conclusion that it did. It is obvious that the said Division Bench did not regard the circular or the amendment as being merely clarificatory. We, therefore, feel that the issue stands entirely covered by the said Division Bench decision. With regard to the submission of alternative remedy, we feel that these writ petitions have been pending before this Court since 2002 and that by virtue of interim orders passed in these writ petitions, the show cause notices were permitted to be proceeded with and adjudication orders were allowed to be passed, however, this Court made it clear that the same would not be implemented. The logic behind this was obvious and, that is, the same were subject to any orders that would be passed in the present writ petitions. In view of the fact that we consider that the issue raised in these writ petitions stands covered by the decision of the Division Bench in Union of India and Ors. v. Citi Bank, N.A. (supra), we feel that no useful purpose would be served by relegating the petitioners to seek their alternative remedy of appeal u/s 90 of the FEMA, particularly, because, according to us, that would not, now, be an equally efficacious remedy. In view of the foregoing discussion, these writ petitions are allowed. The show cause notices and the consequent adjudication orders are set

aside. There shall be no order as to costs.

6. The Show Cause Notice served upon the present appellant is one of the several Show Cause Notices served by the Department upon the different Banks. In another Show Cause Notice of similar nature, the Adjudicating Authority passed an order that bank was not liable for penalty and penalty was imposed only on NRI while in the present case penalty was imposed on NRI as well as Bank.

7. It is not disputed that petitioner was not supposed to preserve records for more than 8 years and present Show Cause Notice was issued only after a period of about 10 years, the bank, therefore, could not make available records on certain deposits to the Adjudicating Authority. Moreover the Show Cause Notice was primarily issued because the bank had accepted deposit in NRI account from a person other than the NRI himself. In view of the judgment of this Court in above decisions given by the Division Bench of this Court, I consider that the Show Cause Notice and the consequent adjudication proceedings were not tenable and the liability of the bank to insist upon that only NRI should appear in person to make the deposits was not clear. This liability was clarified to the bank only in 1995 i.e. after impugned transaction.

I, therefore, accept this appeal. The order dated 14th May, 2010 of the Tribunal is set aside. No order as to costs.