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GOVERNMENT OF INDIA
MINISTRY OF FINANCE
(DEPARTMENT OF REVENUE)

8th Floor, World Trade Centre, Centre – I, Cuffe Parade,
Mumbai-400 005

F.No. 371/153-I, II & III/B/WZ/2022-RA / 180 Date of Issue : 03.01.2024

ORDER NO. 08-40/2024-CUS (WZ)/ASRA/MUMBAI DATED 28.01.2024 OF THE GOVERNMENT OF INDIA PASSED BY SHRI SHRAWAN KUMAR, PRINCIPAL COMMISSIONER & EX-OFFICIO ADDITIONAL SECRETARY TO THE GOVERNMENT OF INDIA, UNDER SECTION 129DD OF THE CUSTOMS ACT, 1962.

F.No. 371/153-I, II & III/B/WZ/2022-RA

Applicant No. 1 / (A1) : Ms. Diksha Matta,
Applicant No. 2 / (A2) : Shri. Rohit Panikar @ Guddu,
Applicant No. 3 / (A3) : Shri Chetbahadur Bist. }

.....**APPLICANTS.**

Respondent: Pr. Commissioner of Customs, CSMI Airport, Mumbai.

Subject : Revision Application filed, under Section 129DD of the Customs Act, 1962 against the Orders-in-Appeal No. MUM-CUSTOM-PAX-APP-1586/2021-22 dated 31.01.2022 issued on 03.02.2022 through F.No. S/49-1003/2020-Appeal passed by the Commissioner of Customs (Appeals), Mumbai - III.

ORDER

These three revision applications have been filed by (i) Ms. Diksha Matta, (ii) Shri. Rohit Panikar @ Guddu and (iii) Shri. Chetbahadur Bist [hereinafter referred to as the Applicants or alternately and more specifically as Applicant no. 1 (A1), Applicant no. 2 (A2) and Applicant no. 3 (A3), resp.], against the Orders-in-Appeal No. MUM-CUSTOM-PAX-APP-1586/2021-22 dated 31.01.2022 issued on 03.02.2022 through F.No. S/49-1003/2020-Appeal passed by the Commissioner of Customs (Appeals), Mumbai - III. Government notes the OIAs, OIOs and their submissions are common, hence the said 3 Revision Applications are being taken up together for a decision.

2(a). Brief facts of the case are that the applicant no was intercepted on 22.12.2018 by Customs Officers at CSMI Airport as she was about to depart to Dubai by SpiceJet Flight No. SC-13 / 22.12.2018. A1 had crossed the immigration. To the query put to her about the quantum of foreign currency carried by her, she had replied in the negative. On sustained interrogation, A1 admitted that she was carrying foreign currency which had been concealed in her body cavity. She voluntarily ejected two packets from which 46 nos of EURO in denomination of 500, totaling EURO 23000/-, equivalent to Rs. 18,12,400/-

2(b). In her statement recorded under Section 108 of the Customs Act, 1962, A1 admitted to knowledge, possession, concealment, carriage, non-declaration and recovery of the foreign currency from her; that she did not have any legal / valid purchase documents for the said foreign currency; that she was not the owner of the foreign currency; that the seized foreign currency had been handed over to her by her friend Guddu; that Guddu was from Ulhasnagar and had mobile no. 7020224363; that she had been promised a monetary consideration of Rs. 10,000/- that she was aware that carrying foreign currency in excess of USD 5000 with a declaration and licit document for its

procurement was an offence; that she was aware that Ms. Asha Jairam Ghind too was intercepted by Customs and EURO 23,000/- was recovered from her; that Ms. Asha Jairam Ghind was her mother and Guddu had given her the currency to be handed over at Dubai, that A3 had advised them to travel on different flights to Dubai.

2(c). The seized foreign currency was deposited in the State Bank of India and a credit confirmation of Rs. 17,87,118/- was received.

2(d). Investigations of the mobile no of Guddu provided by A1 indicated that the same was in the name of applicant no. 3. Statement of A3 was recorded under Section 108 of the Customs Act, 1962 wherein he stated that he was working in a hotel at Bangalore; that he knew Guddu who was his childhood friend and his real name was Mr. Rohit Panikkar (i.e. A2); that he provided the mobile no of A2; that he had given the SIM card of his mobile no. viz 7020224363 to A2; that A2 was a money lender;

2(e). It was alleged that summons dated 11.04.2019, 02.05.2019, 14.05.2019 and 31.05.2019 were issued to A1. However, she had failed to turn up.

2(f). It was also alleged that summons dated 06.05.2019 was issued to A2 at the address provided by A3; that Summons dated 17.05.2019 was issued to the address obtained from the CDR / SDR of his mobile no i.e. A2; that summons dated, 29.05.2019 had been hand delivered to his mother. However, the same had been returned back. A2 had not joined the investigations.

3. After due process of the law, the Original Adjudicating Authority (OAA), viz Additional Commissioner Of Customs, CSMI Airport, Mumbai, vide common Order-In-Original No. ADC/SKR/ADJN/67/2020-21 dated 05.08.2020 issued on 12.08.2020 through S/14-6-12/2019-20/Adjn

(SD/INT/AIU/567/2018-AP'A') ordered for the absolute confiscation of the foreign currency equivalent to Rs. 17,87,118/- under Section 113(d), 113(h) & 113(i) of the Customs Act, 1962 and a personal penalty of (i). Rs. 1,50,000/-, (ii). Rs. 1,50,000/- and Rs. 15,000/- were imposed on the A1, A2 and A3 respectively under Section 114(i) of the Customs Act, 1962.

4. Aggrieved by the said order, the applicants filed appeals before the appellate authority (AA) viz, Commissioner of Customs (Appeals), Mumbai – III, who vide common Orders-In-Appeal Nos. MUM-CUSTOM-PAX-APP-1586/2021-22 dated 31.01.2022 issued on 03.02.2022 through F.No. S/49-1003/2020-Appeal, who held that the absolute confiscation of the foreign currency by the OAA was correct and did not find it necessary to interfere in the personal penalties imposed on the applicants.

5. Aggrieved with the above order, all the Applicants have filed a common revision application and the grounds of revision are as under;

- 5.01. that the financial capacity of A1 should not be a factor to prove that she was a carrier of the currency under seizure; that this allegation in the SCN was based on presumptions and assumptions; that they relied on the case laws of
- (i). Apex Court in the case of Oudh Sugar Mills vs. UOI; reported in 1978-ELT-J-172;
 - (ii). Tribunal in the case of Madhu Food Products vs CCE reported in 1995-76-ELT-197;
 - (iii). Tribunal in M/s. Dulichand Silk Mills (P) Ltd vs. CCE., Hyderabad reported in 2001-ECR-113-Tri-Chennai.;
- 5.02. that A2 submits that his involvement in the case of smuggling had not been proved; that his exculpatory statement dated 30.04.2019 cannot be relied upon to impose penalty on him; that A3 was in no way concerned with the currency seized; that statement of A2 had not been recorded; that in the statement of A1, she had not named A3; that only mistake done by A3 was he had allowed A2 to use the mobile connection; that investigations had failed to prove that A3 was in touch with A1 and A2; that inculpatory statement should be accepted with great deal of caution and by law should be excluded; that A3 had given

an exculpatory statement and no guilt can be drawn against him; that he has relied on various case laws as under;

- (i). Biswanath Aggarwal vs. Meena Gupta and Ors; 2000-CCr LR Sc;
- (ii). Palvinder Kaur vs. the State of Punjab
- (iii). etc.;

5.03. that A2 was in no way concerned with the case; that he had never been examined by the investigating agency; that had never been duly served with summon under Section 108 of the Customs Act, 1962; that any person suspected of having committed an offence punishable under C.A, 1962 should have been examined before filing a complaint against him charging him of an offence; that his aged mother had failed to inform A2; that they rely on case laws of Chajja Textile Ltd vs. Commr. of C.Ex, Haricharan Kurmi vs. State of Bihar, 1964-6-SCR-623; Apex Court Order in Mohar Rai & Bharath Rai vs. The State of Bihar, 1968-AIR-1281, etc;

5.04. that foreign currency was not prohibited goods; that order of absolute confiscation was not sustainable without having distinguished between what was prohibited and what was restricted; that the case of Om Prakash Bhatia relied upon by the OAA had been over ruled by the larger bench of the Apex Court;

(i). Alfred Menezes v/s. Commissioner of Customs (Mumbai) [2011 (236) ELT 587 (Tri-Mumbai)], Section 125(1) ibid clearly mandates that it is within the power of the adjudicating authority to offer redemption of goods even in respect of prohibited goods.

(ii). Yakub Ibrahim Yusuf v/s. Commissioner of Customs, Mumbai [2011-263-ELT-685-Tri-Mumbai]. Term prohibited goods refers to goods like arms, ammunition, addictive drugs, whose import in any circumstance would danger or be detriment to health, welfare or morals of people as whole and makes them liable to absolute confiscation.

(iii). In Shaik Jamal Basha v Government of India 1997 (91) ELT 277 (A.P.) the Hon'ble High Court held that gold is allowed for import on payment of duty and therefore, Gold in the form other than ornaments imported unauthorizedly can be redeemed

(iv). Etc. Exhaustive cases have been referred.;

5.05. that the OAA had failed to apply his mind while drafting the operative part of the OIO which was defective and hence, absolute confiscation was unsustainable; that in the OIO the GST amounting to Rs. 1132/- is referred which was not part of the SCN; that they have relied on the case of M/s. Shubham Electricals vs. Commr. of Service Tax, Rohtak, passed by Principal Bench, New Delhi and a few other case laws on the subject;

5.06. that the OIA was not an order on merits and not a speaking order;

8. A substantial amount of foreign currency was recovered from the applicant no. 1. In this case, the applicant had adopted an ingenious and risky method of concealment to dodge the authorities and smuggle the foreign currency out of the country. This method shows her determination to take the currency out of the country. The foreign currency had been kept concealed in body cavity and she admitted to possession only after persistent questioning. Had it not been for the intelligence gathered and alertness of the Officers, A1 would have been successful in taking out the foreign currency.

9. The concealment adopted clearly indicates that the applicant no. 1 harboured no intention to take any general or special permission of the RBI to carry the foreign currency and had attempted to take it out of the country without declaring the same to Customs at the point of departure. Hence, the Government finds that the conclusions arrived at by the appellate authority that the said provisions of Foreign Exchange Management (Export & Import of Currency) Regulations, 2015 which warrants that the foreign currency should be sourced from legal channels has been violated by the applicant is correct and therefore, the confiscation of the foreign currency ordered, is justified. In doing so, the Government finds that the appellate authority had rightly applied the ratio of the judgement of the Apex Court in the case of Sheikh Mohd. Umar v/s. Commissioner of Customs, Calcutta [1983(13) ELT 1439 (SC)] wherein it is held that non-fulfilment of the restrictions imposed would bring the goods within the scope of "prohibited goods".

10. Government finds that the case of Commissioner of Customs v/s. Savier Poonolly [2014(310 E.L.T. 231 (Mad)] is squarely applicable in this case. Government relies upon the conclusions drawn at paras 10 to 12 of the said case.

10 On facts, there appears to be no dispute that the foreign currency was attempted to be exported by the first respondent - passenger (since deceased) without declaring the same to the Customs Department and therefore, it resulted in seizure.

11 Regulation 5 of the Foreign Exchange Management (Export and Import of Currency) Regulations, 2000 prohibits export and import of foreign currency without the general or special permission of the Reserve Bank of India. Regulation 7 deals with Export of foreign exchange and currency notes. It is relevant to extract both the Regulations, which are as follows

5 "Prohibition on export and import of foreign currency - Except as otherwise provided in these regulations, no person shall, without the general or special permission of the Reserve Bank, export or send out of India, or import or bring into India, any foreign currency

7. Export of foreign exchange and currency notes -

(1) An authorized person may send out of India foreign currency acquired in normal course of business

(2) any person may take or send out of India, -

(i) cheques drawn on foreign currency account maintained in accordance with Foreign Exchange Management (Foreign Currency Accounts by a Person Resident in India) Regulations, 2000;

(ii) foreign exchange obtained by him by drawal from an authorized person in accordance with the provisions of the Act or the rules or regulations or directions made or issued thereunder

.....
12 Section 113 of the Customs Act imposes certain prohibition and it includes foreign exchange. In the present case, the jurisdiction Authority has invoked Section 113(d), (e) and (h) of the Customs Act together with Foreign Exchange Management (Export & Import of Currency) Regulations, 2000, framed under Foreign Exchange Management Act, 1999. Section 2(22)(d) of the Customs Act, defines "goods" to include currency and negotiable instruments, which is corresponding to Section 2(h) of the FEMA. Consequently, the foreign currency in question, attempted to be exported contrary to the prohibition without there being a special or general permission by the Reserve Bank of India was held to be liable for confiscation. The Department contends that the foreign currency which has been obtained by the passenger otherwise through an authorized person is liable for confiscation on that score also

11. Once goods are held to be prohibited, Section 125 still provides discretion to consider release of goods on redemption fine. Hon'ble Supreme Court in case of M/s. Raj Grow Impex has laid down the conditions and circumstances under which such discretion can be used. The same are reproduced below.

71. Thus, when it comes to discretion, the exercise thereof has to be guided by law; has to be according to the rules of reason and justice, and has to be based on the relevant considerations. The exercise of discretion is essentially the discernment of what is right and proper; and such discernment is the critical and cautious judgment of what is correct and proper by differentiating between shadow and substance

as also between equity and pretence A holder of public office, when exercising discretion conferred by the statute, has to ensure that such exercise is in furtherance of accomplishment of the purpose underlying conferment of such power The requirements of reasonableness, rationality, impartiality, fairness and equity are inherent in any exercise of discretion; such an exercise can never be according to the private opinion

71.1 It is hardly of any debate that discretion has to be exercised judiciously and, for that matter, all the facts and all the relevant surrounding factors as also the implication of exercise of discretion either way have to be properly weighed and a balanced decision is required to be taken.

12. The Government finds that the quantum of foreign currency involved in this case is not of importance; that the foreign currency had been ingeniously concealed. The manner of concealment is important as it indicates that A1 had no intention to declare the foreign currency. Government finds that this is a pre-meditated and well thought-out, conscious plan of the applicants to smuggle out substantial quantity of foreign currency. The applicant had not produced any evidence suggesting that the foreign currency was garnered / accumulated from authorized persons. Further, A1 did not join the investigations when summons had been issued to her. Quantity, unaccounted source, manner of keeping, syndicated operation, non-declaration and applicants not being able to explain, concealment being ingenious, etc are factors relevant for using discretion not to allow goods to be released on redemption fine.

13. The Government finds that the quantum of the foreign currency is not paramount; concealment adopted is ingenious and the appellate authority has rightly upheld the absolute confiscation of the foreign currency held by the OAA and had denied the redemption of the foreign currency. Facts and circumstances of the case especially, the ingenious and risky concealment resorted to by A1, warrants absolute confiscation of foreign currency as held

by the OAA and upheld by the Appellate Authority. Government finds the order of absolute confiscation passed by the AA is legal and judicious and does not find it necessary to interfere in the same.

14.01. On the issue of penalty imposed on A1, considering that she had named the person who had handed over the foreign currency to her and that she had carried out the smuggling attempt for monetary consideration, Government find that the penalty imposed on her is excessive and is inclined to reduce the same.

14.02. On the issue of penalty imposed on A2, Government finds that he had not joined the investigations; that he had taken the services of A1 to smuggle the foreign currency out of the country by luring her with monetary consideration; that he was using the mobile connection of A3 who was his schoolmate; that A1 had stated that her mother too had been intercepted and foreign currency was recovered from her which had been given by him (i.e. A2); A1 had stated that foreign currency belongs to A2; that a submission had not been made that the statements have been retracted; the quantum of penalty imposed on him under Section 114 of the Customs Act, 1962 and upheld by the AA, is commensurate with the omissions and commissions committed and is not inclined to interfere in the same.

14.03. On the issue of penalty of Rs. 15,000/- imposed on A3 under Section 114(i) of the Customs Act, 1962 by the OAA and upheld by the AA, Government finds that A3 had admitted that he had given the phone connection to A2 who was his childhood friend; that he had furnished the address of A2; that the investigating agency had not found his any link with A1 or A2 in the CDR; no evidence of his involvement was presented; the penalty imposed on him is harsh. Considering the above, Government is inclined to set aside the penalty imposed on A3 which would meet the ends of justice.

15. In view of the above, the Government modifies the impugned Order passed by the OAA only to the extent of (i). reducing the penalty of Rs. 1,50,000/- imposed on A1 under Section 114(i) of the Customs Act, 1962 to Rs. 1,00,000/- (Rupees One lakh only) and (ii). the penalty of Rs. 15,000/- imposed on A3 under Section 114(i) of the Customs Act, 1962 is set aside. The absolute confiscation of the foreign currency and the quantum of penalty imposed on A2 are sustained.

16. Accordingly, the three Applications are disposed of in terms of the above.


(SHRAWAN KUMAR)

Principal Commissioner & ex-officio
Additional Secretary to Government of India

ORDER No. 08-10 /2024-CUS (WZ) /ASRA/MUMBAI DATED 08.01.2024

To,

1. Ms. Diksha Matta, 402, Om Sai Ram Apartment, Kurla Camp, Ulhas Nagar, Thane - 421 005.,
2. Shri. Rohit Panikkar @ Guddu, Durga Pad, Shiv Mandir Road, Opp. Durga Temple, Ambernath Gaon, Ambernath TK, Thane - 421 501.,
3. Shri. Chetbahadur Bist, Ganga Bhawani Krishna, House No. 1952/7, Near Shiv Mandir Road, Durga Devi Pada, Ulhasnagar, Thane - 421 006.
4. Pr. Commissioner of Customs, Level - II, Terminal - 2, Chhatrapati Shivaji Maharaj Airport, Sahar, Andheri West, Mumbai - 400 099.

Copy To,

1. Shri. Prakash K. Shingrani, Advocate, 12/334, Vivek, MIG Colony, Bandra (E), Mumbai - 400 051.
2. Sr. P.S. to AS (RA), Mumbai.
3. File Copy.
4. Notice Board.