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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. 371/159/B/2022-RA / 213 : Date of Issue : 31.01.2024

ORDER No. 101 /2024-CUS (WZ)/ASRA/MUMBAI DATED 30.01.2024 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.

Applicant : Mr Naushad Kuyyil Kandathi

Respondent : Pr. Commissioner of Customs, C.S.I Airport, Mumbai

Subject : Revision Application filed, under Section 129DD of the Customs Act, 1962 against the Order-in-Appeal No. MUM-CUSTOM-PAX-APP-1561/2021-2022 [F. No S/49-06/2021] dated 27.01.2022 [Date of issue: 28.01.2022] passed by the Commissioner of Customs (Appeals), Mumbai Zone-III.

ORDER

This Revision Application has been filed by Mr Naushad Kuyyil Kandathi (herein referred to as 'Applicant') against the Order-in-Appeal No.MUM-CUSTOM-PAX-APP-1561/2021-2022 [F. No S/49-06/2021] dated 27.01.2022 [Date of issue: 28 01.2022] passed by the Commissioner of Customs (Appeals), Mumbai Zone-III.

2. Brief facts of the case are that, on 03.08.2018, the Applicant, holder of an Indian passport, who was bound for Dubai by Spice Jet Flight No. SG-013 was intercepted by officers of AIU, Customs, CSI Airport after he had cleared the Security and Immigration formalities at departure. On being asked whether he was carrying any contraband, foreign or Indian currency either on his person or in his baggage, he replied in the negative. Not being satisfied with the reply, the officers proceeded to conduct personal search of the Applicant and examination of his baggage. Examination of this trolley bag resulted in the recovery of 330 foreign currency notes of US\$100, totalling US \$33,000 concealed in a blue coloured jean. The said foreign currency of US\$ 33,000, equivalent to Rs. 22,29,150/-, were seized under the reasonable belief that the same were being attempted to be smuggled out of India in contravention of the provisions of the Customs Act, 1962 read with FEMA, 1999 and Foreign Exchange Management (Export and import of currency) Regulations 2015 and hence liable for confiscation.

2.1. The Applicant, in his statement had informed that the foreign currency did not belong to him and that he was handed over the currency by one person on the instruction of his friend and he had tried to take it out of the country for monetary gains, that he knew that carrying foreign in excess of US\$ 5000 was an offence under the Customs Act, 1962 and that he did not have any permission from the RBI. The Applicant retracted his statement and stated that the currency belonged to him but a rebuttal was issued to the retraction.

3. After following the due process of law, the case was adjudicated and the Original Adjudicating Authority (OAA) viz, Additional Commissioner of Customs, Chhatrapati Shivaji International (C S.I) Airport, Mumbai vide Order-in-Original No ADC/SKR/ADJN/77/2019-20 dated 27.02.2020 [Date of issue: 05.03.2020] order the absolutely confiscation of the foreign currency i.e US\$ 33,000 equivalent to Rs. 22,29,150/- under Section 113 (d) (e) & (h) of the Customs Act, 1962 read with relevant provisions of FEMA, 1999. Penalty of Rs. 3,34,500/- was imposed on the Applicant under Section 114(i) of the Customs Act, 1962. The black coloured trolley bag having marking " Leader" and blue colour denim jeans having Tag/Mark/Brand "Hard Currency" used for concealing the foreign currencies was confiscated under Section 119 of the Customs Act, 1962.

4. Aggrieved by this order, the Applicant filed an appeal with the Appellate Authority viz, Commissioner of Customs (Appeals), Mumbai Zone-III, who vide his order Order-in-Appeal No. No.MUM-CUSTOM-PAX-APP-1561/2021-2022 [F. No S/49-06/2021] dated 27.01.2022 [Date of issue: 28.01.2022] upheld in toto, the order of the Original Adjudicating Authority

5. Aggrieved with the aforesaid Order passed by the AA, the Applicant has preferred this revision application inter alia on the following ground:

5.01. That the goods seized from the Applicant are not liable to be confiscated under Section 113(d) & (e) of the Customs Act, 1962;

5.02. That the Applicant in his statement claimed the possession of foreign currencies recovered and seized from him;

5.03. That foreign currency are neither restricted nor prohibited and can be released on payment of redemption fine under Section 125 of CA, 1962 and no other person has claimed the currency which was found from the possession of the Applicant;

5.04. That the violation, if any, was out of ignorance and technical in nature;

5.05. That in the master circular No 06/2015-16 dated 01.07.2015 issued by RBI the limit of foreign exchange which can be brought from an authorised dealer for private visit can obtain foreign exchange upto an aggregate of US\$ 2,50,000 irrespective the number of visits undertaken during the year clearly shows that the export of foreign currency is not prohibited;

5.06. That, in a catena of judgements, Tribunals and GOI, in its orders of revision have directed that confiscated currencies be allowed to be redeemed on payment of appropriate fines by the persons from whom they were seized and confiscated. The Applicant has placed reliance on the following cases:

- i) Yakub Ibrahim Yusuf vs. CC, Mumbai [2011(263) ELT 685(Tri-Mumbai)
- (ii) Hargovind Das K. Joshi vs Collector of Customs [1992 (61) ELT 172(SC)]
- (iii) Commr. Of Customs (Prev) vs India Sales International [2009 (241) E.L.T 182(Cal)]
- (iv) Alfred Menezes vs Commr of Customs, Mumbai [2011(236) E.L.T 587(Tri-Mum)]
- (v) Commr. of Customs vs. Rajinder Nirula [2017 (346) E L T 9(Bom)]
- (vi) Philip Fernandes vs. CC (Airport), Mumbai [2002(146) E.L T 180(Tri-Mum)]
- (vii) Felix Dorez Fernandes vs ACC, Mumbai [2000(118) E.L.T 639(Tri)]
- (viii) Kishin Shewaram Loungani vs Commissioner of Customs, ACC, Mumbai [2002(140) E L T 225(Tri-Mum)]
- (ix) T Soundarajan vs. CC, Chennai [2008(221) E.L T. 258(Tri -Chennai)]
- (x) In RE: Kanwaljit Singh Bala [2012(275) E.L T 272(GOI)]
- (xi) Dhanak M. Ramji vs. Union of India [2009 (237) E.L.T. 280 (Tri-Mum)]
- (xii) In RE: A Mahesh Raj [2007 (214) E L T 588(Sett.Comm)]

Under the circumstances, the Applicant prayed for the release of foreign currency and reduction of penalty of any other order as deemed fit

6. Personal hearing in the case was scheduled for 12.10.2023 or 19.10.2023. Shri N.J Heera, Advocate appeared for the hearing on behalf of the Applicant on 19.10.2023 and submitted that the Applicant was carrying small amount of foreign currency for business purpose. He further submitted that there was no ingenious concealment and Applicant has no past history of any offence. He requested to allow redemption of currency on reasonable fine and penalty

7. Government has gone through the records and facts of the case and the submissions of the Applicant. Government finds that there is no dispute that the seized foreign currency was not declared by the Applicant to the Customs at the point of departure. The seized foreign currency was concealed in the clothes of the Applicant which was in the baggage of the Applicant with the express intention of hoodwinking the Customs. The Applicant in his statement had admitted the knowledge, possession, carriage, concealment, knowledge non-declaration and recovery of the foreign currency. The Applicant after initially claiming that he was carrying the foreign currency on behalf of someone else later on had claimed that the currency belonged to him and did not have any legal/valid documents for purchase of the foreign currency. The Applicant admitted that he was aware that carrying such currency and not declaring the same was an offence under the Indian law. Therefore, the confiscation of the foreign currency was justified as the Applicant could not account for the legal procurement of the currency and that no declaration as required under section 77 of the Customs Act, 1962 was filed by the Applicant.

8. The Government finds that the Applicant had not taken 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 lower adjudicating authority that the said provisions of the Foreign Exchange Management (Export & Import of Currency) Regulations, 2000 have been violated by the Applicant is correct and therefore, the confiscation of the foreign currency ordered, is justified.

9. 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."

10. In a similar case, Bombay High Court in case of Commr. Of Customs vs. Rajinder Nirula [2017(346) ELT-9 (Bom)] while upholding the release of the foreign currency on redemption fine by CESTAT, observed that

"4. The only contention raised before us and equally before the Tribunal is that the seized goods are currency and should not have been allowed to be released by paying a fine. The seizure is of foreign currency and which was attempted to be smuggled out of India without any authorisation. The Tribunal has seriously erred in law in granting the relief.

5. After having perused the order of the Tribunal, we find that the Tribunal came to the conclusion that the confiscated foreign currency should be redeemed. In that regard the Tribunal relied upon a judgment of the High Court of Delhi in the case of Mohd. Ayaz v. Union of India - 2003 (151) E.L.T. 39 (Del.). It also relied upon its own order passed in the case of Pankaj Jagda - 2004 (171) E.L.T. 125 (Tr.-Mum.).

6. We do not find any merit in the learned counsel's argument that the course adopted by the Tribunal was impermissible. The definition of the term "goods" includes currency and negotiable instruments [see Section 2(22)(d)]. When the power of redemption is exercised, what the law

postulates is that there is an option to pay fine in lieu of confiscation. Section 125(1) of the Customs Act, 1962 provides that whenever confiscation of any goods is authorised by this Act, the officer adjudicating it may, in the case of any goods, the importation or exportation whereof is prohibited under this Act or under any other law for the time being in force, and shall, in the case of any other goods, give 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, an option to pay, in lieu of confiscation, such fine as the said officer thinks fit.

7. *In these circumstances, we do not find that there was any error or lack of power. The seized currency was released and by imposing penalty. In the present case, the Tribunal, therefore, was justified in holding that since the foreign currency is redeemed on payment of fine, the penalty also deserves to be scaled down or reduced. This is essentially a finding of fact rendered after consideration of the materials on record. We do not think that the Tribunal was in error in adopting the course that it has adopted. We do not find any merit in the appeal. It is dismissed".*

11 Though the amount involved in the case is substantial, Government finds that the Applicant has claimed ownership of the currency, albeit after retracting his initial statement and the manner of attempting to take the foreign currency out of India is not ingenious. There are no allegations that the Applicant is a habitual offender and was involved in similar offence earlier or there is nothing on record to prove that the Applicant was part of an organized smuggling syndicate. This case is at best a case of mis-declaration rather than smuggling. Government finds that the discretion not to allow redemption of the foreign currency under the provisions of Section 125 of the Customs Act, 1962 is excessive and unjustified. The order of the Appellate authority is therefore liable to be modified and the foreign currency is liable to be allowed redemption on suitable redemption fine.

12. The Government finds that the personal penalty of Rs. 3,34,500/- imposed on the Applicant under Section 114 (i) of the Customs Act, 1962 is commensurate with the omissions and commissions committed.

13. In view of the above, the Government modifies the impugned order of the Appellate authority in respect of the absolute confiscation of the foreign currency and allows the same to be redeemed on payment of redemption fine. The foreign currency totalling to US\$ 33,000 equivalent to Rs.

22,29,150/- is allowed redemption on payment of a fine of Rs. 4,00,000/- (Rupees Four Lakhs only). The penalty of Rs. 3,34,500/- imposed under section 114 (i) of the Customs Act, 1962 by the lower adjudicating authority and upheld by the Appellate Authority is sustained.

14. The Revision Application is disposed of on the above terms.


(SHRAWAN KUMAR)

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

ORDER No. 101 /2024-CUS (WZ)/ASRA/MUMBAI DATED 30.01.2024.

To,

1. Mr. Naushad Kuyyil Kandathil, R/O Post Vavad Koduvalli Village, Calicut, Kerala 673 572.
2. The Pr. Commissioner of Customs, Chhatrapati Shivaji International Airport, Terminal 2, Level-II, Sahar, Andheri (East), Mumbai 400 099.

Copy to

1. The Commissioner of Customs (Appeals), Mumbai-III, Awas Corporate Point, 5th Floor, Makwana Lane, Behind S.M. Centre, Andheri-Kurla Road, Marol, Mumbai - 400 059.
2. Shri N.J Heera, Advocate, Nulwala Building, Ground Floor, 41, Mint Road, Opp. G.P.O, Fort, Mumbai 400 001
- ~~3.~~ Sr. P.S. to AS (RA), Mumbai
4. File Copy
5. Noticeboard.