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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. 371/181/B/WZ/2022-RA/202:

Date of Issue: 31 .01.2024

ORDER No. 102 /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 : Shri Ahammed Irfadh

Respondents: Principal Commissioner of Customs (Airport), Mumbai

Subject : Revision Application filed, under Section 129DD of the
Customs Act, 1962 against the Orders-in-Appeal No.
MUM-CUSTM-PAX-APP-1645/2021-22 dtd 07.02.
2022 [DOI: 11.02.2022] [F.No. S/49-02/2021-22]
passed by the Commissioner of Customs (Appeals),
Mumbai, Zone-III.

ORDER

This Revision application has been filed by the Shri Ahammed Irfadh (hereinafter referred to as the Applicant) against the Order-In-Appeal No. MUM-CUSTM-PAX-APP-1645/2021-22 dated 07-02-2022 [DOI: 11-02-2022] [F.No. S/49-02/2021] passed by the Commissioner of Customs (Appeals), Mumbai, Zone-III.

2. Brief facts of the case are that on 06.02.2020, Shri Ahammed Irfadh, the Applicant holding Indian Passport No. P 4614211, was intercepted by the officers of the Air Intelligence Unit (AIU), CSMI Airport, Mumbai after he had cleared himself through Immigration and while he was proceeding to depart from Mumbai to Dubai. The AIU officers recovered foreign currency viz Omani Riyals of 94*50, 22*20, 3*10, 11*5 and 5*1, totally equivalent to Indian Rupees amounting to Rs.9,70,060/- from him. The AIU Officers took over and seized the recovered foreign currency in the reasonable belief that the same were attempted to be smuggled out of India and hence were liable for confiscation under the provision of Customs Act, 1962.

3. After due process of law, the Original Adjudicating Authority (OAA) viz, Deputy Commissioner of Customs, CSMI Airport, Mumbai vide Order-In-Original No. AirCus/49/T2/ETC/1579/2020,C-Batch dated 06-02-2020 absolutely confiscated the seized impugned foreign currency equivalent to Indian Rupees amounting to Rs.9,70,060/- under section 113(d) & (h) of the Customs Act, 1962, read with relevant provisions of FEMA, 1999 and FEM (Export & Import of Foreign Currency) Regulations, 2015. Personal penalty of Rs. 1,00,000/- was also imposed under section 114(i) of Customs Act, 1962.

4. Being aggrieved by the impugned order passed by the Additional Commissioner, CSMI Airport, Mumbai, the applicant filed appeals with the Appellate Authority (AA) viz, Commissioner of Customs (Appeals), Mumbai

Customs, Zone-III who vide Orders-in-Appeal No. MUM-CUSTOM-PAX-APP-1645/2021-22 dated 07-02-2022 [DOI: 11-02-2022] [F.No. S/49-02/2021] did not find any reason to interfere with the Order-in-Original passed by the OAA and upheld the same.

5. Aggrieved by this Order, the applicant has filed this revision application on the undermentioned grounds of revision;

5.01. that the impugned OIA is bad in law and unjust; has been passed without giving due consideration to the documents on record and facts of the case;

5.02. that the lower authorities ought to have appreciated that there is no duty involved in Export of Foreign Currency and there is no margin of profit; therefore absolute confiscation and imposing penalty is unjustified;

5.03. that the foreign currency carried by the applicant is neither restricted nor prohibited and can be released on payment of redemption fine;

5.04 The applicant has relied upon the undermentioned cases wherein various authorities and forums have allowed release of foreign currency on redemption fine, in lieu of confiscation under Section 125 of the Customs Act, 1962, even in case of non-declaration of foreign currency, to the owner or the person from whom whose possession, it was recovered;

(a). Hon'ble Supreme Court decision in case of Hargovind Das K Joshi v/s. Collector of Customs [1992 (61) ELT 172 SC];

(b). Hon'ble High Court of Calcutta decision in case of Commnr of Customs, West Bengal Vs India Sales International [2009(241)ELT 182 Cal];

(c). CESTAT, Mumbai decision in case of Alfred Menezes v/s. Commissioner of Customs (Mumbai) [2011 (236) ELT 587 (Tri-Mumbai)], the impugned Order has been upheld by the Bombay High Court;

- (d). Bombay High Court decision in case of Commnr of Customs Vs Rajinder Nirula [2017(346)ELT 9(Bom)];
- (e). CESTAT, Mumbai decision in case of Philip Fernandes v/s. Commissioner of Customs Airport (Mumbai) [2002 (146) ELT 180 (Tri-Mumbai)];
- (f). CESTAT, Mumbai decision in case of Felix Dores Fernandes v/s. Commnr of Customs, ACC, Mumbai [2000 (118) ELT 639 (Tribunal)];
- (g). CESTAT, Mumbai decision in case of Kishin Shewaram Loungani v/s. Commnr of Customs, ACC, Mumbai [2002 (140) ELT 225 (Tri-Mumbai)];
- (h). CESTAT, Chennai decision in case of T. Soundarajan Vs Commissioner of Customs, Chennai;
- (i). Revisionary Authority's decision in case of Kanwaljit Singh Bala reported in 2012(275) ELT 272 (GOI);
- (j). CESTAT, Mumbai decision in case of Yakub Ibrahim Yusuf v/s. Commissioner of Customs, Mumbai [2011-263-ELT-685-Tri-Mumbai];
- (k). CESTAT, Mumbai decision in case of Dhanuk Madhusudan Ramji vs Commnr of Customs Airport, Mumbai [2009 (237) ELT-280-Tri-Mumbai] which has ben upheld by he BHC reported in 2009(248)ELT.127(Bom) and the Hon'ble Apex Court reported in 2010(252) ELT A10(SC);
- (l). Revisionary Authority's decision in case of Mohd. Arif reported in 2018 (361) ELT 959 (GOI);

Under the circumstances, the applicant has prayed that in view of the aforesaid case laws, the foreign currency may be released under Section 125 of the Customs Act, 1962; that the personal penalty may be reduced substantially; or pass any other order as deemed fit and proper

6. Personal hearing in the case was scheduled for 21-11-2023. Shri. N. Heera, Advocate for the applicant appeared for personal hearing on behalf of the applicant. He submitted that the applicant was carrying small amount of foreign currency for personal use. He further submitted that currency was not

concealed and applicant is not a habitual offender. He requested to give option to allow redemption of foreign currency on nominal fine and penalty.

7. Government has gone through the facts of the case and the submissions. 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. Further, the applicant had admitted the possession, carriage, concealment, non-declaration and recovery of the foreign currency. Thus, it has been rightly held that in absence of any valid document for the possession of the foreign currency, the same had been procured from persons other than authorized persons as specified under FEMA, which makes the goods liable for confiscation in view of the prohibition imposed in the Foreign Exchange Management (Export and Import of Currency) Regulations, 2015 which prohibits export and import of the foreign currency without the general or special permission of the Reserve Bank of India. 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.

8. Section 125 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.”

9. In a similar case of confiscation of Currency, Delhi High Court in the case of Raju Sharma v/s. Union of India [2020(372) ELT 249 (Del.)] while allowing release of currency observed,

“18. the actual grievance of the Revenue before the Revisionary Authority, was that the seized currency was “prohibited”, redemption thereof ought not to have been allowed at all, and the currency ought to have been absolutely confiscated. This submission directly flies in the face of Section 125 of the Customs Act whereunder, while allowing the redemption, in the case of goods which are not prohibited, is mandatory, even in the case of goods, which are prohibited, it is open to the authorities to allow redemption thereof, though, in such a case, discretion would vest with the authorities. The Commissioner (Appeals), while rejecting the appeal of the revenue, correctly noted this legal position, and observed that, as the AC had exercised discretion in favour of allowing redemption of the seized currency, on payment of redemption fine of Rs. 50,000/-, no occasion arose to interfere therewith. We are entirely in agreement with the Commissioner (Appeals). Exercise of discretion, by judicial, or quasi-

judicial authorities, merits interference only where the exercise is perverse or tainted by patent illegality, or is tainted by oblique motives [Mangalam Organics Ltd. v. UOI - (2017) 7 SCC 221 = 2017 (349) E.L.T. 369 (S.C.)]. No illegality, much less perversity, is discernible in the decision, of the AC, to allow redemption of the seized currency on payment of redemption fine of ` 50,000/-. The Commissioner (Appeals) rightly refused to interfere with the said decision, and the Revisionary Authority, in an order which reflects total non-application of mind, chose to reverse the said decision.

19. We are unable to sustain the order of the Revisionary Authority. We uphold the decision of the Commissioner (Appeals) as well as the order of the AC, which stands affirmed thereby. The seized currency shall, therefore, forthwith be returned to Petitioner No. 2”.

9. The Government also notes that in the case law decided by Hon'ble High Court of Bombay vide its judgment dated 27.10.2016 in case of CC, Mumbai Vs Rajinder Nirula (Customs Appeal No 60/2006), it was held as under

“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.”

10. The Government finds that the amount involved in this case is not a large amount. Also, the applicant claimed ownership of the same and has submitted that he carried the same for personal use Further there is neither any allegations that the applicant is habitual offender, nor that the currencies were concealed. This case is at best a case of mis-declaration rather than smuggling. Government finds that the discretion not to release the foreign currency with reasonable Redemption Fine under the provisions of Section 125 of the Customs Act, 1962, would be harsh and unreasonable. The order of the Appellate authority is therefore liable to be modified and Government considers granting an option to the Applicant to redeem the currency on payment of a suitable redemption fine, as the same would be more reasonable and judicious.

11. Government finds that the penalty of Rs. 1,00,000/- imposed on the applicant for the impugned assorted foreign currency equivalent to Indian Rupees amounting to Rs.9,70,060/- under Section 114(i) of the Customs Act, 1962, commensurate with the omissions and commissions committed.

12. In view of the above, the Government modifies the impugned order of the Appellate authority and the recovered foreign currency viz Omani Riyals

of 94*50, 22*20, 3*10, 11*5 and 5*1, totally equivalent to Indian Rupees amounting to Rs.9,70,060/- is allowed redemption on payment of a fine of Rs. 2,00,000/- (Rupees Two Lakhs Only).

13. The penalty of Rs. 1,00,000/- imposed under section 114 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 above terms.

Shrawan Kumar
22/1/24
(SHRAWAN KUMAR)

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

ORDER No. 102 /2024-CUS (WZ)/ASRA/MUMBAI DATED 30.01.2024.

To,

1. Shri Ahammed Irfadh, Bendichal, Thayal House via Chengala, Kasargod, Kerala-671541.
2. Commissioner of Customs (Airport), CSMI Airport, Sahar, Andheri (East), Mumbai-400099.
3. The Commissioner of Customs (Appeals), Mumbai-III, 5th Floor, Avas Corporate Point, Makwana Lane, Behind S. M. Centre, Andheri Kurla Road, Andheri (East), Mumbai 400 059.

Copy to:

1. Advocate N. J. Heera, Nulwala Building, Ground Floor, 41, Mint Road, Opp. G.P.O. Fort, Mumbai-400001
2. Sr. P.S. to AS (RA), Mumbai.
3. File copy
4. Noticeboard.

