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GOVERNMENT OF INDIA  
MINISTRY OF FINANCE  
(DEPARTMENT OF REVENUE)

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Mumbai-400 005

F.No. 371/402/B/2022-RA / 253

Date of Issue : 01.01.2024

ORDER No. 104 /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 No. 1: Mr. Rashid Mirghani Abdel Rahman Taha

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-CUSTM-PAX-APP-819/2022-23 dated 29.07.2022 [Date of issue: 29.07.2022] [S/49-1519/2021] passed by the Commissioner of Customs (Appeals), Mumbai Zone-III.

**ORDER**

This revision application has been filed by Mr. Rashid Mirghani Abdel Rahman Taha (herein referred to as 'Applicant') against the Order-in-Appeal No. MUM-CUSTM-PAX-APP-819/2022-23 dated 29.07.2022 [Date of issue: 29.07.2022] [S/49-1519/2021] passed by the Commissioner of Customs (Appeals), Mumbai Zone-III.

2. Brief facts of the case are that on 12.12.2018, on the basis of specific information from CISF, the officers of the AIU, Customs, CSI Airport intercepted the Applicant, a Sudanese passport holder, who were scheduled to depart to Dubai by Emirates Flight No. EK-509. On being asked whether they were carrying any contraband, foreign or Indian currency either on their person or in their baggage, he replied that he was carrying only personal effects. Not being satisfied with the reply, the officers conducted personal search and examination of the Applicants baggage. The examination of the trolley bag resulted in the recovery of foreign currency of US \$ 2,08,700 which was concealed in small black colour handbags with mark BALCO (2) and in white coloured envelopes. An export declaration dated 08.12.2018 issued by Dubai Customs, Airport was also recovered.

2.1. The said foreign currency US\$ 2,08,700 valued at Rs. 1,46,68,159/- was seized under the reasonable belief that the same were being attempted to be smuggled out of India and hence were liable to confiscation under the contravention of the provisions of the Customs Act, 1962 read with FEMA, 1999 and Foreign Exchange Management (Export and Import of Currency) Regulations 2015.

2.2. The Applicant in his statement admitted knowledge, possession, concealment, no-declaration, recovery and seizure of the foreign currency of US\$

2,08,700; that he was a dealer in seeds and fabrics; that he did not have any legal/valid purchase documents for the seized currency; that the seized currency were his own which he had brought from Dubai and were withdrawn from his current account in Dubai before departing to India; that the Customs declaration dated 08.12.2018 recovered from his bag was a declaration receipt for 9.5 kgs of gold bars; that he was aware that carrying foreign currency in excess of US\$ 5000 without valid receipt was an offence under Customs Act and FEMA 1999; that he was a partner in the company Al Banash General Trading which was into general trading and gold trading.

4. After due process of the law, 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/66/2019-20 dated 29.07.2020 [Date of issue: 05.08.2020] issued through F.No. [S/14-6-08/2019-20 Adjn SD/INT/AIU/545/2019 AP 'D'] ordered the absolute confiscation of the foreign currency i.e US \$ to Rs. 1,46,68,159/- under Section 113 (d) (e) & (h) of the Customs Act, 1962 read with relevant provisions of FEMA, 1999. Penalty of Rs. 15,00,000/- was imposed on the Applicant under Section 114(i) of the Customs Act, 1962. The two small black coloured handbags with mark BALCO (2) and the white envelopes used to conceal the foreign currency were confiscated under Section 119 of the Customs Act, 1962.

5. Aggrieved by this order, the Applicant filed an appeal with the Appellate Authority viz, Commissioner of Customs (Appeals), Mumbai Zone-III, who vide Order-in-Appeal No. MUM-CUSTM-PAX-APP-819/2022-23 dated 29.07.2022 [Date of issue: 29.07.2022] [S/49-1519/2021] upheld the order of the Original Adjudicating Authority.

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

- 6.01. That the order passed by the OAA is bad in law and unjust;
- 6.02. That the impugned order has been passed without giving due consideration to the documents on record and facts of the case;
- 6.03. That the statement regarding import of gold has been retracted and evidences of the import of gold has not been attached to the SCN;
- 6.04. That the Applicant was a partner in M/s Albanash Trading Co and that he left of 08.12.2018 with USD 210000 for purchasing Indian goods and was given for the purpose of exporting goods from India to Dubai;
- 6.05. That several letters for purchase and negotiation of various products are annexed as bonafides;
- 6.06. That the OIO has not discussed any documents which were presented in the Court proceedings of the Applicant and that several judgements were relied upon wherein in similar cases, foreign currency was released on redemption fine and penalty and the same have not been discussed or referred to in the orders passed by the OAA or AA;
- 6.07. That the OAA has accepted that the foreign currency is a not a dutiable item and therefore import and export if freely allowed subject to fulfillment of conditions which is a point of non-declaration and there is no restriction of remittance of foreign currency;
- 6.08. That OAA has observed that the Applicant has claimed ownership of the seized currency from the date of interception and has further stated that the Applicant has not provided any documentary evidence in respect of acquisition of foreign currency, authorised dealer either in India or at Dubai;
- 6.09. That the non-declaration of currency has been accepted and it has been presumed that the Applicant has carried unspent foreign currency and the OAA has assumed and presumed that the said foreign currency is the sale proceeds of smuggled gold/dutiable goods brought through illegal sources;

- 6.10. That the foreign currency was kept in small bags which were kept in the baggage and the same cannot be considered as concealment;
- 6.11. That the OAA has accepted that the confiscated goods are not prohibited goods and the discretion is vested on the OAA to decide the facts;
- 6.12. That the OAA has not said anything about the judgements which are referred to in the adjudication proceedings and the orders passed by the Adjudicating Authority at the same airport;
- 6.13. That the order in the case of Om Prakash Bhatia is not applicable in this case as the OAA has himself accepted that the goods are not prohibited goods;
- 6.14. That the OAA after having discussed regarding the judgements and foreign currency was redeemed for Indian and foreign nationals, has not said whether the judgements are applicable or not and the judgement quoted by the Applicant has not been segregated in the present case;
- 6.15. That the OAA has merely assumed that the foreign currency is tainted and procured through illegal channels and no evidence has been attached;
- 6.16. That no reasons for imposing penalty has been given by the OAA and the OAA has not applied his mind before imposition of penalty and has passed a mechanical order;
- 6.17. That the OAA ought to have not confiscated the foreign currency as the currency was used for purchasing Indian goods and the OAA has not seen any documents which were placed before the adjudication proceedings;
- 6.18. That the AA failed to consider that the Applicant was a foreign national and does not speak or write English language;
- 6.19. That there was no revenue loss to the Government of India as there is no duty chargeable on carrying foreign currency out of India;
- 6.20. That the Applicant was not aware of the Customs Rules and violation, if any was technical in nature and out of ignorance;

6.21. That this was the first time that the Applicant was carrying the said foreign currency;

6.22. That foreign currency is neither restricted nor prohibited and can be released on payment of redemption fine under Section 125 of the Customs Act, 1962;

6.23. That, in various types of similar cases, various authorities and forums have allowed release of foreign currency on redemption fined and personal penalty of goods even in case of non-declaration of foreign currency The Applicant has placed reliance on the following cases:

- (i) Hargovind Das K. Joshi vs. Collector of Customs [1992(61) E.L.T 172(SC)
- (ii) Commr of Customs vs. Rajinder Nirula [2017(346) E.L.T 9(Bom)]
- (iii) In RE: Mohd Arif [2018(361) E.L.L.T 959(GOI)]
- (iv) In RE: Kailash Jethanand Makhija -Order No. 633/2018-CUS (WZ)/ASRA/MUMBAI dated 21.08.2018
- (v) Commr. of Customs (Prev), West Bengal vs. India Sales International [2009(241) E.L.T 182(Cal)]
- (vi) Alfred Menezes vs. Commr. of Customs, Mumbai [2011(236) E.L.T. 587(Tri-Mum)]
- (vii) Philip Fernandes vs. Commr of Customs (Airport), Mumbai - Order Nos 1923-26/2002-WZB/C-I dated 16.07.2002
- (viii) Felix Dores Fernandes vs. ACC, Mumbai [2000(118) E.L.T 639 Tri]
- (ix) Kishin Shewaram Loungani vs. Commissioner of Customs, ACC, Mumbai [2002 (140) E.L.T 225(Tri-Mum)]
- (x) T. Soundarajan vs. CC, Chennai [2008(221) E.L.T. 258(Tri.-Chennai)]
- (xi) Kanwaljit Singh Bala [2012(275) E.L.T. 272(GOI)]
- (xii) Yakub Ibrahim Yusuf vs. Commr. of Customs, Mumbai [2011(263) E.L.T 685(Tri-Mum)]

Under the circumstances the Applicant prayed for setting aside the OAA and the foreign currency be released and personal penalty be reduced substantially or any other order as deemed fit to be issued.

7. Personal hearing in the case was scheduled for 21.11.2023 or 12.12.2023. Shri N.J Heera and Shri A.M.Sachwani, both Advocates appeared for the hearing on 15.12.2023 on behalf of the Applicant and submitted that the Applicant has explained the source of foreign currency and was carrying the

same back to the UAE where he carries out business. He further submitted that currency was not concealed and Applicant had no past history of any offence. They requested to allow redemption of foreign currency on reasonable fine and penalty. No one appeared for the personal hearing on behalf of the Respondent.

8. 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 of US\$ 2,08,700 valued at Rs. 1,46,68,159/-were not declared by the Applicant to the Customs at the point of departure. The seized foreign currency were concealed in small black colour handbags with mark BALCO (2) and in white coloured envelopes, kept in the baggage carried by the Applicant with the express intention of hoodwinking the Customs. The Applicant in his statements had admitted the ownership, knowledge, possession, carriage, concealment, non-declaration and recovery of the foreign currency and 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 them.

9. 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 and Customs Act, 1962 have been violated by the Applicant is correct and therefore, the confiscation of the foreign currency ordered, is justified.

10. Further the Madras High Court in the case of Commissioner of Customs, Chennai v/s. Savier Poonolly [2014(310 E.L.T. 231 (Mad)] at Para 13 has held as under;

*“..... We find, in the present case, the passenger has concealed the currency of 55,500 US dollars and other currencies, attempted to be taken out of India without a special or general permission of the Reserve Bank of India and this is in violation of the Rules. The fact that it was procured from persons other than authorized person as specified under the FEMA, makes the goods liable for confiscation in view of the above-said prohibition. Therefore, the Original Authority was justified in ordering absolute confiscation of the currency. The key word in Regulation 5 is prohibition of import and export of foreign currency. The exception is that special or general permission should be obtained from the Reserve Bank of India, which the passenger has not obtained and therefore, the order of absolute confiscation is justified in respect of goods prohibited for export, namely, foreign currency..... ”*

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. In the Revision Application, request for release of the foreign currency has been made, relying on cases where redemption was granted and extolling the argument that as far as Section 125 of the Customs Act, 1962 is concerned, that the statement was retracted, that unless the importation or exportation of goods are expressly prohibited, redemption has to be granted and that foreign currency is not a prohibited goods, claims of ignorance of law and the offence being of a technical nature. In this regard, the Government finds that the Original Adjudicating Authority has passed a cogent and judicious Order wherein contentions raised by the Applicants in the Revision Application have been dealt with in great detail at the first stage itself. The case of the Applicants has been thoroughly examined against the relevant provisions of the Customs Act, 1962, Foreign Trade (Development and Regulation) Act, 1992, Foreign Exchange Management (Export and Import of Currency) Regulations, 2015, FEM (Possession and Retention of Foreign Currency) Regulations, 2015 etc. It has been rightly held by the Original Adjudicating Authority that a passenger can carry Indian / foreign currency provided he fulfils the conditions specified in the Foreign Exchange Management (Export and Import of Currency) Regulations, 2015 and that any currency carried in violation of the restrictions imposed and non-declaration or mis-declaration thereof would render such currency liable to confiscation and the passenger would render himself liable to penalty for his / her act or omission and commission. Further, the Original Adjudicating Authority has held that the Applicants had not complied with the conditions as laid down under Regulation 5, 6(b) and 7(4) of the Foreign Exchange Management (Export and Import of Currency) Regulation, 2015 and thus, had violated the restrictions imposed under the said Regulations, and by concealing the foreign currency white coloured envelopes kept in small black colour handbags with mark BALCO (2) and not declaring the same, not obtaining permission from RBI and not

drawing the foreign currency from an authorized dealer, the seized foreign currency was rendered as 'prohibited goods' and liable for confiscation under Section 113(d), (e) and (h) of the Customs Act, 1962 and for this act of omission and commission, the Applicants had rendered themselves liable to penalty under Section 114(i) of the Customs Act, 1962.

13. Government finds that every aspect of the averments made by the Applicants have already been dealt with cogently by the Original Adjudicating Authority and the Appellate Authority and have been deliberated upon and negated, point-wise. The Original Adjudicating Authority and the Appellate Authority have discussed various contentions of the Applicant in the Orders-in-Original and the Orders-in-Appeal. The arguments of the Applicant in the Revision application against the orders of the OAA and AA are nothing but a ploy to escape from the clutches of law when confronted with offences committed by him.

14. The Appellate Authority at Para No. 18 to 23 of the OIA has stated as follows

*18. I find that in terms of section 2(33) of the Customs Act, 1962, as interpreted by the Hon'ble Supreme Court in the matter of Om Prakash Bhatia, reported in 2003 (155) ELT 423 (SC), non-fulfillment of conditions/restrictions laid down in the provisions of Customs Act or any other law for time being in force, would bring the goods within the scope of "Prohibited Goods". The Hon'ble Supreme Court has held that-*

*The expression "any prohibition" in Section 111(d) of the Customs Act, 196 includes restrictions. Merely because Section 3 of the Import and Exports (Control) A 1947, uses three different expressions "prohibiting", "restricting" or "otherwise controlling we cannot cut down the amplitude of the word "any prohibition" in Section 111(d) of the Act. "Any prohibition" means every prohibition. In other words all types of prohibitions. Restriction is one type of prohibition.*

19. Taking out foreign currency is regulated on two fronts i.e. source of acquisition maximum amount which can be taken out by any person. Since the appellant attempted to export the foreign currency in violation of provisions of Baggage Rules, 2016 and Foreign Exchange Management (Export and Import of Currency) Regulations, 2015 and restrictions posed therein, the seized foreign currency falls under the ambit of prohibited goods,

20. In the case at hand the appellant (pax) had not declared the impugned foreign currency truthfully in contravention of Section 77 of the Customs Act, 1962 and had cleverly concealed with intention to export the same illegally and therefore the foreign currency was absolutely confiscated under Section 113 of the Customs Act, 1962 read with provisions of FEMA (Export and Import of Currency) Regulations, 2015, Under Section 125 a discretion has been conferred on the officer to give the option to pay fine in lieu of confiscation in cases of goods, the importation or exportation whereof is prohibited under the Act or under any other law for the time being in force, but in respect of other goods the officer is obliged to give such an option. In the present case, having regard to the facts and circumstances in which the goods were attempted to be exported/smuggled out, the Adjudicating Authority has found that the goods had been attempted to be exported in violation of the provisions of the Customs Act, 1962 & Foreign Exchange Management (Export and Import of Currency) Regulations, 2015,

21. The Appellant has submitted that he was not aware of the Customs Rules and violation, if any, was of a nature and out of ignorance. In this regard, I rely on Legal Maxim "Ignorantia Juris Non Excusat" which means that, one cannot say that he was unaware of the law to avoid the liability after breach of that law. The basic intention behind this legal maxim is to put a check on a person at fault getting freed merely by claiming that he was not aware of given law.

22. I find that the Adjudicating Authority, has observed and held that the mala fide intention of the passenger, by non-declaration of the seized foreign currency to the authorities including Customs and to surreptitiously take the said foreign currency out of the country is apparent; that the seized currency was in excess of the permitted limit and was not declared to the Customs. There is no dispute that the passenger/appellant had ingeniously tried to clear the foreign exchange in a clandestine manner, without declaring the same to Customs. Also, the passenger/appellant did not possess any valid documents regarding the licit acquisition of the seized foreign currency.

23. I find that Hon'ble Bombay High Court in its judgment in the case of Suresh Gangaram Hole vs. Commissioner of Customs (Airport) Mumbai reported at 2015 (327) ELT 555 (Tri.Mumbai) observed that "thus the whole

*story of illicit procurement of the foreign currency is far from convincing and appears a concocted story to mislead the investigation. Be that as it may, even going by the version of the appellants, the foreign currency was brought into India in violation of the provisions of FEMA, 1999 and without declaration to the Customs and was sought to taken out of India illicitly. Thus the illicit nature of the transactions is manifest and amounts to "smuggling" in and out foreign currency. Thus the tainted nature of the seized currency and the transaction is established beyond any doubt". Accordingly, the Court held absolute confiscation of the seized foreign currency under Section 113(d) and (h) of the Customs Act, 1962 beyond any legal challenge."*

15. Government notes that the quantity of the foreign currency is substantial and the same was concealed in white coloured envelopes in small black colour handbags with mark BALCO (2) from the baggage of the Applicant. Government also notes that the Applicant was unable to produce the evidence that the impugned foreign currency had been sourced by them from licit channels and had not complied with the statutory provisions of the law. Had the Applicants not been intercepted, they would have gotten away with the foreign currency. Government finds that considering that a large amount of foreign currency was being kept in a clever manner in the baggage and recovered therefrom, the currency remained unaccountable. The foreign currency though claimed to be belonging to Applicant, the source being in question, thus discretion used by OAA to absolutely confiscate the foreign currency is appropriate and judicious. Government finds that in this case, the discretion not to release the foreign currency under the provisions of Section 125 of the Customs Act, 1962 has been applied appropriately by the Original Adjudicating Authority and has been rightly upheld by the Appellate Authority.

16. Government finds that the Appellate order rejecting the appeal and upholding the confiscation of the foreign currency by the Original Adjudicating Authority is legal and judicious and the Government is not inclined to interfere in the same.

17. The Applicant has prayed for reduction in the penalty imposed on him. The seized foreign currency is equivalent to Rs. Rs. 1,46,68,159/-. Government finds that the personal penalty of Rs. 15,00,000/- imposed on the Applicant under Section 114(i) of the Customs Act, 1962 is commensurate with the omissions and commissions committed by the Applicant and needs no interference.

18. In view of the above, the Government upholds the Order-in-Appeal No. MUM-CUSTOM-PAX-APP-819/2022-23 dated 29.07.2022 [Date of issue: 29.07.2022] [S/49-1519/2021] passed by the Commissioner of Customs (Appeals), Mumbai Zone-III and does not find it necessary to interfere with the same.

19. The Revision Application is dismissed as being devoid of merit.

( SHRAWAN KUMAR )

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

ORDER No. 104 /2024-CUS (WZ)/ASRA/MUMBAI DATED. 30.01.2024.

To,

1. Mr. Rashid Miglani Adbel Rahman Taha, Flat No. 205, Hamad Almalig Building, Deira, Dubai 234 371
2. 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, 5<sup>th</sup> Floor, Makwana Lane, Behind S.M.Centre, Andheri-Kurla Road, Marol, Mumbai - 400 059.
2. Shri A.M.Sachwani/Shri N.J.Heera, Advocates, Nulwala Building, Ground Floor, 41, Mint Road, Fort, Mumbai 400 001

3. Sr. P.S. to AS (RA), Mumbai.
4. File Copy.
5. Noticeboard.