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SPEED POST



GOVERNMENT OF INDIA
MINISTRY OF FINANCE
(DEPARTMENT OF REVENUE)

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

F.No. 371/116/B/WZ/2022-RA/289.

Date of Issue: 01.01.2024

ORDER No. 107 /2024-CUS (WZ)/ASRA/MUMBAI DATED. 31.01.2024
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 Tarheeb Afnan Patel

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-1042/2021-22 dtd 18.11.
2021 [DOI: 23.11.2021] [F.No. S/49-831/2020-21]
passed by the Commissioner of Customs (Appeals),
Mumbai, Zone-III.

ORDER

This Revision application has been filed by the Shri Tarheeb Afnan Patel (hereinafter referred to as the Applicant) against the Order-In-Appeal No. MUM-CUSTOM-PAX-APP-1042/2021-22 dated 18-11-2021 [DOI: 23-11-2021] [F.No. S/49-831/2020-21] passed by the Commissioner of Customs (Appeals), Mumbai, Zone-III.

2. Brief facts of the case are that on 05/06.02.2019, Shri Tarheeb Afnan Patel, the Applicant holding Indian Passport No. R 2110407, 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 India to Dubai by Jet Airways Flight No. 9W 580. The applicant was asked in the presence of punchas whether he was carrying any foreign or Indian currency on his person or on his baggage to which he replied in negative. Not satisfied with the answer, AIU officers conducted his personal search and examination of his baggage. During the personal search and the search of the checked-in baggage, the AIU officers recovered foreign currency viz 190 notes of USD100 totally equivalent to Indian Rupees amounting to Rs.13,37,600/-, which was concealed in the 02 Sunfeast biscuit packets. 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. The seized currency was deposited in the SBI vide TR6 Challan dated 06-02-2019. SBI provided confirmation of credit receipt dated 08.02.2019 showing converted amount as Rs.13,30,000/-. On conclusion of investigation Show Cause Notice was issued to the applicant on 19-07-2019.

3. After due process of law, the Original Adjudicating Authority (OAA) viz, Additional Commissioner of Customs, CSMI Airport, Mumbai vide Order-In-Original No. ADC/SKR/ADJN/08/2020-21 dated 20.05.2020 absolutely

confiscated the seized impugned foreign currency USD 19000 equivalent to Indian Rupees amounting to Rs.13,30,000/- under section 113(d),(e), (h) and (i) 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. 1,50,000/- 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-1042/2021-22 dated 18-11-2021 [DOI: 23-11-2021] [F.No. S/49-831/2020-21] did not find any reason to interfere with the Order-in-Original passed by the OAA and upheld the same.

5. Aggrieved with the above order, the Applicants have made an exhaustive submission of case laws and have submitted copies including their submissions made before the lower authorities etc. They have filed these revision applications on the following main points:

5.01 That Foreign currency is not prohibited goods under Customs Act, 1962 and FEMA; hence the foreign currencies carried by the applicant cannot be considered as prohibited goods; that the said currencies were not concealed and should be redeemed to the applicant;

5.02 That the applicant was not aware that he was supposed to declare the foreign currency carried by him to the Customs;

5.03 That there was no ingenious concealment of the currency and that he had packed the currency in the biscuit wrappers for security reasons and had not concealed in any cavity of the checked in baggage;

5.04 That financial capacity cannot be a factor to prove the allegation that the petitioner was not the owner of the currency;

5.05 That the decisions of Tribunals, High Courts and Supreme Court relied upon by the applicant were rejected by the Appellate authority without proper application of mind; that the Order of the Appellate Authority is vitiated on account of bias violations of principles of natural justice and fair play and is therefore not a speaking order;

5.06 That the penalty imposed on the applicant is disproportionate to the value of currency confiscated and imposition of heavy penalty is not sustainable;

5.07 That the applicant claims ownership and redemption of the currency under Absolute confiscation;

5.08 The applicant finally submitted that this was a single incident of alleged smuggling of goods which can never be justifiable ground for absolute confiscation of the same. The applicant did not commit any act of omission or commission which can be termed as an organized crime of a smuggling activity. The applicant requested that the foreign currency may be released to him on payment of reasonable fine and penalty and to drop further proceedings against him.

6. Personal hearing in the case was scheduled for 31-10-2023. Shri. Prakash Shingarani, Advocate for the applicant appeared for personal hearing on behalf of the applicant. He submitted that the applicant was carrying some foreign currency which was absolutely confiscated. He further submitted that currency was not concealed and applicant is not a habitual offender. He requested to give option to redeem the same on reasonable 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 very large. Also, the applicant claimed ownership of the same and has submitted that he had saved Rs.15,00,000/- from his cosmetic business and purchased the currency from money changers with the intention of buying cosmetics from Dubai. Further there is neither any allegations that the applicant is habitual offender, nor that the currencies were concealed. The currencies were found from his checked-in baggage. 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. 1,50,000/- imposed on the applicant for the impugned assorted foreign currency equivalent to Indian Rupees amounting to Rs.13,30,000/- 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 foreign currency viz USD 19000 totally equivalent to Indian Rupees amounting to Rs.13,30,000/- is allowed redemption on payment of a fine of Rs. 2,50,000/- (Rupees Two Lakh Fifty Thousand Only).

13. The penalty of Rs. 1,50,000/- 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)

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

ORDER No. 107 /2024-CUS (WZ)/ASRA/MUMBAI DATED 31.01.2024.

To,

1. Shri Tarheeb Afnan Patel, H. No. 243/1, Susagadi, Ribco Colony, Musanagar Bhatkal, Karwar-581320
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. Shri. Prakash K. Shingrani, Advocate, 12/334, Vivek, New MIG Colony, Bandra (East), Mumbai - 400 051.
2. Sr. P.S. to AS (RA), Mumbai.
3. File copy
4. Noticeboard.

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