



GOVERNMENT OF INDIA
MINISTRY OF FINANCE
(DEPARTMENT OF REVENUE)

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

F.No. 371/30/B/WZ/2018-RA & : Date of Issue : 20.03.2022
F.No. 380/17/B/WZ/2018-RA. /1272

ORDER NO. 116-117/2022-CUS (WZ)/ASRA/MUMBAI DATED 28.03.2022
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.

(i). F.No. 371/30/B/WZ/2018-RA &

Applicant : Shri. Choith Nanikram Harchandani

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

(ii). 380/17/B/WZ/2018-RA

Applicant : Pr. Commissioner of Customs, CSI Airport, Mumbai.

Respondent: Shri. Choith Nanikram Harchandani

Subject : Revision Application filed, under Section 129DD of the
Customs Act, 1962 against the Order-in-Appeal No.
MUM-CUSTM-PAX-APP-730/17-18 dated 16.11.2017
[F.No. S/49-479/2016] passed by the Commissioner of
Customs (Appeals), Mumbai-III.

ORDER

These revision applications have been filed by Shri. Choith Nanikram Harchandani (herein referred to as Applicant alternately as applicant-respondent) and the Pr. Commissioner of Customs, CSI Airport Mumbai (herein referred to as Applicant-Department) against the Order-In-Appeal No. MUM-CUSTM-PAX-APP-730/17-18 dated 16.11.2017 [F.No. S/49-479/2016] passed by the Commissioner of Customs (Appeals), Mumbai-III.

2(a). Briefly stated the facts of the case are that the on 21.11.2014, the Officers of Customs intercepted the applicant at T2 Terminal, CSI Airport when he was about to depart for Hong Kong by Jet Airways Flight No. 9W-0012 dated 22.11.2014. The applicant had completed the checking formalities and to the query whether he was carrying any contraband/foreign/Indian currency in his hand baggage or person, the applicant had replied in the negative. A search of the baggage carried by the applicant led to the recovery of assorted foreign currencies equivalent to Rs. 37,47,971/- (actual realised amount). The foreign currencies were found in bundles kept in the bags carried by the applicant.

2(b). The applicant in his statement recorded under Section 108 of the Customs Act, 1962 admitted knowledge of possession, concealment, carriage, non-declaration and recovery of the seized foreign currencies; that he did not have any legal / valid purchase documents with him for the seized foreign currencies and that he had acquired the same from the illicit market; that he had concealed the foreign currencies inside the inner lining of the zipper trolley bag which he was carrying as his hand bag to avoid detection by Customs Authorities, that he was carrying foreign currency in excess of US\$ 5000/-; that it was an offence under the Customs Act, 1962; that he had been booked twice for smuggling foreign currencies vide F.No SD/INT/AIU/10/2017 APC and SD/INT/AIU/74/2009 APB where foreign currency equivalent to INR 38,00,671/- and INR 35,94,005/- had been seized from his possession.

3. After due process of the law, the Original Adjudicating Authority (OAA) vide Order-In-Original No. ADC/RR/ADJN/280/2016-17 dated 25.08.2016 [DOI : 26.08.2016 : (S/14-6-02/2015-16-ADJN) (SD/INT/AIU/805/2014 AP 'A')] ordered for the absolute confiscation of the foreign currencies equivalent to

Rs. 37,47,971/- under Section 113(d), (e) and (h) of the Customs Act, 1962 and imposed a penalty of Rs. 4,00,000/- (Rupees Four lakhs) on the applicant under Section 114(i) of the Customs Act, 1962.

4. Aggrieved by this order the Applicant had filed an appeal with the appellate authority viz Commissioner of Customs (Appeals), Mumbai -III who vide his Order-in-Appeal No MUM-CUSTOM-PAX-APP-730/17-18 dated 16.11.2017 [F.No. S/49-479/2016], allowed the redemption of the foreign currency on payment of the redemption fine of Rs. 9,50,000/- (Rupees Nine lakhs fifty thousand only) and penalty of Rs. 4,00,000/- imposed on the applicant under Section 114(i) of the Customs Act, 1962 by the OAA was upheld.

5. Aggrieved with the above order, the Applicant has filed this revision application on the following grounds;

5.01. that he had never crossed the Immigration Section at the airport which can be verified from his renewed passport which does not bear any stamp of immigration.

5.02. that the statement and panchanama were recorded in English and the same had not been read over to the applicant.

5.03. that the applicant has refuted the allegation that his passport was fake and has stated that the passport was new and had been renewed just prior to departure and hence, the record of his previous travel was not retrieved from the system

5.04. that he was never allowed to declare the currency.

Applicant in their revision application has prayed for the release of the foreign currency without any redemption fine and personal penalty or pass any other order as deemed fit.

6. Aggrieved with the order-in-appeal dated 16.11.2017, the Applicant-Department have filed this revision application on the following grounds;

6.01. that the order-in-appeal dated 16.11.2017 was not legal and proper.

6.02. that the applicant-respondent could not produce any document to prove the legal acquisition of the said foreign currency; that under Section 4 of FEMA, 1999 and Regulation 7(2)(ii) of the FEMR, 2000, the applicant-respondent was under an obligation to show that the foreign currency had been acquired from an authorized person. Since, the applicant-respondent could not produce any licit document for the foreign currency in his possession, the same had become 'prohibited goods' under Section 113(d) of the Customs Act, 1962.

6.03. that taking foreign currency out of the country without general or special permission of RBI is prohibited in terms of Regulation 3 of FEMR Act, 1999

6.04. that in terms of Master Circular No. 6/2015-16 dated 01.07.2015 issued by the RBI, foreign currency amounting to USD 2,50,000/- from an authorized dealer can be taken for business visit etc in a financial year, irrespective of the number of visits undertaken during the year; but the applicant had tried to carry the foreign currencies equivalent to Rs. 37,47,971/- without establishing the legal source or acquisition.

6.05. that the applicant had admitted carrying foreign currency, earlier also and was a repeat offender had not been considered by the appellate authority.

6.06. that the appellate authority had failed to appreciate the evidence that the applicant not only admitted to the knowledge, possession, carriage, non-declaration of the foreign currency but also to the concealment of the same with the intention of evading Customs while attempting to smuggle it out of the country.

6.07. that taking into account the gravity of the offence, the appellate authority ought not to have used the discretion under Section 125 of the Customs Act, 1962.

6.08. that the foreign currency was being attempted to be taken out in a clandestine manner and hence, it was necessary to deal sternly with such offence.

6.09. that the applicant-department has relied upon the undermentioned case laws;

(a). Hon'ble Supreme Court's judgement in the case of Om Prakash Bhatia vs. Commissioner of Customs, Delhi [2003(155)ELT 423 SC]

(b). CESTAT Order in the case of Abubaker Haji Qasim vs. Commissioner of Customs, Mumbai Airport [2015(316)ELT 97 Tri-Mum].

(c). Bombay High Court's judgement in the case of Fayaz Gulam Godil [2016(338) ELT 42 (Bom)].

(d). Bombay High Court's judgement in the case of M. Kudubdeen vs. GOI.

6.10. that the applicant was a repeat offender and had been booked thrice earlier in cases of foreign currency smuggling. Applicant was detained under COFEPOSA. The appellate authority had not considered this issue.

Under the circumstances, the applicant-department has prayed to set aside the Order-In-Appeal and to uphold the Order-in-Original or pass any orders as deemed fit.

7(a). Accordingly, personal hearings in the case through the online video conferencing mode were scheduled for 03.12.2021 / 09.12.2021, 05.01.2022 / 19.01.2022, 02.02.2022 / 09.02.2022. None appeared for the department. Shri. N.J Heera, Advocate for the applicant appeared for physical hearing on 09.02.2022 and submitted that the Commissioner (Appeals) has imposed excessive RF and penalty. They submitted that the foreign currency was seized even before the applicant had crossed the Customs or immigration.

7(b). With regard to RA no. 380/17/B/WZ/2018-RA filed by the applicant-department, the applicant-respondent furnished a written counter submission dated 19.01.2022 to the grounds of revision, stating that;

(i). the department had just brushed aside the contentions and representations made during the investigations and adjudication proceedings.

(ii). the appellate authority had rightly allowed the redemption of the foreign currencies under Section 125 of the Customs Act, 1962.

(iii). that the department had erroneously cited the Master Circular no. 06/2015 dated 01.07.2015 issued by RBI, as their case had been booked on 21.11.2014 and therefore, RBI Master Circular was not applicable.

(iv). that the applicant-respondent was uneducated and had retracted his statement.

- (v). seized foreign currency was neither prohibited nor restricted item.
- (vi) that the applicant-respondent was not a carrier.
- (vii). that the applicant-respondent has cited a catena of case laws of various forums such as Apex Court, High Courts, Tribunals, GOI etc.

8. With regard to RA no. 371/30/B/WZ/2018-RA, the applicant has filed an application for condonation of delay of 6 days. Government notes that the revision application has been filed on 26.02.2018. The applicant has stated that the OIA dated 16.11.2017 was received by them on 22.11.2017. Government notes that the date of filing of the revision application falls within the extended period of 6 months (i.e. 3 months + 3 months) as prescribed in Section 129DD (2) of the Customs Act, 1962. Accordingly, Government condones the delay.

9. Government has gone through the facts of the case. Government notes that the applicant had not declared the foreign currencies to the Customs at the point of departure. Further, in his statement he admitted the possession, carriage, concealment, non-declaration and recovery of the foreign currencies and also stated that the same belonged to him. The applicant was unable to produce any document evidencing that the foreign currencies had been acquired from a licit source. Also, admittedly, in the past too, he was involved in two cases involving smuggling of foreign currency. Also, the fact that the foreign currency was procured from persons other than authorized persons as specified under FEMA, makes the goods liable for confiscation in view of the prohibition imposed in Regulation 5 of the Foreign Exchange Management (Export and Import of Currency) Regulations, 2000 which prohibits export and import of the foreign currency without the general or special permission of the Reserve Bank of India. Therefore, the absolute confiscation of the foreign currency was justified as the applicant was carrying foreign currency in excess of the permitted limit and no declaration as required under section 77 of the Customs Act, 1962 was filed.

10. 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. Also,

the applicant had not been purchased from authorized foreign exchange dealers. 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 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 lower adjudicating authority has correctly applied the ratio of the judgement of the Madras High Court in the case of Commissioner of Customs, Chennai v/s. Savier Poonolly [2014(310 E.L.T. 231 (Mad))] wherein it was held at para 13 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. Moreover, Government also observes that the lower adjudicating authority has 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 with the scope of "prohibited goods".

12. Government also relies upon the conclusions drawn at paras 10 to 12 of the case of Commissioner of Customs v/s. Savier Poonolly [2014(310 E.L.T. 231 (Mad))].

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.

13. 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.

14. The Government finds that the applicant is a habitual offender. The Applicant-department has stated that he had been detained under COFEPOSA, which affirms

the fact that he is a repeat offender. It is clear that the Applicant was aware of the law. Government notes the non-accountal of source and the fact of applicant being a habitual offender, has been considered by the OAA while absolutely confiscating the foreign currencies. Government finds that the discretion to release the foreign currency under the provisions of Section 125 of the Customs Act, 1962 on payment of redemption fine by the appellate authority was not judicious and proper. All relevant factors were not weighed in by him properly. Government finds that the order of the appellate authority to release the foreign currency on payment of redemption fine of Rs. 9,50,000/-, therefore, deserves to be set aside.

15. The Order-in-Appeal no. MUM-CUSTOM-PAX-APP-730/17-18 dated 16.11.2017 [F.No. S/49-479/2016] passed by the Commissioner of Customs (Appeals), Mumbai-III is set aside and absolute confiscation ordered vide Order-in-Original No. ADC/RR/ADJN/280/2016-17 dated 25.08.2016 [DOI : 26.08.2016 : (S/14-6-02/2015-16-ADJN) (SD/INT/AIU/805/2014 AP 'A')] is restored.

16. The Government finds that the personal penalty of Rs. 4,00,000/- imposed on the applicant under Section 114(i) of the Customs Act, 1962 by the lower adjudicating authority and upheld by the appellate authority is reasonable and justified

17. Accordingly, the above two revision Applications are disposed of on above terms.


(SHRAWAN KUMAR)

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

ORDER No. 116-117/2022-CUS (WZ) /ASRA/ DATED 28.03.2022

To,

1. Shri. Choith Nanikram Harchandani, BK No. 868, Room No. 11, Section 19, Ulhasnagar - 421 003.
2. Pr. Commissioner of Customs, Chhatrapati Shivaji International Airport, Terminal - 2, Mumbai - 400 099.

Copy to:

1. Shri. N.J Heera, Advocate, 41, Mint Road, Opp. G.P.O, Fort, Mumbai -
2. 400 001.
3. Sr. P.S. to AS (RA), Mumbai.
4. Guard File.
5. File Copy.
6. Notice Board.