

REGISTERED
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. 380/145/B/16-RA

2975

Date of Issue

02/06/21

ORDER NO. [32/2021-CUS (SZ)/ASRA/MUMBAI DATED 20.05.2021 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 : Commissioner of Customs, Bangalore.

Respondent : Shri Ahammed Niyaz Chemnad

Subject : Revision Application filed, under Section 129DD of the Customs Act, 1962 against the Order-in-Appeal C.CUS-I No. 401/2016 dated 08.06.2016 passed by the Commissioner of Customs (Appeals), Bangalore.

ORDER

This revision application has been filed by Commissioner of Customs (Airport), Mangalore (herein referred to as Applicant) against the order No. 401/2016 dated 08.06.2016 passed by the Commissioner of Customs (Appeals-I), Bangalore.

2. Briefly stated the facts of the case are that the respondent, was bound for Abu Dhabi and was intercepted in the departure hall of the Mangalore International Airport on 18.11.2015. Examination of his person resulted in the recovery of foreign currency of UAE dirhams and Saudi Riyals equivalent to Rs. 3,42,625/- (Rupees Three lacs Forty two thousand Six hundred and twenty five). The currency was recovered from the front pockets of the trousers worn by the Respondent.

3. After due process of the law vide Order-In-Original No. 07/2016(AP) dated 02.02.2016 the Original Adjudicating Authority ordered absolute confiscation of the currency under Section 113 (d) (e) & (h) of the Customs Act, 1962, and imposed a penalty of Rs. 1,00,000/- under Section 114 (i) of the Customs Act, 1962.

4. Aggrieved by the said order, the applicant and the respondent both filed appeal before the Commissioner (Appeals) who vide Order-In-Appeal No. 401/2016 dated 08.06.2016 observed as under

" I also find that the possession and attempt to take out the foreign exchange forms the crux of the case. However, in the grounds of appeal the appellant have contended that the statement given before the Superintendent of Customs on 18.11.2015 is under duress. Appellant also stated that he has not written any letter dated 18.11.2015. These facts need to be examined before the complicity of the appellant warranting imposition of penalty. I find that in the event of non issue of SCN and the appellant not having been heard by the adjudicating authority the impugned order suffers from the vice of being a non-speaking order. Hence, ends of justice would be met if the appellant is made to represent his case before the adjudicating authority afresh.

While I agree that there was an attempt to smuggle out the foreign currency and I also agree that the seizure was done on a reasonable doubt in a bona fide way, the subsequent process leading to confiscation and leading to penalty etc.,

are not agreeable. Therefore, I set aside the order except the portion pertaining to seizure and direct the lower authority to issue a proper Show Cause Notice as per Section 124 and adjudicate the case afresh."

The order in original was set aside and the lower authority was directed to issue a proper show cause notice and adjudicate the case afresh.

4. Aggrieved with the above order the Applicant department has filed this revision application inter alia on the grounds that;

4.1 The pax, vide his letter dated 18/11/2015, has handed over the passport; has deposed a statement on 18/11/2015 before the Superintendent of Customs, Mangaluru International Airport under Section 108 of the Customs Act, 1962; A mahazar has been drawn on 18/11/2015, which bears the signature of the pax; A boarding pass issued by Jet Airways exists for his journey on 18/11/2015 at seat No. 105; A confirmed ticket exists for the journey of the pax by flight No. 9W 502 on 18/11/2015; and a detention memo was also signed by the pax on 18/11/2015. All these prove beyond doubt that the pax was in Mangalore International Airport on 18/11/2015. Though the pax has not contested the seizure of foreign currency from his possession and has not rebutted the signing of other documents, it is astonishing that the pax only retracts the letter through which he has waived legal rights without as assigning proper reasons and such retraction has been accepted by the appellate authority, who proceeded to pass the impugned OIA remanding the case back to the original authority holding that the order suffered from the vice of being a non-speaking order. The Appellate Authority has also failed to understand that it is not a case where the department did not follow the principles of natural justice but the pax has waived off his legal rights. In the cases where the parties waive off their legal right, the Appellate authority cannot sit on judgement of the same after a lapse of a long period.

4.2 The Appellate Authority has failed to appreciate the fact that Section 110 and Section 124 of the Customs Act, 1962 are interlinked and has failed to give credence to the fact that notice / representation could be oral also. Further, Section 122A of the Customs Act, 1962, which deals with the Adjudication Procedure stipulates that the adjudicating authority shall, in any proceeding, give an opportunity of being heard to a party in a proceeding, if the party so desires. Thus, if the party does not desire, then the

adjudicating authority is not required to offer any personal hearing in the matter. In the subject case, the party, by his letter dated 18/11/2015, did not desire the personal hearing and even the show cause notice. Thus, the appellate authority has erred in remanding the case back to the original authority.

4.3 The Revision Applicant cited various other assorted judgments in support of their case and prayed for setting aside the order of the impugned Appellate authority, uphold the order of the original adjudicating authority or any such order as deemed fit.

5. In view of the above, the Respondent was called upon to show cause as to why the order in Appeal should be annulled or modified as deemed fit. The Respondent has not responded to the Show cause notice. Personal hearing in the case were scheduled on 28.08.2018, 25.09.2018, 27.11.2018, 07.11.2019 and 21.11.2019 however the respondent has also not responded to these letters. The Applicant department in their letter dated 04.11.2019 have stated that their grounds of appeal are self explanatory. In view of the change in revisionary authority personal hearing was granted on 08.12.2020, 15.12.2020, and on 22.12.2020. One final hearing was again scheduled on 25.02.2021. Shri Avinash Kiran Deputy Commissioner appeared on behalf of the Applicant department and reiterated the submissions in the revision application and requested to uphold the Order in original. The respondent again did not attend the hearing, the case is therefore being decided on merits.

6. The Government has gone through the case records, there is no dispute that the foreign currency was recovered from the pockets of the trousers worn by the Respondent as he was leaving for Abu Dhabi. The respondent also could not produce documents to show its purchase from an authorized foreign exchange dealer and licit possession of the same and under the circumstances confiscation of the currency is justified.

7. The Commissioner of Customs (Appeals) has remanded the case back to the original adjudicating authority as the respondent has contended that the statement given before the Superintendent of Customs on 18/11/2015 was under duress and the appellant has stated that he has not written any letter dated 18/11/2015. In addressing this issue Government notes that the Applicant department have produced a letter dated 18/11/2015 bearing the signatures of the

Respondent wherein the respondent has requested for a waiver of the show cause notice and a personal hearing as he had to travel back urgently to Abu Dhabi. The letter has been read and translated to the respondent in Malayalam. Thus the claim that the Respondent had not written any such letter dated 18/11/2015 is false and baseless. The said letter also states that the submission was made as the respondent had to travel back urgently to Abu Dhabi. Adjudication Procedure stipulates that the adjudicating authority shall, in any proceeding, give an opportunity of being heard to a party in a proceeding, if the party desires. Therefore the allegation of duress in submitting the letter is unfounded. Under the circumstances the Government does not find any error in the order of the original adjudicating authority.

8. In the case of Viswa Organics Pvt. Ltd. Vs CCE, Indore reported in 200 (120) ELT 456 it has been held by the Tribunal, Delhi that as " Assessee had a legal right to a Show Cause notice and personal hearing which was waived and hence there is no infirmity in confirmation of demand without issue of Show Cause notice". The case on hand is identical to this case as the respondent had waived his legal rights vide his letter dated 18.11.2015, enclosed by the Applicant department in the revision application. The hon'ble Apex Court judgment in case of MIL India Ltd. [2007 (210) E.L.T. 188 (S.C.), states, Commissioner (Appeals) has to decide the case by calling for records and evidence as an adjudicating authority by following principles of natural justice - Remand order is illegal and Commissioner (Appeals) was ordered to decide the case - Section 35A of Central Excise Act, 1944". In view of the above there is no infirmity in the order of the adjudicating authority and therefore the order of the Appellate authority is liable to be set aside.

9. The facts of the case bring out that the respondent was intercepted while he was proceeding to security check after completion of his checked-in and immigration formalities, When specifically asked as to whether he carried any contraband goods or any Indian/foreign currency, Shri Ahammed Niyas Chemnad replied that he only carried Indian currency of Rs.3530/- and that he had no foreign currency with him. It is therefore clear that the respondent wanted to smuggle foreign currency out of India. He had no valid documents with him to show its purchase from any authorized exchange dealers. In his statement recorded on 18.11.2015 he has categorically stated that the said foreign currency notes were given to him by the travel agent M/s. Riya Travels, Kasargod, from where he booked his ticket, for handing over the same to one contact person in Abu Dhabi, thus the

foreign currency was not his own, but that of a third person, for whom he was acting as a carrier. These acts of the respondent reveal these acts to be contumacious.

10. Government observes that Section 122A "Adjudication Procedure" of the Customs Act, 1962, which deals with the Adjudication Procedure stipulates that the adjudicating authority shall, in any proceeding, give an opportunity of being heard to a party in a proceeding, if the party so desires. Thus, if the party does not desire, then the adjudicating authority is not required to offer any personal hearing in the matter. The absence of any representation from the respondent to this office letters scheduling personal hearings, further giving credence to the fact that it is not a case where the department did not follow the principles of natural justice but the pax has waived off his legal rights. It cements the fact that the respondent is not interested in pursuing the matter and constrains the government to accept the Applicant department's submissions. The original adjudication order is therefore liable to be upheld, and the impugned order in Appeal is liable to be set aside.

11. The impugned order in appeal is therefore set aside. The impugned order of the original adjudicating authority is upheld.

12. The Revision application is disposed of on above terms.

Shrawan
20/5/21
(SHRAWAN KUMAR)

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

ORDER No. 32/2021-CUS (SZ) /ASRA/

DATED 20/05.2021

To,

1. The Commissioner of Customs, New Custom House, Panambur, Mangalore.
2. Shri. Ahammed Niyaz Chemnad, s/o Late Shri Muhammed Shareef Chemnad House, House no. 483, Ward No. 1, Chemnad GP, Chirakkal Kunnil House, PO Chemnad, Kombanadukkam, Kasargod district, Kerala.

Copy to:

1. Sr. P.S. to AS (RA), Mumbai.
2. Guard File.
3. Spare Copy.