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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. 371/381 & 384/B/2019-RA/SS1 : Date of Issue 01.02.2023

ORDER NO. 49-150/2023-CUS (WZ)/ASRA/MUMBAI DATED 30.01.2023
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.

F.No. 371/381/B/2019-RAApplicant No. 1.(A1).

Applicant No. 1 : Shri. Rislle Ali Agat,

F.No. 371/384/B/2019-RAApplicant No. 2 (A2).

Applicant No. 2 : Shri. Aftab Alam Shamsul.

Respondent : Pr. Commissioner of Customs, CSMI Aiport, Mumbai

Subject : Revision Application filed under Section 129DD of the
Customs Act, 1962 against the Orders-in-Appeal No.
MUM-CUSTM-PAX-APP-214 & 215/19-20 both dated
25.06.2019 issued on 04.07.2019 through F.No. S/49-
87 & 63/2018/AP resp., passed by the Commissioner of
Customs (Appeals), Mumbai - III.

ORDER

These two revision applications have been filed by (i). Shri. Rislle Ali Agat & (ii). Shri. Aftab Alam Shamsul (hereinafter referred to as the Applicant No. 1 and Applicant No. 2, resp., alternately, also referred to as Applicants) against the Orders in Appeal Nos. MUM-CUSTOM-PAX-APP-214 & 215/19-20 both dated 25.06.2019 issued on 04.07.2019 through F.No. S/49-87 & 63/2018/AP resp., passed by the Commissioner of Customs (Appeals), Mumbai - III.

2(a). Brief facts of the case are that the applicant no. 1 who was a crew member of Jet Airways and scheduled to fly to Hong Kong by Jet Airways Flight No. 9W-076 / 04.02.2016 was identified and intercepted by DRI, MZU on 04.02.2016 at CSMI Airport, Mumbai after he had cleared Immigration and had submitted the Crew Declaration Form (CDF) at the Customs counter. No mention of possession of foreign currency had been made by A1 in the CDF form. On persistent inquiries, A1 admitted to having foreign currency in his checked-in baggage. Upon examination of his checked-in baggage, USD 3,90,000/- was recovered which had been concealed in five leather diary covers placed in his checked-in baggage.

2(b). During investigation it was revealed by A1 that; the said foreign currency was being smuggled out of India for a monetary consideration of Rs. 1,00,000/- on behalf of one of his colleagues, viz, Mr. Aftab Alam (Applicant no. 2) who was also a cabin crew in M/s Jet Airways; that 3 days prior to 04.02.2016, he had received a call from A2 who had enquired about his monthly roster; that on 03.02.2016, A2 had handed over three diary covers to him at his residence and had informed that it contained USD 2,50,000/- packed inside it and he would be handing over more foreign currency; that later at the airport on 04.02.2016 prior to his check in for flight no. 9W-076 to Hong Kong, A2 had handed over a back pack containing foreign currency

at the departure entry area of CSMI airport; that since Dec2014, he was aware that A2 was indulging in smuggling of foreign currency to Hong Kong; that using the same modus operandi, on 7 occasions in the past he had smuggled foreign currency to Hong Kong; that in 2015, he had purchased a residential flat in Mira Road and a second hand car i.e. Maruti SX4 from A2 for Rs. 2,20,000/-; that upon being shown a message received on his mobile from A2 at about 12:31 am on 04.02.2016 which read 'Capt gave 1,40,000 nw', he revealed that this message pertained to the amount of foreign currency handed over by A2 on 04.02.2016 and the word 'Capt' was a term in which they both used to refer to each other; that on 04.02.2016, as per the roster he had been allotted to Brussels, however, he had swapped the duty with his junior colleague who had been allotted Hong Kong; it was not his regular duty to go Hong Kong on that day .

2(c). Numerous attempts were made to locate A2 at his known addresses, but he was unavailable. Several summons had been issued to A2, however he had not responded. Compliant was lodged under Section 174 of the Indian Penal Code at A2 at the CMM Court for non-compliance of summons and the warrant issued had gone un-executed. Two times Anticipatory Bail applications were filed by A2 before the Sessions Court, Mumbai and on both occasions, it had been rejected.

2(d). Financial investigations pertaining to the of the bank account of the wife of A2 was carried out where credits and debits of substantial amounts made by A2 to M/s. Patil and Sons Jewellery were found.

2(e). Shri. Pramod Patil, prop. of M/s. Patil and Sons Jewellery informed that these transactions pertained to purchase of old jewellery from wife of A2.

2(f). Subsequent, to the issuance of SCN dated 27.07.2016 by DRI, MZU to A1, on 25.10.2016, A2 surrendered before ACMM, Mumbai. A2 besides revealing about the transactions found in his account, informed that in the past Shri. Pramod Patil had made an offer to him to carry foreign currency; that he was aware that the foreign currency seized from A1 belonged to Shri. Pramod Patil; that A2 had denied that he had handed over the foreign currency of USD 3,90,000/- to A1; that regarding the message found on the mobile phone of A1, A2 stated that the figures were in Indian rupees which A1 had owed him.

2(g). Shri. Pramod Patil denied all the allegations made by A2 and reiterated that he did not know A1.

2(h). An addendum dated 24.04.2017 was issued by DRI, MZU to the earlier SCN dated 27.07.2016.

3. The Original Adjudicating Authority (OAA) i.e. Addl. Commissioner of Customs, CSMI Airport, Mumbai vide Order-In-Original No. ADC/AK/ADJN/1132/2017-18 dated 27.12.2017 issued through F.No. S/14-6-10/2016-17 ADJN (DRI/MZU/C/INT-08/2016) ordered for the absolute confiscation of the foreign currency of USD 3,90,000/- equivalent to Rs. 2,63,05,500/- (realized amount) under Section 113(d), 113(e) & 113(h) of the Customs Act, 1962 seized from A1 on 04.02.2016. Penalties of Rs. 52,00,000/- under Section 114(i) of the Customs Act, 1962 and Rs. 50,00,000/- under Section 114AA of the Customs Act, 1962 were imposed on A1. A penalty of Rs. 52,00,000/- under Section 114(i) of the Customs Act, 1962 was also imposed on A2. Further, the Maruti SX4 car valued at Rs. 2,50,000/- which had been seized from the possession of A1 was ordered to be confiscated.

4. Aggrieved by the said order, the applicants filed appeals before the Commissioner of Customs (Appeals), Mumbai - III who vide combined Orders-In-Appeal No. MUM-CUSTOM-PAX-APP-214 & 215/19-20 both dated 25.06.2019 issued on 04.07.2019 through F.No. S/49-87 & 63/2018/AP modified the OIO only to the extent of setting aside the confiscation of the seized Maruti SX4 car.

5. Aggrieved with the aforesaid Order passed by the AA, A1 has preferred this revision application inter alia on the grounds that;

5.01. that the lower authorities had not used their discretion by giving A1 the option to release the USD equivalent to Rs. 2,63,05,500/- in terms of provisions of Section 125 of Customs Act, 1962. Absolute confiscation would arise, with respect only on peculiar facts and circumstances of the case i.e. where there was a risk to public safety and security, where there is health hazard and where the release would be substantially detrimental to public interest like in the case of arms and ammunition, drugs and chemicals which could be hazardous. In all other cases, redemption ought to be allowed. The absolute confiscation should be ordered only where the goods cannot be allowed for public consumption' and only where its release would be highly detrimental to economic interest of the country. Otherwise, the redemption should be the rule and absolute confiscation, an exception.

5.02. A1 from the very beginning had very clearly stated that the said foreign currency did not belong to him i.e. he was not the owner of said foreign currency. However, the investigating authorities till date had not been able to trace out and locate the owner of the said foreign currency, even though more than 3½ years had elapsed from the date of detection of the case. In all probability, the owner could not be traced out as the required period had passed and owner would remain untraced. Therefore, as mandated under the provisions of section 125, in case of other goods, option of redemption of the currency should be given 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, the redemption should be allowed to such person". The redemption was permissible under a statutory provision when the owner was not known. Therefore, A1 has prayed that the redemption of currency on payment of such appropriate fine may be allowed having regard to peculiar facts and circumstances of the case.

- 5.03. The import and export of foreign currency through baggage, was not absolutely prohibited. Certain amount of foreign currency was permitted to be carried by tourist and passengers under provisions of Foreign Exchange Management Act, 1999. It depended upon whether the visit was private wherein the permissible amount was USD 2,50,000/- under the Liberalized Remittance Scheme (LRS) for resident individuals. Such limit was also permissible for business trip and in case of establishing the Joint ventures (JV) for wholly owned subsidiaries, upto USD 2,50,000/- remittance was allowed. Such schemes were modified and revised having regard to all relevant facts and circumstances by the RBI. Any amount could be carried out, if so permitted by the RBI or under specific permission granted by DGFT.
- 5.04. On one hand, the entire currency worth Rs. 2,63,05,500/- had been absolutely confiscated and on another hand, a huge penalty amount of Rs. 1.02 crore have been imposed on A1. The State was getting enriched unjustifiably, illegally and improperly to such a huge sum of Rs. 3.65 Crores, for merely a 'simple civil offence' and not for a crime. The end of justice would be met only when, the redemption of currency was allowed to A1 from whose possession the said currency was seized. RF should be in the range of 1% to 10%.
- 5.05. Redemption had even been allowed in cases where the amount confiscated was very high. In the case of Commissioner of Customs v/s Pravin R. Ajudiya decided on 08.05.2019, the Hon Gujarat High Court while disposing of tax appeal no. 59 of 2019 had allowed the redemption of diamonds on payment of redemption fine equal to 10% of the value of goods and penalty equal to 1% of the value of the goods and providing a BG for a sum of Rs. 25 lakhs to be kept alive till final disposal of the appeal. The same bench had also permitted the redemption of the gold bars valued at Rs. 6.75 Crores on payment of redemption fine of Rs. 40 lakhs (5.92% of the value of goods) and penalty of Rs. 6 lakhs (1% of the value of the goods) and Bank Guarantee of Rs. 1 Crore in the case of Commissioner of GST and Central Excise, Surat vs. Dharmesh Pansuriya (tax appeal no. 62 of

2018). Also, in the case of D. Jewel vs. Commissioner of Customs, Surat, decided on 14.02.2019, the Gujarat High Court had permitted the release of gold bars, diamonds/precious stones/moti and gold jewellery totally worth Rs. 5,91,09,147/-, on payment of RF of Rs. 59,10,915/- (10% of the value of the goods) and penalty of Rs. 5,91,091/- (1% of the value of the goods) with two bank guarantee each of Rs. 50 lakhs.

5.06. A1 while seeking the redemption of the confiscated currency, has also relied on the following cases :-

(i) the Kolkata High Court judgement in the case of CCP - West Bengal vs. India Sales International {2009 (241) ELT 182 (Cal.)}, that the words used by the legislature under Section 125 of Customs Act, 1962, cannot be held as "prohibited absolutely". The word "prohibited absolutely" has not been used under section 125 ibid by the legislators which cannot be inserted by Court.

(ii) The Kolkata Bench of CESTAT in the case of Vijay Kumar Chaudhary vs. Commissioner of Customs, Patna {2015 (325) ELT 788 (Tri. Kol)}; had held that once confiscated goods were sold, it implied that there was no absolute prohibition for import of such goods. That, such restrictions are curable and thus, allowed the redemption of 3437 imported mobile phone of Chinese origin.

(iii). The Hon. CESTAT, Mumbai Bench, in the case of Yakub Ibrahim Yusuf vs. Commissioner of Customs, Mumbai {2011 (263) ELT 685 (Tri - Mum)}; had held that the redemption of confiscated gold on an option to pay fine in lieu of confiscation was not against the provisions of Section 125 of Customs Act, 1962.

5.07. A1 has been dismissed from the service of Jet Airways and had remained behind the bars for nearly two months. He was now jobless, in deep financial stress and depression and had somehow managed to pay Rs. 7.65 lakhs as pre-deposit while filing the appeal. He should be given the option of redemption of the said confiscated foreign currency.

5.08. Even token relief had not been given by the AA on the issue of very high penalty of Rs. 1.02 crores imposed by OAA i.e. Rs. 52 lakhs under Section 114(i) of the Customs Act, 1962 and Rs. 50 lakhs imposed under Section 114AA of Customs Act, 1962

5.09. The provisions of Section 114(i) of Customs Act, 1962 is meant for such persons who indulge in committing an offence by their act of omissions and commissions while exporting goods by way of filing shipping bill,

commercial invoice, packing list and in description of goods and in declaration of its value with ill motive of availing export incentives or in manipulation of remittance of foreign exchange or in evasion of customs duty i.e. which could be attributed to the exporter or to the firm who files the shipping bill. The other category of persons under 114(i) are those persons who aid and abate in undervaluation or in mis-declaration of quantity by way of transport and storing of goods or helping the exporter illegally and improperly. A1 was not a person connected with export of declared goods under prescribed customs documents in either way. Therefore, the provisions of section 114(i) of Customs Act, 1962 were not attracted against him even as an aider or abettor. The foreign currency, fell under the mischief of definition of 'goods' under provisions of Customs Act, 1962. Hence, could be liable for confiscation. Therefore, the penalty should have been imposed only under provisions of Section 114AA of Customs Act, 1962 as A1 had allegedly not declared in his baggage declaration form' about carriage of those foreign currency. Therefore, the penalty of Rs. 52 lakhs as imposed under provisions of section 114(i) of Customs Act, 1962 straightway warrants to be set aside in full.

- 5.10. Even otherwise, it was a settled principle of law that if there were two penalties prescribed under such scheme of law, the penalty should be imposed under such provisions which attracts maximum quantum of penalty. For that reason also the amount of penalty under section 114(i) of Customs Act, 1962 needs to be set aside.
- 5.11. It had clearly come on record that A1 was not known to Shri. Pramod Patil whose reference had come in the proceedings during the course of investigation / SCN/addendum, as well as in O-in-O. In fact, AA had held that Mr. Pramod Patil, owner of a jewellery shop at Bandra was the kingpin in the racket of foreign exchange smuggling. At any point in time, A1 had not met Shri. Pramod Patil who too had also deposed that he had never met A1 and did not know him.
- 5.12. A1 was not in conscious possession of the alleged foreign currency at the point of his interception while travelling to Hong Kong as a crew member of Jet Airways. The currencies were concealed in the leather-bound diaries. The Applicant had no access to its contents. As regards, the SMS sent from the mobile of A2, the same cannot be considered as an admissible piece of evidence as no cross examination had been carried out as provided under provisions of section 138B(2) of Customs

Act, 1962, corresponding to section 9D of Central Excise Act, 1944. In other words, the evidence in electronic form cannot be straightway admitted unless its source, transmission and reception were recognized and accepted by its maker and receiver.

- 5.13. As regards the allegation that on many occasions such currency had been smuggled out in previous trips to Hong Kong by A1, the same was mere presumption and had not been corroborated by any other independent material evidence. Such allegations were required to be sustained through documentary evidence which had not been brought on record. Therefore, imposition of such gigantic amount of penalty against an alleged low paid crew member of an airline should not be allowed to be sustained.
- 5.14. The penalty amount needs to be drastically reduced.

Under the circumstances, A1 has prayed to the Revisionary Authority to allow their application. A1 has prayed that the foreign currency equivalent to Rs. 2,63,05,500/- be allowed to be redeemed on payment of such fine as deemed fit and proper and that the entire amount of penalties of Rs. 1.02 crs should be set aside or to grant any other relief as deemed fit and proper.

6. Aggrieved with the aforesaid Order passed by the AA, A2 has preferred this revision application inter alia on the grounds that;

- 6.01. AA had erred in rejecting his Appeal.
- 6.02. findings of the AA in para 5 of his OIA was not correct.
- 6.03. A2 had produced sufficient material for doubting the accuracy of the confessional statement of A1 which had not been appreciated by the AA. A1 had retracted his statement which was overlooked by the AA.
- 6.04. The AA had held that Shri. Pramod Patil was the kingpin and therefore, had erred in rejecting the appeal.
- 6.05. OIO was required to be set aside as the principles of natural justice had been violated as cross-examination had not been allowed. A2 has relied upon the case laws of (a) Andaman Timber Industries - 2015 (324) ELT 641 (S.C.). (b) Gujarat Cypromet Ltd. - 2017 (345) ELT 520(Guj.). (c) Him Logistics Pvt.Ltd. - 2016 (336) ELT 15 (Del.). (d) Flevel International-2016 (332) ELT 416(Del.).(e) Jindal Drugs Pvt.Ltd. - 2016 (340) ELT 67 (P&H). (f) G-Tech Industries-2016 (339) ELT 209(P&H). (g)

Basudev Garg 2013 (294) ELT 353 (Del.). (h) Agrawal Round Rolling Mills Ltd. - 2015 (317) ELT 145 (T).

- 6.06. AA had held that A2 being a carrier could not claim redemption of the confiscated currency and hence, there was no justification for imposing penalty of Rs.52 lakhs on a mere carrier.
- 6.07. AA ought to have reduced the penalty in the light of CESTAT Judgement in the case Suresh Gangaram Hole reported in 2015 (327) ELT 555 (Tri-Mum.).
- 6.08. statements of A1 were inconsistent as he had changed his statements constantly and hence, such statements could not be relied upon as valid proof or evidence.
- 6.09. Only because A2 had been absconding, had avoided or did not respond to the Summons issued by DRI, it did not prove his involvement. Explanation had been given in his statement. In the case of Mokhtar Mistry [1994 (71) ELT 380 (Tribunal)], CESTAT has held that person avoiding summons not treatable as involved in smuggling merely for that reason. In the case of Jaswinder Singh [1996 (83) ELT 175(Tri.)], CESTAT held that non-appearance in response to summons could not be a factor or criteria in determining the guilty conduct. In the case of Santosh Textiles [2007 (219) ELT 894 (Tri.)] the CESTAT held that keeping oneself scarce and not responding to summons could create suspicion but did not take the place of positive evidence.
- 6.10. The allegation based on a SMS was false, baseless and unsubstantiated. Electronic evidence from the mobile phones relied upon by the department did not satisfy the test of Section 138C. A2 relied upon the following case laws;
- (1) Agarvanshi Aluminium Ltd. - 2014 (299) ELT 83 (Tri.)
 - (2) Premier Instruments and Controls Ltd. - 2005 (183) ELT 65 (Tri.),
 - (3) Tele Brands (India) Pvt.Ltd. - 2016 (336) ELT 97 (Tri.).
- 6.11. The entire case of the department against A2 was solely based on assumptions and speculations without any admissible evidence; false allegations such as "the Applicant was the supplier of foreign currency, in the syndicate of smuggling, etc, these were made without any evidence. Department had failed to investigate the source of such huge amount of foreign currency and had simply put the blame on A2.
- 6.12. No foreign currency was seized from the A2. A case of disproportionate asset had also not been made out. A2 was in no way concerned or connected with the foreign currency under seizure. A2 had not

committed any act rendering the seized currency liable to confiscation under Section 113 and hence, was not liable for penalty under Section 114(i).

Under the circumstances, A2 has prayed to the revision authority to set aside the OIA and quash the penalty imposed on him and to grant consequential relief.

7(a). Personal hearing in respect of A1 was scheduled for 13.09.2022, 27.09.2022, 13.10.2022, 20.10.2022 and 02.11.2022. Shri. B.R Tripathi, Consultant and Ms. Akshita Prajapati, Advocate appeared for physical hearing on 02.11.2022 and submitted that applicant (A1) was an employee of Jet Airways and foreign currency recovered from him did not belong to him. They further submitted that from statements of Aftam Alam (A2) and Pramod Patil it is evident that applicant (A1) was merely a carrier. They further requested that since goods have been recovered from applicant's possession, goods should be allowed to be released to him on a reasonable fine. They have requested to reduce penalty on applicant. They assured compilation of judgements would be submitted within a week. They requested to drop penalty under Section 114AA as no declaration could not be equated with false / fraudulent declaration.

7(b). On 10.11.2022, they furnished the print-outs of the case laws cited in their written submissions / defense.

7(c). Personal hearing in respect of A2 was scheduled for 13.09.2022, 27.09.2022 and 30.09.2022. Shri. Anil Balani, Advocate appeared online on 30.09.2022 and submitted that applicant was not the mastermind of the case, that applicant has clarified all points in his statement, and penalty imposed is extremely harsh. He requested to set aside or reduce the penalty substantially.

8. Government has gone through the facts of the case and the written submissions, SCN, orders, etc. Government finds that there is no dispute that the seized foreign currency was not declared by the Applicant no. 1 to the Customs at the point of departure. A1 was working as Flight Steward for the airline and it was mandatory for him to declare the foreign currency in the Customs Declaration Form (CDF). However, he had not done so in the CDF submitted by him and huge amount of foreign currency was found in his possession. Further, in his statement, A1 had admitted to the possession, carriage, concealment, non-declaration and recovery of the foreign currency. A1 was unable to give the source of how he came in possession of the foreign currency. The fact remains that A1 had not disclosed the impugned foreign currency and the source of the foreign currency had remained unaccounted. A1 and his accomplice were unable to show that the impugned foreign currency in his possession was procured from authorized persons as specified under FEMA. Thus, it has been rightly held by the appellate authority that in the 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 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 confiscation of the foreign currency was justified as the applicant had been carrying foreign currency in excess of the permitted limit and no declaration as required under section 77 of the Customs Act, 1962 was filed. Moreover, the act committed by A1 was conscious and pre-meditated insofar as he had exchanged his duties in the roster and had taken this flight with an express intention of carrying the huge amount of foreign currency for a monetary consideration.

8. In this case, the applicant no. 1 was working as a Flight Steward for the airline viz, Jet Airways and an examination of his baggage led to the recovery of huge amount of foreign currency of USD 3,90,000/-. A1 had cleared immigration and as a staff member of an airline had submitted a CDF to Customs. However, no mention of the foreign currency in his possession had been made. The foreign currency had been ingeniously concealed in five leather diary covers and packing materials had been used to conceal the same. Had it not been for specific intelligence developed by the Officers of DRI, MZU, A1 would have been successful in taking out the foreign currency.

9. The Government finds that the A1 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 appellate authority that the said provisions of Foreign Exchange Management (Export & Import of Currency) Regulations, 2015 which warrants that the foreign currency should be sourced from legal channels has been violated by the A1 is correct and therefore, the confiscation of the foreign currency ordered, is justified. In doing so, the Government finds that the appellate authority had rightly 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 within the scope of "prohibited goods".

10. Government finds that the case of Commissioner of Customs v/s. Savier Poonolly [2014(310) E.L.T. 231 (Mad)] is squarely applicable in this case. Government relies upon the conclusions drawn at paras 10 to 12 of the said case.

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) cheq
ues drawn on foreign currency account maintained in accordance with Foreign Exchange Management (Foreign Currency Accounts by a Person Resident in India) Regulations, 2000;

(ii) forei
gn 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.

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 this case, the Government finds that the concealment was ingenious and the applicant no 1 from whose possession the foreign currency was recovered had not produced any evidence suggesting that the same i.e. foreign currency had been garnered / accumulated from authorized persons or legitimate sources. A1 was a crew member and had knowingly and wilfully, indulged in the act of smuggling of huge quantity of foreign currency. A1 had mis-used his position and together with A2 who too was a crew member working with same airline had engaged themselves in smuggling of foreign currency for a monetary consideration. Quantity, unaccounted source, manner of keeping, non-declaration, their job profile and A1 being unable to explain, etc are factors relevant for using discretion not to allow goods to be released on redemption fine. Investigations too had come to a conclusion that A1 had acted as a carrier for monetary consideration. Further, investigations on the financial profile of the applicant no. 1 confirmed that he could not have come in possession of such a large amount of foreign currency through his known sources of income. For all these reasons, Government finds that the absolute confiscation of the foreign currency held by the OAA and upheld by the AA is proper, legal, judicious and is not inclined to interfere in the same. Considering the job profile of

the applicants who have indulged in the act of smuggling such a large quantity of foreign currency mis-using their positions, this is a case of grass eating the fence, it is imperative that exemplary punitive action is meted out to them which would deter others from indulging in such similar acts.

On the issue of reduction of penalty imposed on A1;

13.1. The Government finds that the quantum of the currency is huge and that gravity of the offence is immense, especially, that A1 was a crew member and had not filed a true declaration. Source of the foreign currency was not revealed by A1 and it was obvious that the same was from illegitimate sources.

13.2. In his defence, A1 had disclosed that the foreign currency was handed over to him by his colleague i.e. A2 and that he had carried the same for a monetary consideration. A2 in his defense has stated that the he had retracted his statement. This issue has been dealt with in detail by both the lower authorities. But the fact remains, that a huge amount of foreign currency had been recovered from his possession. A valid and plausible explanation for the same had not been provided by A1 to the investigating agency. No proof of acquiring such a huge amount of foreign currency through legitimate sources had been provided by A1 or his accomplice, A2. It is clear that the retraction was an afterthought to somehow wiggle away from being prosecuted and get a favourable decision.

13.3. In his defense, A1 has stated that the currency was handed over to him by A2 and was not aware of the contents. This pretext on the part of A1 is unacceptable since, as a crew member, he was aware of his responsibilities and should have taken appropriate pre-caution. Government finds that A1 has misused his position and had agreed to carry the foreign currency for a

monetary consideration. He was aware that as a crew member he would not arouse suspicion and would manage to smuggle out the foreign currency. Government finds that the act committed by A1 especially being a crew member, is quite serious and a risk to the security and should not go unpunished.

13.4. The act of smuggling the foreign currency committed by A1 was pre-meditated and conscious. On the specific day of seizure of the foreign currency, A1 had been allotted another sector. His original duty was for Mumbai to Brussels flight. However, A1 had swapped his duties with his junior colleague and took the Mumbai to Hong Kong flight. A1 had done this swapping to carry the foreign currency. Moreover, he had informed of this swapping of the roster to his accomplice viz, A2 who then delivered the second tranche of the foreign currency to A1.

13.5. By his aforesaid actions, A1 had made himself liable to penal action both under Section 114(i) of the Customs Act, 1962.

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. A1 had not obtained any permissions for the authorized agencies to export the foreign currency. Also, the foreign currency had not been obtained from legitimate sources. Hence, A1 deserves to be penalised under Section 114(i) of the Customs Act, 1962. However, considering that A1 was a mere carrier and was to receive minor amount as a remuneration and also considering that A1 has been dismissed from service by his employer for the act committed by him, Government finds that the quantum of penalty imposed on A1 under Section 114(i) of the Customs Act is harsh and excessive and is inclined to reduce the same.

13.6. By his aforesaid actions, A1 had also made himself liable to penal action both under Section 114AA of the Customs Act, 1962.

As a crew member working for an airline, A1 was working in a sensitive area and had knowingly and consciously indulged himself in the act of smuggling a huge amount of foreign currency. A1 by not disclosing in the CDF that he was in possession of foreign currency, had made a false declaration at the point of departure. As a member of the crew, it was incumbent on A1 to make a true declaration. However, A1 had chosen not to do so and was found in possession of a huge amount of foreign currency which had not been declared. Government finds that the penalty imposed on him under Section 114AA of the Customs Act, 1962 would act as a deterrent against those harbouring such intentions of indulging in smuggling. Considering that A1 has been dismissed from service by his employer for the act committed by him and has been held as a carrier, Government finds that the quantum of penalty imposed on him is harsh and excessive and is inclined to reduce the same.

14. A1 had revealed that he had engaged himself in the act of carrying the foreign currency at the behest of his colleague and friend, viz A2. As soon as A1 had been apprehended, A2 had made himself unavailable. Efforts were made to apprehend him, but A2 was elusive. Anticipatory Bail Applications filed by A2 were rejected. A2 had surfaced only when the SCN had been issued. A1 had revealed the role played by A2 and had confessed that the foreign currency had been handed over to him by A2. The change of the roster too had been intimated by A1 to A2. The call records obtained by the investigative agency indicates that at the relevant time, A2 was in touch with A1. Government finds that for his act of abating in the act of smuggling of the foreign currency the penalty imposed on A2 under Section 114(i) of the

Customs Act, 1962 was proper and justified. However, considering A2 had already been dismissed from service by his employer, the quantum of penalty imposed on A2 is harsh and excessive. Government is inclined to reduce the same.

15.1. A1 now has made a submission that since the foreign currency was recovered from him the same should be redeemed to him. Since, Government finds the absolute confiscation of foreign currency is legal and judicious, the question of releasing the foreign currency which has been confiscated absolutely, does not arise.

15.2. A clutch of case laws have been cited by A1 in favour of redemption of foreign currency. A perusal of these case laws indicates that the same are on different facts and not applicable to the facts of the present case. The fact that A1 and A2 were both crew members and such a large amount of foreign currency was recovered, indicates that they have mis-used their position. The lower authorities have dealt with the same in detail and Government finds the same to be proper.

16.1. In view of the above, insofar as the absolute confiscation of the foreign currency and release of the car is concerned, the Government is in agreement with the appellate order and does not find it necessary to interfere in the same.

16.2. On the issue of penalties of Rs. 52 lakhs and Rs. 50 lakhs imposed on A1 under Section 114(i) and Section 114AA of the Customs Act, 1962 resp., is concerned, for the aforesaid reasons, the Government hereby reduces the said penalties to Rs. 20,00,000/- (Rupees Twenty Lakhs only) and Rs. 10,00,000/- (Rupees Ten Lakhs only) resp. under the said sections, respectively.

16.3. On the issue of penalty of Rs. 52 lakhs imposed on A2 under Section 114(i) of the Customs Act, 1962 is concerned, for the aforesaid reasons, the Government hereby reduces the same to Rs. 20,00,000/- (Rupees Twenty Lakhs only).

17. Accordingly, both the revision applications are disposed of in the above terms.


30/11/23
SHRAWAN KUMAR)

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

¹⁴⁹⁻¹⁵⁰
ORDER NO. /2023-CUS (WZ)/ASRA/MUMBAI DATED 30.01.2023.

To,

1. Shri. Rislle Ali Agat, Flat No. 003, A-Wing, Shiv Shakti, Kanakia Road, Mira Road, Thane : 401 104 **Address No. 2.** Flat No. 203, Shree Balama Apt., Queens Park, Near Deepak Hospital, Off. Mira-Bhayander Road, Mira Road (E), Thane-401 107; **Address No. 3.** C/o. Akshita Prajapati, 6-A, Yojna Apartment, Near Alka Vihar Restaurant, S.V. Road, Malad West, Mumbai - 400 063.
2. Shri. Aftab Alam Shamsul, 406, F-Wing, Poonam Shrishti CHS, Latif Park, Mira Road, Thane : 401 107.
3. The Pr. Commissioner of Customs, CSMI Airport, Terminal -2, Level - II, Sahar, Andheri (West), Mumbai - 400 059.

Copy to:

4. Shri. B.R Tripathi, Advocate, A-23/90, Rajawadi CHS, Chitranjan Nagar, Ghatkopar East, Mumbai - 400 077.
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6. Shri. Anil Balani, Advocate, 717, Raheja Chambers, 213, Free Press Journal Marg, Nariman Point, Mumbai - 400 021.
7. Sr. P.S. to AS (RA), Mumbai.
8. File Copy.
9. Noticeboard.