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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. 371/518/B/2019-RA

[Signature]

Date of Issue 01.02.2023

ORDER NO. 152/2023-CUS (WZ)/ASRA/MUMBAI DATED 31.01.2023
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.

Applicant : Shri. Rajkumar Nandlal Sukhwani

Respondent : Pr. Commissioner of Customs (Airport), Mumbai.

Subject : Revision Application filed, under Section 129DD of the
Customs Act, 1962 against the Order-in-Appeal No. MUM-
CUSTM-PAX-APP-629/2019-20 dated 31.10.2019 [S/49-
759/2019] passed by the Commissioner of Customs
(Appeals), Mumbai - III.

ORDER

This Revision application has been filed by Shri. Rajkumar Nandlal Sukhwani (hereinafter referred to as the Applicant) against the Order in Appeal MUM-CUSTOM-PAX-APP-629/2019-20 dated 31.10.2019 [S/49-759/2019] passed by the Commissioner of Customs (Appeals), Mumbai-III.

2. Brief facts of the case are that on 11.01.2018, Mr. Rajkumar Nandlal Sukhwani, the applicant, holding Indian Passport No.NI498633 was intercepted on the basis of intelligence and profiling, by the officers of the Air Intelligence Unit (AIU), while he was proceeding to board Jet Airways Flight No. 9W 307 dated 11.01.2018 to Delhi and immediately thereafter from Delhi to Bangkok on Jet Airways Flight No. 9W 066 dated 11.01.2018, after he had cleared himself through Immigration. During the personal search and detailed examination of his baggage, the passenger was found in possession of foreign currency i.e. US\$ 3000 from his hand baggage, USD 3000 in black coloured roll concealed in his rectum and USD 16000 concealed in a pair of black coloured slipper. The recovered foreign currency were found to be totaling to USD 22,000 equivalent to Rs.13,81,600/- .The recovered foreign currency was seized by the officers of Customs, in the reasonable belief that the same were attempted to be smuggled out of India and hence were liable for confiscation, under the provisions of Customs Act 1962 read with the provisions of FEMA, 1999 and Foreign Exchange Management (Export and Import of currency) Regulations, 2015.

3. The Original Adjudicating Authority (OAA) i.e. Additional Commissioner of Customs vide Order-In-Original No. ADC/AK/ADJN/29/2019-20 dated 30.04.2019 ordered for the absolute confiscation of the seized impugned foreign

currency i.e. USD 22000 equivalent to Indian Rs. 13,65,144/-, under Section 113(d), 113(e) & 113(h) of the Customs Act, 1962 and imposed a penalty of Rs. 1,50,000/- on the applicant under Section 114 of the Customs Act, 1962.

4. Aggrieved by the said order, the applicant filed an appeal before the Appellate Authority viz, Commissioner of Customs (Appeals), Mumbai-III who vide Order-In-Appeal No. MUM-CUSTOM-PAX-APP-629/2019-20 dated 31.10.2019 [S/49-759/2019] upheld the original order passed by the OAA and rejected the appeal.

5. Aggrieved with the aforesaid Order passed by the AA, the Applicant has preferred this revision application inter alia on the grounds that the statement recorded on 11.01.2018 was not voluntary and the same was retracted and no investigation revealed any other person who claimed currency. The Applicant prayed to the Revision Authority to set aside the absolute confiscation and to release the foreign currency on payment of redemption fine.

6. Personal hearing was scheduled for 14.11.2022. Shri Prakash K. Shingrani, Advocate for the applicant appeared for physical hearing and submitted that applicant is not a habitual offender, was not aware about the procedures for carrying foreign currency and that the amount of currency is not large. He requested to allow release of currency on nominal 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, in his statement the applicant had admitted the knowledge, possession, carriage, concealment, non-declaration and recovery of the foreign currency.

The applicant was unable to give the documents for licit acquisition and possession of the foreign currency. The fact remains that the applicant had not disclosed the impugned foreign currency and the source of the foreign currency had remained unaccounted. In his confessional statement, he stated that he was given the currency by one Mr. Bunty Bhai and asked to handed over the same to his (Bunty's) cousin in Bangkok for monetary consideration of Rs. 8,000/- and expenses of his Air Ticket from Mumbai to Delhi and further Delhi to Bangkok. Subsequently he retracted the same which was rebutted by the department. The Applicant was 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 lower adjudicating 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 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. 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 have

been violated by the applicant is correct and therefore, the confiscation of the foreign currency ordered, is justified.

9. Government finds that 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" is applicable in this case.

10. Government finds that the case of Commissioner of Customs, Chennai 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) 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."

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. The Government finds that the amount involved in this case is not huge. The applicant in his affidavit has claimed ownership of the Currency and had explained the source of the money and the purpose for taking it out of the country. The past record of the applicant does not indicate anything adverse. This case is at best a case of mis-declaration rather than smuggling. Government finds that the discretion not to release the foreign currency under the provisions of Section 125 of the Customs Act, 1962 is excessive and unjustified. The order of the Appellate authority is therefore liable to be modified and the foreign currency is liable to be allowed redemption on suitable redemption fine.

13. The Government finds that the personal penalty of Rs. 1,50,000/- imposed on the applicant under Section 114 of the Customs Act, 1962 and upheld by the AA as reasonable and commensurate with the omissions and commissions committed.

14.1 In view of the above, the Government modifies the impugned order of the Appellate authority in respect of the foreign currency. The foreign currencies

consisting of USD 22,000, equivalent to INR. 13,81,600/- is allowed redemption on payment of a fine of Rs. 2,60,000/- (Rupees Two Lakh Sixty Thousand Only).

14.2 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.

15. The Revision Application is disposed of on above terms.


31/1/23
(SHRAWAN KUMAR)

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

ORDER NO. 152/2023-CUS (WZ)/ASRA/MUMBAI DATED 31.01.2023.

To,

1. Shri. Rajkumar Nandlal Sukhwani, BK No. 417, R. No. 2, Near Maya Gas Agency, Ulhasnagar, Thane-421001, Maharashtra.
2. The Pr. Commissioner of Customs, C.S.I Airport, Terminal 2, Level-II, Sahar, Andheri (East), Mumbai 400 099.
3. The Commissioner of Customs (Appeals), Mumbai-III, 5th Floor, Avaz Corporate Point, Makwana Lane, Behind S.M.Centre, Andheri Kurla Road, Andheri (East), Mumbai 400 059

Copy to:

4. Advocate Prakash K. Shingarani, 12/334, Vivek, New MIG Colony, Bandra East, Mumbai-400051.
5. Sr. P.S. to AS (RA), Mumbai.
6. File Copy.
7. Noticeboard.