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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. 373/502/B/2019-RA / 1623 :

Date of Issue : 05.05.2022

ORDER NO. 56 / 2022-CUS (WZ/SZ)/ASRA/MUMBAI DATED .04.2022
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.

F.No. 373/502/B/2019-RA

Applicant : Shri. Nagoor Meera Jabbar

Respondent : Pr. Commissioner of Customs, Commissionerate – I,
Chennai Airport and Aircargo Complex, New Custom
House, Meenambakkam, Chennai – 600 027.

Subject : Revision Application filed, under Section 129DD of the
Customs Act, 1962 against the Order-in-Appeal C. Cus. I
No. 272/2019 [C4/I/149/O/2019-AIRPORT] dated
04.11.2019 passed by the Commissioner of Customs
(Appeals-I), Chennai 600 001.

ORDER

This revision application has been filed by Shri. Nagoor Meera Jabbar (hereinafter referred to as the Applicant) against the Order in Appeal 272/2019 [C4/I/149/O/2019-AIRPORT] dated 04.11.2019 passed by the Commissioner of Customs (Appeals-I), Chennai 600 001.

2. Brief facts of the case are that the applicant who was bound for Kuala Lumpur by Air Asia Flight No. AK-12/16.11.2018 was intercepted by Customs Officers on 16.11.2018 after he had cleared the Immigration and Customs counters and was proceeding towards the security hold area in the departure terminal of the Chennai International Airport. To query whether he was carrying any foreign / Indian currency / contraband either on his person or in baggage, the applicant had replied in the negative. On examination of his person, USD 3000/- (30 nos of USD in 100 denomination) was recovered which had been kept in the pant pocket. Further, upon persistent inquiry, the applicant revealed that he had concealed foreign currency in his body cavity. Thereafter, he ejected a further USD 9000/- (90 nos of USD in 100 denomination) from his body cavity. Thus, a total of 12,000 USD (120 nos of USD in 100 denomination), equivalent to Rs. 8,55,000/- was recovered from the applicant. The applicant had neither declared the foreign currency to the Customs nor did he possess any valid document/permit etc from RBI, as required under FEMA for export of the impugned currencies. The applicant had informed that the foreign currency did not belong to him and was handed over by a person outside the Chennai Airport with instruction to hand it over at Kuala Lumpur; that he had carried the currency for a monetary consideration; that he was aware that it was an offence to smuggle foreign currency without any valid permit and had committed the same for monetary benefit.

3. The Original Adjudicating Authority (OAA) i.e. Asstt. Commissioner of Customs (Adj-AIR) vide Order-In-Original No. 47/2019-18-Commissionerate-I dated 14.05.2018 {F.No. O.S. No. 498/2018-AIU} ordered for the absolute confiscation of the seized foreign currency i.e. USD 12,000 (120 nos USD in denomination of 100), equivalent to Rs. 8,55,000/- under Section 113(d), 113(e) & 113(h) of the Customs Act, 1962 readwith FEM (Import and Export of currency)(Amendment) Regulation Act, 2015 and imposed a penalty of Rs. 85,000/- on the applicant under Section 114(i) 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-I), Chennai - 600 001 who vide Order-In-Appeal Airport I No. 272/2019 [C4/I/149/O/2019-AIRPORT] dated 04.11.2019 upheld in toto, 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;

5.01. that the order of the appellate authority is against law, weight of evidence and circumstances and probabilities of the case; that the seized currency is not prohibited and the same is a restricted item; that the goods must be prohibited before export or import; that simply because of non filing of declaration, the goods cannot become prohibited; that the conclusion drawn that the goods is prohibited because of non filing of a declaration is nothing but clear non-application of mind.

5.02. that there are various adjudication orders passed by the Customs department and judgments of Hon'ble High Court, Madras in respect of identical goods, but the OAA and AA have failed to consider the same ; that the OAA and AA are not following the guidelines or orders passed by the High Court, thus amounting to violation of law.

- 5.03. that the AA has not exercised the option under section 125 of the Customs Act 1962 and straightaway proceeded to confiscate the goods without grant of opportunity to the appellant to pay fine in lieu of confiscation.
- 5.04. that there is no law prohibiting carrying the goods for some other person. Further there is no distinction between the owner and carrier under the Customs Act. The OAA held that applicant was a carrier which is non-application of mind.
- 5.05. the applicant has cited and relied on various case laws where release of the foreign currency was allowed on payment of redemption fine and a few of these are as given below;
- (i). Delhi High Court case in r/o. Mohd. Ayaz vs UOI reported in 2003 (151) ELT 39 (DN) where it was held that currency was not prohibited for export & redemption on payment of fine was allowed.
 - (ii). CESTAT Order dated 13.04 2007, in the case of T Sundarajan vs. Commr. Of Customs, Chennai reported in 2008 (221) ELT 258 (Tri-Chennai),
 - (iii). GOI Order No. 134/06 dated 26.04.2006 in the case of Shri. Gulam Kader Ahmed Sheriff.
 - (iv). GOI Order no. 144/02 dated 30.05.2002
 - (v). CESTAT WRB Mumbai Order No. A/242/WZB/2004-C.II in the case of Mr. Roach Patrick vs. CC, Mumbai
 - (vi). CESTAT, WRB, Mumbai Order No. A/368-371/WZB/2007 dated 18.05.2007.
 - (vii). GOI order 210/08 dated 10.07.2008 in the case of Shri. Sheikh Suleman.
 - (viii). CESTAT SZB, Chennai's Order No. 325/09 dated 30.03.2009 in the case of Shri. Pandithurai vs. Commissioner of Customs, Chennai wherein foreign currency equivalent to Rs. 58, Lakhs was redeemed on payment of fine of Rs. 7,50,000 and penalty of 1,00,000/-
 - (ix). V.P Hameed 1994(73) ELT 425-Tribunal where there is no legal requirement for currency upto US\$ 10,000/-
 - (x) etc.
- 5.06. that as per Board's Instruction vide F. 275/17/2015-CX BA dated 11.03.2015, in the national litigation policy (NLP) formulated by Government of India aiming to reduce government litigation it is mentioned that quality judgements should be passed which stand up to legal scrutiny.
- 5.07. Applicant has relied on CESTAT case in r/o. in Peringatil Hamza Vs. Commissioner Of Customs, Mumbai reported in 2014 (309) E.L.T. 259

(Tri-Mumbai). in Final Order No, A/1228/2014-WZB/C-IV (SMB), dated 18.07.2014 in appeal no C/65/2008-Mum where ownership lies with the person from whom currency recovered.

- 5.08. that the currency is restricted item not prohibited and the authority ought to have allowed the applicant to redeem the same on a payment of nominal redemption fine and penalty. But the authority had passed the order of absolute confiscation which is too harsh.
- 5.09. that mere possession of currency is not an offence; that there was no misdeclaration; that the applicant had not violated the Customs Act and never attempted to export the foreign currency; that there was no legal requirement under the said act to declare the currency upto USD 10, 000 US S; that the seized currency was within permissible limit.
- 5.10. that the Hon'ble Supreme Court (full bench) has in judgment dated 30.09.2011 in OM Prakash Vs union of India categorically stated that the main object of the enactment of the said act was the recovery of excise duties and not really to punish for infringement of its provisions. Further held that the offences are compoundable under section 137 of the said act and summary proceedings under section 138 of Customs Act. .

Under the above circumstances of the case, the applicant prayed to Revision Authority to release the foreign currency on payment of redemption fine and reduce the personal penalty and to render justice.

6(a). Personal hearing through the online video conferencing mode was scheduled for 23.03.2022 and 30.03.2022. Smt. Kamalamalar Palanikumar, Advocate for the applicant appeared for physical hearing on 30.03.2022 and submitted a written submission. She requested to allow the application.

6(b). In the written submission dated 18.02.2022 handed over on 30.03.2022 during the personal hearing, Smt. Kamalamalar Palanikumar reiterated the submissions made in the grounds of appeals and relied upon some more case laws given below, to buttress their case.

(i). GYANCHAND JAIN Vs Commissioner of Customs (Airport), Mumbai, judgment reported in 2017 (325) ELT 53 (Tri Mumbai) -Final Order No. A/85865/2017-WZB- dated 14.02.2017 in appeal no C/56/2007- Mum; that Customs Act, 1962 is concerned with the illegal importation into India and exportation out of the country and in the absence of any prescription requiring declaration of foreign currency taken out, the confiscation was not justified.

(ii). Commissioner of Customs Vs Rajinder Nirula (S.C. Dharmadhikari and B.P. Colabawala, JJ dated - 27.10.2016), judgment reported in 2017 (346) ELT 9 (HC-BOM); that when power of redemption is exercised, law postulates that there is an option to pay fine in lieu of confiscation.

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 possession, carriage, concealment, non-declaration and recovery of the foreign currency. The applicant was unable to give the source of how he came in 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. Applicant was unable to show that the impugned foreign currency in his possession was procured from authorized persons as specified under FEMA. Moreover, the manner of concealment adopted by the applicant besides being ingenious was also risky for his life. 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 absolute confiscation of the foreign currency was justified as the applicant could not account for the legal procurement of the currency and that and no declaration as required under Section 77 of the Customs Act, 1962 was filed.

8. The demeanour of the applicant is required to be considered. In this case, the applicant had adopted an ingenious method of concealment. A major part of the foreign currency had been concealed in his body cavity i.e rectum. Had it not been for the alertness of the Officers, the applicant would have been successful in taking out the foreign currency.

9. 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 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 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 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 with 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)

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. In this case, the Government finds that the lower adjudicating authority has used discretion correctly in not releasing the foreign currency (i.e. release on redemption) which is consistent with the provisions of Section 125 of the Customs Act, 1962. The concealment was ingenious and the applicant has not produced any evidence suggesting that the foreign currency was garnered / accumulated from authorized persons and is bereft of any proof indicating the foreign currency had been generated out of legal dealings. Quantity, unaccounted source, manner of keeping, non-declaration and applicant not being to explain, etc are factors relevant for using discretion not to allow goods to be released on redemption fine.

13. The Government finds that the appellate authority has upheld in to-to the order passed by the OAA. Facts and circumstances of the case especially, the ingenious concealment resorted to by the applicant and unaccounted source, warrants absolute confiscation of foreign currency as held by the

adjudicating authority. Government finds the order of the OAA upheld by the AA is legal and judicious.

14. Government finds that the penalty of Rs. 85,000/- imposed on the applicant by the OAA under Section 114(i) of the Customs Act, 1962 and upheld by the AA as reasonable and commensurate with the omissions / commissions committed.

15. For the aforesaid reasons, the Government, therefore finds no reason to interfere in the Order passed by the OAA which has been rightly upheld by the AA.

16. Accordingly, the revision application is dismissed.


(SHRAWAN KUMAR)

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

ORDER NO. /2022-CUS (WZ/SZ)/ASRA/MUMBAI DATED .04.2022.

To,

1. Shri. Nagoor Meera Jabbar, S/o. Shri. Jabbar, No. 26/53, 2nd Floor, Pachaiyappan Street, Ellis Road, Chennai – 600 002.
2. The Pr. Commissioner of Customs, Commissionerate-I, Chennai Airport, New Custom House, Meenambakkam, Chennai – 600 027.

Copy to:

3. Smt. Kamalamalar Palanikumar, No. 10, Sunkurama Street, Second Floor, Chennai – 600 001..
4. Sr. P.S. to AS (RA), Mumbai.
5. File Copy.
6. Noticeboard.