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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. 373/177/B/2019-RA / 1580:

Date of Issue : 05.05.2022

ORDER No. 163 /2022-CUS (WZ/SZ)/ASRA/ DATED. 20.04.2022.
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. 373/177/B/2018-RA

Applicant : Shri. Jesuraj

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. 49-51/2018 [C4/I/26-28/O/2018-AIR] dated
03.04.2018 passed by the Commissioner of Customs
(Appeals-I), Chennai 600 001.

ORDER

This revision application has been filed by the Shri. Jesuraj (herein referred to as Applicant) against the Order-in-Appeal C. Cus. I No. 49-51/2018 [C4/I/26-28/O/2018-AIR] dated 03.04.2018 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 Singapore by Indigo Flight No. 6E-51/14.12.2017 was intercepted by Customs Officers on 14.12.2017 after he had cleared the Immigration counter 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 hand baggage nothing incriminating was recovered. A personal search led to the recovery of 55 notes of USD in denomination of 100 from his wallet. The total equivalent value of the foreign currencies was INR 3,50,350/-. 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 he had carried the same for a monetary consideration; that as he did not possess any legal documents for the purchase of the foreign currency.

3. After due process of the law, the Original Adjudicating Authority (OAA) viz, Asstt. Commissioner of Customs (Adjudication-AIR) vide Order-In-Original No. 625/2017-18-Airport dated 31.01.2018 issued through F.No. O.S. No. 625/2017-AIU, absolutely confiscated the foreign currencies viz, 55 notes USD of 100 denomination, equivalent to Rs. 3,50,350/- under Section 113 (d), (e) & (h) of the Customs Act, 1962 readwith Foreign Exchange Management (Export and Import of Currency) Regulation Act, 2015. A penalty of Rs.

20,000/- was imposed on the applicant under Section 114 of the Customs Act, 1962.

4. Aggrieved by this order, the Applicant filed an appeal with the Appellate Authority viz, Commissioner of Customs (Appeals-I), Chennai 600 001, who vide his order Order-in-Appeal C. Cus. I No. 49-51/2018 [C4/I/26-28/O/2018-AIR] dated 03.04.2018 upheld in to-to the order of the Original Adjudicating Authority.

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 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.

5.03. 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.

5.04. 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.

5.05. 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). 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),
- (ii). CESTAT WRB Mumbai Order No. A/242/WZB/2004-C.II in the case of Mr. Roach Patrick vs. CC, Mumbai.
- (iii). 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/-.
- (iv). Revision Authority Order F.No. 373/43/B -Cus RA dated 16.04.2008 in the case of Bepari Saleem.
- (v). 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.
- (vi). Etc.

Under the above circumstances of the case, the applicant has 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 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. 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. In doing so, the lower adjudicating authority has applied the ratio of the judgement of the Madras High Court in the case of Apex 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.....

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 very small and below the prescribed limit set by the RBI. Also, the applicant had kept the currency in his wallet and had not concealed it. 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. 20,000/- imposed on the applicant under Section 114 of the Customs Act, 1962 is commensurate with the omissions and commissions committed.

14. 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 55 notes of USD of 100 denomination, equivalent to INR. 3,50,350/- is allowed redemption on payment of a fine of Rs. 90,000/- (Rupees Ninety Thousand Only). The penalty of Rs. 20,000/- 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.


(SHRAWAN KUMAR)

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

ORDER No. 163 /2022-CUS (WZ/SZ)/ASRA/ DATED 20.04.2022.

To,

1. Mr. Jesuraj, S/o. Shri. Savarinathan, No. 10/77-1, Chetti Street North, Velankanni – Post, Kilvelur TK, Nagapattinam, Tamil Nadu.
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.