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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. 373/217/B/2018-RA
F.No. 373/218/B/2018-RA

11768

Date of Issue : 11.05.2022

ORDER NO. 166-167/2022-CUS (WZ/SZ)/ASRA/MUMBAI DATED 06.05.2022
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.

(i). F.No. 373/217/B/2018-RA

Applicant : Shri. Pakkir Mohammed

(ii). F.No. 373/218/B/2018-RA

Applicant : Shri. Mohammed Mansoor

Respondent : Commissioner of CGST, Service Tax & C.Ex. Central Revenue
Building, Bibikulam, Madurai – 625 002.

Subject : Revision Applications filed respectively, under Section 129DD
of the Customs Act, 1962 against Orders-in-Appeal No. TCP-
CUS-000-APP-115 & 116-18 dated 31.07.2018 [A.No.
C24/17 & 16/2018-TRY(CUS)] passed by the Commissioner of
GST, Service Tax & C.Ex (Appeals), Tiruchirappalli – Pin : 620
001.

ORDER

These revision applications have been filed by (i). Shri. Pakkir Mohammed & (ii). Shri. Mohammed Mansoor (hereinafter referred to as the Applicants or alternately, as Applicant No. 1 and Applicant No. 2 resp.) against the Orders-In-Appeal No. TCP-CUS-000-APP-115 & 116-18 dated 31.07.2018 [A.No. C24/17 & 16/2018-TRY(CUS)] passed by the Commissioner of GST, Service Tax & C.Ex (Appeals), Tiruchirappalli - Pin : 620 001.

2. Briefly stated facts of the case are that the on 11.05.2016, the Officers of the DRI, Regional Unit, Tuticorin intercepted the applicants at the Madurai International Airport, Madurai. The applicants were bound for Dubai via Colombo by Mihin Lanka Flight MJ306 and had been issued their boarding passes. To the query whether they were carrying any Indian / foreign currency, the applicants had replied in the negative. The applicants were searched and foreign currencies i.e. (i). Saudi Riyals 1,00,000/- and USD 2000/- equivalent to INR 18,14,400/- were found in the baggage of applicant No. 1 and (ii). Saudi Riyals 80,000/-, UAE Dirhams 530/-, USD 800/- and Qatar Riyals 3000/- equivalent to Rs. 14,62,600/- were found in the baggage carried by applicant no. 2. The foreign currency had been neatly stacked and concealed inside the side walls of the carton box which was required to be cut open to retrieve the cash. Applicants had been asked whether they possessed any legal / licit documents for the export of the foreign currency, to which they both had replied in the negative. Applicants were also asked whether they possessed any valid document / permit from RBI as required under FEMA for export of the aforesaid foreign currency, to which they both had replied in the negative. From applicant no. 1 foreign currency equivalent to Rs. 18,14,400/- and from applicant no. 2 foreign currency equivalent to Rs. 14,62,600/- were recovered and seized.

3. The Original Adjudicating Authority (OAA) viz, i.e. Joint Commissioner of Customs, Madurai vide Order-In-Original No. No. MDU-CUS-JC-15-2017 dated 07.12.2017 issued through F.No. VIII/10/3/2016-Adjn.Cus / DRI/CZU/TTN/VIII/48/INT-1/2016, ordered the absolute confiscation of the seized currencies i.e foreign currency equivalent to (i). Rs. 18,14,400/- and (ii). Rs. 14,62,600/- mentioned, under Section 113(d) & (e) of the Customs Act, 1962 read with Sections 2(22), 2(33), 77 of the Customs Act, 1962, para 2.45 of the Foreign Trade Policy of 2015-2020, Section 3 of the Foreign Exchange Management Act, 2000 and Regulations 5 and 7 of the Foreign Exchange Management (Export and Import of Currency) Regulations, 2015 and Foreign Exchange Management (Possession and retention of Foreign Currency) Regulations, 2015. Also, penalties of Rs. 8,00,000/- and Rs. 7,00,000/- were imposed on Applicant No. 1 & 2 respectively, under Section 114(i) of the Customs Act, 1962. Further, penalty of Rs. 18,00,000/- under Section 114(i) of the Customs Act, 1962 was also imposed on the 3rd person involved in the case.

4. Aggrieved by the said order, the applicant filed an appeal before the Appellate Authority (AA) viz, Commissioner of GST, Service Tax & C.Ex (Appeals), Tiruchirappalli – Pin : 620 001, who vide Orders-In-Appeal No. TCP-CUS-000-APP-115& 116-18 dated 31.07.2018 [A.No. C24/17 & 16/2018-TRY(CUS)] modified the Original Order passed by the OAA to the extent of reducing the penalties imposed on the applicants and upheld the remaining part of the order. The penalties imposed under Section 114(i) of the Customs Act, 1962 on applicant no. 1 and applicant no. 2 were reduced to Rs. 2,00,000/- and Rs. 1,50,000/- respectively.

5. Aggrieved with the aforesaid Order passed by the AA, the Applicant has filed 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;

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 possession of foreign currency is not an offence; that there was no misdeclaration by the applicants; that they had not violated the Customs Act, 1962.

5.04. the applicant has cited and relied on various case laws where release of the foreign currency and gold were allowed on payment of redemption fine and a few of these are as given below;

(i). V.P Hameed 1994(73) ELT 425-Tribunal where there is no legal requirement for currency upto US\$ 10,000/-.

(ii). 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.

(iii). Revision Authority Order F.No. 373/43/B -Cus RA dated 16.04.2008 in the case of Bepari Saleem.

(iv). 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.

(v). 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),

(vi). GOI Order No. 134/06 dated 26.04.2006 in the case of Shri. Gulam Kader Ahmed Sheriff.

(vii). 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/-.

(viii). CESTAT WRB Mumbai Order No. A/242/WZB/2004-C.II in the case of Mr. Roach Patrick vs. CC, Mumbai

(ix). 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 Mumbai.

(x). RA order in the case of Chellani Mukesh reported in 2012 (276) ELT 129-GOI held that foreign currency not being prohibited absolute confiscation is very harsh.

(xi). 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 30.03.2022 handed over 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
- (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 Mumbai.

7. Government has gone through the facts of the case. Government finds that there is no dispute that the seized foreign currency was not declared by the Applicants to the Customs at the point of departure. Further, in their statements, the applicants had admitted the possession, carriage, concealment, non-declaration and recovery of the foreign currency. The applicants were unable to give the source of how they came in possession of the foreign currency. The applicants had acted in concert with others named by them in

attempting to smuggle out the foreign currency. Applicants were unable to show that the impugned foreign currency in their possession was procured from authorized persons as specified under FEMA. Source of currency had remained unaccounted. Applicants admitted that the foreign currency did not belong to them and they were mere carriers who agreed to smuggle the same for monetary consideration. 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 Regulation 5 of 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 applicants 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.

8. The Government finds that the Applicants had not taken any general or special permission of the RBI to carry the foreign currency / Indian currency as stipulated under Regulations 3(1)(a) and 7(1), (2)(ii) and (3) of the Foreign Exchange Management (Export and Import of Currency) Regulations, 2015 framed with clause (g) of sub-Section (3) of Section 6 and under sub-section (2) of Section 47 of the Foreign Exchange Management Act, 1999 and had attempted to take it out of the country without declaring the same to Customs at the point of departure. The Government notes that admittedly the applicants are frequent travellers and are well versed with the law. They had knowingly attempted to export large amount of foreign currency worth Rs. 18,14,400/-

and Rs. 14,62,600/- respectively. Further, the applicants had used an ingenious and clever method to conceal the foreign currency and hoodwink the authorities. The currency notes had been neatly stacked and concealed inside the side walls of the carton box which was required to be cut open to retrieve the cash. 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, 2015 have been violated by the applicants 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 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".

9. 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.

10. 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.

11. Government finds that considering that such huge amount of foreign / currency was being carried in the baggage, currency remained unaccountable, method of concealment being ingenious, thus discretion used by OAA to absolutely confiscate the currencies is appropriate and judicious. Facts and circumstances of the case warrants absolute confiscation of foreign currency as held by the adjudicating authority and upheld by the appellate authority. The reduced penalty of Rs. 2,00,000/- and Rs. 1,50,000/- imposed on applicant no. 1 and 2 respectively is reasonable and judicious. Government therefore finds no reason to interfere in the Order passed by the AA.

12. Accordingly, both the revision applications are dismissed.


(SHRAWAN KUMAR)

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

ORDER NO. ¹⁶⁶⁻¹⁶⁷ /2022-CUS (WZ/SZ)/ASRA/MUMBAI DATED 06.05.2022

To,

1. Shri. Pakkir Mohammed, S/o Kalifullah, No. W5/20, S.P.M. Compound, Karungalakudi, Melur Taluk, Madurai Dist., Pin : 625 101.
2. Shri. Mohammed Mansoor, S/o Shri. Mohammed Ali, No. 1118, Manickavasagar Street, V.O.C Nagar, Melamadai, Madurai, Pin : 625 020.

3. Commissioner of CGST, Service Tax & C.Ex. Central Revenue Building,
Bibikulam, Madurai – 625 002.

Copy To,

1. Smt. Kamalamalar Palanikumar, Advocate, No. 10, Sunkurama Street, Chennai – 600 001.
2. Sr. P.S. to AS (RA), Mumbai.
3. File Copy.
4. Notice Board.