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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. 380/11/B/15-RA / 5614

Date of Issue 29.09.2021

ORDER NO. ^{233/2021} CUS (SZ)/ASRA/MUMBAI DATED 22.09.2021 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 : Pr. Commissioner of Customs, CSI Airport, Mumbai.

Respondent : Shri Jayesh Vinodray Mashru
Shri. Kirit Bhagwandas Gadhia.

Subject : Revision Application filed, under Section 129DD of the
Customs Act, 1962 against the Order-in-Appeals No.
MUM-CUSTM-PAX-APP-630 & 631/14-15 dated
07.01.2015 passed by the Commissioner of Customs
(Appeals), Mumbai-III.

ORDER

This revision application has been filed by the Pr. Commissioner of Customs, CSI Airport Mumbai (herein referred to as Applicant department) against the order No. MUM-CUSTOM-PAX-APP-630 & 631/14-15 dated 07.01.2015 passed by the Commissioner of Customs (Appeals), Mumbai-III.

2. Briefly stated facts of the case are that the on 16.04.2002 the Officers of Customs intercepted Shri Jayesh Vinodray Mashru, bound for Dubai, at the C.S. International airport after he had cleared immigration. An examination of his checked in baggage resulted in the recovery of various foreign currencies equivalent to Rs. 50,54,659/- (Rupees Fifty lakhs Fifty four thousand Six hundred and Fifty nine).

3. After due process of the law vide Order-In-Original No. JC/RPK/ADJN/10/2011-12 dated 18.08.2011, the Original Adjudicating Authority confiscated the currency absolutely and imposed a penalty of Rs. 10,00,000/- (Rupees Ten lakhs) under section 114(i) of the Customs Act, 1962 on the Respondent. Investigations revealed that Shri Kirit Bhagwandas Gadhia was the main person behind the attempt to smuggle, a penalty of Rs. 15,00,000/- (Rupees Fifteen lakhs) was imposed on him under section 114(i) of the Customs Act, 1962

4. Aggrieved by this order the Respondent and Shri Kirit Bhagwandas Gadhia both filed appeals with the Commissioner of Customs (Appeals), The Commissioner (Appeals) vide his order No. MUM-CUSTOM-PAX-APP-630 & 631/14-15 dated 07.01.2015 allowed the redemption of the currency on payment of the redemption fine of Rs. 12,70,000/- (Rupees Twelve lacs Seventy thousand) and also reduced the penalty imposed to Rs. 1,50,000/- (One lakh Fifty thousand) on the Respondent. Penalty imposed on Shri Kirit Bhagwandas Gadhia was also reduced to Rs. 2,50,000/- (Two lakhs Fifty thousand) without interfering with the penalty imposed.

5. Aggrieved with the above order the Applicant department has filed this revision application on the grounds that the Appellate order is neither legal nor proper for the following grounds;

5.1 Passenger, Mr. Jayesh Vinodray Mashru (Respondent No. 1) was carrying the impugned currency on behalf of Mr. Kirit Bhagwandas Gadhia (Respondent No. 2) and attempted to clandestinely smuggle it out of the country without declaration and without any evidence of legal procurement or RBI permission, for a monetary consideration. The non-fulfillment of the restrictions laid down in FEMA regulations 1999, has caused the said currency to come within the scope of "prohibited goods" as defined in Section 2(33) of the Customs Act and hence liable for confiscation u/s 113 (d),(e)&(f) of the said Act.

5.2 As far as redemption of such goods is concerned, in the ambit of Section 125 of the Customs Act, it is the obligation of the Adjudicating Authority to use discretion and take appropriate decision based on the issues involved and the nature of goods. Thus, taking into account the facts on record and the gravity of the offence the lower authority had rightly ordered the absolute confiscation of the impugned currency.

5.3 The lower Appellate Authority has allowed the redemption of the said currency mainly on the grounds that the appellants are not alleged to have any history of previous violations or to have engaged in organized smuggling. However, facts of the case and investigations conducted reveal that there was a definite amount of organization in the subject attempt of smuggling of Foreign Currency.-

- In his statement Respondent No.1 admitted to be full time into hardware business; that he had opened an account (Acc. No. 1852) in Raghuvanshi Co-op Bank and signed as the proprietor of one M/s Khyati Caterers at the advice of Respondent No. 2; that the account was being run by Respondent No. 2 and that role of the Respondent No. 1 was limited to signing cheques only.

- On verification of the said bank account and transactions thereof, it was revealed that Respondent No. 1 had signed as proprietor of M/s

Khyati Caterers; that he was introduced by one Deepak Champak Lai Modi (a staffer of M/s Krishna travels a firm of Respondent No. 2; that all deposits to the account were made in cash and the entire amount was withdrawn on the same day by cheque issued in favour of Krishna Travels and T S Foreign Exchange; the transactions were always in lakhs which do not represent real transactions made by Respondent No. 1 keeping in view his business and income profile; the withdrawals were always relatable to Respondent No. 2.

- The above facts indicate that the said account was controlled and operated by Respondent No. 2 and that the name of Respondent No. 1 was used only as a front; that M/s Khyati Caterers was floated with the clear intention for utilizing the account for illegal transactions including purchase of foreign currency and exporting the same illegally through carriers like Respondent No. 1
- In his statement Respondent No. 2 admitted that the entire foreign currency was delivered to Respondent No. 1 through Deepak Champak Lal Modi (an employee of Respondent No. 2)
- Respondent No. 2 had also stated that of the seized currency, USD 17,000 and travellers cheque of USD 10,000/- was his and that the remaining belonged to Navin Tanna, Ragin Mehta and Devihal Ghasilal Jain. However, all three of them denied having paid any foreign currency to either of the two appellants.

5.4 The Respondents have been unable to dispel the charge made against them. Although they had retracted their statements, the department had adequately rebutted the said retractions. Further the appellants have not contested the rebuttal. Both Respondents conspired and tried to mislead the investigation by concocting a story with doctored and non-reliable evidences and statements.

5.5 The judgment relied upon by the Commissioner (Appeals) in the case of Dhanak Ramji Vs Commissioner of Customs (AP) [2009(237)ELT280(Tri-MUM)] to justify the decision to release the currency to Respondent No 1 does not apply in the subject case. The

passenger in the subject case was intercepted on suspicion by the AIU in the departure lounge after clearance through Emigration and Customs and on being asked if he was carrying any contraband like drugs/currency he replied in the negative, but search of his baggage resulted in the recovery of the impugned foreign currency. Thus, in this case, the pax attempted to mislead the department, whereas, in the cited case it was held that there was only a technical violation of non-declaration. The same hence is not applicable.

5.6 The Madras High Court in the case of S Faisal Khan V/s Jt. Commissioner of Customs (AP), Chennai [2010(259)ELT541(Mad)], has upheld the absolute confiscation of FC which was attempted to be smuggled out of India. In this case the passenger was intercepted at the departure hall of the Chennai Airport and was found carrying Foreign Currency belonging to another person for a monetary consideration. As the nature and activity in the instant case is similar, the said judgment is squarely applicable to the subject case.

5.7 The tribunal in the case of illegal export of Indian Currency by Peringathil Hamza, vide order no M/1280/14/CSTB/C-I dated 23.06.2014, held that if the goods are prohibited they can be absolutely confiscated and it is the discretion of the proper officer to allow redemption, in case the circumstances warrant it.

5.8 The penalties on the two appellants ought not to have been reduced keeping in view the gravity of the offence and the fact that the Respondent No. 2 connived with Respondent No. 1 to illegally procure foreign currency and take it out of India clandestinely through Respondent No. 1 for a monetary consideration; that Respondent No. 2 had floated a catering company with Respondent No. 1 as the proprietor only on paper and opened a bank account in the name of the said company which was apparently created with the admitted intent of siphoning out funds and for illegal acquisition and export of Foreign Currency; there is nothing on record to show that the Indian currency used for the purchase of FC was from a legal source; that the two of them attempted to mislead the investigation with concocted stories and

doctored evidences; they were unable to prove the legal acquisition of the impugned FC.

5.9 In view of the above, the Order-in-Appeal No MUM-CUSTOM-PAX-APP-630&631 /14-15 dated 07.01.15 passed by the Commissioner of Customs (Appeals), Mumbai Zone —III, be set aside and the order of the order-in-original be upheld. Any other order as deemed fit and proper may be passed.

6. Accordingly personal hearings in the case were scheduled on 02.03.2021, 09.03.2021, 06.04.2021 and 13.04.2021. However, no one appeared on behalf of the applicant department nor the respondent, the case is therefore being decided on the basis of available records on merits.

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 Respondent No. 1 (viz Shri. Jayesh V. Mashru) to the Customs at the point of departure. Further, in his statement he admitted the possession, carriage, concealment, non-declaration and recovery of the foreign currencies and traveller's cheques and also revealed that the foreign currency was handed over to him by Respondent No. 2 (viz Shri. Kirit Bhagwandas Gadhia). Shri. Gadhia admitted that part of the foreign currency belonged to him and the remaining belonged to three other persons. Investigations revealed that all these three persons denied that the foreign currency belonged to them. Thus, source of currency remained unaccounted.

8. Also, the fact that the foreign currency was procured from persons other than authorized persons as specified under FEMA, 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 absolute confiscation of the foreign currency was justified as the respondent no. 1 was carrying foreign currency in excess of the permitted limit and no declaration as required under section 77 of the Customs Act, 1962 was filed.

9. The Government finds that though the Respondent had retracted his statement, the department had adequately rebutted the said retractions and these retractions had not been contested. Also, investigations by the department had concluded that the Respondent No. 2 had floated a catering company with the Respondent No. 1 as the proprietor and that this was only on paper and with the admitted intent of siphoning out funds and for illegal acquisition and export of Foreign Currency.

10. The Government finds that the Respondent No. 1 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 has been violated by the Respondent No. 1 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 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".

11. 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.

12. 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.

13. The Government finds that the lower adjudicating authority has used its 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 Respondent No. 1 had disowned the currency and had admitted that he was merely acting as a carrier for monetary consideration and it 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 being merely a carrier are factors relevant for not using discretion to allow goods to be released on redemption fine.

14. The Government finds that the personal penalties imposed on the Respondent No. 1 and Respondent No. 2 by the lower adjudicating authority are well justified and are commensurate with the act committed and admitted by them.

15. In view of the aforesaid, the Government holds that the Order no. JC/RPK/ADJN/10/2011-12 [S/14-6-8/2002 ADJN] dated 18.08.2011 issued vide F.No. D/INT/AIU/16/2002 APD" is correct and judicious and is restored and the Order-in-Appeal No. MUM-CUSTOM-PAX-APP-630 & 631 dated 07.01.2015 (DOI : 12.01.2015) is hereby set aside.

16. Revision application is disposed of in the above terms.

Shrawan
22/09/21

(SHRAWAN KUMAR)
Principal Commissioner & ex-officio
Additional Secretary to Government of India

ORDER No. ²³³/2021-CUS (SZ) /ASRA/ DATED 22.09.2021

To,

1. The Commissioner of Customs, Chhatrapati Shivaji International Airport, Mumbai - 400 099.
2. Shri Jayesh Vinodray Mashru, B/301, Lalji Complex, New Link Road, Dhanukarwadi, Kandivali (W), Mumbai 400 067
3. Shri. Kirit Bhagwandas Gadhia, B/603, Vicky Classic, Mahavir Nagar, Kandivali (W), Mumbai 400 067.

Copy to:

1. / Sr. P.S. to AS (RA), Mumbai.
2. / Guard File.
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