



GOVERNMENT OF INDIA
MINISTRY OF FINANCE
(DEPARTMENT OF REVENUE)

8th Floor, World Trade Centre, Centre – I, Cuffe Parade,
Mumbai-400 005

F.No. 373/152/B/16-RA / 5759

Date of Issue 06/10/2021

249/2021 -
ORDER NO. CUS (SZ)/ASRA/MUMBAI DATED 29.09.2021 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 : Shri. Abdula Kundor

Respondent : Commissioner of Customs, International Airport,
Mangalore.

Subject : Revision Application filed, under Section 129DD of the
Customs Act, 1962 against the Order-in-Appeals No.
367 / 2016 dated 21.04.2016 passed by the
Commissioner of Customs (Appeals), C.R Building, P.B
No. 5400, Queen's Road, Bangalore – 560 001.

ORDER

This revision application has been filed by the Shri. Abdulla Kundor, (herein referred to as Applicant) against the order No. 367 / 2016 dated 21.04.2016 passed by the Commissioner of Customs (Appeals), Bangalore : 560 001.

2. Briefly stated facts of the case are that on the basis of credible intelligence that the applicant viz, Shri Abdulla Kundor travelling to Sharjah on 26.06.2014 by Air India Flight No. IX 823 would attempt to smuggle foreign currency notes out of India without the support of any valid documents, the Custom Officers of Mangalore International Airport intercepted him at the departure area of International Airport, Mangalore. Applicant had completed his check-in formalities with Air India and Immigration authorities and was proceeding towards Customs clearance. Upon questioning, initially the applicant denied that he was carrying any foreign currency. However, after repeated questioning, the applicant revealed that he was carrying foreign currency in his hand baggage. On examination, 19000 Saudi Riyals in denominations of 500 and 100 (i.e. 18 X 500 + 100 X 100) were recovered from a white coloured envelope which was kept secretly among the clothes placed in the blue coloured hand bag. Applicant was unable to produce any licit document for the foreign currency found in his possession. The said foreign i.e. 19000 Saudi Riyals were seized for having sufficient reasons to believe it was liable to confiscation under Section 113 of the Customs Act, 1962, as the same was attempted to be improperly exported out of India in contravention of the provisions of Regulation 5 and Regulation 7(2)(ii) of the Foreign Exchange Management (Export and Import of Currency) Regulations, 2000, read with the Prevention of Money Laundering Act, 2002.

3. After due process of the law, vide Order-In-Original-No. 26 / 2014 dated 14.11.2014 issued through C.No. VIII/04/61/2014 Cus AP, the Original Adjudicating Authority confiscated the currency absolutely under Section 113 (d) of the Customs Act, 1962 read with Section 2(18), Section 2(22), Section 2(33) and Section 125 of the Customs Act, 1962 read with Regulation 5 and Regulation 7(2)(ii) of the Foreign Exchange Management (Export and Import of Currency) Regulations, 2000 and Section 2(c), Section 2(i) and Section 2(m) of

the Foreign Exchange Management Act, 1999. The said foreign currency was appropriated and penalty of Rs. 1,00,000/- was imposed under Section 114(i) of the Customs Act, 1962.

4. Aggrieved by this order, the Applicant filed an appeal with the Commissioner of Customs (Appeals), Bangalore, who vide his order No 367 / 2016 dated 21.04.2016 held that he did not find any reason to interfere with the order of the lower authority which was legal and proper.

5. Aggrieved with the above order, the Applicant has filed this revision application against the Appellate order on the grounds that;

5.1. the Order passed by the appellate authority is bad in law.

5.2. the order of the appellate authority was harsh and was a miscarriage of justice.

5.3. appellate authority has not considered the release of the currency since the same was not prohibited goods and that absolute confiscation was not warranted.

5.4. that the case of the department was based on assumptions and presumptions and nothing incriminating was found.

The applicant has prayed that the order of absolute confiscation and imposition of penalty passed by the appellate authority be set aside in the interest of justice and equity.

6. Accordingly personal hearings in the case was scheduled on 30.08.2018 / 25.09.2018. However, no one appeared on behalf of the applicant. Thereafter, after the change in the Revision Authority, a revised date was scheduled on 24.08.2021 / 31.08.2021 for hearing through the video conferencing mode. Shri. K.D.A Shukoor, Advocate of the applicant appeared online on 31.08.2021. He reiterated his earlier submissions and submitted that the applicant was working in Saudi Arabia for several years While going back the applicant was carrying Saudi currency worth about Rs. 3 lakhs. He submitted that the currency

belonged to the applicant and the same was below the permissible limit, therefore, it should be released.

7. Government has gone through the facts of the case. Government finds that the applicant had not declared the seized foreign currency to the Customs at the point of departure. On being confronted, the applicant initially denied but later admitted that he was carrying foreign currency. The applicant was unable to produce any documents to show that the foreign currency had been purchased from authorized foreign exchange dealer and he informed that the said foreign currency was handed over to him by his owner in Dubai for sending goods from India. Inquiries and searches were carried out and no incriminating documents or foreign currency was found. The source of currency remained unaccounted.

8. 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, confiscation of the foreign currency was justified.

9. The Government finds that though the applicant had retracted his statement, however, this has been dealt with in great detail in the order passed by the Original Adjudicating Authority.

10. 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 adjudication authority while confiscating the foreign currency has placed reliance on the judgement of the

Madras High Court in the case of Commissioner of Customs, Chennai v/s. Savier Poonolly [2014(310 E.L.T. 231 (Mad))] wherein at para 13 it was held 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.....

11. 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.

12. 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.*

13. 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.

14. The Government finds that the amount involved in this case is below the prescribed limit set by the RBI. Also, the applicant when confronted by the Customs Officers, admitted that he was carrying foreign currency. Government finds that the discretion not to release the foreign currency under the provisions of Section 125 of the Customs Act, 1962 is punitive and unjustified. The order of

the Appellate authority is therefore liable to be set aside and the foreign currency is liable to be allowed redemption on suitable redemption fine and penalty.

15. The Government finds that the personal penalty of Rs. 1,00,000/- imposed on the applicant under Section 114(i) of the Customs Act, 1962 is also excessive as this being first case relating to him. Penalty imposed is not commensurate with the act of carrying foreign currency of 19,000 Saudi Riyals by applicant.

16. In view of the above, the Government sets aside the impugned order of the Appellate authority in respect of the foreign currency. The foreign currency consisting of 19000 Saudi Riyals is allowed redemption on payment of Rs. 60,000/- (Rupees Sixty thousand only). The penalty of Rs. 1,00,000/- imposed under section 114(i) of the Customs Act, 1962 imposed by the lower adjudicating authority and upheld by the appellate authority is reduced to Rs. 50,000/- (Rupees Fifty thousand only).

17. Revision Application is disposed of on above terms.

Shrawan
29/9/21
(SHRAWAN KUMAR)

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

ORDER No. ²⁴⁹/2021-CUS (SZ) /ASRA/ DATED 29.09.2021

To,

1. Mr. Abdulla Kundor, S/o. Moosa Kundor, Periya House, Periya Post, Pallikara, Kasargod District, Kerala State.
2. The Commissioner of Customs, International Airport, Bajpe, Kenjar, Mangalore.

Copy to:

1. Mr. K. P. A. SHUKOOR, Advocate, United Law Chambers, 2nd Floor, Krishnaprasadd Building, K. S. Rao Road, Mangaluru-575001, D. K District, Karnataka State.
2. Sr. P.S. to AS (RA), Mumbai.
3. Guard File.
4. Spare Copy.