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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. **373/127/B/16-RA** /6098 Date of Issue 20/10/2021

ORDER NO. 258/2021- CUS (SZ)/ASRA/MUMBAI DATED 30.09.2021 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. Abdulla Kunhi Kakakara

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. 296 - 299 / 2016 dated 31.03.2016 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 Kunhi Kakakara, (herein referred to as Applicant) to as Applicant) against the order No. 296-299 / 2016 dated 31.03.2016 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 Kunhi Kakakara travelling to Sharjah on 25.06.2014 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 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 the applicant revealed that he was carrying foreign currency. On examination, US$ 5000 in denominations of 100 were recovered from the from his red hand bag. The said foreign currency was 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. 27 / 2014 dated 16.11.2014 issued through C.No. VIII/04/56/2014 Cus AP/5884, the Original Adjudicating Authority confiscated the foreign 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. 296-299 / 2016 dated 31.03. 2016 upheld the order of the Original Adjudicating Authority.

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

5.1. the order of the appellate authority was harsh and was a miscarriage of justice.
5.2. that currency was not a prohibited item has not been considered by the appellate authority and hence ought to have released the same.
5.3. that the adjudicating authority and the appellate authority have relied upon the assumptions and presumptions made by the Customs.

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 However, no one appeared on behalf of the applicant. Thereafter, a revised date was scheduled on 14.09.2021 / 21.09.2019 for hearing through the video conferencing mode. Shri. K.D.A Shukoor, Advocate of the applicant appeared online on 21.09.2021. He reiterated his earlier submissions and submitted that the applicant was working in Sharjah and currency was the unspent amount with him. He further submitted that currency was below $5000, below the permissible limit and submitted that applicant not being an habitual offender the currency should be released. Shri. Vasudev Naik, Asstt. Commr, appeared online on behalf of the Respondent and requested to maintain the Order passed by the Commissioner of Customs (Appeals).

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 admitted that he was carrying foreign currency. Initially, the applicant had stated that the foreign currency was given to him by a person from M/s. Orbit Travels, Udma, Kasargod for delivery to a person at Sharjah. 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, the absolute confiscation of the foreign currency was justified and also as no declaration as required under section 77 of the Customs Act, 1962 was filed by the applicant.

9. The though the applicant had retracted his statement, the Government finds that this has been dealt with in great detail in the order passed by the Original Adjudicating Authority and does not need intervention.

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.

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 with the scope of "prohibited goods" is applicable in this case and the lower adjudicating authority has placed reliance on the same.

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 justified as the applicant admittedly, is a frequent traveller and was aware of the

procedures and law on carrying foreign currency. Penalty imposed is commensurate with the act committed and admitted by applicant.

16. In view of the above, the Government is inclined to take a reasonable view in the matter and sets aside the impugned order of the Appellate authority in respect of the foreign currency. The foreign currency consisting of US$ 5000/-is allowed redemption on payment of Rs.90,000/- (Rupees Ninety 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 appropriate.

17. Revision Application is disposed of on above terms.

Shrawan 30/9/21

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

ORDER No. 238/2021-CUS (SZ) /ASRA/ DATED 30.09.2021

To,

1. Mr. Abdulla Kunhi Kakakara, S/o. K.M Moideen Kutty, Razik Manzil, Kettinnullil, Mangad, Bara (PO), Kasargod District, Kerala State. (address taken from search report in OIO)
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.