



GOVERNMENT OF INDIA
MINISTRY OF FINANCE
(DEPARTMENT OF REVENUE)
8th Floor, World Trade Centre, Centre - I, Cuffe Parade,
Mumbai-400 005

F.No. 380/126/B/16-RA/6165

Date of Issue 20/10/2021

ORDER NO. ²⁶³/2021-CUS (SZ)/ASRA/MUMBAI DATED 20.10.2021 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, Anna International Airport,
Meenambakkam, Chennai Pin : 600 027.

Respondent : Shri. Thiruppathy Rajagopal

Subject : Revision Application filed, under Section 129DD of the
Customs Act, 1962 against the Order-in-Appeal C. CUS-I
No. 121/2016 [C4-I/39/O/2016-Air] dated 29.02.2016
passed by the Commissioner of Customs (Appeals-I),
Chennai 600 001.

ORDER

This revision application has been filed by Pr. Commissioner of Customs, Anna International Airport, Chennai (herein referred to as Applicant) against the Order in Appeal C. CUS-I No. 121/2016 dated 29.02.2016 [C4-I/39/O/2016-Air] passed by the Commissioner of Customs (Appeals-I), Chennai 600 001.

2. The brief facts of the case are that on 02.10.2015, a passenger by name Shri Thirupathy Rajagopal (hereinafter referred to as the Respondent) was bound for Singapore by Tiger Airways flight No. TR 2637. Acting on intelligence that the Respondent may be carrying huge amount of Indian / Foreign currency in his baggage, he was intercepted by the Customs Officer at the Security hold area in departure terminal of Anna International Airport, Chennai. The Respondent had cleared the Immigrations and Customs. He was questioned about foreign / Indian currency in his possession, to which he replied that he was carrying only some Indian currency. Not being satisfied with the reply, the Respondent was examined at the AIU room. A detailed personal search of the Respondent led to the recovery of USD 11,100/- (i.e. 111 Nos of US Dollars of 100 denomination) equivalent to Rs. 7,28,160/-. As the Respondent was not in possession of any valid document for legal export of the said foreign currencies, the same were seized under the Customs Act, 1962 read with Foreign Exchange Management Act, 2009.

3. After due process of investigation, the case was adjudicated by the lower adjudicating authority who vide Order-in-Original No. 387/15-16 dated 30.11.2015 [F.No. OS.No. 1077/2015-AIR] had ordered for absolute confiscation of the seized Foreign currency of Rs.7,28,160/- under Section 113 (d), (e) & (h) of the Customs Act, 1962 read with Foreign Exchange Management(Export and Import of Currency) (Amendment) Regulations, 2009 and also imposed penalty of Rs. 75,000/- on the Respondent viz Shri. Thirupathy Rajagopal under section 114(i) of the C.A., 1962.

4. Aggrieved by the order of the lower authority, the Respondent filed an appeal before the appellate authority, who while disposing of the Appeal vide Order-in-Appeal C.Cus-I No.121/2016 dated 29.02.2016 [C4-I/39/O/2016-Air] ordered for redemption of the foreign currency i.e. USD 11,100/- (i.e. 111 Nos of US Dollars of 100 denomination) equivalent to Rs. 7,28,160/ on payment of redemption fine of RS.3,00,000/- and upheld the penalty imposed by the lower 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. that 12 small rolls of foreign currency notes had been recovered from specially made cavities in the bag and passenger was not in possession of any valid document for the legal export of the same.

5.2. that the Respondent was carrying foreign currency for monetary consideration.

5.3. that the Respondent had not declared that he was carrying foreign currency and had not satisfied the requirement for carrying the foreign currency.

5.4. the applicant has relied upon a plethora of case laws to buttress their case.

The applicant has prayed that the order of the appellate authority allowing for the redemption of the foreign currency on payment of redemption fine may be set aside.

6. Personal hearings in the case through vide conferencing mode were scheduled online on 17.08.2021 / 24.08.2021. However, Shri. K. Mohamed Ismail, Advocate for the respondent vide his letter dated 14.08.2021 waived the personal hearing and requested the Revisionary Authority to take up the case for adjudication and that they were relying on the considerations of the adjudicating authority as their arguments and has requested to decide the case in the Respondent's favour.

7. Government has gone through the facts of the case. Government finds that the respondent had not declared the seized foreign currency to the Customs at the point of departure. On being confronted, the respondent had admitted that he was carrying some Indian currency but had not disclosed that he was carrying foreign currency. Further, the Government has observed that the Respondent is a repeat offender and two nos. of offences have been registered against him, albeit for a small amount of Rs. 1,10,500- (which is mentioned at para 3 of the OIO dated 30.11.215).

8. The source of the foreign currency had remained unaccounted. 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 the appellate authority had pointed out that the Respondent had retracted his statement immediately within a day and had raised the issue of retraction before the lower adjudicating authority. Retraction of statement mechanically without explaining the source of foreign currency, need for creating cavities to hide it, non-declaration of the same, etc does not alter the factual matrix of the case.

10. The Government finds that the respondent 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 respondent is correct and therefore, the confiscation of the foreign currency ordered, is justified. In doing so, the Government finds that the lower adjudicating authority has correctly 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.....

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)] relied upon by the adjudicating authority 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 Respondent is a habitual offender. It is apparent that the Respondent was aware of the law. Government notes the manner of concealment, non-accountal of source, and the fact of respondent

being habitual offender. Government finds that the discretion to release the foreign currency under the provisions of Section 125 of the Customs Act, 1962 on payment of redemption fine by the appellate authority was not judicious. All surrounding factors were not weighed in by him properly. The order of the appellate authority to release the foreign currency on payment of redemption fine of Rs. 3,00,000/-, therefore, deserves to be set aside. The Order-in-Appeal no. C. CUS-I No. 121/2016 dated 29.02.2016 [C4-I/39/O/2016-Air] is set aside and absolute confiscation ordered vide Order-in-Original No. No. 387/15-16 dated 30.11.2015 [F.No. OS.No. 1077/2015-AIR] is restored.

15. The Government finds that the personal penalty of Rs. 75,000/- imposed on the respondent under Section 114(i) of the Customs Act, 1962 by the lower adjudicating authority and upheld by the appellate authority is reasonable and justified

16. Accordingly, the Revision Application is allowed.


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

ORDER No. ²⁶³ /2021-CUS (SZ) /ASRA/

DATED 20.10.2021

To,

1. Pr. Commissioner of Customs, Anna International Airport, Meenambakkam, Chennai Pin : 600 027.
2. Shri. Thiruppathy Rajagopal, No. 16, Linghi Chetty Street, Harbour, Chennai - 600 001.

Copy to:

1. Shri. K. Mohamed Ismail, Advocate, New No. 102 [Old no. 271], Linghi Chetty Street, Chennai - 600 001.
2. Sr. P.S. to AS (RA), Mumbai.
3. Guard File,
- ✓ 4. File Copy.