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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. 373/272/B/2020-RA / 6220 Date of Issue 26/10/21
F.No. 380/56/B/SZ/2020-RA

ORDER NO. 282-283 /2021-CUS (WZ)/ASRA/MUMBAI DATED
23.10.2021 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.

F.No. 373/272/B/2020-RA

Applicant : Smt. Rayavarapu Sridevi

Respondent: Pr. Commissioner of Customs, Chennai Airport,
Meenambakkam, Chennai - 600 016.

F.No. 380/56/B/SZ/2020-RA

Applicant-Department : Pr. Commissioner of Customs, Chennai Airport,
Meenambakkam, Chennai - 600 016.

Respondent : Smt. Rayavarapu Sridevi

Subject : Revision Application filed, under Section 129DD of the
Customs Act, 1962 against the Order-in-Appeal Airport.
Cus. I No. 206 / 2020 [C4/I/99/O/2020/AIR] dated
20.05.2020 passed by the Commissioner of Customs
(Appeals-I), Chennai 600001.

ORDER

These revision applications has been filed by Smt. Rayavarapu Sridevi (hereinafter referred to as the Applicant) as well as by the Pr. Commissioner of Customs, Chennai Airport, Meenambakkam, Chennai – 600 016 (hereinafter referred to as the Applicant-Department) against the Order in Appeal Airport. Cus. I No. 206 / 2020 [C4/I/99/O/2020/AIR dated 20.05.2020 passed by the Commissioner of Customs (Appeals-I), Chennai 600 001

2. Briefly stated facts of the case are that the on 25.04.2019, the Officers of the Air Intelligence Unit, Customs intercepted Smt. Rayavarapu Sridevi, a Malaysia National at the Anna International Airport, Chennai. The applicant was bound for Kuala Lumpur, Malaysia onboard Batik Air Flight No. ID6019/25.04.2019 and had cleared immigration. To the query whether she was carrying any Indian / foreign currency, the applicant had replied in the negative. Examination of her checked-in baggage resulted in the recovery of 676 nos of US Dollars all of 100 denomination. Applicant was asked whether she possessed any legal document for the export of aforesaid foreign currency, to which she replied in the negative. Applicant was also asked whether she possessed any valid document / permit from RBI as required under FEMA for export of the aforesaid foreign currency, to which she replied in the negative. As the applicant had attempted to export the foreign currency by concealing the same and without any declaration, the said foreign currency valued at Rs. 46,44,120/- was seized.

3. The Original Adjudicating Authority i.e. Joint Commissioner of Customs (Adj-AIR) vide Order-In-Original No. O.S No. 375/2019-AIU {F.No. O.S.No. 40/2019-INT-AIR} dated 08.06.2020 ordered absolute confiscation of the seized foreign currency equivalent to Rs. 46,44,120/- under Section 113(d), 113(e) & 113(h) of the Customs Act, 1962 read with FEM (Export and Import of Currency) Regulations, 2015 and imposed a penalty of Rs. 5,00,000/- on the applicant under Section 114 of the Customs Act, 1962.

4. Aggrieved by the said order, the applicant filed appeal before the Commissioner of Customs (Appeals-I), Chennai – 600 001 who vide Order-In-Appeal Airport. Cus. I No. 206 / 2020 [C4/1/99/O/2020/AIR dated 20.05.2020 allowed to redeem the foreign currency on payment of redemption fine of Rs. 4,00,000/- under Section 125 of the Customs Act, 1962 to be paid within 120 days of the communication of the Order. Personal Penalty of Rs. 5,00,000/- imposed under Section 114 of the Customs Act, 1962 was reduced to Rs. 3,25,000/-

5. Aggrieved with the aforesaid Order passed by Commissioner of Customs (Appeals-I), Meenambakkam, Chennai – 600 016, the Applicant has filed this revision application inter alia on the grounds that;

5.1 the order of the appellate authority was wholly unfair, unreasonable, unjust, biased and contrary to the established legal principles.

5.2. the appellate authority while allowing the redemption of the foreign currency had totally ignored the facts that there was no concealment, the applicant was not a trader, had no adverse record.

5.3. that the currency carried was not prohibited nor restricted for import / export.

5.4. that the currencies were placed under seizure for a technical violation of non-declaration.

5.5. that the currency belongs to her and was given to her by her family i.e. son, son-in-law, daughter.

5.6. that the applicant was a foreign national and had a sound income from her business at Malaysia.

5.7 that the appellate authority had not considered her plea that the service of the show cause notice to her had been delayed beyond the stipulated date which was 25.10.2019 and that she had received it on 10.11.2019 and on this count itself, the currency ought to have been released to her. The contention of the applicant was that the SCN was served to her beyond a period of six months and that the SCN had been dispatched on 28.10.2019.

5.8. that the applicant pleads that she may be allowed to re-export the foreign currency

5.9. that the applicant had relied on a catena of judgements viz;

- (a). 2014(307) ELT 837 (Delhi HC),
- (b). 2016(342) ELTA225 (S.C),
- (c). 2017(352) ELT 53 (Tri-Mumbai),
- (d). 2018(361) ELT 959 (GOI),
- (e). 2014(314) ELT 849 (GOI),
- (f). 2008(221) ELT 258 (Tri-Chennai),
- (g). 2017(346) ELT 9 (HC-Bom),
- (h). 2002(146) ELT 180 (Tri-Mumbai),

5.10. that her pleas for the provisional release of the currency had not been considered by the Principal Commissioner of Customs (Air) and Principal Chief Commissioner of Customs, Chennai.

The Applicant has prayed for

(a). the unconditional release of the foreign currency as the SCN was not served within the time frame provided under the provisions of Section 124 & 153 of the Customs Act, 1962.

(b). the fine and penalty imposed was disproportionate to the offence which was technical in nature.

(c). pass any other order as deemed fit

6. Aggrieved by the impugned Order-in-Appeal passed by the appellate authority, the Applicant-Department have also filed a revision application on the grounds that;

6.1 the order was not legal and proper.

6.2. the passenger did not have permission to carry foreign currency as required under Regulation 5 of the Foreign Exchange Management (Export and Import of Currency) Regulations, 2000, which stipulated

general or special permission of the Reserve Bank to export or to send out of India any Foreign currency and had thus contravened the provisions of section 3 of the FEMA, 1999 and thereby Section 11(2) (u) of the Customs Act, 1962 and hence, the foreign currency under seizure had been rendered liable for confiscation under section 113(d) of the Customs Act, 1962.

6.3. that in terms of Section 2(22) (d) of the Customs Act, 1962, "goods" included currency and negotiable instruments and thus in terms of para 2.7 of Foreign Trade Policy any goods, export or import of which was restricted under ITC (HS) can be exported or imported only in accordance with an authorization or in terms of a public notice in this regard. The Respondent did not have in his possession any valid documents/permission of the competent authorities for legal export of foreign currency.

6.4 that the applicant had not declared the foreign currency as required under Section 77 of the Customs Act, 1962.

6.5. that the applicant in her statement had admitted that in the past she had travelled to India nearly 20 times and each time she would bring foreign currency.

6.6. that the applicant was legally not entitled to take the currency back as she was a foreign national and had not declared the foreign currency.

6.7. that the foreign currency was liable for confiscation and that the Commissioner Appeals had erroneously ordered for the release of the foreign currency on payment of redemption fine of Rs. 4 lakhs and reduced the penalty to Rs. 3,25,000/-

6.8. that in a recent case RA Order no. 1108/2018 dated 03.12.2018 in case of Shri. Jang Bahadur, the RA set aside the O-I-A and enhanced the redemption fine from Rs. 2 lakhs to Rs. 12 lakhs and the PP from Rs. 1 lakh to Rs. 2 lakhs.

Applicant Department has prayed that the order passed by the appellate authority be set aside or pass any order as deemed fit.

7. The applicant had filed a Writ Petition no. 19449 of 2021 and WMP No. 20741 of 2021 in the Hon'ble Madras High Court which issued directions to the Revisionary Authority to dispose of the stay petition as expeditiously as his business would permit and in any event, within three weeks before 08.10.2021. Also, the Hon'ble High Court had made it amply clear that it had not expressed any opinion or view on merits of the matter in the order.

8. In deference to the Orders of the Hon'ble Madras High Court, personal hearing via online video conferencing mode was scheduled for 08.10.2021 and 14.10.2021. Shri. B. Kumar, Consultant appeared online on 14.10.2021 on behalf of the applicant and reiterated the earlier submissions. He stated that it was first time offence. Currency was kept in the hand baggage therefore, redemption has been correctly allowed by Commissioner (Appeals). He stated that he would be submitting a written submission within two days. Nobody attended the hearing on behalf of the Applicant department.

9. Shri. B Kumar, Consultant submitted his written say on 14.10.2020. The same was a synopsis of his earlier written submission and it is not being reproduced here. An additional issue raised by the applicant was that the Revision application of the department was not maintainable as no new materials were relied upon by them. It was reiterated to confirm the order of the appellate authority and to reduce the redemption fine and penalty based on the merits and facts of the case.

10. The applicant has sought for condonation of delay in filing the revision application and the reason cited is due to disruption caused by Covid-19. The delay is of 16 days. For condonation of the delay, applicant has relied upon the notification dated 30.09.2020 issued by Government of India under Section 6 of the Taxation and Other Laws (Relaxation and amendment of Certain Provisions Act, 2020 (S.No. 38 of 2020) extending the time limit till 30.12.2020. The Government finds that the reason cited by the applicant is genuine and the request of condonation of delay is accepted.

11. On the issue of the averments made by the applicant that the show cause notice [SCN] was issued beyond the stipulated period prescribed in the law, the Government finds that the applicant vide her written communication dated 25.04.2019 had requested for waiver of the show cause notice and the case to be adjudicated without issue of a SCN. Having done so, the applicant, at a later date, cannot renege on her commitment and find fault that merely because SCN was received late, the process is vitiated and was entitled to get benefit thereof. The SCN was issued on time but the applicant had alleged that it was received late. The Government finds that once the applicant had waived the SCN, recourse cannot be taken that it was not received or not received on time. Moreover, once OIO/OIA has been issued on the matter, and goods are confiscated, seizure of goods no longer remains relevant.

12. 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 Applicant to the Customs at the point of departure. Further, in her statement the applicant had admitted the possession, carriage, concealment, non-declaration and recovery of the foreign currency. The applicant was unable to give the source of how she came in possession of the foreign currency save her statements that each time that she came to India she had brought the currency. Later, the applicant had changed her version and had stated that the foreign currency had been given to her by her son-in-law, daughter and son. The fact remains that she had not disclosed the impugned foreign currency during her frequent trips to India. Thus, source of currency had remained unaccounted. Applicant was unable to show that the impugned foreign currency in her possession was procured from authorized persons as specified under FEMA. 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, 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 applicant 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.

13. 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 has been violated by the applicant 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 with the scope of "prohibited goods".

14. 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.*

15. 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.*

16. The Government finds that the appellate authority has allowed to redeem the foreign currency on payment of redemption fine of Rs. 4,00,000/- under Section 125 of the Customs Act, 1962 which was ordered to be paid within

120 days of the communication of the Order. Also, the personal Penalty of Rs. 5,00,000/- imposed under Section 114 of the Customs Act, 1962 was reduced to Rs. 3,25,000/-. Considering that such huge amount of currency was being carried concealed in the bags, currency remained unaccountable, none of differing versions of sourcing currency were found true, thus discretion used by Commissioner (Appeals) to allow redemption of prohibited goods was inappropriate. Facts and circumstances of the case warrants absolute confiscation of foreign currency as held by the adjudicating authority. The reduced personal penalty is reasonable and judicious. Government therefore finds no reason to interfere in the penalty imposed by the appellate authority.

17. Accordingly, the revision application no. 373/272/B/2020-RA filed by the applicant and the revision application no. 380/56/B/SZ/2020-RA filed by applicant department are decided on above terms.

Shrawan
25/10/21
(SHRAWAN KUMAR)

Principal Commissioner & ex-officio

Additional Secretary to Government of India

282-283
ORDER No. /2021-CUS (SZ) /ASRA/

DATED 25.10.2021

To,

1. Smt. Rayavarapu Sridevi, W/o Shri. E. Subramaniam, B-39, Lorong Sena-1, Taman Pesaka, Jalan Maharaja Leela Teefuk, Intan 36000 Perak, Malaysia **to be dispatched to applicant's local address in India as per records i.e.** 64-7-21, Ramnagar, Sriharipuram, Vishakhapatnam - 530 011.
2. The Pr. Commissioner of Customs, Commissionerate-I, Chennai Airport, New Custom House, Meenambakkam, Chennai - 600 016.

Copy to:

3. B.K Associates, 117/55, Egmore High Road, Egmore, Chennai - 600 008.
4. Sr. P.S. to AS (RA), Mumbai.
5. Guard File. ,
6. File Copy.