



**REGISTERED**  
**SPEED POST**

**F. No. 375/29/B/2013-RA**  
GOVERNMENT OF INDIA  
MINISTRY OF FINANCE  
DEPARTMENT OF REVENUE  
(REVISION APPLICATION UNIT)

14, HUDCO VISHALA BLDG., B WING  
6<sup>th</sup> FLOOR, BHIKAJI CAMA PLACE,  
NEW DELHI-110 066

Date of Issue 29/3/16.....

**ORDER NO. 34/2016-CUS DATED 22.03.2016** OF THE GOVERNMENT OF INDIA, PASSED BY SMT. RIMJHIM PRASAD, JOINT SECRETARY TO THE GOVERNMENT OF INDIA, UNDER SECTION 129 DD OF THE CUSTOMS ACT, 1962.

Subject : Revision Application filed, under Section 129 DD of the Customs Act, 1962 against the Order-in-Appeal No. CC(A)CUS/598/2013 dated 18.10.2013.

Applicant : Shri Vinay Kumar

Respondent : Commissioner of Customs IGI, Airport, T-3, New Delhi.

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## ORDER

This Revision Application is filed by Shri Vinay Kumar, (here in after referred to as the applicant) against the Order-in-Appeal No. CC(A)CUS/598/2013 dated 18.10.2013 passed by Commissioner of Customs, (Appeals) NCH, New Delhi, with respect to Order-in-Original No. 16/2013/AK/ADC/IGI dated 05.03.2013 passed by Additional Commissioner of Customs, IGI Airport, New Delhi.

2. Brief facts of the case are that acting on a specific intelligence that the applicant, holder of Indian Passport No. J-7347673 issued from Chandigarh, would arrive from Hong Kong by flight no. AI-317 dated 03.04.2012 and carry memory cards, surveillance was mounted on the applicant right from his disembarkation from Bay No. 22-B. On arrival after completing his immigration formalities, the applicant opted to walk through the green channel. At the time of exit through the arrival hall, he was asked whether he was carrying any dutiable goods to which he replied in the negative. It was found that the applicant had left the column no. 6 of the disembarkation slip (Customs portion) blank. Not being satisfied with the reply and compounded by the fact that there was a specific intelligence about him, the applicant was diverted for X-ray scanning of his two hand bags. The personal search and search proceedings of his two hand bags were conducted before two panchas. As a result of his personal search currency INR 430, USD 24 and HKD 20, Disembarkation Slip, E-Ticket booked on 02.04.2012, Boarding Pass of the Pax, two used mobile phones-Sony Ericsson and Zen Mobile and sales invoice no. 07048 dated 03.04.2012 were recovered. Of these items the currency and used mobile phones being within the permissible limits and being used personal effects were subsequently returned to the Pax.

2.1 Thereafter, the officers opened and examined the two hand baggage of applicant one-by-one in the presence of the witnesses and in the presence of applicant. The baggage was found to contain the following electronic goods as detailed below:

S.No.	Memory Card	Brand	Manner of Packing	Qty. found (Pcs)
<b>HAND BAG NO. 1 (Brown colour zipper bag)</b>				
1.	4 GB	Micro SD HC	600 pcs each packed in 4 brown colour Samsung cardboard boxes	2400
2.	4 GB	San Disk	Wrapped in one red colour cloth bag	1200
<b>HAND BAG NO. 2 (Blue colour laptop bag)</b>				
3.	4 GB	Micro SD HC	500 pcs each in six packs and 114 pcs in one pack wrapped in 7 red colour air bubbled poly bags	3114
<b>Total</b>				<b>6714</b>



The price of the 4 GB memory cards has been taken at Rs. 215/- per piece. The value of the same has been taken from website flipcard.com and agreed to by the pax.

2.2. Since the applicant could not produce any valid documents in support of the import, 6714 pieces of 4 GB Memory Cards, collectively valued at Rs. 14,43,510/- were seized under Section 110 of the Act *ibid* on the reasonable belief that he same were smuggled into India and were therefore, liable to confiscation under the Act *ibid*. The two hand bags used for concealing the seized goods were also seized under Section 118 read with 119 of the Customs Act, 1962. The disembarkation slip (Customs portion), Boarding Pass from Hong Kong to Delhi, e-tickets and sales invoice no 07048 dated 03.04.2012 were also taken into possession being relevant to the investigation. A panchnama dated 03/04.04.2012 was drawn on the spot.

2.3. In his voluntary statement dated 04.04.2012 tendered under Section 108 of the Customs Act, 1962 wherein the applicant stated that he arrived at IGI Airport , New Delhi from Hong Kong by flight no. AI 317 on 03.04.2012; that while going out of the green channel, he was intercepted by a Customs officer near the exit gate of arrival hall and was diverted for X-ray of his two handbags; that after observing the images of memory cards during the X-ray of his both the handbags, i.e. one brown colour zipper bag and one blue colour laptop bag, the officers called two independent witnesses to witness the examination/search proceedings of his handbags and his personal search; that during the search 6714 nos. of memory cards of 4 GB each were recovered; that he fully agreed with the valuation of the seized goods; that after graduation from Ratia (Haryana) he did two years MCA from NIIT, New Delhi and thereafter started a computer shop in the name and style of M/s Meera Company which was later on closed; that in January 2012, he along with his brother-in-law Shri Lalit Kumar started a company namely M/s Rich Hood Trading Company Pvt. Ltd dealing in the trading of memory cards; that they used to purchase memory cards from local markets in Delhi and sell them in the local markets of Hisar and its surrounding markets; that on an average they used to earn about Rs.20,000/- each per month; that he had visited China and Hong Kong on four occasions including this visit; that 6714 nos. of memory cards were recovered from both his handbags and were seized under Section 110 of the Act, *ibid*; that he had purchased 6114 pieces of memory cards vide sales invoice no. 07048 dated 03.04.2012 from M/s Sun –Infinity Devices, Hong Kong; that he purchased another 600 pieces of memory cards from some other shop at Hong Kong without any purchase invoice; that there was no specific buyer for these memory cards; that he had to sell these memory cards in the open market of Haryana; that he visited China/Hong Kong on three earlier occasions only to explore the business prospects for their company but did not bring any dutiable goods while returning to India; that during this present visit to Hong Kong he carried with him US Travel Card of a value of USD 9000 and that while some funds were arranged from the sale of his shop, the rest were raised from his family savings.

2.4. The applicant could not produce any valid documents in support of the import of 6714 pieces of 4 GB memory cards, collectively valued at Rs. 14,43,510/-. He was arrested under Section 104 of the Act *ibid* on 04.04.2012 and subsequently released on bail.

2.5. In a follow up action, the residential premises H.No. 231, W.No. 11, Tibba Colony, Ratia, District Fatehabad and the official premises i.e M/s Rich Hood Trading Company Pvt. Ltd, H 3314, Sector 14, Hisar were got searched. Nothing incriminating/objectable was found from his residence and in respect of the trading premises, it has been reported that no such address as disclosed by the Pax exists.

2.6. The recovered invoice no.07048 dated 03.04.2012 revealed the price of 4 GB memory cards SD as 1.84 USD. In order to ascertain the true value for the purpose of assessing the seized goods, market enquiry was conducted. On account of the market enquiry, it is transpired that 4 GB memory card SD are available in the market @ Rs. 215 per piece. In view of the above, it appeared that the invoice does not correspond to the market value and has been obtained to suit the requirements of the Pax. Hence, in order to arrive at the true assessable value, abatement @ 25% on account of statutory taxes/levies, profit margin is given. Therefore the total value of the impugned goods after giving abatement @ 25% works out to Rs. 10,82,633/-.

2.7. A Show Cause Notice was issued to applicant alleging therein as to why:-

(i) 6714 pcs of 4 GB memory cards valued at Rs. 10,82,633/- should not be held liable to confiscation under Section 111 (l) & (m) of the Act *ibid*.

(ii) The two hand bags (one brown colour zipper bag and one blue colour laptop bag) used for concealing the said seized goods should not be held liable to confiscation under Section 118 read with Section 119 of the Act, *ibid*.

(iii) Customs duty and Education cess @ 36.05% total amounting to Rs. 3,90,290/- should not be demanded and recovered from him under Section 28 of the Act *ibid*.

(iv) Interest on the duty evaded at applicable rates, should not be demanded and recovered under Section 28 AB of the Act *ibid*.

(v) Penalty should not be imposed on him under Section 112 of the Act, *ibid*.

2.8. Accordingly, the Additional Commissioner of Customs(Airport), IGI Airport, New Delhi passed the order vide Order-in-Original No. 16/2013/AK/ADC/IGI dated 05.03.2013 and ordered:-

(i) Denial free allowance of Rs. 35,000/- to Shri Vinay Kumar on account of various acts of omission and commission.

(ii) Confiscation of the seized memory cards valued at Rs. 10,82,633/- recovered from the applicant under Section 111(l) & (m) of the Customs Act, 1962 with an option to redeem the same on payment of redemption fine of Rs. 2,50,000/- under

Section 125 of the Act *ibid* and on payment of appropriate duty and interest under Section 28 and 28 AB of the Act *ibid*.

(iii) Confiscation of two hand bags used for concealing the aforesaid seized goods under Section 118 and 119 with an option to redeem the same on payment of redemption fine of Rs. 3,000/- under Section 125 of the Act, *ibid*.

(iv) Imposition of penalty of Rs. 2,00,000/- on the applicant for the various acts of omission and commission committed by him under Section 112 of the Customs Act, 1962.

3. Being aggrieved by the said Order-in-Original, the applicant filed appeal before Commissioner (Appeals) who vide Order-In-Appeal No. CC(A) Cus/598/2013 dated 18.10.2013 modified the Order-In-Original to the extent by reducing the redemption fine to Rs. 1,55,000/- and penalty to Rs. 1,00,000/- under Section 112(a) of the Act, *ibid*.

4. Being aggrieved by the impugned Order-in-Appeal, the applicant has filed this Revision Application under Section 129 DD of Customs Act, 1962 before Central Government on the following grounds :

4.1. That the order passed by the Commissioner of Customs (Appeals) is not correct.

4.2. That no interest is leviable under Section 28 AB on the goods seized under Section 110 of the Customs Act, 1962; that Section 28 AB is applicable only in the case of recovery of duties not levied or short levied or erroneously refunded under Section 28 of the Act, *ibid*. That the goods were seized by the Customs Department and were with the Customs Department. There is no question of short levied or not levied or erroneously refunded under Section 28 of the Act.

4.3. That Section 28 of the Customs Act, 1962 may be read as:-

*"Recovery of duties not levied or short-levied or erroneously refunded, or any interest payable has not been paid, part-paid or erroneously refunded, for any reason other than the reasons of collusion or any willful mis-statement or suppression of facts-*

*A. the proper officer shall, within one year from the relevant date, serve notice on the person chargeable with the duty or interest which has not been so levied or which has been short-levied or short-paid or to whom the refund has erroneously been made, requiring him to Show Cause why he should not pay the amount specified in the notice;"*

Explanation- For the purpose of this Section, "relevant date" means,-

- a) In a case where duty is not levied, or interest is not charged, the date on which the proper officer makes an order for the clearance of goods;
- b) In a case where duty is provisionally assessed under Section 18 of the Act, *ibid*, the date of adjustment of duty after the final assessment or reassessment, as the case may be, thereof;



- c) In a case where duty or interest has been erroneously refunded, the date of refund;

From the above said language of Section 28 of the Customs Act, 1962 it is clearly established without any doubt that Section 28 is applicable only when there is order of clearance passed by the proper officer and the proper officer has to issue a Show Cause Notice for duties not levied or short levied or erroneously refunded within one year from the date of passing of the order by the proper officer. That neither their case is of provisional assessment under Section 18 of the Customs Act, 1962 nor their case is the case of refund of Customs Duty. That in their case no order of clearance has been passed by the proper officer. Therefore, Section 28 of the Customs Act, 1962 is not applicable.

- 4.4. The applicant placed reliance on the decision of CESTAT in the case of Essar Oil Ltd vs. Commissioner of Customs (Prev), Jamnagar-2006 (197) ELT 450 (Tri-Mumbai) as under:-

*"Demand-short levy-Section 28 of the Customs Act, 1962 is applicable when duty has been short-levied or non-levied pursuant to an order of assessment and since no order of clearance under Section 47 ibid issued, no short levy or non-levy of duty can arise for recovery in terms of Section 28 ibid."*

- 4.5. Section 44 of the Customs Act clearly stated that Section 47 of the Customs Act is not applicable to the goods imported under baggage and goods imported by post. There is no question of payment of interest under Section 28AB.

- 4.6. The applicant prayed for setting aside the Order passed in respect of demand of interest under Section 28AB or any other relief as deem fit.

5. Personal hearing in this case held on 18.12.15 was attended by Shri S. S. Arora, Advocate on behalf of the applicant, who submitted a written submission reiterating the same grounds of revision application. He contended that no interest is chargeable under Section 125 of the Customs Act which only refers to duty and in view of CESTAT decision of Essar Oil Ltd vs. Commissioner of Customs (Prev), Jamnagar and Government of India's Order No. 21/2014-Cust dated 28.01.2014 in the case of CC, Delhi vs Nirvair Singh.

6. Government has carefully gone through the relevant case records available in case files, oral & written submission and perused the impugned Order-in-Original and Order-in-Appeal.

7. On perusal of records, Government observes that the applicant upon arrival from Hong Kong by flight no. AI-317 dated 03.04.2012 had misdeclared the impugned goods carried by him which vide impugned Order-in-Original dated 05.03.2013 were

confiscated under Section 111 (l) &(m) *ibid* with option to redeem the same on payment of redemption fine of Rs. 2,50,000/- under Section 125 and payment of appropriate duty and interest under Section 28 & 28AB *ibid*. Packing material used for concealing the said goods was confiscated under Section 118 & 119 of the Customs Act, 1962 with the option to the applicant to redeem the same on payment of Rs. 3000/- under Section 125 of the Act *ibid*. A penalty of Rs. 2,00,000 was also imposed upon the applicant under Section 112 *ibid*. Aggrieved by the said order, the applicant filed appeal before Commissioner (Appeals), who *vide impugned Order-in-Appeal* reduced the quantum of redemption fine and penalty. Now the applicant has filed Revision Application on the grounds stated in para 4.

8. Government observes that the limited issue on which the present application has been filed by the applicant is regarding the applicability of Section 28AB *i.e.* charging of interest in the present case. Applicant has contended that interest under Section 28AB of the Customs Act, 1962 is not leviable in the instant case as Section 28 invoked for the demand of duty is not applicable in this case in as much that no order for clearance of goods was passed under Section 47 of the Act, *ibid* for home consumption by virtue of Section 44 of the Act, *ibid*; that Sections 46 & 47 of the Customs Act, 1962 are not applicable in baggage cases; that demand/recovery of duty not levied can be done under Section 28 of the Act, *ibid* if the order is passed by the proper officer for clearance of goods under Section 47 of the said Act; therefore, when Section 28 of the Customs Act, 1962 is not applicable then demand of interest under Section 28AB is also not maintainable. Moreover, the confiscated goods were in possession of the department. Reliance has been placed by the applicant on the decision of the CESTAT in the case of *Essar Oil vs. Commissioner of Customs(Prev.)*, Jamnagar reported in 2006 (197) ELT 450 (Tri-Mumbai).

9. Government further observes that Chapter V of the Customs Act, 1962 deals with levy of, and exemption from, Customs duties and Section 12 which is the charging Section reads as under:-

*"Section 12: Dutiable goods- (1) Except as otherwise provided in this Act, or any other law for the time being in force, duties of customs shall be levied at such rates as may be specified under the Customs Tariff Act, 1975 or any other law for the time being in force, on goods imported into, or exported from India.*

*(2) The provisions of sub-section (1) shall apply in respect of all goods belonging to Government as they apply in respect of goods not belonging to Government".*

From the plain reading of the Section it is clear that at the time of import, duty is chargeable on all the goods imported into the country irrespective of mode of import viz cargo, baggage, post etc. How these goods will be cleared upon import is provided for in separate Sections. While clearance of imported goods is covered



under Chapter VII, clearance of baggage and post articles are covered under Chapter XI of the Act.

10. Section 28 of the Customs Act, 1962 on the other hand provides for the recovery of any duty which has not been paid, short paid or erroneously refunded and reads as under:-

*"Section 28-Recovery of duties not levied or short-levied or erroneously refunded-(1) Where any duty has not been, levied or short-levied or erroneously refunded, or any interest payable has not been paid, part-paid or erroneously refunded, for any reason other than the reasons of collusion or any willful mis-statement or suppression of facts,-*

*(a) the proper officer shall, within one year from the relevant date, serve notice on the person chargeable with the duty or interest which has not been so levied or which has been short-levied or short-paid or to whom the refund has erroneously been made, requiring him to Show Cause why he should not pay the amount specified in the notice;*

*(b) the person chargeable with the duty or interest, may pay before service of notice under clause (a) on the basis of*

*(i) his own ascertainment of such duty; or*

*(ii) the duty ascertained by the proper officer*

*the amount of duty along with the interest payable thereon under Section 28AA or the amount of interest which has not been so paid or part- paid".*

11. Section 28 AA (now 28AB) of the Customs Act, 1962 provides for the interest on delayed payment of duty and reads as under:-

*"Section 28AA-Interest on delayed payment of duty- (1) Notwithstanding anything contained in any judgment decree, order or direction of any Court, Appellate Tribunal or any authority or any authority or in any other provisions of this Act or the rules made thereunder, the person, who is liable to pay duty in accordance with the provisions of Section 28, shall, in addition to such duty, be liable to pay interest, if any, at the rate fixed under sub-section (2), whether such payment is made voluntarily or after determination of the duty under that section.*

*(2) Interest at such rate not below ten per cent and not exceeding thirty-six percent, per annum, as the Central Government may, by notification in the official gazette, fix, shall be paid by the person liable to pay duty in terms of Section 28 and such interest shall be calculated from the first day of the month succeeding the month in which the duty ought to have been paid or from the date of such erroneous refund, as the case may be, up to the date of payment of such duty.*

*(3) Notwithstanding anything contained in sub-section (1) no interest shall be payable where-*



(a) *the duty becomes payable consequent to the issue of an order, instruction or direction by the Board under Section 151 A ; and*

(b) *such amount of duty is voluntarily paid in full, within forty-five days from the date of issue of such order, instruction or direction, without reserving any right to appeal against the said payment at any subsequent stage of such payment”.*

12. Further, Government notes that Chapter XI of the Customs Act, 1962 specifies the special provisions regarding baggage, goods imported or exported by post and stores. Section 77 and 78 of the said Act read as under:-

*‘Section 77 - Declaration by owner of baggage - The owner of any baggage shall, for the purpose of clearing it, make a declaration of its contentions to the proper officer.*

*Section 78 - Determination of rate of duty and tariff valuation in respect of baggage- The rate of duty and tariff valuation, if any, applicable to baggage shall be the rate and valuation in force on date on which a declaration is made in respect of such baggage under Section 77”.*

13 Government finds that in the present case the applicant failed to declare the impugned goods imported as baggage thereby violating the provisions of Section 77 of the Customs Act, 1962. The said goods were undisputedly chargeable to appropriate duty under Section 12 read with Section 78 of the Act. The applicant has imported the impugned goods chargeable to duty as baggage as laid down under Section 12 of the Customs Act, 1962 and failed to pay the duty at the time of import. He carried the said goods with an intention to evade payment of the Customs duty leviable on these goods. Therefore duty was rightly demanded under Section 28 of the Act *ibid* and the demand confirmed after following due process of law. When duty was not paid at the time of import, the interest is chargeable on the duty amount where duty has not been paid on the goods in terms of Section 28 AA (now 28AB) of the Act, *ibid*. Hence interest is also rightly held to be payable by the impugned order on the duty demanded.

14. Government also finds no merit in the argument of the applicant that no interest is leviable on goods placed under seizure. Section 110 the Act *ibid* provides for seizure of goods liable for confiscation for improper importation into the country in terms of Section 111. Seizure and confiscation of goods does not absolve such goods from levy of duty and interest in turn is charged on such duty not paid.

15. Government observes that the order of CESTAT in the case of Essar Oil Ltd. vs Commissioner of Customs(Prev.) Jamnagar, 2006 (197) ELT 450 (Tri-Mumbai) relied upon by the applicant is not applicable to the facts of the present case as the case law relates to an order of assessment under Section 47 which is not applicable to baggage. Also in the Government of India’s Order No.21/2014-Cus. dated 28.01.2014

relied upon by the applicant the applicability of Section 28 and 28 AA of the Act ibid was not a point in consideration.

16. In view of above discussions, Government does not find any infirmity in the impugned Order-in-Appeal and upholds the same.

17. The Revision Application is rejected as being devoid of merits.

18. So ordered.



**(RIMJHIM PRASAD)**

Joint Secretary to the Government of India

Shri Vinay Kumar,  
S/o Shri Madan Lal,  
R/o H.No.231, W.No.11,  
Tibba Colony, The Ratia,  
Fatehabad (Haryana).



Attested




**ORDER NO. 34/2016-CUS DATED 22.03.2016**

Copy to:-

1. The Commissioner of Customs Airport, New Delhi-110037.
2. Shri S.S. Arora(Advocate), B-1/71, Safdarjung Enclave, New Delhi-110029.
3. The Commissioner of Customs (Appeals), NCH, New Delhi.
4. The Additional Commissioner of Customs, IGI Airport, New Delhi.
5. PA to JS (RA).
6. ✓ Guard File.
7. Spare Copy.

Attested

  
(Shaukat Ali)  
Under Secretary (RA)