

REGISTERED
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. 371/406/B/2019-RA / 7058

Date of Issue : 30.11.2022

ORDER No. 346 /2022-CUS (WZ)/ASRA/MUMBAI DATED 21.11.2022.
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. 371/406/B/2019-RA

Applicant : Shri. Javed Babu Khan

Respondent : Pr. Commissioner of Customs, C.S.I Airport, Mumbai

Subject : Revision Application filed, under Section 129DD of the
Customs Act, 1962 against the Order-in-Appeal No.
MUM-CUSTOM-PAX-APP-162/19-20 [S/49-53/2018]
dated 24.05.2019 passed by the Commissioner of
Customs (Appeals), Mumbai Zone-III.

ORDER

This revision application has been filed by the Shri. Javed Babu Khan, (herein referred to as Applicant) against the Order-in-Appeal No. MUM-CUSTOM-PAX-APP-162/19-20 [S/49-53/2018] dated 24.05.2019 passed by the Commissioner of Customs (Appeals), Mumbai Zone-III.

2. Brief facts of the case are that the applicant who was bound for Dubai by Jet Airways Flight No. 9W-580 was intercepted by officers of AIU, Customs, CSI Airport 21.11.2017 near the Customs counter after he had cleared the Immigration counter. On questioning the applicant admitted that he had concealed foreign currency in his body and in the checked in baggage which was then retrieved from the concerned airline. The foreign currencies in denominations as given in Table No. 1 below were recovered. The total equivalent value of the foreign currencies was INR 27,58,400/-. The applicant had neither declared the foreign currency to the Customs nor did he possess any valid document/permit etc from RBI, as required under FEMA for export of the impugned currencies. The applicant had informed that the foreign currency did not belong to him and that he was carrying the same for monetary consideration; that as he did not have any legal documents for the purchase of the foreign currency, he had attempted to smuggle the same by way of concealment to avoid detection.

TABLE No. 1

Sr. No.	Currency	Denomination	Nos. of notes	Total value	Exch. Rate in INR.	Total Value in INR.
1	EURO	500	32	16000	75.65	12,10,400/-
2	UAE Dirhams	1000	90	90000	17.20	15,48,000/-
		TOTAL	122			27,58,400/-

3. After due process of the law, the Original Adjudicating Authority (OAA) viz, Additional Commissioner of Customs, Chhatrapati Shivaji International (C.S.I) Airport, Mumbai vide Order-In-Original No. DC/AK/ADJN/197/2018-

19 dated 13.08.2018 issued through F.No. S/14-6-12/2018-19 Adjn [SD/INT/AIU/333/2017 AP 'A'] absolutely confiscated the foreign currencies of denominations, as mentioned at Table No. 1 above, equivalent to Rs. 26,89,695/- under Section 113 (d), (e) & (h) of the Customs Act, 1962 read with FEMA, 1999 and Regulations framed thereunder. A penalty of Rs. 3,00,000/- was imposed on the applicant under Section 114(iii) of the Customs Act, 1962.

4. Aggrieved by this order, the Applicant filed an appeal with the Appellate Authority viz, Commissioner of Customs (Appeals), Mumbai Zone-III, who vide his order Order-in-Appeal No. MUM-CUSTOM-PAX-APP-162/19-20 [S/49-53/2018] dated 24.05.2019 upheld in toto, the order of the Original Adjudicating Authority.

5. Aggrieved with the aforesaid Order passed by the AA, the Applicant has preferred this application for condonation of delay and revision application inter alia on the grounds that;

5.01. that the impugned Order-in-Original has been passed without due consideration to the documents on record and the facts of the case;

5.02. that the applicant was carrying this type of goods i.e foreign currency for the first time and there was no previous case registered against him

5.03. that the adjudicating authority has not taken into consideration that the foreign currency is neither restricted nor prohibited and could be released on payment of redemption fine and no other person has claimed the foreign currency recovered from the applicant;

5.04. that the foreign currency are goods and the option to redeem the goods under Section 125 of CA, 1962 has to be given to the applicant;

5.05 the applicant has cited and relied on various case laws where it has been held that the foreign currency is not prohibited and option to redeem the same ought to be given to the person from whom it was recovered

(i) Hargovind Das K.Joshi vs. Collector of Customs [1992(61) E.L.T. 172(SC)]

- (ii) Commissioner of Customs (Preventive) vs. India Sales International [2009(241) E.L.T. 182(Cal)]
- (iii) Alfred Menezes vs. Commissioner of Customs, Mumbai [2011(236) E.L.T. 587(Tri.-Mumbai)]
- (iv) Philip Fernandes vs. CC. Airport, Mumbai [2002(146) E.L.T 180(Tri.-Mumbai)]
- (v) Felix Dores Fernandes vs. CC. Airport, Mumbai [2000(118) E.L.T. 639(Tri.-Mum)]
- (vi) Kishin Shewaram Loungani vs. Commissioner of Customs, ACC, Mumbai [2002(140)E.L.T. 225(Tri.-Mum)]
- (vii) T.Soundarajan vs. CC, Chennai [2008(221) E.L.T. 258(Tri.-Chennai)]
- (viii) Revision Authority order in the case Kanwaljit Singh Bala [2012(275) E.L.T. 272(G.O.I)]
- (ix) R. Mohandas vs. Commissioner of Customs, Cochin [2016(336) E.L.T. 399(Ker)]
- (x) Order No 2065-2070/2000-WBZ/C-II in the case of Commissioner of Customs, Kandla vs. Deluxe Exports
- (xi) Yakub Inrahim Yusuf vs. Commissioner of Customs, Mumbai [2011(263) E.L.T. (685) Tri.-Mumbai]
- (xii) Dhanak Madhusudan Ramji vs. Commissioner of Customs, Airport, Mumbai [2009(237) E.L.T. 280(Tri.-Mumbai)]
- (xiii) Order of the Settlement Commission, Chennai in the case of A. Mahesh Raj [2007(214) E.L.T. 588(Sett. Comm.)]

Under the above circumstances of the case, the applicant prayed to the Revision Authority to release the foreign currency on payment of nominal redemption fine and substantial reduction of the personal penalty.

6. Personal hearing in the case was scheduled for 10.08.2022 and 24.08.2022. Shri Prakash Shingrani, Advocate for the applicant appeared for the hearing and submitted that foreign currency was not prohibited. He

further submitted that the currency amount was not large and applicant was not a habitual offender and therefore currency be released on nominal redemption fine and penalty.

7. Government has gone through the facts of the case and the submissions. Government finds that there is no dispute that the seized foreign currencies was not declared by the Applicant to the Customs at the point of departure. The foreign currencies were ingeniously concealed by the applicant inside his body and his checked in baggage and recovered therefrom. Further, in his 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 he came in possession of the foreign currency. The fact remains that the applicant had not disclosed the impugned foreign currency and the source of the foreign currency had remained unaccounted. Applicant was unable to show that the impugned foreign currency in his 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 documents 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 the Foreign Exchange Management (Export and Import of Currency) Regulations, 2015 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 on the ground of body concealment and also as the applicant could not account for the legal procurement of the currency and that and no declaration as required under section 77 of the Customs Act, 1962 had been filed.

8. 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, 2015 have been violated by the applicant is correct and therefore, the confiscation of the foreign currency ordered, is justified. In doing so, the lower adjudicating authority has 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))].

9. 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.

10. 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.

11. Government notes that the quantity of the foreign currency is substantial and the same was ingeniously concealed inside the body of the applicant. The applicant was unable to produce the evidence that the foreign currency had been sourced by him from licit channels. The applicant had not complied with the statutory provisions. A case has been made out that the applicant being a frequent traveller was aware of the provisions of law and had attempted to smuggle out the foreign currency without declaring the same. Had the applicant not been intercepted, he would have gotten away with the foreign currency. Government finds that considering that a large amount of foreign

currency was being concealed in his body and in the checked in baggage and recovered therefrom, currency remained unaccountable, applicant being a frequent traveller, admittedly the foreign currency was not belonging to him, thus discretion used by OAA to absolutely confiscate the currencies is appropriate and judicious. Government finds that in this case, the discretion not to release the foreign currency under the provisions of Section 125 of the Customs Act, 1962 has been applied appropriately by the original adjudicating authority which has been upheld by the Appellate Authority. Government finds that the Appellate order confiscating the foreign currency is legal and judicious and the Government is not inclined to interfere in the same.

12. The Government finds that the personal penalty of Rs. 3,00,000/- imposed on the applicant under Section 114(i) of the Customs Act, 1962 is commensurate with the omissions and commissions committed.

13. In view of the above, the Government is in agreement with the Appellate Order and does not find it necessary to interfere in the same.

14. Accordingly, the Revision Application is dismissed.


(SHRAWAN KUMAR)

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

ORDER No. ३५६ /2022-CUS (WZ/SZ)/ASRA/MUMBAI DATED 25/11/22.

To,

1. Shri Javed Babu Khan, B-Sector, P-Line, Room No 17, Cheeta Camp, Trombay, Mumbai – 400 088.
2. Pr. Commissioner of Customs, Chhatrapati Shivaji International Airport, Terminal 2, Level-II, Sahar, Andheri (East), Mumbai 400 099.

3. The Commissioner of Customs (Appeals), Mumbai -III, Awas Corporate Point, 5th Floor, Makwana Lane, Behind S.M.Centre, Andheri-Kurla Road, Marol, Mumbai - 400 059.

Copy to:

4. Shri Prakash Shingrani, (Advocate), 12/334, Vivek, New MIG Colony, Bandra (East), Mumbai 400 051
5. ~~Sr.~~ P.S. to AS (RA), Mumbai.
6. ~~File Copy.~~
7. Noticeboard.