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GOVERNMENT OF INDIA
MINISTRY OF FINANCE
(DEPARTMENT OF REVENUE)

8th Floor, World Trade Centre, Centre - I, Cuffe Parade,
Mumbai-400 005

F.No. 371/342/B/2018-RA

7485

Date of Issue

12/12/2022

ORDER NO. 369/2022-CUS (WZ)/ASRA/MUMBAI DATED 09.12.2022
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. 371/342/B/2018-RA

Applicant : Shri. Hamsa Kasaragod Ibrahim

Respondent : Pr. Commissioner of Customs, CSMI Airport, Mumbai

Subject : Revision Application filed under Section 129DD of the
Customs Act, 1962 against the Order-in-Appeal No. MUM-
CUSTM-PAX-APP-725 & 726/18-19 dated 15.11.2018
passed by the Commissioner of Customs (Appeals),
Mumbai - III.

ORDER

This revision application has been filed by Shri. Hamsa Kasaragod Ibrahim (hereinafter referred to as the Applicant) against the Order in Appeal No. MUM-CUSTOM-PAX-APP-725 & 726/18-19 dated 15.11.2018 passed by the Commissioner of Customs (Appeals), Mumbai - III.

2. Brief facts of the case are that the applicant who was bound for Dubai by Emirates Flight No. EK-503/16.02.2015 was intercepted by Customs Officers on 16.02.2015 at CSMI Airport, Mumbai. To query whether he was carrying any foreign / Indian currency / contraband either on his person or in baggage, the applicant had replied in the negative. On examination of his checked-in baggage, a total of USD 99,000/- (95000+4000) was recovered from the false bottom of a casserole. An amount equivalent to INR 61,42,208/- was realised against the USD 99,000/-. The applicant had neither declared the foreign currency to the Customs nor possessed any valid document/permit etc from RBI, as required under FEMA for export of the impugned foreign currencies. The applicant had informed that the foreign currency did not belong to him and he was supposed to hand over the same at Dubai and that he had carried the same for a monetary consideration.

3. The Original Adjudicating Authority (OAA) i.e. Addl. Commissioner of Customs, CSMI Airport, Mumbai vide Order-In-Original No. ADC/RR/ADJN/373/2016 dated 07.11.2016 issued through F.No. S/14-6-07/2015-16 ADJN (SD/INT/AIU/69/2015 AP'D") ordered for the confiscation of the seized foreign currency equivalent to Rs. 61,42,208/- under Section 113(d), 113(e) & 113(h) of the Customs Act, 1962. However, applicant was granted an option to redeem the confiscated currency on payment of a redemption fine of Rs. 10,00,000/- under Section 125 of the Customs Act,

1962. Further a penalty of Rs. 6,00,000/- was imposed on the applicant under Section 114(i) of the Customs Act, 1962.

4. Aggrieved by the said order, the applicant as well as the respondent filed appeals before the Commissioner of Customs (Appeals), Mumbai - III who vide Order-In-Appeal Airport No. MUM-CUSTOM-PAX-APP-725 & 726/18-19 dated 15.11.2018, allowed the appeal filed by the respondent and ordered for the absolute confiscation of the foreign currency. The penalty imposed on the applicant by the OAA was retained.

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

- 5.01. that the impugned order passed by the AA is bad in law and unjust;
- 5.02. that the impugned order has been passed without giving due consideration to the documents on record and facts of the case;
- 5.03. that this was the first time that the applicant was carrying currency and no previous case has been registered against him;
- 5.04. that the foreign currency carried by the applicant is neither restricted nor prohibited has been considered by the AA;
- 5.05. that option to redeem under Section 125(1) of the Customs Act, 1962 was available.
- 5.06. that there are a number of judgements of the Apex Court, High Courts, Tribunals wherein foreign currency was held as not prohibited and therefore, it should not be confiscated absolutely and option to redeem the same on redemption fine ought to be given to the person from whom it is recovered.
- 5.07. that they rely on the following case laws to buttress their case;
 - (a). The Hon'ble Supreme Court of India in Hargovind Das K. Joshi Versus Collector of Customs reported in 1992 (61) E.L.T. 172 (S.C.) has observed that: Redemption Fine - Customs - Absolute confiscation of goods by Collector without considering question of redemption on payment of fine although having discretion to do so - Matter remanded to Collector for consideration of exercise of discretion for imposition of redemption fine - Section 125 of Customs Act, 1962.
 - (b). The Hon'ble High Court of Calcutta in the matter of Commissioner of Customs (Preventive), West Bengal versus India Sales International reported in 2009 (241) E.L.T. 182 (Cal.) - Power of Appellate Tribunal - Penalty - Quantum of penalty - Redemption of

confiscated goods Discretion exercised by Adjudicating Authority for awarding penalty on firm as well as partners - Tribunal should not have any authority to sit on appeal on said question and it is not within domain of Tribunal to come to such conclusion to reduce the amount without properly testing the question that whether discretion applied by said authorities properly or not- Section 114 of Customs Act, 1962.

- (c) The Hon'ble Tribunal in the case of ALFRED MENEZES v/s COMMISSIONER OF CUSTOMS, MUMBAI reported in 2011 (236) E.L.T. 587 (Tri. - Mumbai) held that Power of adjudicating authority under provisions of Customs Act, 1962 to offer redemption fine in lieu of confiscation of prohibited/restricted goods confiscated - Section 125(1) ibid clearly mandates that it is within the power of adjudicating authority to offer redemption of goods even in respect of prohibited goods - Order of Commissioner not giving any reason for concluding that adjudicating authority's order is wrong, set aside. This Order of the Tribunal has been upheld by the Hon'ble Bombay High Court on the issue of granting option of redemption.
- (d). The Hon'ble Revision Authority IN RE MOHD.ARFIF reported in 2018(361) E.L.T.959 (G.O.I) has observed that: Fine on absolute confiscation of foreign currency being exported out of India Imposition of Foreign currency though prohibited goods, can be allowed to be redeemed on payment of fine- Section 125 of The Customs Act, 1962.
- (e). PHILIP FERNANDES VIS CC Airport, Mumbai - 2002 (146) E.L.T. 180 (Tri. - Mumbai); Smuggling-Seizure of foreign currency at Airport from person leaving for Dubai - Sufficient evidence to show legitimate acquisition of foreign currency in Dubai - Currency carried, not being declared by Applicant, liable to confiscation.
- (f) FELIX DORES FERNANDES VIs CC, Airport, Mumbai - 2000 (118) E.L.T. 639 (Tribunal); Confiscation of currency Customs Undeclared foreign currency found with Applicant on his departure to Dubai Confiscation of currency sustainable - However, currency allowed to be redeemed or payment of fine - Sections 121 and 125 of Customs Act, 1962.
- (g) KISHIN SHEWARAM LOUNGANI Versus COMMR. OF CUS., ACC, MUMBAI - 2002 (140) E.L.T. 225 (Tri. - Mumbai) -Plea that he declared the contents of baggage to proper officer since he replied in affirmative to the query not accepted holding that in terms of Section 77 ibid he was to declare the details of the exact amount of the currency which was not declared by him.
- (h) T. SOUNDARAJAN V/S CC, Chennai - 2008 (221) E.L.T. 258 (Tri. - Chennai); Applicant entitled to redemption of currencies on payment of appropriate fine - Matter remanded to original authority for de novo adjudication.

- (i). R.MOHANDAS v/s. COMMISSIONER OF CUSTOMS, COCHIN -
W.P. (C) Nos. 24074 and 39096 of 2015 (H), decided on 29-2-2016 -
2016 (336) ELT 399 (ker.): Department cannot plead that they will
not release goods to person who is not owner - If such stand of
Customs Authority is accepted, any importer of goods can escape
from liability from clutches of Customs Act, 1962, by shifting onus
to owner of goods.[paras 7,8]
- (j). Tribunal in the case of YAKUB IBRAHIM YUSUF v/s
COMMISSIONER OF CUSTOMS, MUMBAI reported in 2011 (263)
E.L.T. 685 (Tri. - Mumbai) held that: "Confiscation Prohibited goods
Scope of Term prohibited goods refers to goods like arms,
ammunition, addictive drugs, whose import in any circumstance
would danger or be detriment to health, welfare or morals of people
as whole, and makes them liable to absolute confiscation - It does
not refer to goods whose import is permitted subject to restriction,
which can be confiscated for violation of restrictions, but liable to be
released on payment of redemption fine since they do not cause
danger or detriment to health-Sections 111 and 125 of Customs Act,
1962.
- (k). Tribunal in the case of DHANAK MADHUSUDAN RAMJI Versus
COMMISSIONER OF CUSTOMS (AIRPORT), MUMBAI reported in
2009 (237) E.L.T. 280 (Tri. Mumbai) held that "Confiscation -
Absolute confiscation Non-declaration of jewellery and foreign
currency Order of absolute confiscation assailed pleading that
jewellery and foreign currency not prohibited items and that only
charge was non-declaration - HELD: This Order of the Hon'ble
Tribunal has been upheld by the Hon'ble Bombay High Court
reported in 2009 (248) E.L.T. 127 (Bom.) and the Hon'ble Apex Court
reported in 2010 (252) E.L.T. A 102 (S.C.) on the issue of granting
option of redemption.
- 5.08. that the AA ought to have observed Judicial Discipline as held by the
Apex Court and other Judicial Authorities, while dealing with cases
having similar facts and situations; that they are relying on the
undermentioned case laws for judicial discipline.
- (a). Judgements of the of Hon'ble Supreme Court in the case of Birla
Corporation Ltd. Vis. Commissioner of Central Excise reported in
2005 (186) ELT 266 (S.C.) wherein it is held that "Judicial Discipline
- Discrimination - When question arising for consideration and facts
are almost identical to previous case, revenue cannot be allowed to
take a different stand."
- (b). Judgement of the Hon'ble Bombay High Court in the case of
Commissioner of Central Excise, Nasik V/s Jain Vanguard
Polybutlene Ltd. Reported in 2010 (256) ELT 523 (Bom) wherein it is
held that the Revenue cannot be allowed to take different view when
question raised identical to previous case - High Court in present

case cannot take view different from that of Karnataka High Court in 2006 (201) E.L.T. 559 as approved by Supreme Court - Appeal dismissed

- (c). Judgement of the Hon'ble Tribunal in the case of Nirma Ltd. V/s. Commissioner of Central Excise, Nasik reported in 2012 (276) E.L.T. 283 (Tri. Ahmd.)

Under the circumstances, the applicant has prayed to the Revision Authority that the OIA be rejected and the OIO be restored or to pass any other order as deemed fit.

6(a). Personal hearing through the online video conferencing mode was scheduled for 02.08.2022. Shri. N.J Heera, Advocate appeared for physical hearing on 02.08.2022. He requested for restoring OIO as it has appreciated facts correctly and is just and fair.

7. Government has gone through the facts of the case and the submissions. 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 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 appellate 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 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.

8. In this case, the applicant had adopted an ingenious method of concealment. The foreign currency had been concealed in the false bottom of the casserole kept in the checked-in baggage. Had it not been for the alertness of the Officers, the applicant would have been successful in taking out the foreign currency.

9. 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 appellate authority that the said provisions of Foreign Exchange Management (Export & Import of Currency) Regulations, 2015 which warrants that the foreign currency should be sourced from legal channels 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 appellate authority had rightly 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 within the scope of "prohibited goods".

10. 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.

11. 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.

12. In this case, the Government finds that the concealment was ingenious and the applicant had not produced any evidence suggesting that the foreign currency was garnered / accumulated from authorized persons. Quantity, unaccounted source, manner of keeping, non-declaration and applicant not being able to explain, etc are factors relevant for using discretion not to allow goods to be released on redemption fine.

13. The Government finds that the quantum of the currency is huge and the appellate authority has rightly over-ruled the order passed by the OAA wherein redemption of the currency had been allowed. Facts and circumstances of the case especially, the ingenious concealment resorted to by the applicant and unaccounted source, warrants absolute confiscation of foreign currency as held by the Appellate Authority. Government finds the order passed by the AA is legal and judicious.

14. Government finds that the penalty of Rs. 6,00,000/- imposed on the applicant by the OAA under Section 114(j) of the Customs Act, 1962 and upheld by the AA is 10% of the seizure value and the same is reasonable and commensurate with the omissions / commissions committed.

15. For the aforesaid reasons, the Government therefore finds no reason to interfere in the Order passed by the AA and is not inclined to interfere in the same.

16. Accordingly, the revision application is dismissed.


(SHRAWAN KUMAR)

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

ORDER NO. 369/2022-CUS (WZ)/ASRA/MUMBAI DATED 09.12.2022.

To,

1. Shri. Hamsa Kasaragod Ibrahim, Panalam House, Cheroor PO, Kasargod, Kerala – 671 123.
2. The Pr. Commissioner of Customs, CSMI Airport, Terminal -2, Level – II, Mumbai – 400 059.

Copy to:

3. Sachwani, Advani, Heera, Shah, Advocates, Nulwala Bldg, Ground Floor, 41, Mint Road, Opp. G.P.O, Fort, Mumbai – 400 001.
4. Sr. P.S. to AS (RA), Mumbai.
5. File Copy.
6. Noticeboard.