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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. 371/500/B/2019-RA

Date of Issue : 20.12.2022

ORDER No. Ho3 /2022-CUS (WZ)/ASRA/MUMBAI DATED. 16.12.2022.
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. 371/500/B/2019-RA

Applicant : Shri. Asgar Ali Abdul Kader Girnari

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-CUSTM-PAX-APP-611/19-20 [S/49-414/2019]
dated 31.10.2019 passed by the Commissioner of
Customs (Appeals), Mumbai Zone-III.

ORDER

This Revision Application has been filed by Mr. Asgar Ali Abdul Kader Girnari, (herein referred to as 'Applicant') against the Order-in-Appeal No. MUM-CUSTOM-PAX-APP-611/19-20 [S/49-414/2019] dated 31.10.2019 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-536 was intercepted by officers of AIU, Customs, CSI Airport on 17.05.2018 near the Customs counter after he had cleared the Immigration counter. During search, the Applicant was found to be in possession of 105 notes of UAE Dirham of 1000 denomination totalling UAE Dirham 1,05,000 which was concealed in light brown ankle caps worn by the Applicant and 15 notes of UAE Dirham of 1000 denomination totalling UAE Dirham 15,000 was kept in the pocket of a blue coloured jeans which was in black coloured trolley bag carried by the Applicant. The total equivalent value of the foreign currencies was INR 21,06,000/-. 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, which was later retracted; that as he did not have any legal documents for the purchase of the foreign currency.

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. ADC/AK/ADJN/523/2018-19 dated 23.08.2019 issued through F.No. [SD/INT/AIU/224/2018 AP 'B'] ordered absolute confiscation of the foreign currency i.e UAE Dirhams 1,20,000 equivalent to Rs. 21,06,000/- under Section 113 (d), (e) & (h) of the Customs Act, 1962 read with Section 6(3) (g) of FEMA, 1999 and Regulations

framed thereunder. A penalty of Rs. 2,30,000/- was imposed on the Applicant under Section 114(i)& (iii) of the Customs Act, 1962. The blue coloured jeans was also absolutely confiscated under Section 119 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-611/19-20 [S/49-414/2019] dated 31.10.2019 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 revision application inter alia on the grounds that;

5.01. that the Applicant had retracted his statement dated 17.05.2018 where he had admitted his role as a carrier and vide statements dated 30.07.2018 and 09.08.2018 had claimed ownership of the foreign currency;

5.02. that reliance was placed on similar orders passed by various adjudicating authorities, Appellate Authorities and Revisional Authorities where option of redemption was granted under Section 125 of the Customs Act, 1962;

Under the above circumstances of the case, the Applicant prayed to the Revision Authority to set aside the order of absolute confiscation and release the foreign currency on payment of redemption fine and reduce the personal penalty imposed.

6. The department filed written submissions vide letter dated 15.10.2020, wherein the facts of the case have been reiterated and it was requested to uphold the order of the OAA and reject the appeal on the following grounds:

- (i) that the foreign currency was concealed on his person and in the Applicants baggage and that the Applicant had admitted the

knowledge, possession, carriage, concealment and recovery of the foreign currency and that he did not have any legal/valid purchase document and was aware that non declaration of foreign currencies was an offence under the Customs Act, 1962

- (ii) That when offending/smuggled goods are seized alongwith inculpatory statement, the statement has to be relied upon as decided in the following cases
- (a) Surjeet Singh Chhabra vs UOI [1997(89) E.L.T. 646 (SC)]
 - (b) K.I. Pavunny vs Asstt. Collector, Cochin [1997(90) E.L.T. 241 SC]
- (iii) That the Applicant could not produce any licit document for lawful purchase of seized foreign currency and hence there was no scope for the ineligible to go out of the purview of Section 123 of the Customs Act, 1962
- (a) Commissioner of Customs vs. Shri Savier Poonolly— Order dated 04.09.2014 of the HC of Madras
 - (b) Shri S.Faisal Khan vs. Joint Commissioner – Order dated 13.09.2010 of the High Court of Madras
 - (c) Baburaya Narayan Nayak vs. Commissioner of Customs, Bangalore [2018(364) E.L.T 811 (Tri- Bang)]
- (iv) That the illicit nature of transactions is manifest and amounts to “smuggling” in and out foreign currency and absolute confiscation of the seized currency under Section 113(d) and (h) is beyond legal challenge as held in Suresh Gangaram Hole vs. Commissioner of Customs (Airport) [2015 (327) E.L.T 555(Tri-Mumbai)]
- (v) That from Regulations 5 and 7(2) of FEM (Export and Import of Currency) Regulations 2015 and Section 2 of FEMA 1999 and Para A.4, A.9 and A.18 of the Master Circular No 6/2015-16 dated 01.07.2015 issued by Reserve Bank of India, it was apparent that a passenger can carry India/Foreign currency provided he fulfils the

conditions specified in the said Regulations and circular and in the instant case the Applicant had violated the same.

7. Personal hearing in the case was scheduled for 22.09.2022. Shri Prakash Shingrani, Advocate for the Applicant appeared for the hearing and submitted that the Applicant was carrying foreign currency for business purposes. He submitted that for non-declaration of currency, absolute confiscation was too harsh. He further submitted that the amount was not large and Applicant was not a habitual offender and therefore currency be released on nominal redemption fine and penalty.

8. Government has gone through the records and facts of the case and the submissions of the department and the Applicant. 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 seized foreign currencies was concealed in light brown ankle caps worn by the Applicant in both his legs and also kept in jeans in the trolley bag carried by the Applicant with the express intention of hoodwinking the Customs. The Applicant in his statement on the day of seizure of the foreign currency had admitted that the currency did not belong to him and that he was carrying the same in lieu of a money consideration. Government notes that the Applicant had retracted his statement recorded on the day of the seizure of the currency. No rebuttal of the department of the retracted statement is on record. Government notes that the Applicant in his further statement had admitted the possession, carriage, concealment, non-declaration and recovery of the foreign currency. The Applicant had claimed that the currency belonged to him and had explained the source of the money for purchase and the purpose for attempting to take it out of the country. The foreign currencies were kept by the Applicant on his body and his checked in baggage and recovered therefrom. Therefore, the confiscation of the foreign currency was justified as the Applicant could not account for the legal procurement of the currency and

that no declaration as required under section 77 of the Customs Act, 1962 was filed.

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 lower adjudicating authority that the said provisions of the Foreign Exchange Management (Export & Import of Currency) Regulations, 2000 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)] 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.....”

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. In a similar case, Bombay High Court in case of Commr. Of Customs vs. Rajinder Nirula [2017(346)ELT-9 (Bom)] while upholding the release of the foreign currency on redemption fine by CESTAT, observed that

“4. The only contention raised before us and equally before the Tribunal is that the seized goods are currency and should not have been allowed to be released by paying a fine. The seizure is of foreign currency and which was attempted to be smuggled out of India without any authorisation. The Tribunal has seriously erred in law in granting the relief.

5. After having perused the order of the Tribunal, we find that the Tribunal came to the conclusion that the confiscated foreign currency should be redeemed. In that regard the Tribunal relied upon a judgment of the High Court of Delhi in the case of Mohd. Ayaz v. Union of India - 2003 (151) E.L.T. 39 (Del.). It also relied upon its own order passed in the case of Pankaj Jagda - 2004 (171) E.L.T. 125 (Tri.-Mum.).

6. We do not find any merit in the learned counsel's argument that the course adopted by the Tribunal was impermissible. The definition of the term “goods” includes currency and negotiable instruments [see Section 2(22)(d)]. When the power of redemption is exercised, what the law postulates is that there is an option to pay fine in lieu of confiscation. Section 125(1) of the Customs Act, 1962 provides that whenever

confiscation of any goods is authorised by this Act, the officer adjudicating it may, in the case of any goods, the importation or exportation whereof is prohibited under this Act or under any other law for the time being in force, and shall, in the case of any other goods, give to the owner of the goods or where such owner is not known, the person from whose possession or custody such goods have been seized, an option to pay, in lieu of confiscation, such fine as the said officer thinks fit.

7. *In these circumstances, we do not find that there was any error or lack of power. The seized currency was released and by imposing penalty. In the present case, the Tribunal, therefore, was justified in holding that since the foreign currency is redeemed on payment of fine, the penalty also deserves to be scaled down or reduced. This is essentially a finding of fact rendered after consideration of the materials on record. We do not think that the Tribunal was in error in adopting the course that it has adopted. We do not find any merit in the appeal. It is dismissed”.*

12. The Government finds that the amount involved in this case is not substantial and the Applicant has claimed ownership of the currency after explaining the source and purpose of taking it out of the country by keeping the currency in ankle caps worn by him and in the trolley bag. This case is at best a case of mis-declaration rather than smuggling. Government finds that the discretion not to release the foreign currency under the provisions of Section 125 of the Customs Act, 1962 is excessive and unjustified. The order of the Appellate authority is therefore liable to be modified and the foreign currency is liable to be allowed redemption on suitable redemption fine.

13. The Government finds that the personal penalty of Rs. 2,30,000/- imposed on the Applicant under Section 114 (i) & (ii) of the Customs Act, 1962 is commensurate with the omissions and commissions committed.

14. In view of the above, the Government modifies the impugned order of the Appellate authority in respect of the absolute confiscation of the foreign currency and allows the same to be redeemed on payment of redemption fine. The foreign currencies consisting of 120 notes of UAE Dirham of 1000 denomination, equivalent to Rs. 21,06,000/- is allowed redemption on

payment of a fine of Rs. 4,00,000/- (Rupees Four Lakhs Only). The penalty of Rs. 2,30,000/- imposed under section 114 (i) & (ii) of the Customs Act, 1962 by the lower adjudicating authority and upheld by the Appellate Authority is sustained.

15. The Revision Application is disposed of on above terms.


(SHRAWAN KUMAR)

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

ORDER No. 403 /2022-CUS (WZ)/ASRA/MUMBAI DATED 16.12.2022.

To,

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Address No. 2: C/o 12/334, Vivek, New MIG Colony, Bandra (East), Mumbai 400 051
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:

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2. Sr. P.S. to AS (RA), Mumbai.
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