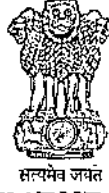


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GOVERNMENT OF INDIA
MINISTRY OF FINANCE
(DEPARTMENT OF REVENUE)

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

F.No. 371/28/B/2018-RA/2023

Date of Issue : ~~03.2023~~
05.04.2023

ORDER No. 408 /2023-CUS (WZ)/ASRA/MUMBAI DATED. 30.03.2023
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.

Applicant : Mr. Mshtaqe Abdul Wahab Kazi

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

Subject : Revision Application filed under Section 129DD of the
Customs Act, 1962 against the Order-in-Appeal No. MUM-
CUSTM-PAX-APP-708/2017-18 dated 07.11.2017 [Date of
issue: 07.11.2017] [F.No. S/49-556/2016] passed by the
Commissioner of Customs (Appeals), Mumbai Zone-III.

ORDER

This revision application has been filed by the Mr. Mshtaqe Abdul Wahab Kazi (herein referred to as 'Applicant') against the Order-In-Appeal No. MUM-CUSTOM-PAX-APP-708/2017-18 dated 07.11.2017 [Date of issue: 07.11.2017] [F.No. S/49-556/2016] passed by the Commissioner of Customs (Appeals), Mumbai Zone-III.

2.01. Brief facts of the case are that the Applicant who was departing from Mumbai to Dubai by Jet Airways Flight No. 9W 538 on 31.03.2015 was intercepted by custom officers at the boarding gate No 65B after he had cleared the immigration at the Chattrapati Shivaji International Airport, Mumbai. The Applicant was asked whether he was carrying any contraband, foreign/Indian currency either in his baggage or on his person to which he replied that he was carrying only personal effects and food stuff. On being asked how much foreign/Indian currency he was carrying, he replied that he had approximately Rs. 6,000/-. On examination of the black and red colour bag being carried by him, it was found to contain one transparent packet of tamarind and another transparent packet was found to contain kokum. On cutting open the transparent packets containing tamarind and kokum, it was noticed that one bundle each was found concealed in packet of tamarind and kokum. On opening the bundles, Indian currency amounting to Rs. 24,50,000/- and Rs. 26,50,000/-, totally amounting to Rs. 51,00,000/- was recovered and the same was seized under the reasonable belief that the same were attempted to smuggle out of India and hence liable for confiscation under the provisions of the Customs Act, 1962 read with FEMA, 1999 and with Foreign Exchange Management (Export and Import of Currency) Regulation, 2000. The seized amount of Rs. 51,00,000/- was deposited in the State Bank of India, CSI Airport Branch, Mumbai.

2.03. The Applicant admitted that the currency was concealed as he was aware that carrying the amount of currency was not allowed under the said Act and

Regulations. He also stated that Rs. 41 lakhs was from selling his wife's property in Hyderabad and balance was from his savings and that he did not have any bank account in India or abroad. The Applicant admitted to carrying, non-declaration, concealment and recovery of the said Indian currency and stated that the currency was being carried to buy a second hand Volvo FH 2 Flatbed Trailer at Dubai.

2.04. The Applicant retracted his statement and the department filed a rebuttal.

2.05. In the subsequent statements, the Applicant had changed track from his earlier stated source of funds to having arranged Rs. 44 lakhs from his salary and commissions received and that he had borrowed Rs. 11 lakhs from five person and there was no agreement to between them. None of the persons who had purportedly lent money to the Applicant responded to the summons issued to them

3. After due process of the law, the Original Adjudicating Authority (OAA) viz, Additional Commissioner of Customs, CSI Airport, Mumbai vide Order-in-Original No. ADC/RR/ADJN/347/2016-17 dated 27.10.2016 [S/14-6-10/2015-16 ADJN SD/INT/AIU/152/2015 AP 'A'], ordered for the confiscation of the seized Indian currency, totally valued at Rs. 51,00,000/- under Section 113(d), (e) and (h) of the Customs Act, 1962 and gave an option to the Applicant to redeem the Indian currency on payment of redemption fine of Rs. 7,50,000/- under Section 125(1) of the Customs Act, 1962 and imposed a penalty of Rs. 5,00,000/- on the Applicant under Section 114 of the Customs Act, 1962.

4. Aggrieved by the Order-in-Original dated 27.10.2016, both the Applicant and Respondent-Department filed appeals with the Appellate Authority viz, Commissioner of Customs (Appeals), Mumbai Zone-III. The Applicant filed the appeal on the grounds that there was no previous case registered against him and there was no duty involved in export of Indian currency and there is no margin of profit and hence the heavy redemption fine and penalty was not justified. The department filed the appeal against the option of redemption given

to the Applicant. The Appellate Authority vide his order Order-In-Appeal No. MUM-CUSTM-PAX-APP-708/2017-18 dated 07.11.2017 [Date of issue: 07.11.2017] [F.No. S/49-556/2016] modified the OIO to the extent of absolutely confiscating the Indian currency. The penalty imposed in the OIO was upheld.

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

6.01. that the A.A ought to have appreciated that the impugned order passed by the OAA was well reasoned order and the justification rationale for permitting redemption of impugned goods to the Applicant was well founded and was based on solid grounds and sound principles of law;

6.02. that the AA ought to have appreciated that there was only contravention of Section 77 of the Customs Act, 1962, by the Applicant. It is submitted that due to the reason of contravention of Section 77 of the Customs Act, 1962, the OAA had imposed fine and penalty on the Applicant;

6.03. that the AA ought to have appreciated that the Applicant was the owner of the Indian currency and had given full details of the acquisition of Indian currency;

6.04. that the OAA had clearly and rightly expressed the reason for granting the option of redemption of Indian currency to the Applicant;

6.05. that the OAA had correctly recorded the judgments relied upon by the Applicant and the Grounds & Judgments mentioned in the Appeal filed by the Department were inapplicable to this case, since the facts of the said cases were entirely different from the facts of the present case;

6.06. that in the matter of Panchbhaya Ismail Suleman vs Commissioner Of Customs., Airport, Mumbai, cited by the respondent, the only differentiation is that the Appellant is a carrier, whereas here in this case the Applicant was a owner of the said Indian currencies. Also, it was a case before 2010;

6.07. that in the matter of Salim M. Mamdani vs. Commissioner of Customs (Airport), Mumbai, cited by the respondent, the only differentiation is that the Appellant is a carrier, whereas here in this case, the Applicant was an owner of the said Indian currencies. That this case is of 2005;

6.08. that in the matter of Harish Muljimal Gandhi vs. Commissioner of Customs, ACC, Mumbai, relied upon by the respondent, it is an old case

of year 2007, the only differentiation is that the Appellant is a carrier and the same was sent by post, whereas here in this case the Applicant was an owner of the said Indian currencies;

- 6.09. that the OAA had passed reasoned order; that there are judgements of various forums including the Apex Court where goods have be ordered to be released to the carriers also.; The list is as under:
- (a) that CESTAT, in the case of Shri Ivan Leslie Anthony Pinto wherein vide Order No A/94645/16/SMB dated 24.08.2016, and which is direct on the subject Appeal involving absolute confiscation of INR Rs. 49,73,000/- carried by the said Appellant, the Bench set aside the Order of absolute confiscation and directed the release of the INR currency on payment of RF and Penalty. In doing so and while interpreting the provisions relating to release of currency, it was observed that Currency was not prohibited goods and, therefore, the adjudicating authority is bound to allow redemption to the person from whom it was seized and option to redeem the goods had been allowed.
 - (b) that CESTAT vide Order No A/85021/17/SD dated 08.11.2016, set aside the Order of absolute confiscation of INR Rs. 21,00,000/- and foreign currency of Rs.47,00,000/- from the Appellant, Shri Sanjay Agarwal was released.
- 6.10. The Applicant has relied upon the following case laws;
- (i) Hargovind Das K. Joshi vis. Collector of Customs Civil Appeals Nos. 139-143 of 1985, decided on 6-1-1987; 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
 - (ii) Alfred Menezes v/s. Commissioner of Cus..(C.S.I.) Airport, Mumbai. Final Order Nos. A/613-614/2008-WBZ/C-II/(SMB) and Stay Order Nos. S/298 299/2008-WBZ/C-II(SMB), dated 1-8-2008 in Application Nos. C/Stay/862 and 1063/2008 in Appeal Nos. C/531-532/2008 ; Power of adjudicating authority under provisions of Customs Act, 1952 to offer redemption fine in lieu of confiscation of prohibited / restricted goods confiscated-Section125(1) Ibid clearly mandates that it is within the power of adjudicating authority to offer redemption of goods even in respect of prohibited goods.
 - (iii) Commissioner of Customs, Kandla v/s. Deluxe Exports : Order Nos. 2065-2076/2000-WBZ/C-II, dated 25-7-2000 in Appeals Nos. C/368, 554 to 564/2000-Mum.
 - (iv) R.Mohandas v/s. Commissioner of Customs, Cochin : W.P. (C) Nos. 24074 and 39096 of 2015 (H), decided on 29-2-2016 ; Department cannot plead that they will not release goods to person who is not owner-

Petitions Allowed.

- (v) Yakub Ibrahim Yusuf vis. Commissioner of Customs, Mumbai : Final Order No. A/362/2010-WBZ/C-II/(CSTB), dated 28-10-2010 in Appeal No. C/51/1996-Mum;
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.
- (vi) Union of India v/s. Dhanak M. Ramji : Writ Petition Nos. 1397 with 1022 of 2009, decided on 4-8-2009 ; Confiscated goods Redemption of Ownership Tribunal order assailed on the ground that goods could not be released to non-owner- Finding by Tribunal that application for release of goods maintainable Goods not prohibited but became prohibited due to violation of law - Discretion properly exercised by Tribunal in ordering release of confiscated goods on payment of redemption fine.
- 6.11. that in similar situations / cases, Customs have permitted the redemption of Indian currency under Section 125 of the Customs Act, 1962 and therefore the impugned goods in the present case also ought to have been released under Section 125 of Customs Act, 1962.; that these orders had been accepted by the department and the Department ought to have observed Judicial Discipline as held by the Apex Court and other Judicial Authorities, while dealing with the cases having similar facts and situations:
- (a). that they rely on the case of Birla Corporation Ltd. V/s. Commissioner of Central Excise reported in 2005 (186) ELT 266 (S.C.) passed by the Apex Court on judicial discipline.
- (b) Judgment of the Hon'ble Bombay High Court in the case of Commissioner of Central Excise, Nasik Vis Jain Vanguard Polybutlene Ltd. Reported in 2010 (256) ELT 523 (Bom) on judicial discipline.
- (c) Judgement of Hon'ble CESTAT in the case of Commissioner of Central Excise, Vapi vs. Trinity Industries reported in 2010 (254) E.L.T.119 (Tri-Ahmd.) on judicial discipline

Under the circumstance of the case, the Applicant has prayed to the Revision Authority to set aside the OIA passed by the AA and to uphold the OIO passed by the OAA and the redemption fine and penalty may be reduced substantially.

6.1. Personal hearing in the case was scheduled for 02.08.2022. Shri N.J. Heera, Advocate appeared for the personal hearing on behalf of the Applicant and requested for adjournment. Shri N.J.Heera appeared for personal hearing on 29.09.2022 and submitted several order of Tribunal, Appellate Authority and Original Authority where Indian currency has been released on redemption fine. He submitted that the order passed by the Original Authority is legal and fair and requested that the order of the Original Authority may be restored.

7. Government has gone through the facts of the case and the submissions. Government finds that there is no dispute that during the search of the baggage of the Applicant, Indian currency being carried by the Applicant in packets of tamarind and kokum were recovered and had not been declared by the Applicant to the Customs at the time of departure from India. The Applicant stated that he was working in Dubai since 2009 and was getting salary of 7000 dirhams per month and also commissions and that source of the seized currency were his savings, from sale of his wife's property, and borrowings from several persons.

8. For a better understanding, the relevant provisions of the regulations of the Foreign Exchange Management (Export and import of currency) Regulations, 2000 dated 03rd May 2000 (Notification No. FEMA 6 /RB-2000 dated 3rd May 2000) are reproduced as under:

(i) Regulation 3 states as under:

"3. Export and Import of Indian currency and currency notes :-

(1) Save as otherwise provided in these regulations, any person resident in India,

(a) may take outside India (other than to Nepal and Bhutan) currency notes of Government of India and Reserve Bank of India notes upto an amount not exceeding Rs.5,000/- per person;

(b) may take or send outside India (other than to Nepal and Bhutan) commemorative coins not exceeding two coins each.

Explanation :

'Commemorative Coin' includes coin issued by Government of India Mint to commemorate any specific occasion or event and expressed in Indian currency.

c) who had gone out of India on a temporary visit, may bring into India at the time of his return from any place outside India (other than from Nepal and Bhutan), currency notes of Government of India and Reserve Bank of India notes upto an amount not exceeding Rs.5,000/- per person."

Further the Reserve Bank of India vide Notification No 309/2014 dated 04.06.2014 made amendments to the Foreign Exchange Management (Export and Import of Currency) Regulations, 2000 (Notification No FEMA 6 /RB-2000 dated 3rd May 2000 and the relevant portions are reproduced as under:

1. Short title and commencement

(a).....

(b)

2. Amendment to Regulations

In the Foreign Exchange Management (Export and Import of Currency) Regulations, 2000 (Notification No.FEMA.6/2000-RB dated May 3, 2000), in regulation 3, (A) in sub-regulation 1,

2. Amendment of the Regulations: In the Foreign Exchange Management (Export and Import of Currency) Regulations, 2000 (Notification No.FEMA.6/2000-RB dated May 3, 2000), in regulation 3, (A) in sub-regulation 1,

(i) the existing clause (a) shall be substituted as follows:

"may take outside India (other than to Nepal and Bhutan) currency notes of Government of India and Reserve Bank of India notes up to an amount not exceeding Rs. 25000 (Rupees Twenty Five Thousand Only) per person or such other amount and subject to such conditions as notified by Reserve Bank of India from time to time."

(ii) the existing clause (c) shall be substituted as follows: "who had gone out of India on a temporary visit, may bring into India at the time of his return from any place outside India (other than from Nepal and Bhutan), currency notes of Government of India and Reserve Bank of India notes up to an amount not exceeding Rs. 25,000 (Rupees Twenty Five Thousand only) per person or such other amount and subject to such conditions as notified by Reserve Bank of India from time to time."

9. Government finds that there is no dispute that the Indian 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 Indian currency. The export of Indian currency outside the country in excess of Rs. 25,000/- was proscribed in terms Regulation 3 of the Foreign Exchange Management (Export and import of currency) Regulations, 2000 dated 03rd May 2000 (Notification No. FEMA 6 /RB-2000 dated 3rd May 2000) as amended by RBI vide Notification No. 309/2014-RB dated 04.06.2014. Government observes that the conclusions arrived at by the lower authorities noting 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 Indian currency ordered, is justified.

10. As regards the treatment of the confiscated currency, it is relevant to delve into the relevant Sections of the Customs Act, 1962 and the same have been reproduced as under

10.1 Section 2(33) of the Customs Act, 1962 and Section 125 of the Customs Act, 1962, reads as under:

2(33) "prohibited goods" means any goods the import or export of which is subject to any prohibition under this Act or any other law for the time being in force but does not include any such goods in respect of which the

conditions subject to which the goods are permitted to be imported or exported have been complied with;

Section 125 of Customs Act, 1962

“Option to pay fine in lieu of confiscation. - (1) Whenever confiscation of any goods is authorised by this Act, the officer adjudging 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 :

Provided that where the proceedings are deemed to be concluded under the proviso to sub-section (2) of section 28 or under clause (i) of sub-section (6) of that section in respect of the goods which are not prohibited or restricted, the provisions of this section shall not apply :

Provided further that, without prejudice to the provisions of the proviso to sub-section (2) of section 115, such fine shall not exceed the market price of the goods confiscated, less in the case of imported goods the duty chargeable thereon.

(2) Where any fine in lieu of confiscation of goods is imposed under sub-section (1), the owner of such goods or the person referred to in sub-section (1), shall, in addition, be liable to any duty and charges payable in respect of such goods.

(3) Where the fine imposed under sub-section (1) is not paid within a period of one hundred and twenty days from the date of option given thereunder, such option shall become void, unless an appeal against such order is pending.”

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. Government notes that the quantum of currency was not very large and the same was recovered in the packets of tamarind and kokum. Despite the same, the Applicant has given the sources of the Indian currency to be from selling of wife's property, his own savings, his salary and commissions and to loan from friends and has claimed ownership of the same and no one else has come forward to claim ownership. The Applicant had also submitted letter from his employer in Dubai and salary slips and statements of friends and relatives to buttress the genuineness of the source of funds. Government observes that as held by the OAA, despite some inconsistencies in the source of funds, no attempts to refute the claim of the Applicant has been made by the Department. Government finds that considering that the quantum of currency not being huge and the Applicant having claimed ownership and given details of the source of the currency, the option of redemption given by the OAA is in order under the provisions of Section 125 of the Customs Act, 1962 and also the quantum of penalty has been applied judiciously by the Original Adjudicating Authority.

13. The Original Adjudicating Authority at Para 8 and 8.1 of the impugned order has stated as follows

"8 As regards the request for release of the seized Currency on redemption fine under Section 125 (1) of the Customs Act, 1962, the following Judgements have laid down guiding principles:

a) Kanwaljit Singh Bala-2012 (275) ELT 272 (GOI). In this case the Passenger was trying to take out more than US Dollars 5,000/- without making proper declaration in (CD.F.) Currency Declaration Form. The Revisionary Authority upheld the confiscation but reduced redemption fine and penalty.

b) Alfred Menezes v/s. Commissioner of Customs, Mumbai-2011 (236) ELT 587 (TRI-Mumbai)-It has been held in this Order that it was within the power of Adjudicating Authority to offer redemption of goods even in respect of prohibited goods The Order of Commissioner not giving any reason for concluding that Adjudicating Authority's Order was wrong was set aside.

c) Yakub Ibrahim Yusuf v/s. Commissioner of Customs, Mumbai 2011 (263) ELT 685 (Tri- Mum). Term prohibited goods refers to goods like arms, ammunition, addictive drugs, whose sport in any circumstances would danger or be detrimental to health, welfare or moral of people as whole and makes them liable to absolute confiscation. It does not refer to goods hose import is permitted subject to some 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.

d) In Dhanak M Ramjee V/S Union of India 2009 (248) ELT 127 (Bom) the Hon'ble Supreme Court held that where the owner of the confiscated goods is not known, the person from whose custody such goods have been seized is entitled to redeem the goods and it is irrelevant as to ether the person had established the title over goods or not.

8.1. Considering the facts and circumstances of the case in light of the above judgements specially the important fact that the goods viz Indian currency is a non dutiable item, it is allowed to be taken out of country in small quantity, the passenger has claimed ownership and other owner has been found or come forward I hold that option of redemption can be allowed to the passenger on imposition of appropriate fine."

14. The option to allow redemption of the seized goods is the discretionary power of the adjudicating authority depending on the facts of each case and the discretion to release the gold is based on various factors such as methodology of smuggling, manner of concealment, quantity, form, attempt of smuggling as part of a syndicate etc and after examining the merits. The OAA has also observed that the Applicant was carrying Indian currency which was acquired from his own resources and from friends and relatives and had produced evidence to the effect. Concealment was not ingenious, past record of the applicant does not indicate anything adverse. Investigations have not concluded that the attempted act of the Applicant to carry Indian currency in excess of the norms is linked to conduct of any sinister activity planned by the Applicant or indicative of the Applicant being a part of any organised syndicate. In the circumstances, Government finds that the absolute confiscation of the currency by the AA is

harsh and unreasonable. The OAA had used his discretion in allowing the Indian currency to be redeemed on payment of a fine. Government finds the same to be legal and proper and is inclined to restore the OIO passed by the OAA.

15. Government finds that the personal penalty of Rs. 5,00,000/- imposed on the applicant under Section 114 of the Customs Act, 1962 is commensurate with the omissions and commissions committed.

16. In view of the above, the Government sets aside the Order-in-Appeal No. MUM-CUSTOM-PAX-APP-708/2017-18 dated 07.11.2017 [Date of issue: 07.11.2017] [F.No. S/49-556/2016] passed by the Commissioner of Customs (Appeals), Mumbai Zone-III and hereby, restores the OIO passed by the OAA. The quantum of penalty imposed on the Applicant under Section 114 of the Customs Act, 1962 is appropriate.

17. The Revision Application is allowed on the above terms.


(SHRAWAN KUMAR)

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

ORDER No. 408 /2023-CUS (WZ)/ASRA/MUMBAI DATED. 30.03.2023.

To,

1. Mr. Mstauqe Abdul Wahab Kazi, S/o Kazi Abdul Wahab, 104 'A' Wing, Golden Valley, N.H.Road, Next to Ideal Tower, Mira Road (East), Distt: Thane 400 107
2. The Pr. Commissioner of Customs, C.S.I Airport, Terminal 2, Level-II, Sahar, Andheri (East), Mumbai 400 099.

Copy to:

1. Shri N.J. Heera, Advocate, Nulwala Building, Ground Floor, 41, Mumt Road, Opp G.P.O, Fort, Mumbai 400 001.

2. The Commissioner of Customs (Appeals), Mumbai-III, 5th Floor, Avas Corporate Point, Makwana Lane, Behind S.M.Centre, Andheri Kurla Road, Andheri (East), Mumbai 400 059.
3. Sr. P.S. to AS (RA), Mumbai.
4. File copy.
5. Notice Board.