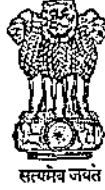


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GOVERNMENT OF INDIA
MINISTRY OF FINANCE
(DEPARTMENT OF REVENUE)

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

F.No. 371/534 & 535/B/2019-RA

Date of Issue : 03.01.23

ORDER No. 27-28/2022-CUS (WZ)/ASRA/ DATED. 03.12.2022. 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. 371/534 & 535/B/2019-RA

Applicants : (1). Shri. Gafoor Kollampady Abdulla
(2). Shri. Rasheed Nandanath.

Respondent : Commissioner of Customs, Custom House, Marmagoa,
Goa - 403 803.

Subject : Revision Application filed, under Section 129DD of the Customs Act, 1962 against the Orders-in-Appeal No. GOA-CUSTM-000-APP-017 to 018-2019-20 dated 25.06.2019 issued on 02.07.2019 through F.No. A-02 & 03/CUS/GOA/2019-20 passed by the Commissioner (Appeals), CGST & CUSTOMS, GOA.

ORDER

These two revision applications have been filed by (i). Shri. Gafoor Kollampady Abdulla and (ii). Shri. Rasheed Nandanath (hereinafter referred to as Applicants or alternately, as Applicant no. 1 or Applicant No. 2, resp.) against the Orders-in-Appeal No. GOA-CUSTM-000-APP-017 to 018-2019-20 dated 25.06.2019 issued on 02.07.2019 through F.No. A-02 & 03/CUS/GOA/2019-20 passed by the Commissioner (Appeals), CGST & CUSTOMS, GOA. These two revision applications are being taken together for a combined decision.

2(a). Brief facts of the case are that the applicants who were scheduled to fly to Sharjah by Air Arabia Flight No. G9-493 were intercepted on 19.09.2017 by the Customs Officers in the departure hall at the Dabolim International Airport (DIA), Goa. A search of their person and baggage led to the recovery of assorted foreign currency. The details of the same are given below,

2(b). From the handbag of A1 during the personal search, the following currencies were recovered,

Table No. 1.

Foreign Currency	Denomination	Nos. of Notes	Total	Grand Total in INR
UAE Dirhams	500	38	19000	3,72,065/-
	100	01	100	
Bahraini Dinar	20	15	300	

2(c). The assorted foreign currencies recovered from the 3 bags carried by A2 and found on his person are given below in Table no. 2. The said foreign currencies were recovered by cutting open the (i). lining of his bags, (ii). cardboard boxes containing shirts (2 nos), Vest (2 nos) and (iii) stitching in between the synthetic linings of backpack and (iv) personal search.

Table No. 2.

Foreign Currency	Denomination	Nos. of Notes	Total	Grand Total (FC)
UAE Dirhams	1000	10	10000	48,000
	500	35	17500	
	200	78	15600	
	100	45	4500	
	50	08	400	
US Dollars	100	115	11500	12000
	50	08	400	
	20	05	100	
Kuwaiti Dinars	20	28	560	800
	10	13	130	
	05	22	110	
Saudi Riyals	500	144	72000	85000
	100	130	13000	
Bahraini Dinars	20	120	2400	2400

2(d). The details of the total foreign currencies recovered from the applicants are as given at Table No. 3 below,

Table No. 3.

Sr. No.	Foreign Currency	Total Amt of F.C	Exch. Rate INR	Amt in INR
1	UAE Dirhams	67,100/-	16.90	11,33,900/-
2	US Dollars	12,000/-	63.25	7,59,000/-
3	Kuwaiti Dinars	800/-	205.45	1,64,360/-
4	Saudi Riyals	85,000/-	16.55	14,06,750/-
5	Bahraini Dinars	2,700/-	164.25	4,43,475/-
			TOTAL	39,07,575/-

2(e). The applicants in their statements revealed that the foreign currency had been given to them by a person named Shri. Mohammed Kunhi and that they had agreed to carry the same for a monetary consideration.

2(f). The bank realisation amount of the foreign currency recovered from A1 was Rs. 3,69,705/- and from A2 was Rs. 35,20,770/- i.e. a total of Rs. 38,90,475/- was recovered from the applicants.

3. After due process of the law, the Original Adjudicating Authority (OAA) viz, Addl. Commissioner of Customs, Marmagoa, Goa vide his Order-In-Original No. 17/2018-19-ADC(CUS) dated 07.01.2019 issued through F.No. 11/61/2017-R&I(AIU)/Adj ordered for the absolute confiscation of the foreign currency equivalent to Rs. 38,90,475/- under Section under Section 113 (d) of the Customs Act, 1962 readwith Foreign Exchange Management (Export and Import of Currency) Regulation Act, 2015. Penalties of Rs. 1,95,000 each were imposed on applicant 1 & 2 and also, Shri. Mohammed Kunhi respectively, under Section 114(i) of the Customs Act, 1962.

4. Aggrieved by this order, the Applicants filed an appeal with the Appellate Authority viz, Commissioner (Appeals), CGST & Customs, Goa, who vide his Orders-in-Appeal No. GOA-CUSTM-000-APP-017 to 018-2019-20 dated 25.06.2019 issued on 02.07.2019 through F.No. A-02 & 03/CUS/GOA/2019-20 upheld the order of the Original Adjudicating Authority and rejected the appeals.

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

5.01. that the applicants do not have any criminal antecedents or any case of smuggling or money laundering anywhere in the country; that the applicants were intercepted near the check-in counter of Air Arabia and the search had been carried out even before they had entered the Customs area; that check-in counter was not the place to declare the goods; that applicants had neither obtained the boarding pass nor had cleared the immigration check; that there was no proof that the applicants had attempted to smuggle out the foreign currency without declaring the same; that foreign currency was not prohibited goods and possession of the same was not an offence; that a plain reading of Para 13 Regulation 5 of Foreign Exchange management (Export and import of Currency) Regulations 2000, makes it clear that the foreign currency as such was not prohibited and its import or export is subject to permission given by RBI; that no special circumstance had been shown by the OAA to warrant absolute confiscation of the foreign currency; that it was

held in the OIO that the applicant had failed to produce valid documents and had not declared the foreign currency and had attempted to export it out of India when in fact, the applicants had not been given an opportunity to declare the goods before the Customs authorities; that boarding pass as evidence could not be produced by the department; that as per the master circular No.6/2015-16 dated 1 July 2015 issued by RBI, the limit of foreign exchange which can be brought from authorised dealers for private visit is USD 2,50,000/- in a financial year; can obtain foreign exchange upto an aggregate of US \$ 2,50,000 from an authorised dealer; that the department had failed to prove the guilt of the applicants;

- 5.02. On the issue of customs area, the applicants have relied on (a). Ranjit Export Private Ltd vs Collector of Customs, Madras, 1985 (21) E.L.T. 353 at p.367(Mad) : 1985 (5) E.C.C 150 (Mad); (b). Commissioner of Customs v Jt Secretary, Government of India, 2016 (333) E.L.T 60 at pp.62,63.(Del); (c). Md. Raju Hussain v Commissioner of Customs (Prev), Guwahati, 2016 (331) E.L.T. 595 at p. 600 (Tri- Kolkata).
- 5.03. On the issue of preparation to export, they have relied upon the following cases,
- (a). Bimal Kumar Jain vs Commissioner of Customs, Mumbai, 2004(177) E.L.T. 389 at p. 391 (Tri-Mumbai).
 - (b). State of Maharashtra v Mohd Yakub, 1983(13) E.LT. 1637 (S.C)
 - (c). Kashmiri v Commissioner of Customs, 1992(57) E.L.T 284 (Tri.)
- 5.04. On the issue of penalty, the applicants have stated that the same cannot be imposed unless the goods are confiscated under Section 113. Since, they had not entered the Customs area, the foreign currency cannot be confiscated and hence, imposition of penalty was not sustainable. They have relied upon the case law viz S.P. Bahl v Commissioner of Customs (Import), Mumbai, 2015 (319) E.LT. 157 at pp. 159,160 (Tri-Mumbai)
- 5.05. that since the Customs authorities have miserably failed to prove the guilt of the accused or to prove any attempt of smuggling against the applicants which is a requirement under Section 113(d) of the Customs Act, 1962 by providing any boarding pass if he had really entered the Airport, or any emigration check/ exit entry or any entry for offloading the passenger in their Passports to suggest that they had made an attempt to smuggle the seized goods out of country
- 5.06. that Preparations to export is not covered under Section 113.-" Preparations to export is not covered under Section 113(d). They have relied upon Bimal

Kumar Jain vs Commissioner of Customs, Mumbai, 2004(177) E.L.T. 389 at p. 391 (Tri-Mumbai) and Malkiat Singh v State of Punjab 1969 (2) SCR 663.; that in the present case attempt was not proved.

- 5.07. that in various types of similar cases, various authorities and forums had allowed the release of foreign currency on payment of a redemption fine even in case of non-declaration of foreign currency; they have relied upon the following case laws on the issue,
- (a). The Hon'ble Supreme Court of India in Hargovind Das K. Joshi V/s Collector of Customs 1992 (61) E.L.T. 172(S.C)
 - (b). Revisionary Authority in the case of KANWALJIT SINGH BALA reported in 2012 (275) E.L.T. 272 (G.O.I)
 - (c). 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)
 - (d). Tribunal in the case of ALFRED MENEZES v/s COMMISSIONER OF CUSTOMS, MUMBAI (this case was upheld by the Bombay High Court)
 - (e). Yakub Ibrahim Yusuf vs. Commr. of Customs, Mumbai [2011-263-ELT-685-Tri-Mumbai]
 - (f). Tribunal in the case DHIANAK MADHUSUDAN RAMJI Versus COMMISSIONER CUSTOMS (AIRPORT), MUMBAI reported in 2009 (237) E.L.T. 280 -Mumbai) (this case has been upheld by 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)
 - (g). FELIX DORES FERNANDES v/s COMMISSIONER OF CUSTOMS.ACC, MUMBAI- 2000(118) E.L.T. 639 (Tribunal)
 - (h). Kishin Shewaram Loungain V/s Commissioner of Customs, ACC Mumbai- 2002(146) E.L.T 180 (Tri-Mumbai).
 - (i). Order No.449-450/06 dated 29.08.2006 of Govt of India (JS-RA)
 - (j). Order No.33/2002 dated 31.01.2002 of Govt of India (JS-RA)
 - (k). Order No.370-371/2004 dated 20.07.2004 of Govt of India (JS-RA)
 - (l). Order No.443-434/2004 dated 16.03.2004 of Govt of India JS(RA)
 - (m). High Court of Chennai in the case of CC Customs Chennai Vs P.Sinnasamy [2016-TIOL-2544-HC-MAD-CUS]
 - (n). High Court of Delhi has granted release of confiscated foreign currency in the case of Mohd. Ayaz vs Union of India [2003 (151) E.L.T 39 (Del.)]
 - (o). Bombay High Court in the case of Commissioner of Customs vs Rajinder Nirula [2017 (346) ELT 9 (Bom)]

(p). Pankaj Jagda vs Commissioner of Customs, Mumbai [2004 (171) ELT 125 (Tri. Mum))

Applicants have prayed to the Revision Authority to set aside the OIA and to release the foreign currency on payment of a redemption fine and the penalty imposed on them may be dropped

6. Applicants have filed an application praying for condonation of delay as the OIA had been sent to their Counsel who was not able to approach them immediately. They have stated that the revision application has been filed within the condonable period of 3 months.

7. Personal hearing through the online video conferencing mode was scheduled for 11.08.2022, 23.08.2022. Shri. Sameer Kashimji, Advocate, appeared for hearing on 23.08.2022 on behalf of the applicant. He submitted that applicants were apprehended before issue of boarding pass. On source of currency he submitted it was brought by them earlier when coming to India. He requested to release the currency on nominal RF and penalty. He submitted some case laws. He submitted that Section 111(d) of Customs Act, 1962 is not applicable in the instant case.

7.1. During the personal hearing, the Advocate of the applicant cited some more case laws wherein redemption had been granted under Section 125 of the Customs Act, 1962

(a). Philip Fernandes vs. Commr. Of Customs, Mumbai Airport 2002-146-ELT-180-Tri-Mumbai.

(b). Ashok Kumar Verma -2019 (369) E.L.T.1677 (GOI) where gold concealed ingeniously was allowed to be redeemed.

(c). etc.

8. On the issue of condonation of delay, Government observes that the applicants have filed the revision applications on 19.12.2019. The OIA was issued on 02.07.2019 and the applicants have claimed that they had received the same

on 07.07.2019. Government notes that the Revision Applications have been filed well within the condonable period of 3 months after the statutory period of 3 months (i.e. 3 months + 3 months). Therefore, Government condones the delay.

9.1. Government has gone through the facts of the case and the submissions. Government finds that there is no dispute that the seized foreign currency had been recovered from the possessions of applicant no. 1 and 2 respectively. Further, in their statements the applicants had admitted the possession, carriage and recovery of the foreign currency. Applicants were unable to show that the impugned foreign currency in their possession was procured from authorized persons as specified under FEMA. The fact remains that the applicants were in possession of foreign currency which was way above the permissible limit. Thus, it has been rightly held by the lower adjudicating authority that in the absence of any valid document for the possession of the foreign currency, the goods become 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 confiscation of the foreign currency was justified.

9.2. Applicants have contended that their baggage was checked before security check up, before immigration check-up and before they could make up any declaration to Customs. Applicants have pleaded that the case against them had been made prematurely before they could make a declaration. The Government finds that the applicants 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. 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 applicants is correct.

10. Government finds that 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" is applicable in this case.

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 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".*

13. In a case of confiscation of Indian Currency, Delhi High Court in the case of Raju Sharma v/s. Union of India [2020(372) ELT 249 (Del.)] while allowing release of Indian currency observed,

- "18.** the actual grievance of the Revenue before the Revisionary Authority, was that the seized currency was "prohibited", redemption thereof ought not to have been allowed at all, and the currency ought to have been absolutely confiscated. This submission directly flies in the face of Section 125 of the Customs Act whereunder, while allowing the redemption, in the case of goods which are not prohibited, is mandatory, even in the case of goods, which are prohibited, it is open to the authorities to allow redemption thereof, though, in such a case, discretion would vest with the authorities. The Commissioner (Appeals), while rejecting the appeal of the revenue, correctly noted this legal position, and observed that, as the AC had exercised discretion in favour of allowing redemption of the seized currency, on payment of redemption fine of ` 50,000/-, no occasion arose to interfere therewith. We are entirely in agreement with the Commissioner (Appeals). Exercise of discretion, by judicial, or quasi-judicial authorities, merits interference only where the exercise is perverse or tainted by patent illegality, or is tainted by oblique motives [Mangalam Organics Ltd. v. UOI - (2017) 7 SCC 221 = 2017 (349) E.L.T. 369 (S.C.)]. No illegality, much less perversity, is discernible in the decision, of the AC, to allow redemption of the seized currency on payment of redemption fine of ` 50,000/-. The Commissioner (Appeals) rightly refused to

interfere with the said decision, and the Revisionary Authority, in an order which reflects total non-application of mind, chose to reverse the said decision.

19. *We are unable to sustain the order of the Revisionary Authority. We uphold the decision of the Commissioner (Appeals) as well as the order of the AC, which stands affirmed thereby. The seized currency shall, therefore, forthwith be returned to Petitioner No. 2ⁿ.*

14. The Government finds that the applicants had been intercepted in the departure hall. i.e. in other words, they had not crossed the immigration and Customs counters at the airport. This point was raised by the applicants before the lower authorities and the respondents had not controverted the same. It is clear that at the point of interception, the applicants had not crossed the immigration and Customs counters and were in the departure area. Since applicant has not taken any permission from RBI and the manner of keeping the currency bring out that they did not have any intention to declare the same, hence the same is rightly confiscated. However, considering the overall facts, Government is inclined to set aside the order of absolute confiscation passed by the appellate authority and considers granting an option to the applicants to redeem the foreign currency on payment of a suitable redemption fine as the same would be more reasonable and fair.

15. Government finds that the personal penalty of Rs. 1,95,000/- each imposed on the applicant no. 1 & 2 under Section 114(i) of the Customs Act, 1962 are commensurate with the omissions and commissions committed. Therefore, Government does not find any merit in request for reduction of the same.

16. In view of the above, the Government modifies the impugned order of the Appellate authority in respect of the foreign currency seized from the applicants. The assorted foreign currency equivalent to Rs. 3,69,705/- pertaining to applicant no. 1 is allowed to be redeemed on payment of a fine of Rs. 75,000/- (Rupees Seventy Five Thousand only). The foreign currency equivalent to Rs. 35,20,770/-

recovered from applicant no. 2 is allowed to be redeemed on payment of a fine of Rs. 7,50,000/- (Rupees Seven Lakhs Fifty Thousand only). The penalty of Rs. 1,95,000/- imposed on applicant no. 1 and 2 under section 114(i) of the Customs Act, 1962 are appropriate.

17. The two Revision Applications are disposed of on above terms.

Shrawan
9/12/22

(SHRAWAN KUMAR)
Principal Commissioner & ex-officio
Additional Secretary to Government of India

ORDER No. ⁴²⁷⁻ ~~428~~ /2022-CUS (WZ)/ASRA/MUMBAI DATED ⁰⁹.12.2022.

To,

1. Shri. Gafoor Kollampady Abdulla, Kollampady Valia Valappil, Anangoor PO Kasargod, Kasargod, Kerala – 671123.
2. Shri. Rasheed Nandanath, Yaseen Manzil, Kovvalpally, PO Kanhangad South, Kasargod, Kerala – 671 531.
3. Commissioner of Customs, Custom House, Marmagoa, Goa – 403 803.

Copy to:

1. Shri. Sameer Kashimji, Advocate, 22, Sweet Home Apartments, Britto Lane, Falnir, Mangalore – 575 001.
2. Sr. P.S. to AS (RA), Mumbai.
3. File Copy.
4. Noticeboard.