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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. 371/273/B/2021-RA/3710 : Date of Issue : 19/05/23

ORDER No. 462/2023-CUS (WZ)/ASRA/MUMBAI DATED 17.05.2023. 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.

F.No. 371/273/B/2021-RA

Applicant : Shri. Hudaifa Mangadan Amoo

Respondent : Pr. Commissioner of Customs, CSIA, Mumbai –400 099.

Subject : Revision Application filed, under Section 129DD of the Customs Act, 1962 against the Order-in-Appeal No. MUM-CUSTM-PAX-APP-179/2021-22 dated 27.05.2021 issued on 03.06.2021 through F.No. S/49-882/2019 passed by the Commissioner of Customs (Appeals), Mumbai – III.

ORDER

This revision application has been filed by the Shri. Hudaifa Mangadan Amoo, (herein referred to as Applicant) against the Order-in-Appeal No. MUM-CUSTOM-PAX-APP-179/2021-22 dated 27.05.2021 issued on 03.06.2021 through F.No. S/49-882/2019 passed by the Commissioner of Customs (Appeals), Mumbai - III.

2(a). Brief facts of the case are that the applicant who was bound for Dubai by Indigo Airlines Flight No. 6E / 11.11.2017 was intercepted by Officers of Customs on 11.11.2017 after he had cleared the Immigration counter and was near the Customs desk in departure at CSMI Airport, Mumbai. Detailed examination of his checked-in baggage resulted in the recovery of assorted foreign currencies in various denomination as given at Table No. 1, below, equivalent to INR. 19,59,120/-. The foreign currency consisting of USD 17000/- and 5160 Omani Riyals had been wrapped in newspaper and cleverly concealed in four bags of 'Shipton' Tea of 1 kg each.

TABLE No. 1

Sr. No.	Currency	Denomination	Nos. of notes	Total value FCN	Total Value in INR.
1.	US Dollar	100	112	11,200	7,13,440/-
2.	US\$	50	116	5,800	3,69,460/-
3.	Omani Riyal	50	90	4,500	7,64,145/-
4.	Omani Riyal	20	23	460	78,113/-
5.	Omani Riyal	10	07	70	11,887/-
6.	Omani Riyal	05	26	130	22,075/-
		TOTAL			19,59,120/-

2(b). The seized foreign currency was deposited in the SBI, CSMI Airport branch and an amount equivalent to INR 19,08,849/- was realised.

2(c). 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 stated that the currency belonged to him and that during his previous visit he had brought USD 15,000/-.

However, he had not declared this amount. He did not have any evidence which indicated that the money belonged to him.

3. After due process of the law, the Original Adjudicating Authority (OAA) viz, Addl. Commissioner of Customs, CSMI Airport, Mumbai vide Order-In-Original No. ADC/AK/ADJN/44/2019-20 dated 14.05.2019 (DOI : 16.05.2019) through F.No. S/14-6-08/2018-19/Adjn – SD/INT/AIU/317/2017-AP'C' absolutely confiscated the assorted foreign currencies of various denominations as listed at Table No. 1 above, equivalent to Rs. 19,08,849/- under Section 113 (d) & (e) of the Customs Act, 1962 readwith Section 6(3)(g) of FEMA, 1999 and Regulations framed thereunder. A penalty of Rs. 2,15,000/- was imposed on the applicant under Section 114(i) and (iii) of the Customs Act, 1962.

4. Aggrieved by this order, the Applicant filed an appeal with the Appellate Authority (AA) viz, Commissioner of Customs (Appeals), Mumbai – III., who vide his Order-in-Appeal No. MUM-CUSTOM-PAX-APP-179/2021-22 dated 27.05.2021 issued on 03.06.2021 through F.No. S/49-882/2019 upheld in to-to, the said 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 was carrying the goods for renewal of his shop license located in Lorenza International City, Dubai, which was owned by him along with two other partners; that the OAA while passing the OIO had not taken into consideration all the facts and circumstances of the matter; that details and justifiable reasons had not been provided by the lower authorities while rejecting his case; that no evidence had been brought by the department; that applicant was not aware about the procedure regarding declaration of goods nor was he aware that the goods were prohibited; that applicant had carried the goods for the first time and he did not have any criminal antecedents; that the allegations of concealment of foreign currency inside the tea bags had not been substantiated by the Department and nothing had been brought on record or even mentioned in the SCN; that applicant had submitted evidence and had discharged his onus of burden as per law; that in his statement he had clearly stated that he had brought USD 15,000/-;

that the remaining was purchased / borrowed; that non-consideration of material/submissions had vitiated the impugned order; that no incriminating material or evidence was found; that Section 125 of the Customs Act, 1962 gave an option to pay fine in lieu of confiscation, which had not been considered or appropriately discussed by the lower authorities; that this was his first offence and had not come to adverse notice earlier; that this was a fit case for release of the currencies; that they have relied on the undermentioned case laws;

(a). In the case of Rajesh Kumar Ishwar Parikh versus C.C Ahmedabad reported in 2020 SCC Online CESTAT 374 *"it cannot be said that the appellant had any malafide intention to export the foreign currency as they do not have any gain even if permission is not obtained. As regard the judgments cited by Learned Authorized Representative regarding absolute confiscation of foreign currency, I find that there is no trite law that in each and every case the confiscation of goods should be made absolute. The issue that whether confiscation of goods should be made absolute or conditional such as redemption on payment of fine has to be decided on the basis of facts of each case"*.

(b). Commissioner of Customs Vs Rajinder Nirula (S.C. Dharmadhikari and B.P. Colabawala, JJ dated - 27.10.2016), judgment reported in 2017 (346) ELT 9 (HC-BOM); that when power of redemption is exercised, law postulates that there is an option to pay fine in lieu of confiscation.

(c). In the case of Raju Sharma Versus Union of India reported in 2020 (372) ELT 249 (Del) wherein the Hon'ble Court had noted that *"the actual grievance of them 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 files in the face of section 125 of the Customs Act whereunder, while allowing the redemption, in the case of goods which are 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 on authorities"*.

Under the circumstance, the applicant has prayed to the Revisionary Authority to set aside the impugned order and grant relief.

6. Personal hearing was scheduled for 06.12.2022 and for 20.12.2022. Shri. Aditya Talpade, Advocate for the applicant appeared for physical hearing and reiterated the earlier submissions. He requested to release the currency on reasonable RF 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 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 lower adjudicating 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 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 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.

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))] 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.....

9. 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.

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(a). Government notes from the records that another revision application filed by the applicant is pending before the Revisionary Authority i.e. F.No. 371/485/B/2022-RA. Here, the applicant had been apprehended whilst attempting to smuggle 499 grams of gold valued at Rs. 14,56,581/- which were in the form of two chrome coated rods and had been affixed ingeniously, to the bottom part of the trolley. Moreover, the personal hearing of this case too had been scheduled alongwith the current case i.e. F.No. 371/273/B/2021-RA. However, the same had not been represented by the applicant or his Advocate.

11(b). Government notes that the applicant is a habitual offender and has indulged in such activity which indicates his contumacious behaviour towards the law.

12. Government notes that the quantity of the foreign currency is quite substantial. 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. The currency had been concealed in an ingenious manner inside the tea bags. 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 got away with the foreign currency. Government finds that such a substantial amount of foreign currency was being carried in the baggage, currency remained unaccountable, applicant being a frequent traveller, admittedly the foreign currency did not belonging to him, applicant being a habitual offender, finds that 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. For the aforesaid reasons, especially, the applicant not having produced evidence of legal

procurement of the foreign currency and being a habitual offender, 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.

13. The Government finds that the personal penalty of Rs. 2,15,000/- imposed on the applicant under Section 114(i) and (iii) of the Customs Act, 1962 is commensurate with the omissions and commissions committed.

14. 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.

15. Accordingly, the Revision Application is dismissed.


(SHRAWAN KUMAR)

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

ORDER No. 462/2023-CUS (WZ)/ASRA/MUMBAI DATED 17.05.2023.

To,

1. Mr. Hudaifa Mangadan Amoo, 1/146-A, Mangadan House, Thekkil, Post :- Thekkil Ferry, Kasargod, Kerala – 671 541.
2. Pr. Commissioner of Customs, CSMI Airport, Level – II, Terminal – II, Sahar, Andheri (East), Mumbai – 400 099.

Copy to:

3. Shri. Aditya Talpade, Advocate, 7, Trimurti Residency, J.B. Nagar, Andheri East, Mumbai – 400 059.
4. Sr. P.S. to AS (RA), Mumbai.
5. File Copy.
6. Noticeboard.