



GOVERNMENT OF INDIA  
MINISTRY OF FINANCE  
(DEPARTMENT OF REVENUE)

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

F.No. 380/01/B/WZ/2020-RA / 4030

Date of Issue ~~05-2023~~

07.06.2023

ORDER NO. <sup>465</sup> /2023-CUS (WZ)/ASRA/MUMBAI DATED 31.05.2023 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.

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

Respondent : Shri Abdul Razak Chattanchal

Subject : Revision Application filed, under Section 129DD of the Customs Act, 1962 against the Order-in-Appeal MUM-CUSTM-PAX-APP-605/19-2020 dated 30-10-2019 [F.NO. S/49-413/2019] passed by the Commissioner of Customs (Appeals-I), Mumbai-III.

**ORDER**

This Revision Application has been filed by Pr. Commissioner of Customs, CSMI Airport, Mumbai (herein referred to as Applicant) against the Order in Appeal No. MUM-CUSTOM-PAX-APP-605/19-2020 dated 30-10-2019 [S/49-413/2019] passed by the Commissioner of Customs (Appeals), Mumbai-III in respect of Shri Abdul Razak Chattanchal (hereinafter referred to as the Respondent).

2. The brief facts of the case are that on 03.07.2018, a passenger by name Shri Abdul Razak Chattanchal (the Respondent) holding Indian Passport No. R4233113, was bound for Dubai by Jet Airways flight No. 9W-558. Acting on the basis of intelligence, the Respondent was intercepted by the officers of AIU, while he was proceeding to board the flight after he had cleared himself through Immigration and Customs. A detailed personal search of the Respondent led to the recovery of foreign currency ie US\$35000 and 8000 Omani Riyals equivalent to Indian Rupees amounting to Rs. 37,16,100/- from a black coloured polythene kept in a black coloured unbranded travel bag. The recovered foreign currency was seized by the officers of the Customs under the provisions of Customs Act, 1962 read with Foreign Exchange Management Act, 1999 and the Regulations made thereunder.

3. After due process of investigation, the case was adjudicated by the Original Adjudicating Authority (OAA) viz Additional Commissioner of Customs who vide Order-in-Original No. ADC/AK/ADJN/522/2018-19 dated 28-03-2019 had ordered for absolute confiscation of the seized Foreign currency, valued at Rs.37,16,100/- under Section 113 (d), (e) & (h) of the Customs Act, 1962 read with Foreign Exchange Management Act, 1999 and the Regulations made thereunder and also imposed Personal penalty of Rs. 4,25,000/- on the Respondent under section 114(i) and (iii) of the Customs Act, 1962.

4. Aggrieved by the aforesaid order, the Respondent filed an appeal before the Commissioner of Customs (Appeal), Mumbai-III (AA), who vide OIA No MUM-CUSTOM-PAX-APP-605/19-2020 dated 30-10-2019 [S/49-413/2019] ordered for redemption of the foreign currency i.e. foreign currency ie US\$ 35000 and 8000 Omani Riyals equivalent to Rs. 37,16,100/- on payment of redemption fine of Rs.7,50,000/- and upheld the penalty of Rs.4,50,000 imposed by the OAA.

5. Aggrieved with the above order, the Applicant-department has filed this revision application on the grounds that the Appellate order is neither legal nor proper for the following grounds;

5.1 The said passenger could not produce any documents to prove the legal acquisition of the said foreign currency nor could he produce RBI permission for taking the foreign currency out of India. Hence, the same is liable for confiscation under the provisions of Customs Act, 1962 read with FEMA, 1999 and FEMR 2015. The facts and circumstances related to interception of the passenger and subsequent recovery and seizure of the seized foreign currency is undisputed and hence it is held as proved.

5.2 In his statement recorded on 03.07.2018 under Section 108 of the Customs Act, 1962 the Respondent has admitted the knowledge, possession, ownership, concealment, carriage, non-declaration and recovery of the foreign currency seized under Panchanama dated 03.07.2018 and that the seized foreign currency was being taken out of India for setting up a shop in Dubai.

5.3 A passenger can carry India/foreign currency provided he fulfills the conditions specified in the Foreign Exchange Management (Export & Import of Currency) Regulations, 2015 and any currency carried in violation of the restrictions imposed and non-declaration or mis-declaration thereof would render such currency liable to confiscation and the passenger would render himself/herself liable to penalty for his/her act of omission and commission. While issuing

the foreign currency, the type of Visa has a huge bearing on the said issuance of foreign currency. Meaning thereby, the validity of foreign currency is backed by a proper document issued by the Authorised Declaration. Hence, carrying a licit document is a condition precedent, a restriction imposed by Foreign Exchange Management (Export and Import of Currency) Regulations 2015 framed under FEMA, 1999, for valid possession of foreign currency.

5.4 That the Respondent passenger in his confessional statement recorded on 03.07.2018 under Section 108 of the Customs Act, 1962, admitted that the seized foreign currency amounting to USD 35,000 and Omani Riyals 8,000 belonged to him and he did not have any valid/legal proof of their procurement which clearly shows that the passenger had not acquired the seized foreign currency from authorized dealer nor he had filled the prescribed Form A2 and made declaration under the Liberalized Remittance Scheme. Hence, the seized currency was being carried abroad in violations of FEMA Regulations.

5.5 That the seized foreign currency was in excess of the quantity prescribed for declaration i.e. USD 10,000 or equivalent and hence, the passenger was supposed to declare the same to the Customs under the provisions of Section 77 of Customs Act, 1962; that he had mala fide intention to surreptitiously take the said foreign currency out of the country which he has admitted in his voluntary statements; that the seized currency was found concealed in one black coloured unbranded travel bag of the passenger and the contents were not declared to the Customs and hence it becomes 'prohibited goods' under Section 2 (33) of the Customs Act, 1962 rendering it liable for confiscation under Section 113 (d), (e) and (h) of the Customs Act, 1962 and the Respondent has rendered himself liable for penalty under Section 114(iii) of the Customs Act, 1962.

5.6 The passenger is a frequent traveler and had travelled 85 times during the period from 01.01.2017 to 03.07.2018 and previously a case was also registered against the passenger on 12.07.2017, where he was intercepted by Customs officers for carrying 4 gold bars of foreign origin by ingenious concealment in trolley. He had in that case admitted to have acted as carrier for the

seized gold for monetary consideration. The case was adjudicated and gold was absolutely confiscated and penalty of Rs.1,30,000/- was also imposed. Hence, as per evidence available on record, he is a carrier engaged in organized smuggling.

5.7 The passenger concealed the said seized foreign currency in a black coloured polythene bag placed inside the black coloured unbranded travel bag and this mode of concealment reflects the intent of the passenger not to declare the foreign currency and avoid detection of the same by the Customs Authorities. Hence, mensrea of the passenger to smuggle the foreign currency is apparent.

5.8 That taking into account the facts on record and the gravity of the offence, the Appellate Authority's order to allow to redeem the foreign currency (totally amounting to Rs. 37,16,100/-) carried out of Country without any legal documents or permission from RBI is not legal and proper.

5.9 Moreover, when the original adjudicating authority has taken an informed decision of confiscating the subject goods absolutely and imposed personal penalty, the Commissioner (Appeals) should not have allowed redemption, without pointing out any legal infirmity in the order of the adjudicating authority.

5.10 It was held in Commissioner of Customs, Tuticorin V/s Sai Copiers [2008 (226) E.L.T. 486 (Mad.) that any order of the lower authority could be interfered with only in circumstances in which it was demonstrated that such order was purely arbitrary, whimsical and resulting in miscarriage of justice. In this regard, the applicant relied in the Hon'ble Supreme Court case of Om Prakash Bhatia Commissioner of Customs, Delhi (2003 (155) E.L.T. 423 (SC)); that in matter of quasi-judicial discretion interference by the Appellate Authority would be justified only if the lower authority's decision was illogical or suffers from procedural impropriety.

5.11 It is submitted that the impugned Order in Original does not suffer from any such vice and therefore Commissioner (Appeals) should not have allowed redemption of the subject foreign currencies

in the present case following the ratio of the above referred judgments.

i) In the case of Fayaz Gulam Godil Vs. Union of India 2016 (338) ELT 42 (BOM);

ii) In the case of M.Kudubdeen Vs. Jt. Secretary (GOI) 2016 (338) ELT 42 (BOM),

5.12 That Commissioner (Appeals) has not considered the facts of the present case, where the foreign currency in question was not declared and leads to intent of smuggling and other ulterior motives, coupled with the fact that the passenger is a repeat offender by his own admission and has admitted being booked in another case of gold smuggling for monetary consideration. In view of the above, the passenger appears to be a person engaged in organized smuggling of goods.

The applicant has prayed that the order of the appellate authority allowing for the redemption of the foreign currency on payment of redemption fine may be set aside and the Order in Original may be upheld.

6. Personal hearings in the case was scheduled on 6.12.2022, 20.12.2022, 12.01.2023 and 23.01.2023. However, no one appeared before the Revisionary Authority for personal hearing on any of the appointed dates for hearing. Since sufficient opportunity for personal hearing has been given in the matter, the case is taken up for decision on the basis of the available records.

7. Government has gone through the facts of the case, the Order in Appeal, the Order in Original and the Revision Application filed. The issue to be decided is whether the Redemption allowed by the Commissioner Appeal is justified.

8 Government finds that the respondent had not declared the seized foreign currency to the Customs at the point of departure. The Respondent admitted ownership, possession, carriage, non-declaration of the foreign currency at the time of the recording of the Statement. Further, the Government has observed that the Respondent is a habitual offender as a case

of smuggling of 464 grams of gold valued at Rs.12,30,648/- was registered against him (which is mentioned at para 19 of the OIO dated 30.03.2019).

9. Though the Respondent admitted the ownership of the seized currency, the source of the foreign currency remained unaccounted. He could not produce any documents showing licit acquisition of the said currency. The fact that the foreign currency was procured from persons other than authorized persons as specified under FEMA, 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, confiscation of the foreign currency was justified.

10. The Government finds that the respondent 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 respondent is correct and therefore, the confiscation of the foreign currency ordered, is justified. Government refers to 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.....”.*

11. 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.

12. Government finds that the case of Commissioner of Customs, Chennai v/s. Savier Poonolly [2014(310 E.L.T. 231 (Mad)] relied upon by the adjudicating authority 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.*

13. 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."*

14. The Government finds that the Respondent is a habitual offender, in an earlier occasion a case was registered against him for smuggling of gold wherein the gold was absolutely confiscated and penalty was imposed on him. The fact that the applicant was involved in a similar previous offence indicates that the Respondent was aware of the law. Moreover, he is a frequent traveller and had travelled 85 times during the period 1.01.2017 to 03.07.2018. Government notes the manner of concealment, non-account of source, and the fact of respondent being habitual offender reflects the malafide intent of the Respondent. Government finds that the discretion to release the foreign currency under the provisions of Section 125 of the Customs Act, 1962 on payment of redemption fine by the appellate authority was not judicious. All surrounding factors were not weighed in by him properly. The order of the appellate authority to release the foreign currency on payment of redemption

fine of Rs. 7,50,000/-, therefore, deserves to be set aside. The Order-in-Appeal no. MUM-CUSTOM-PAX-APP-605/19-2020 dated 30-10-2019 is set aside and absolute confiscation ordered vide Order-in-Original No. ADC/AK/ADJN/522/2018-19 dated 28-03-2019 needs to be restored.

15. The Government finds that the personal penalty of Rs. 4,25,000/- imposed on the respondent under Section 114(i) & (iii) of the Customs Act, 1962 by the OAA and upheld by the AA is reasonable and justified

16. The Revision Application is disposed on the above terms.

  
( SHRAWAN KUMAR )

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

ORDER No. 465/2023-CUS (WZ) /ASRA/

DATED 31.05.2023

To,

1. Pr. Commissioner of Customs, CSI Airport, Terminal - 2, Level - 2, Andheri East, Mumbai - 400 099.
2. Shri. Abdul Razak Chattanchal, Chattanchal House, Post Thekkil, Kasargod, Kerala-671541

Copy to:

1. Commissioner of Customs (Appeals), Mumbai-III, Awas corporate Pont (5<sup>th</sup> Floor), Makwana Lane, Andheri-Kurla Road, Marol, Mumbai-400059
2. Shri P.K.Shingrani, Advocate, 12/334, Vivek, New MIG Colony, Bandra East, Mumbai-400051.
3. P.S. to AS (RA), Mumbai.
4. Notice Board.