REGISTERED
SPEED POST

सत्यमेव जयते

GOVERNMENT OF INDIA
MINISTRY OF FINANCE
(DEPARTMENT OF REVENUE)
8th Floor, World Trade Centre, Centre – I, Cuffe Parade,
Mumbai-400 005

F.No. 380/04/B/WZ/2020-RA / 4053 Date of Issue: 06.06.2023

ORDER No. 468/2023-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: Principal Commissioner of Customs (Airport), Mumbai

Respondents: Shri Muhammadsaad Muhammadsuhel Nariyalwala

Subject : Revision Application filed, under Section 129DD of the Customs Act, 1962 against the Orders-in-Appeal No. MUM-CUSTM-PAX-APP-659/2019-20 dated 27.11.2019 [DOI: 27.11.2019] [F.No. S/49-247/2019] passed by the Commissioner of Customs (Appeals), Mumbai, Zone-III.

ORDER

This Revision application has been filed by the Principal Commissioner of Customs (Airport), Mumbai (hereinafter referred to as the Applicant) against the Order-In-Appeal No. MUM-CUSTM-PAX-APP-659/2019-20 dated 27.11.2019 [DOI: 27.11.2019] [F.No. S/49-247/2019] passed by the Commissioner of Customs (Appeals), Mumbai, Zone-III, in respect of the appeal filed by Shri Muhammadsaad Muhammadsuhel Nariyalwala (herein after referred to as the Respondent).

2. Brief facts of the case are that on 04.02.2018, the Respondent Mr. Mohammadsaad Muhammadsuhel Nariyalwala, was intercepted by the officers of the Air Intelligence Unit (AIU), while he was proceeding to board Malaysian Airlines Flight No. MH 0195 dated 04.02.2018 to Kaulalumpur after he had cleared himself through Immigration and Customs. During the search, the passenger was found in possession of foreign currency UK Pounds 23430 (UK pounds 4430) from hand bag and 19000 from the Chappals worn by him) equivalent to Indian Rs. 20,84,099/-, the details of the recovered foreign currencies are as under:

Sr No	Bundles	Foreign Currency	Denomination	Number of Notes	Total (UK Pounds)
1.	01(Right chappal)	UK Pounds	50	100	5000
2.	02 (Right chappal)	UK Pounds	50	86	4300
3.	03 (Right chappal)	UK Pounds	20	20	400
4.	01 (Left chappal)	UK Pounds	50	100	5000
5.	02 (Left chappal)	UK Pounds	50	80	4000
6.	03 (Left chappal)	UK Pounds	20	15	300
7.	Shoulder Bag	UK Pounds	50 20	01 2019	50 4380
				TOTAL :	**23,430/-**

The AIU Officers took over and seized the recovered foreign currency in the reasonable belief that the same were attempted to be smuggled out of India and hence were liable for confiscation under the provision of Customs Act, 1962 read with the provisions of Foreign Exchange Management Act, 2000 and Foreign Exchange Management (Export and Import of Currency) Regulation, 2000.

3. After due process of law, the Original Adjudicating Authority (OAA) viz, Additional Commissioner of Customs, Airport, Mumbai vide Order-In-Original No. ADC/AK/ADJN/431/2018-19 dated 17.01.2019 absolutely confiscated the impugned foreign currency under section 113(d), (e) and (h) read with Section 6(3)(g) of the FEMA, 1999 and Regulations framed thereunder and imposed a personal penalty of Rs. 2,30,000/- under section 114(iii) of Customs Act, 1962.

4. Being aggrieved by the impugned order passed by the Addl. Commissioner, CSI Airport, Mumbai, the respondents filed appeals with the Appellate Authority (AA) viz, Commissioner of Customs (Appeals), Mumbai Customs, Zone-III who vide Orders-in-Appeal No. MUM-CUSTM-PAX-APP-659/2019-20 dated 27.11.2019 [DOI: 27.11.2019] [F.No. S/49-247/2019] allowed to redeem the foreign currency on payment of redemption fine of Rs.4,50,000/- and upheld the penalty imposed by the OAA.

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

5.1 That the seized currencies were not declared to the Customs and further, the respondent could not produce any legal documents for its licit acquisition and possession nor he could produce RBI permission for taking the foreign currency out of India. The facts and circumstances related to

interception of the passenger and subsequent recovery and seizure of the foreign currency is undisputed and hence it is held as proved.

5.2 In his statement recorded on 05.02.2018 under Section 108 of the Customs Act, 1962 the passenger admitted the possession, concealment, carriage, non-declaration and recovery of foreign currency amounting to UK pound 23,430/- equivalent to Indian Rs.20,84,099/- and further stated that he had not carried foreign currency during his earlier visits and that he had no intention of declaring the seized foreign currency to Customs at departure.

5.3 As per Regulation 5 of the Foreign Exchange Management (Export & Import of Currency) Regulations, 2015, 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". As regards the source from which foreign currency being taken out should be acquired, Regulation 7(2) (b) of the Foreign Exchange Management (Export & Import of Currency) Regulation, 2015 lays down, inter-alia, that any person may take or send out of India foreign exchange obtained by him from an authorized person in accordance with the provisions of the Act or the Rules or Regulations or directions made or issued there under.

5.4 The maximum amount of foreign currency which can be taken out by any person per year for different purposes i.e. Private Visits/Business Trip under liberalized remittance scheme has been consolidated in Para A.4, A.9 and A. 18 of Master Circular No 6/2015-16 dated 1st July 2015 issued by the Reserve bank of India (RBI), i.e. taking or remitting USD 2,50,000 per financial year for business visit/ private visit/ for permissible currency or capital account transactions or a combination of both under liberalized remittance scheme, is allowed provided he fills Form A2 and Application cum declaration for purchase of foreign exchange under Liberalized Remittance Scheme.

5.5 From the legal provisions discussed above, it is apparent that 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. 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.

5.6 The passenger was found carrying foreign currency amounting to UK Pound 23430, which he was taking out of India ingeniously concealed in his chappals and in his baggage. The passenger had not acquired the seized foreign currency from authorized dealer nor had he 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.

5.7 The, mensrea of the passenger to smuggle the foreign currency is apparent, which has also been corroborated by his statements recorded under the Customs Act, 1962. Thus, the seized foreign currency become '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(6) and (iii) of the Customs Act, 1962.

5.8 The passenger by his own admission is engaged in unauthorized import and sale of illegal mobile phones. Hence, the passenger is engaged in smuggling of illegal mobile phones financed by foreign currency procured from illegal sources. Hence, the aspect of smuggling is apparent from the case records. The mens-rea of the passenger to smuggle the foreign currency is apparent. Hence, release of the seized foreign currency under redemption fine is not tenable.

5.9 The circumstances of the case and the intention of the Respondent was not at all considered by the Appellate Authority while giving him option to redeem the seized goods on payment of fine and penalty. The Appellate Authority ought not to have allowed redemption of the seized currency which was confiscated absolutely by the Adjudicating Authority. The impugned Order in Original did not suffer from any vice and therefore Commissioner (Appeals) should not have allowed redemption of the subject foreign currencies. The following case laws were relied:

a) 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.

b) Hon'ble Supreme Court in the case of Om Prakash Bhatia Vs Commissioner of Customs, Delhi (2003 (155) E.LT. 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.

c) Fayaz Gulam Godil Vs. Union of India 2016 (338) ELT 42 (BOM) the High Court of Judicature at Bombay dismissed the appeal and

upheld the order in original. In this case, the Tribunal found that it is an admitted case of illegal export of foreign currency from India by concealing the same in baggage and considering the substantial quantum of currency seized, the discretion ought not be exercised so as to allow release of the same by paying redemption fine

5.10 Regarding the redemption fine and penalty, the applicant submitted that, it shall depend on the facts and circumstances of the case and other cases cannot be binding as a precedent. In support of this contention, they relied on the the judgment of Hon'ble Delhi High Court in the case of Jain Exports Vs Union of India 1987(29) ELT 753.

5.11 The Applicant has requested to the Revisionary authority to set aside the Order-in-Appeal No. MUM-CUSTM-PAX-APP-659/19-20 dated 27.11.2019 passed by the Commissioner of Customs (Appeals), CSI Airport, Mumbai-Zone-III and uphold the original order passed by the OAA or pass any other order as deemed fit under the circumstances of the case.

6. Personal hearing in the case was scheduled for 06.12.2022, 20.12.2022, 12.01.2023, 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 and the submissions. Government finds that there is no dispute that the seized foreign currency was not declared by the respondents to the Customs at the point of departure. Further, in their statement the respondents had admitted the possession, carriage, concealment, non-declaration and recovery of the foreign currency. Thus, it has been rightly held that in 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 respondent 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. Section 125 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."*

9. In a similar case of confiscation of Currency, Delhi High Court in the case of Raju Sharma v/s. Union of India [2020(372) ELT 249 (Del.)] while allowing release of 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 Rs. 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. 2".*

9. The Government finds that the amount involved in this case is not large. There is no case made out that the respondents are habitual offenders. The Appellate Authority relying on the case laws viz i) Omprakash Jhunjhunwala Vs. Commissioner-2017 (353) E.LT. A95(Tri-Mum); ii) Order No. 43/2018 dated 23.03.2018 of Mohd. Arif reported in 2018 (361) E.L.T.959 (G.O.I.) and Hon'ble High Court of Bombay vide its recent judgment dated 27.10.2016 in case of CC, Mumbai Vs Rajinder Nirula (Customs Appeal No 60/2006) has summarised at para 14 of his order as under,

> *".....14. The above decisions of higher appellate forums suggest that redemption of foreign currency can be allowed based on facts and merit of each case and there cannot be any straight jacket formula to decide such cases. I find that the statements recorded under section 108 of the Customs Act, 1962 of the passenger revealed that the foreign currency belonged to him and he had claimed ownership of the seized currency; that he was carrying the said currency for purchasing mobile phones from Kualalumpur; that this was the first time he had carried such huge amount of foreign currency. Besides, the appellant explained how he had arranged the foreign currency from forex exchange agent Mr. Chetan, though illegally and there is nothing on record to suggest that he was working as carrier for somebody else or was member of organized smuggling racket....."*.

11. The Government finds that the amount involved in this case is not very large. Also, the respondents claimed ownership of the same. This case is at best a case of mis-declaration rather than smuggling. Government finds that the discretion not to release the foreign currency with reasonable Redemption Fine under the provisions of Section 125 of the Customs Act, 1962 would be harsh and unreasonable. Governments therefore finds that the appellate authority has passed a legal and judicious order by allowing redemption of the foreign currency and is not inclined to interfere in the order passed by the appellate authority.

12. The Government finds that the quantum of redemption fine under Section 125 of the Customs Act, 1962 by the Appellate Authority and personal penalty imposed on the respondents by the OAA and upheld by the Appellate Authority under Section 114(i) of the Customs Act, 1962 is commensurate with the omissions and commissions committed and is not inclined to interfere in the same.

13. In view of the above, Government does not find any reason to interfere with the OIA No. MUM-CUSTM-PAX-APP-659-2019-20 dated 27-11-2019 passed by Commissioner of Customs (Appeals), Mumbai Zone-III and rejects the appeal filed by the department.

14. The Revision Application is disposed of in the above terms.

Shrawan 31/5/23

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

ORDER No. 468/2023-CUS (WZ/SZ)/ASRA/MUMBAI DATED 31. 05.2023.

To,

1. Shri Mohammadsaad Muhammadsuhel Nariyalwala, A-25, Gayatri Society, Near Siddique Square, Opposite Dhan Mora Circle, New Render Road, Surat-395009
2. Commissioner of Customs (Airport), CSMI Airport, Sahar, Andheri (East), Mumbai-400099.

Copy to:

3. Shri P.K. Shingarani, Advocate, 12/334, Vivek, New MIG Colony, Bandra (East), Mumbai-400051
4. Commissioner of Customs (Appeals), Mumbai-III, Awas Corporate Point, (5th Floor), Makwana Lane, Behind S.M. Centre, Andheri-Kurla Road, Marol, Mumbai-400059
5. Sr. P.S. to AS (RA), Mumbai.
6. Noticeboard.