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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. 371/354/B/2022-RA

4559

Date of Issue : 11.07.2023

ORDER No. 528/2023-CUS (WZ)/ASRA/MUMBAI DATED 07.07.2023.
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. Ativ Pareshkumar Mehta

Respondent : Pr. Commissioner of Customs, C.S.I Airport, Mumbai

Subject : Revision Application filed, under Section 129DD of the
Customs Act, 1962 against the Order-in-Appeal No.
MUM-CUSTOM-PAX-APP-141/2022-23 dated 05.05.2022
[Date of issue: 09.05.2022] [F.No.S/49-1464/2020]
passed by the Commissioner of Customs (Appeals),
Mumbai Zone-III.

ORDER

This revision application has been filed by the Mr Ativ Pareshkumar Mehta, (herein referred to as 'Applicant') against the Order-in-Appeal No. MUM-CUSTOM-PAX-APP-141/2022-23 dated 05.05.2022 [Date of issue: 09.05.2022] [F.No.S/49-1464/2020] passed by the Commissioner of Customs (Appeals), Mumbai Zone-III.

2. Brief facts of the case are on the basis of the information provided by CISF officials, the officers of AIU, Customs, Chatrapati Shivaji International (CSI) Airport, intercepted the Applicant after he had cleared emigration and was proceeding to board Cathay Pacific flight No CX 660 to Hongkong. The Applicant was asked how much foreign/Indian currency he was carrying on his person or in his baggage to which he replied that he was not carrying any foreign currency. Not being satisfied with the reply, personal search of the Applicant was done and his baggage was examined. The examination of the baggage resulted in the recovery of USD 99,550 which was concealed inside the bag amongst the cloth and other items in the bag. The foreign currency of USD 99,550 equivalent to Rs. 70,18,275/- was taken over and seized in the reasonable belief that the same was attempted to be smuggled out of India and hence liable for confiscation under the provisions of the Customs Act, 1962 read with Foreign Exchange Management Act, 1999 and the rules and regulations issued thereunder. The Applicant admitted the ownership, possession, concealment, carriage, non-declaration and recovery of the seized currency and initially stated that the foreign currency was exchange of Indian rupees which was received in India on account of sale of diamond in Hongkong. Subsequently, he claimed that he kept his small earnings as saving with his father, in India, regularly and which was being taken to Hongkong of business and investment purpose.

3. After due process of the law, the Original Adjudicating Authority (OAA) viz, Additional Commissioner of Customs, Chhatrapati Shivaji International

(C.S.I) Airport, Mumbai vide Order-In-Original No. ADC/VDJ/ADJN/106/2021-22 dated 05.07.2021 [Date of issue: 07.07.2021] issued through F.No. S/14-6-38/2019-20 Adjn [SD/INT/AIU/292/2019 AP 'B'] confiscated the foreign currency amounting to USD 99,550 equivalent to Rs. 70,18,275/- under Section 113 (d), (e) & (h) of the Customs Act, 1962 read with FEMA, 1999 and Foreign Exchange Management (Export and Import of Currency) Regulations 2015. However, the Applicant was given an option for redemption of the confiscated foreign currency on payment of redemption fine of Rs. 15,00,000/-. Personal penalty of Rs 5,00,000/- was imposed on the Applicant under Section 114(i) of the Customs Act, 1962.

4. Aggrieved by this order, the Department filed an appeal with the Appellate Authority viz, Commissioner of Customs (Appeals), Mumbai Zone-III, who vide Order-in-Appeal No. MUM-CUSTM-PAX-APP-141/2022-23 dated 05.05.2022 [Date of issue: 09.05.2022] [F. No. S/49-1464/2020] set aside the order of the Original Adjudicating Authority and ordered absolute confiscation of the foreign currency. The Appellate Authority refrained from deciding anything with respect to penalty.

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

5.01. That foreign currency attempted to be exported by them are not to be treated as 'prohibited goods' under the provisions of the Customs Act, 1962 or Foreign Exchange Management Regulations;

5.02. That Section 125 of the Customs Act, 1962 vests the power to grant redemption of confiscated goods and the adjudicating authority has the discretion to give an option of redemption fine in case of prohibited goods but for other goods, it is mandatory to give the option of redemption of goods on payment of fine. The Applicant has placed reliance on the following cases in support of his contention:

(i) CC (Prev) vs. Uma Shankar Verma

(ii) Gauri Enterprises vs. CC, Pune [2002(145) E.L.T 706(Tri-Bang)]

5.03. That Boards Circular No 9/2001-Customs dated 22.02.2001 states that redemption fine and personal penalties should be such that it not only wipes out the margin of profit but also acts as a strong deterrent against repeat offences;

5.04. That in the instant case the amount of redemption fine of Rs. 15 lakhs and penalty of Rs. 5 lakhs works out to 28.50% of the total value of the foreign currency and the decision of the OAA is justified because it entirely wiped out not only the margin of profit but also acted as a strong deterrent against repeat offences and as far as the department is concerned the decision of the learned OAA appears to meet the ends of justice;

5.05. That the appeal filed by the Additional Commissioner of Customs against the order of redemption issued by the OAA is an interference of the discretionary power for the OAA conferred on him under Section 125 of the Customs Act, 1962. Thus the prayer in the appeal for absolute confiscation under Section 113(d), (e) and (h) of the Act is bad in law and not sustainable; Reliance is placed on the following case law:

(i) IPCL vs General Secretary [Gujarat High Court decision dated 19.03.2008

5.06. That foreign currency is not prohibited goods but only 'restricted' goods. Import/export of foreign currency is not prohibited and therefore, it is the duty of on the part of the adjudicating authority, if he is of the view that it is liable for confiscation to permit its redemption on appropriate fine;

5.07. That may adjudicating/reviewing authorities commit an error while differentiating between restriction and prohibition in import; that restriction to import/export does not mean prohibition;

5.08. If any goods are restricted to import/export, the Government fixes some sort of barriers to import/export which an importer/exporter has to overcome such barrier which means certain procedures have to be completed to

import/export such restricted products. Reliance is placed on the following cases

- (i) Prem Kumar vs. Customs [2016(334) ELT 498(Del)]
- (ii) Neyveli Lignite Cor Ltd vs. UOI [2009 (242) E.L.T. 487 (Mad.)]
- (iii) R. Mohandas vs CC, Cochin [2016(336) ELT 399(Ker)]
- (iv) Dhanak M. Ramji vs. Union of India [2009 (237) E.L.T. 280 (Tri-Bom.)]
- (v) A Rajkumari vs. Commr. of Customs (Airport-Air cargo) Chennai [2015(321) E.L.T. 540].
- (vi) Shaik Mastani Bi vs Pr. CC Chennai [2017(345) ELT 201(Mad)]
- (vii) Bhargav Patel [Appeal No C/381/10-Mum] [2015-TIOL-1951-CESTAT-Mum] and cases relied upon in the order

5.09. That what follows from various judgement of the Honourable courts and various forums is that the option of redemption under Section 125 of the Customs Act, 1962 can be exercised to secure the ends of justice and analysis of the judgements on the issue of redemption of gold under Section 125 of the Customs Act, 1962 makes it clear that the discretion has to be exercised based on merits of the case and there cannot be any straight jacket formula to decide such cases;

5.10. That restrictions cannot be considered as prohibition more particularly under the Foreign Trade Policy, 2014-19. Under the EXIM policy, certain goods are placed under restricted categories for import and export and some of the goods are absolutely prohibited for import and export whereas some goods can be imported or exported against a licence. After extolling and analyzing the meanings, principles and differences between 'prohibition' and 'restriction', the Applicant has veered to the conclusion that foreign currency is not prohibited for import/export and therefore an option should be given to the importer/exporter for redemption of the goods, even if the importer/exporter fails to fulfil the conditions for export of currency;

5.11. That there should be consistency in favour of 'formal' justice i.e that two cases are the same (in relevant respects) should be treated in the same way and it would be inconsistent to treat them differently;

5.12. That concerns of consistency provide some justification for treating earlier decisions as sources of law rather than approaching each question anew when it arises again;

5.13. That if the earlier decision was wrong, then the persons subject to it may have been treated or less favourable than they should have been treated and if they were treated more favourable then clearly that should have been corrected;

5.14. That a lower court should honour findings of law made by the higher court that is within the appeals path of case the court hears and precedent is a legal principle or rule that is created by a court decision and is binding on or persuasive for a court or tribunal when deciding subsequent cases with similar issues or facts. This decision becomes an example, or authority for judges deciding similar issues later. '*Stare decisis*' is a legal doctrine that obligates courts to follow historical cases when making ruling on a similar current or future case. The rule of stare decisis is a judicial policy based on the principle that based on powerful countervailing considerations like cases should be decided alike in order to maintain stability and continuity in the law;

5.15. In terms of Section 125 of the Customs Act, re-export permission has been granted in many more cases by the Addl Commissioner. Commissioner of Customs (Appeals), GOI or CESTAT

- (i) Satuty Sharma –Order No 2107 dated 13.02.2002
- (ii) Jasvinder Singh- Order No MP (196) AIR/09
- (iii) Liaquat Ali Hameed vs CC, Chennai [2003(156) ELT 863(T)]
- (iv) Mohd Ramzan vs UOI [1995(75) ELT 207(GOI)]
- (v) Pradeep Kumar Bhanvarpal vs. UOI [2003(153) ELT 226]
- (vi) Dhanak M. Ramji vs. Union of India [2009 (237) E.L.T. 280 (Tri-Bom.)]
- (vii) A Rajkumari vs. Commr. of Customs (Airport-Air cargo) Chennai [2015(321) E.L.T. 540].
- (viii) Mohd Zia Ul Haque vs. Addl. Commissioner of Customs, Hyderabad [2014(214) E.L.T 849 (GOI)]

5.16. That orders must be speaking order giving clear findings of the adjudicating/appellate authority and he shall discuss each point raised by the defence and shall give cogent reasoning in case of rebuttal of such points but in the present case, the learned Appellate Authority conveniently avoided to discuss and counter each point raised by the Applicant and passed the order

against the Applicant without going into the merits of all the defense submission;

5.17. That the adjudicating/appellate authority is under obligation to take on record the submissions made by the Applicants as also the evidence produced by him and then come to a conclusion after examination in entirety along with evidence on record but in the instant case no answer is found to the Applicants defense in the Appellate proceedings;

5.18. That while exercising the judicial power, the Adjudicating /appellate Authority is bound to follow the 'principles of natural justice' which are based on justice, equity, common sense, fair play and rule of law and the authority should act without bias and should be impartial;

5.19. That had the Appellate Authority gone through each and every defense submission made by the Applicant he would have understood the infirmities in the prosecution case and would have desisted from passing such order which clearly establishes that there was no application of mind;

The Applicant has relied on the following case laws in support of his contention:

- (i) Judgement of the Supreme Court in the case of State of Punjab vs. K.R. Erry
- (ii) Liberty Oil Mills vs. UOI
- (iii) C. L. Tripathi vs. State Bank of India
- (iv) A.R. Kraipak vs. Union of India
- (v) Judgement of the Orissa High Court in the case of Chintomani Padha vs. Paika Samal
- (vi) Decision of CESTAT in the case of Sahara India TV Network vs, CCE, Noida
- (vii) JC, Income Tax, Surat vs. Saheli Leasing and Ind Ltd [2010(253) ELT 705(SC)]
- (viii) CESTAT order in the case of Vikas Enterprises vs. CCE Allahabad
- (ix) K.Sharp Carbon India vs. CCEx, Kanpur
- (x) UOI vs. Sri Kumar Agencies
- (xi) International Woollen Mills Ltd vs, Standard Wool (UK) Ltd
- (xii) Kranti Associates Pvt Ltd. Masood Ahmed Khan [2011(273) ELT 345(SC)]
- (xiii) Mahabir Prasad Santosh Kumar vs, State of UP [AIR 1970 SC 1302]
- (xiv) Travancore Rayons Ltd vs. UOI [AIR 1971 SC 862]
- (xv) Woolcombers of India vs, Woolcombers Workers Union and anr [AIR 1973 SC 2758]
- (xvi) Siemens Engineering and Mfg Co India Ltd vs UOI [AIR 1976 SC 1785]
- (xvii) Testeels Ltd vs. Desai N.M

- (xviii) SSE Hari Nagar Sugar Mills Ltd vs. Shyamsundar Jhunjhunwala [AIR 1961 SC 1669]
(xix) Bhagat Raja case [AIR 1957 SC 1606]

5.20. That all the abovesaid cases are applicable to the present case and a judicial or quasi judicial authority giving its decision must give reasons in support of the decision and the only qualification to this rule is where an adjudication is provided against the decision of the quasi judicial authority;

5.21. That discretionary powers of the quasi judicial authority cannot be lightly interfered. That if the order of the OAA is within the parameters prescribed under the law, if the penalty imposed is not less than the minimum prescribed, when an element of discretion is vested in the authority to impose penalty between the minimum and the maximum and if the authority has exercised its discretion and imposed penalty at a particular time, the revisional authority in his revisional jurisdiction cannot enhance the penalty

The Applicant has relied on the following case laws in support of their contention:

- (i) Sahdeo vs. Satya Ranjan Ghosh
- (ii) Durga Das vs. Nalin Chandra Nandan
- (iii) Corporation of Calcutta vs. Mulchand Agarwal
- (iv) State of Karnataka vs. Puttaraja
- (v) Om Kumar vs. UOI [2001(2) SCC 386]
- (vi) Order of Delhi High Court in the case of Anand Bhushan vs. R.A. Haritash
- (vii) Decision of the Punjab and Haryana High Court in the case of C. CEx vs. Vee Gee Faucets Pvt Ltd
- (viii) CEGAT, Tamil Nadu in the case of CEx vs. Narayana Industries
- (ix) CCE, Bangalore vs. S.B. Gopalkrishna [2004(164) ELT 158 (Tri-Bang)]
- (x) V. Shanmughavel vs. CCE, Chennai [2001(131) ELT 14]
- (xi) CEGAT Bangalore order in the case of CCE vs. First Flight Couriers Ltd
- (xii) Punjab and Haryana High Court order in CCE vs, KC Alloys and Steel Castings

5.22. That discretion, in general is the discernment of what is right and proper and denotes knowledge and prudence, that discernment which enables a person to judge critically of what is correct and proper united with caution; nice discernement and judgement directed by circumspection; deliberate

judgement; soundness of judgement; a science or understanding to discern between falsity and truth, between wrong and right, between shadow and substance, between equity and colourable glasses and pretences and not according to the will and private affections of persons. The Applicant has mentioned the gist of the following case laws:

- (i) S.G Jaisinghani vs. UOI
- (ii) CIC vs. Department of Posts
- (iii) Carpenter Classic Exim Pvt Ltd vs. CC (Imp) [(2009) 11 SCC 293]
- (iv) Superintendent and Remembrancer of legal affairs to Govt of Bengal vs, V. Abani Maity [(1979) 4 SS 85]

5.23. That the decisions of the Tribunals, High Courts and Government of India relied upon by the Adjudicating Authority were rejected by the Appellate Authority without proper application of mind and factual situation of the case of the Applicant fits with the decisions on which reliance was placed by the Adjudicating Authority and the Appellate Authority failed to read the decisions as whole in the context of the cases and therefore the impugned appeal is not maintainable;

5.24 That the common law is different from codified law as it follows the judgement while the codified law precedes it and therefore it can be said that it is a system of rules and declarations of principles from where the judicial ideas and legal definitions are derived. Judges turn to case law to fill in gaps left by the other forms of law and rely on case law when the correct interpretation of a law is not clear. The Applicant has quoted from the following case laws

- (i) Shankar Raju Vs. UOI
- (ii) E.I. Dupont India Pvt Ltd vs. UOI [2014(5) TMI 128]
- (iii) Claris Life Sciences vs UOI [2014(1) TMI 1467]
- (iv) Waman Rao vs. UOI [1981) 2 SCC 362]
- (v) Manganese Ore (India) Lte vs. Regional Asst CST [(1979) 4 SCC 124)]
- (vi) UOI vs. Raghbir Singh [(1989) 2 SCC 754)]
- (vii) Krishna Kumar vs. UOI [(1990) 4 SCC 207)]
- (viii) UOI vs Paras Laminates (P) Ltd [(1990) 4 SCC 453)]
- (ix) Hari Singh vs. State of Haryana
- (x) Commr. of Customs vs. Rajinder Nirula [2017(346)ELT 9(Bom)]

- (xi) Omprakash Jhunjhunwala vs. Commissioner [2017 (353) ELT A.95 (Tri-Mum)]
- (xii) RE: Mohammed Ashfaq Mohammad Kasim vs. Commr of Customs –Order No 139/20121-Cus (SZ) ASRA/Mumai dated 28.06.2021
- (xiii) RE: Mohd. Arif [2018(361) ELT 959 (GOI)]

5.25. That in the present case there has been a total lack of application of mind on the part of the review authority and it should be appropriate for the review authority to have examined the said judgements, facts of the case, legal issues involved in the cases, arguments raised and cases cited by the parties, legal reasoning that is relevant to resolve the issues, judicial opinions given by the Courts, ruling of the court on questions of law, the result of the case, the courts order and which party was successful and the applicability of ratio of the said judgements in the case being dealt with

- (i) SC judgement in Bombay Dyeing and Manufacturing Company Ltd. vs. Bombay Environmental Action Group
- (ii) Islamic Academy of Education vs. State of Karnataka
- (iii) Supreme court judgement in the case of CIT vs. Sun Engineering Works (Pvt) Ltd

5.26. That foreign currency is not declared as 'prohibited goods' under the provisions of either the Customs Act, 1962 or Foreign Exchange Management Regulations and Regulation 5 of the Foreign Exchange Management (Export and Import of Currency) Regulations, 2015, RBI may by regulations prohibit, restrict or regulate the export, import or holding of currency notes and thus foreign currency is not prohibited and its import or export is subject to law and rules and regulations issued by a competent authority;

5.27. That in a catena of decisions wherein the Tribunals and the GOI in its orders in revision have directed that confiscated currencies have to be allowed to be redeemed on payment of appropriate fines by the persons from whom they were seized or confiscated

Further the Applicant has placed reliance on the following cases:

- (i) Prem Kumar vs. Customs [2016(334) ELT 498(Del)]
- (ii) T. Soundarajan vs. CC, Chennai [2008(221) E.L.T. 258(Tri.-Chennai)]
- (iii) UOI vs. Harish Muljimal Gandhi
- (iv) Mohammed Liakat Ali vs Commr. of Customs (Prev) Kolkata [2008(22) ELT (Tri-Kolkata)]
- (v) Kishin Shewaram Loungani vs. Commissioner of Customs, ACC, Mumbai

- (vi) Mohd. Ayaz vs UOI
- (vii) Rajinder Nirula and Tilak Raj vs. Commr of Customs -CESTAT order dated 25.04.2006
- (viii) Commr. of Customs vs. Harshvadan Bhagvanji Varia- CESTAT order dated 05.10.2001
- (ix) Raju Sharma vs. UOI [(2020(372) ELT 249(Del)]
- (x) Rajesh Kumar Ishawar Parikh vs. CC, Ahmedabad
- (xi) RE: Mukesh Chellani [2012(276) ELT 129(GOI)]
- (xii) Ramesh Mehta vs. Sanwal Chand Singhvi [(2004) 5 SCC 409]

Under the above circumstances of the case, the Applicant prayed to the Revision Authority to set aside the Order-in-Appeal and the Order-in-Original of the Additional Commissioner of Customs may be ordered to be implemented and the foreign currency may be ordered to be released to the Applicant on payment of the redemption fine and penalty imposed vide the Order-in-Original.

6. Personal hearing in the case was scheduled for 18.05.2023. Shri Prakash Shingrani, Advocate for the Applicant appeared for the hearing and submitted that the Applicant was carrying foreign currency which is not prohibited goods and the currency was not ingeniously concealed. He further submitted that considering all aspects, original authority allowed option to redeem the goods on redemption fine and penalty. He requested to restore the OIO as the same was legal and reasonable.

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. The Applicant, when asked whether they were carrying foreign currency on his person or in his baggage, had replied in the negative. It is subsequent to the examination of his baggage that the foreign currency which were kept inside the bag amongst the cloth and other items in the bag and was recovered therefrom. Further, in his statement the Applicant admitted the ownership, possession, carriage, non-declaration and recovery of the

foreign currency. The Applicant after initially stating that the currency was the converted proceeds of sale of diamond in India, subsequently stated that the seized currency was his savings from his job which he used to keep with his father in India and was carrying the same to Hongkong for business and investment purpose. The fact remains that the Applicant had not disclosed the impugned foreign currency and the source of the foreign currency had remained unaccounted. The Applicant could not provide any evidence that the seized foreign currency was obtained from legitimate / authorized sources. Also, 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, 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 was carrying foreign currency in excess of the permitted limit and no declaration as required under section 77 of the Customs Act, 1962 was filed by the Applicant.

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.

9. Further, the maximum amount of foreign currency which can be taken out of the country by any person per year for different purposes i.e. Private Visits/Business trip under the Liberalized Remittance Scheme which 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), allowed 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. The Applicant was carrying foreign currency which was below this limit, however the same was unaccounted and was not declared by him.

10. In the Revision Application, the Applicant has requested for release of the foreign currency, relying on a number of cases wherein the redemption of currency being taken abroad is justified. In this regard, the Government finds that the lower adjudicating authority has passed a cogent and judicious Order wherein every contention raised by the Applicant in the revision application have been dealt with by the Original Adjudicating Authority in great detail at the first stage itself. After examining the case of the Applicant has been thoroughly examined against the relevant provisions of the Customs Act, 1962, Foreign Trade (Development and Regulation) Act, 1992, Foreign Exchange Management (Export and Import of Currency) Regulations, 2015, Liberalised Remittance Scheme of RBI, etc, it has been held by the lower adjudicating authority that the though the currency was liable to confiscation, the option for redemption could be granted as it was a fit case for redemption. In doing so, the original adjudicating authority has applied the ratio of the judgement of the Bombay High Court in the cases of Commissioner of Customs vs. Rajinder Narula [2017(346) ELT 9 (Bom)], Omprakash Jhunjhunwala vs. Commissioner of Customs (CSI Airport) [2017(353) ELT A95 (Tri-Mum)] and orders of the Revisionary Authority in the case of Mohammed Ashfaq Mohammas Kasim vs. Commissioner of Customs, Mumbai and Mohd. Arif vs. Commissioner of Customs [2018(361) ELT 959(GOI)].

The Original Adjudicating Authority, at Para 17, 18 and 19 of the impugned OIO has held as under:

“17. Once the goods are held to be liable for confiscation, the next question before me is whether to allow the release of the impugned goods on Redemption Fine. I find that sub-section (1) of Section 125 of the Customs Act, 1962 stipulates that:

"Wherever confiscation of any goods is authorised by the Act, the officer adjudging it may, in the case of any goods, the importation or exportation whereof prohibited under the 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;"

18. It is, amply clear from the said Section that, where the confiscated goods are not prohibited for import or export, the adjudicating authority is under obligation to release the same. However, in those cases where the confiscated goods are prohibited for import or export, discretion has been vested in the adjudicating authority to decide the issue on the basis of the facts and circumstances involved. Therefore, I proceed to decide the issue of redemption /re-export or absolute confiscation of the seized foreign currency.

19. I find, from punchnama dated 20.09.2019 that search of the baggage of the passenger resulted in recovery of USD 99,550/- equivalent to Rs 70,18,275/- (Rupees Seventy Lakh Eighteen Thousand Two Hundred Seventy Five Only) which was kept inside the bag amongst the cloth and other items in the bag. Keeping the currency in bag cannot be considered as an ingenious concealment. Further I find that from statement of passenger recorded under section 108 of the Customs Act 1962 wherein he stated that his annual income is around HKD 3,60,000/-. He had filed Tax Return for a gross Income of HKD 4,96,400/- for the Assessment Year 2017-18 and HKD 3,60,000/- for the Assessment Year 2018-19; I find that the passenger has submitted all documentary evidence in this regard to the investigation. The passenger further stated that the said seized foreign currency amounting USD 99,550/- was his savings from his job and business earnings in Hongkong for the last 10 years; that he was keeping his savings in USD with his father residing at 102, Arihant Apartments, Near KG Hospital, Navsari, Gujarat - 396445 for the last several years. He used to come to India frequently for his job and business activities and kept his small earnings as savings with his father regularly which amounted to USD 99,550/-. He was carrying the said USD 99,550/- to Hongkong for business and investment purpose. I find that investigation concluded that passenger failed to submit any exchange receipt from the authorized dealer for the same but investigation has failed to refute the ownership of the seized currency by the passenger. Looking at the financial status of the passenger, the claim of ownership by the passenger of the seized foreign currency stands established though he has not produced the proof of licit acquisition of seized foreign currency. In view of above factual matrix as well as a fact that this is not a case of an ingenious concealment, I am of the considered opinion that under section 125 of the Customs Act 1962, the option for redemption can be granted. I therefore, find this case fit for redemption. I hold it accordingly

*under the powers vested with me under Section 125(1) of the Customs Act, 1962.
.....”*

11. Also, 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. The Government finds that the Applicant has claimed ownership of the foreign currency after explaining the source and purpose of taking it out of the country by keeping the currency in his baggage among the clothes and other items in the bag. This case is at best a case of mis-declaration rather than smuggling. Government finds that the order of absolute confiscation of the impugned currency by the Appellate Authority is excessive and unjustified and is therefore liable to be modified and the foreign currency is liable to be allowed redemption on suitable redemption fine.

14. The Government finds that the personal penalty of Rs. 5,00,000/- imposed on the Applicant under Section 114 (i) & (ii) of the Customs Act, 1962 is commensurate with the omissions and commissions committed.

15. In view of the above, the Government sets aside the impugned order of the Appellate authority in respect of the absolute confiscation of the foreign currency and restores the Order of the Original Adjudicating Authority. The

impugned foreign currency of USD 99,550, equivalent to Rs. 70,18,275/- is allowed to be redeemed on payment of redemption fine of Rs. 15,00,000/- (Rupees Fifteen Lakhs Only). The penalty of Rs. 5,00,000/- imposed under section 114 (i) of the Customs Act, 1962 by the Original Adjudicating Authority and upheld by the Appellate Authority is sustained.

17. The Revision Application is disposed of on the above terms.

Shrawan
7/7/23
(SHRAWAN KUMAR)

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

ORDER No. 528/2023-CUS (WZ)/ASRA/MUMBAI DATED 07.07.2023.

To,

1. Shri Ativ Pareshkumar Mehta, 102, Arihant Apartments, Near K.G.Hospital, Navsari, Gujarat 396 445.
2. Pr. Commissioner of Customs, Chhatrapati Shivaji International Airport, Terminal 2, Level-II, Sahar, Andheri (East), Mumbai 400 099.

Copy to:

1. The Commissioner of Customs (Appeals), Mumbai-III, Awas Corporate Point, 5th Floor, Makwana Lane, Behind S.M.Centre, Andheri-Kurla Road, Marol, Mumbai - 400 059.
2. Shri Prakash Shingrani, (Advocate), 12/334, Vivek, New MIG Colony, Bandra (East), Mumbai 400 051
3. Sr. P.S. to AS (RA), Mumbai.
4. File Copy.
5. Noticeboard.

