

SPEED POST



F. No. 380/34/B/2017-R.A.
GOVERNMENT OF INDIA
MINISTRY OF FINANCE
(DEPARTMENT OF REVENUE)

14, HUDCO VISHALA BLDG., B WING
6th FLOOR, BHIKAJI CAMA PLACE,
NEW DELHI-110 066

Date of Issue.. 31/12/19

ORDER NO. 53/19-Cus dated 02-12-2019 OF THE GOVERNMENT OF INDIA, PASSED BY SMT. MALLIKA ARYA, ADDITIONAL SECRETARY TO THE GOVERNMENT OF INDIA, UNDER SECTION 129DD OF THE CUSTOMS ACT, 1962.

SUBJECT : Revision Application filed under section 129DD of the Customs Act, 1962 against the Order-in-Appeal No. CC(A)/CUS/Air/2437-2438/2015 dated 28.12.2015, passed by the Commissioner of Customs (Appeals), New Customs House, Near IGI Airport, Delhi-110037.

APPLICANT : Commissioner of Customs, IGI Airport, Delhi.

RESPONDENT . : Mr. Virender Verma & Tushar Kumar.

ORDER

A Revision Application No. F. No. 380/34/B/2017-R.A. dated 03.08.2017 has been filed by the Commissioner of Customs, IGI Airport, T-3, Delhi (hereinafter referred to as the applicant) against order-in-appeal No. CC(A)/CUS/Air/2437-2438/2015 dated 28.12.2015, passed by the Commissioner of Customs (Appeals), New Customs House, Near IGI Airport, Delhi-110037. The order-in-appeal has modified the Additional Commissioner's Order-in-Original No. 81/2015 dated 03.03.2015 wherein the redemption fine on confiscated foreign currency amounting to US\$ 130500 (equivalent to INR 77,58,225/-) was reduced from Rs 9 lacs to Rs. 5 lacs, and Penalty of Rs. 7 lacs on Sh. Virender Verma has been waived. However, Penalty of Rs. 1.5 lacs on Sh. Tushar Kumar was upheld.

2. The Revision application has been filed on the ground that the order of the Commissioner (Appeals) is erroneous. The Appellate Authority failed to appreciate the quantum of the redemption fine imposed by the Adjudicating Authority on the huge amount of the seized foreign currency, which are prohibited goods. The appellate authority has reduced the redemption fine to Rs. 5 lacs arbitrarily without giving any cogent reason to substantiate the relief. The Order-in-Appeal has also set aside the penalty imposed on Sh. Virender Verma. The revision application in Para No. 11.8 states as follows "*the very fact of non-compliance of the conditions of export renders such goods liable for confiscation and for absolute confiscation in the facts and circumstances of the case.*"

3. Personal hearing in the matter was fixed on 18.09.2019 which was not attended by the applicant. Ms Nidhi Tomar, Proxy Counsel appeared for the respondent and requested for copy of the Revision Application. Accordingly, the next date of hearing was fixed on 10.10.2019. Sh. Ritaj Kacker, Advocate attended the hearing on behalf of the respondent. He was asked to produce a copy of show cause notice issued to applicant alongwith the relied upon documents. No one appeared from the applicant's side also,

and no communication for adjournment has been received from them. Hence the case is being decided on the basis of evidence on record.

4. The case file C. No. VIII (AP) 10/ P&I/ 835-C/ Dep/ 2014 was sought from the applicant on 06.11.2019. From the perusal of the file it has been observed that a Complaint for offences punishable under Sections 132 & 135 (1) (a) & 135 (1) (b) of the Customs Act, 1962 has been filed by the applicant against the respondents Sh. Tushar Kumar and Virender Verma on 25.03.2017. Sh. Tushar Kumar in his statement dated 03.07.2014 recorded under Section 108 has stated the currency did not belong to him and the same was handed over to him by the mother of one person, namely, Sh. Virender Verma of Delhi, alleged to be the owner of currency. The currency was concealed inside the inner linings of his check in baggage so as to avoid detection by the Customs. He did not have any documents or evidence for lawful possession of the impugned currency. He further stated that Virender Verma was introduced to him by his cousin, Sh. Ayush Malik and had promised him Rs. 20,000/- for carrying the currency. Sh. Tushar Kumar was arrested on 03.07.2004 and was released on Bail Bond with surety tendered by Smt Naina Malik W/o Sh. Ayush Malik. Sh. Virender Verma stated that Sh. Ayush Malik was his friend and Sh. Tushar Kumar is cousin of Sh. Ayush Malik.

5. Sh. Virender Verma in his statement under Section 108 of Customs Act, 1962 dated 16.12.2014 has stated that he was engaged in the business of trading of electronic and clothing goods in Hong Kong and was getting commissions for the same in US \$. He also submitted commission invoices raised in his favour by M/s Fast International Trading, Hong Kong, from 02.04.2014 to 01.07.2014 and the seized currency were his savings from his business. He also submitted the copies of bank accounts in JP Morgan Chase which the evidencing withdrawal of US\$ 14008 and US\$ 11500. He had asked his friend Sh. Ayush Malik to get the impugned currency delivered to him in Hong Kong, through his cousin Sh. Tushar Kumar.

6. Section 2 (22) of Customs Act, 1962 defines Goods as:

"goods" includes -

- (a) vessels, aircrafts and vehicles;
- (b) stores;
- (c) baggage;
- (d) currency and negotiable instruments; and**
- (e) any other kind of movable property.

Rule 7 of the Baggage Rules, 2016 stipulates as under:

“Currency. - The import and export of currency under these rules shall be governed in accordance with the provisions of the Foreign Exchange Management (Export and Import of Currency) Regulations, 2015, and the notifications issued thereunder.”

Section 11 (2) (c) read with 11 (2) (e) of Customs Act, 1962 prohibits import or export of goods for the purpose of prevention of smuggling or for conservation of foreign exchange and safeguarding balance of payments.

From the evidence on record it is evident that a huge amount of foreign currency was recovered from the respondent, i.e., Tushar Kumar, on 03.07.2014 which was wrapped in black carbon paper concealed **in inner lining of bag on the side walls**. It is also not disputed by him that he did not declare the impugned currency to Customs officers at the airport and he did not have any documents or evidence showing lawful possession of the impugned currency. The currency so concealed by him was deliberately not declared to the proper officer of the Customs under Section 77 of the Customs Act, 1962.

7. Regulation 5 of the Foreign Exchange Management (Export and Import of Currency) Regulations, 2000, states that *no foreign currency can be send out of India or brought into the country without the permission of the Reserve Bank of India*. As per Regulation 3 (1) and Regulation 5 of Foreign Exchange Management (export and Import of Currency) Regulations, 2000, read with Foreign Exchange Management (possession and Retention of Foreign Currency) Regulations, 2000, at the material time reads as follows:-

“any person may take out of India foreign currency notes, bank notes and foreign currency travellers cheques not exceeding US\$2000 or its equivalent in aggregate.”

The legal provisions of FEMA, 1999, the Foreign Exchange Management (Export and Import of Currency) Regulations, 2000, Section 2(33) of the Customs Act, 1962 read with Section 11 clearly stipulate that an attempt to smuggle foreign currency out of India which has not been procured from authorized sources is 'prohibited'. Therefore the impugned foreign currency seized from the respondent Sh. Tushar Kumar concealed and attempted to be illegally exported in violation of the provisions of FEMA, 1999, read with Foreign Exchange Management (Export and Import of Currency) Regulations, 2000 and Section 11 of Customs Act, 1962 will fall in the category of 'prohibited goods' and is liable for absolute confiscation under Section 113 (d) (e) (h) (i) of Customs Act, 1962.

Hon'ble Madras High Court in the case of Commissioner of Customs (AIR) Chennai-I vs. Samynathan Murugesan [2009 (247) E.L.T. 21 (Mad.)] relying on the definition of 'prohibited goods' given by the Apex Court in case of Omprakash Bhatia Vs. Commissioner of Customs, Delhi [2003(155) ELT 423 (SC)] has held as under:-

"In view of meaning of the word "prohibition" as construed laid down by the Supreme Court in Om Prakash Bhatia case we have to hold that the imported gold was 'prohibited goods' since the respondent is not an eligible passenger who did not satisfy the conditions".

The Apex Court has upheld the order of Madras High Court and dismissed the special leave to Appeal (Civil) no. 22072 of 2009 filed by Samynathan Murugesan. The Honourable Apex Court has observed as follows:

"Applying the ratio of the judgment in the case of Om Prakash Bhatia Vs. Commissioner of Customs, Delhi reported in 2003 (155) ELT 423 (S.C.)=2003 (6) S.C.C. 161, to the facts of the case, we find that, in the present case, the assessee did not fulfil the basic eligibility criteria, which makes the imported item a prohibited goods; hence, we see no reason to interfere with the impugned order. The special leave petition is, accordingly, dismissed."

8. The case file no. VIII (AP) 10/ P&I/ 835C/ Dep/ 2014 was called from Commissioner of Customs, IGI Airport, New Delhi. The statements recorded under Section 108 of Customs Act, 1962 and other documentary evidence available in the file have been perused.

9. It is observed that Tushar Kumar in his statement tendered under section 108 of the Customs Act, 1962 has contended that he was carrying the impugned forex on behalf of Virender Verma for a consideration. He further contended that he had on an earlier occasion travelled alongwith Virender Verma to HongKong and carried forex amounting to \$20000 for a consideration of Rs. 15,000/-.

Therefore it is apparent that Tushar Kumar could not have acquired such a huge amount of forex on his own and was working on behalf of someone else. It is also observed that the redemption fine amounting to Rs. Nine lacs (9 lacs) imposed on the notice, namely, Sh. Tushar Kumar by the adjudicating authority has been paid by Virender Verma. This further reflects the financial condition of Tushar Kumar. Hence he is a mere carrier of impugned foreign currency.

10. Apart from the statement of Sh. Virender Verma recorded under Section 108 of Customs Act, 1962, that the impugned forex is the proceeds of his legal business in Hongkong, there is no corroboratory evidence on record to verify the veracity of his claim.

Apex Court in the case of Naresh J. Sukhawani vs. UOI [1996 (83) E.L.T. 258 (S.C.)] has held as follows:

"It is contended that the statement of co-accused could be used only to corroborate other evidence as one of the circumstances under Section 30 of the Evidence Act. But it cannot be used as substantive evidence without corroboration from other independent evidence."

Since the statement of Virender Verma does not get corroborated from the evidence on record, the finding of the adjudicating authority that Virender Verma is the owner of forex remains unsubstantiated.

11. As mentioned earlier Tushar Kumar was arrested by the Customs Authorities and was released on bail on 03.07.2004. It is pertinent to note that bail bond dated 03.07.2014 of Tushar Kumar was furnished by Smt. Naina Malik who is a relative of Virender Kumar. This shows a nexus between Tushar Kumar and Virender Verma.

Government is of the view tht Sh. Virender Verma and Tushar Kumar are part of a Hawala racket and have attempted to illegally smuggle a huge quantity of forex out of the country which was concealed in the inner lining of the bag.

12. Hence it is observed that the lower authorities have failed to appreciate the facts of the case in the correct perspective and ordered the release of the impugned currency on payment of redemption fine to the noticee which should have been confiscated under Section 113 of Customs Act, 1962 without giving an option of redemption.

Reliance is placed on Madras High Court in the case of Commissioner of Customs (AIR) Chennai-I vs. Samynathan Murugesan [2009 (247) E.L.T. (Mad.)], wherein the Honourable High Court has considered that concealment as a relevant factor meriting absolute confiscation. The Honourable High Court has held as under: *"In the present case too, the concealment had weighed with the Commissioner to order absolute confiscation. He was right, the Tribunal erred."*

In a similar case Hon'ble High Court of Delhi in writ petition filed against G.O.I. Order No. 391-392/ 12- Cus dated 09.10.2012 [2015 (320) E.L.T. 368 (Del.)], while dismissing the writ petition of the petitioner have made the following observation:

"Para 8....The investigation conducted by customs and statement of passenger Shri Ram Kumar categorically reveal that said currencies did not belong to Shri Ram Kumar and he acted as carrier on behalf of somebody else....Hon'ble Supreme Court has held in the case of Surjeet Singh Chabra v. UOI - 1997 (84) E.L.T. (646) S.C. has observed that statement made

before Customs Officer though retracted within 6 days, is an admission and binding since Customs Officers are not police officers. As such, the statement tendered before Customs is a valid evidence under law...

Para 10....In view of the aforesaid position and the above discussion, we do not think that the applicant is entitled to benefit of Section 125 of the Act.....

11.In view of the above, we do not find any merit in the present application and the same is dismissed."

The High Court of Bombay in the case of Union of India Vs. Aijaj Ahmad – 2009(244)ELT 49 (Bom), while deliberating on option to be given to whom to redeem the goods has held in para 3 of the judgment has held as follows:-

"3. In the instant case, according to the respondent himself the owner was Karimuddin as he had acted on behalf of Karimuddin. The question of the Tribunal exercising the jurisdiction u/s 125 of the Customs Act and remit the matter to give an option to the respondent herein to redeem the goods was clearly without jurisdiction."

In light of above judicial pronouncements Government holds that impugned forex is liable for absolute confiscation under Section 111 of Customs Act, 1962.

13. Sh. Virender Verma in his statement tendered under Section 108 of Customs Act, 1962 before the customs officers has stated that the impugned goods belonged to him and were kept in cash in India and he had requested for delivery of the same in Hongkong.

The Supreme Court of India in the case of Surjeet Singh Chhabra Vs. U.O.I.[1997 (89) E.L.T. 646 (S.C.)] has held as follows:-

"Evidence - Confession statement made before Customs officer though retracted within six days is an admission and binding since Customs Officers are not Police Officers - Section 108 of the Customs Act and FERA."

Commissioner (Appeals) in the impugned order-in-appeal has observed as follows:-

"In the absence of any evidence, direct or implied, that the rightful owner of the currency had any role to play in non-declaration of the foreign currency by Sh. Tushar Kumar, any penalty on Shri Virender Verma will amount to arbitrariness, difficult to justify."

This observation of Commissioner (Appeals) is fallacious and is completely devoid of merit.

The role of Virender Verma cannot be undermined in this Hawala racket. Government observes that Virender Verma has abetted smuggling of impugned forex and is liable for penalty under section 114 of Customs Act, 1962.

14. The adjudicating authority has imposed a penalty of Rs. 1.5 lacs on Tushar Kumar. Hon'ble Delhi High Court in the case of Ram Kumar Vs. Commissioner of Customs [2015 (320) E.L.T. 368 (Del.)] has held as follows:-

"The aforesaid stand, we had observed, confirms and reinforces the finding that the applicant was merely a carrier. The currency belonged to a third person. The reference to the third person obviously was to Vinod Kumar Saini. It is quite apparent that the paltry fine of Rs. 2 lakhs imposed on the applicant was in view of the fact that he was not the owner."

In this case also a lesser amount of penalty has been imposed on Tushar Kumar by the adjudicating authority since he is the carrier of the impugned currency. Government holds that keeping in view gravity of the offence and the fact that the respondent is a habitual offender, a higher quantum of penalty merits to be imposed on Tushar Kumar.

15. In view of the above discussions, Government modifies the orders passed by the lower authorities as follows:

i) Impugned currency is confiscated under Section 113 (d) (e) (h) (i) of the Customs Act, 1962.

(ii) The option of redemption under Section 125 of the Customs Act, 1962 is denied.

(iii) A penalty of Rs. 5 lacs (Rupees Five Lacs) is imposed on Tushar Kumar under under Section 114 (i) of the Customs Act, 1962 read with Regulation 13 of Foreign Exchange Management (Export and Import of Currency) Regulation, 2000.

(iii) Penalty of Rs. 7 lacs (Rupees Seven lacs) imposed on Virender Verma by the adjudicating authority under Section 114 (i) of the Customs Act, 1962 read with Regulation 13 of Foreign Exchange Management (Export and Import of Currency) Regulation, 2000 is upheld.

Application filed by the applicant is allowed to this extent.

Mallika Arya
(MALLIKA ARYA)

ADDITIONAL SECRETARY TO THE GOVERNMENT OF INDIA

1. The Commissioner of Customs, IGI Airport, T-3, Delhi-110037
2. Sh. Virender Verma, MIG-9, DDA Flats, shiv Mandir Road, Madipur, Delhi-110063.
3. Sh. Tushar Kumar, BH-54, Phase-I, Pallav Puram, Meerut.

ORDER NO. 53/19-Cus **dated** 02-12-2019

Copy to:-

1. The Commissioner (Appeals), New Customs House, Near IGI Airport, Delhi-110037.
2. P.S. to A.S.
3. Guard File.
4. Spare Copy.

ATTESTED

N. Devi
02/12/19

(NIRMALA DEVI)

SECTION OFFICER (RA)