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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. 371/032/B/2019-RA / 5033
F.No. 371/32A/B/2019-RA

Date of Issue : 03.08.22

ORDER NO. ^{SH2} ~~SH3~~ /2023-CUS (WZ)/ASRA/MUMBAI DATED 27.07.2023
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.

(i). F.No. 371/032/B/2019-RA

Applicant No. 1 : Shri. Sahubar Sathik Mohamed Kareem

(ii). F.No. 371/32A/B/2019-RA

Applicant No. 2 : Shri. Ajmeer Khaja Katubawa

Respondent : The Commissioner of Customs, Airport, Mumbai

Subject : Revision Applications filed respectively, under Section 129DD
of the Customs Act, 1962 against Orders-in-Appeal No. MUM-
CUSTM-PAX-APP-1162 & 1163 /A-18-19 dated 28-02-2019
[F.No.S/49-244 & 245/2017] passed by the Commissioner of
Customs (Appeals), Mumbai Zone-III

ORDER

These two revision applications have been filed by (i). Shri. Sahubar Sathik Mohamed Kareem & (ii). Shri. Ajmeer Khaja Katu Bawa (hereinafter referred to as the Applicants or alternately, as Applicant No. 1 and Applicant No. 2 resp.) against the Orders-In-Appeal No. MUM-CUSTOM-PAX-APP-1162 & 1163 /A-18-19 dated 28-02-2019 [F.No.S/49- 244 & 245/2017] passed by the Commissioner of Customs (Appeals), Mumbai Zone-III. Since matter in both applications is identical, these are decided together in this common order.

2. Brief facts of both revision applications are that on 09-12-2015, the officers at CSI Airport, Mumbai intercepted the Applicant-1 holding Indian passport No. Z 3248739, when he was departing to Singapore by Jet Airways Flight No. 9W 010 dated 9-12-2015 and Applicant-2 holding Indian Passport No. Z 2881959 when he was departing to Singapore by Singapore Airlines Flight No. SQ421 dated 9-12-2015. Detailed search of the luggage of the Applicants, resulted in recovery of US \$ 1,00,000/- currency notes from each of the applicant which was kept in the wall of the carton containing vermicelli. The Officers seized the said foreign currency under the reasonable belief that the same was attempted to be smuggled out of India and was liable for confiscation under the Customs Act, 1962 read with Chapter 3.11 of FEMA, 2000 para 5&6 and Foreign Exchange Management (Export & Import Currency) Regulation, 2000. Subsequently Show cause Notice was issued to the Applicants.

3. The Original Adjudicating Authority (OAA) viz, i.e. Additional Commissioner of Customs, CSI Airport, Mumbai vide Order-In-Original No. No. ADC/RR/ADJN/10-2017-18 dated 12-04-2017 ordered the absolute confiscation of the seized currencies, under Section 113(d) & (e) of the Customs

Act, 1962 read with Sections 2(22), 2(33). Also, penalties of Rs. 7,00,000/- were imposed on Applicant No. 1 & 2 each, under Section 114(i) & (ii) of the Customs Act, 1962.

4. Aggrieved by the said order, the applicant filed an appeal before the Appellate Authority (AA) viz, Commissioner of Customs (Appeals), Mumbai Zone-III, who vide Orders-In-Appeal No. MUM-CUSTOM-PAX-APP-1162 & 1163 /A-18-19 dated 28-02-2019 [F.No. S/49-244 & 245/2017] upheld the Order passed by the original adjudicating authority.

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

5.01. that the order of the appellate authority is against law, weight of evidence and circumstances and probabilities of the case; that the seized currency is not prohibited and the same is a restricted item;

5.02. that the goods must be prohibited before export or import, simply because of non declaration of the goods cannot become prohibited after import.

5.02. that the AA has not exercised the option under section 125 of the Customs Act 1962 and straightaway proceeded to confiscate the goods without grant of opportunity to the appellant to pay fine in lieu of confiscation.

5.03. that possession of foreign currency is not an offence; that there was no misdeclaration by the applicants; that they had not violated the Customs Act, 1962.

5.04. the applicant has cited and relied on various case laws where release of the foreign currency and gold were allowed on payment of redemption fine and a few of these are as given below;

- (i). V.P Hameed 1994(73) ELT 425-Tribunal where there is no legal requirement for currency upto US\$ 10,000/-.
- (ii). Peringatil Hamza Vs. Commissioner Of Customs, Mumbai reported in 2014 (309) E.L.T. 259 (Tri-Mumbai). in Final Order No, A/1228/2014-WZB/C-IV (SMB), dated 18.07.2014 in appeal no C/65/2008-Mum where ownership lies with the person from whom currency recovered.
- (iii). Revision Authority Order F.No. 373/43/B -Cus RA dated 16.04.2008 in the case of Bepari Saleem.
- (iv). Delhi High Court case in r/o. Mohd. Ayaz vs UOI reported in 2003 (151) ELT 39 (DN) where it was held that currency was not prohibited for export & redemption on payment of fine waa allowed.
- (v). CESTAT Order dated 13.04 2007, in the case of T Sundarajan vs. Commr. Of Customs, Chennai reported in 2008 (221) ELT 258 (Tri-Chennai),
- (vi). GOI Order No. 134/06 dated 26.04.2006 in the case of Shri. Gulam Kader Ahmed Sheriff.

Under the above circumstances of the case, the applicants prayed to Revision Authority to release the foreign currency on payment of redemption fine and reduce the personal penalty and to render justice.

6. Personal hearing was scheduled for 24.01.2023 and 07.02.2023. Mr Dhaval Deshpande, Advocate and Mr Yash Jariwala, Advocate appeared for the hearing and reiterated earlier submissions. They further submitted a few

Judgements on the matter that foreign currency is not prohibited item. They further requested to use discretion to release goods on fine and penalty as applicants are not habitual offenders. They requested to take a considerate view and allow their application.

7. Government has gone through the facts of the case. Government finds that there is no dispute that the seized foreign currency was not declared by the Applicants to the Customs at the point of departure. Further, in their statements, the applicants had admitted the possession, carriage, concealment, non-declaration and recovery of the foreign currency. The applicants were unable to give the source of how they came in possession of the foreign currency. The applicants had acted in concert with one Shri Sayed in attempting to smuggle out the foreign currency. Applicants were unable to show that the impugned foreign currency in their possession was procured from authorized persons as specified under FEMA. Source of currency had remained unaccounted. Applicants admitted that the foreign currency did not belong to them and they were mere carriers who agreed to smuggle the same for monetary consideration of Rs.10,000/- each. Thus, it has been rightly held by the lower adjudicating authority that in the absence of any valid document for the possession of the foreign currency, the same had been procured from persons other than authorized persons as specified under FEMA, which makes the goods liable for confiscation in view of the prohibition imposed in 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 absolute confiscation of the foreign currency was justified as the applicants had been carrying foreign currency in excess of the permitted limit

and no declaration as required under section 77 of the Customs Act, 1962 was filed.

8. The Government finds that the Applicants had not taken any general or special permission of the RBI to carry the foreign currency / Indian currency as stipulated under Regulations 3(1)(a) and 7(1), (2)(ii) and (3) of the Foreign Exchange Management (Export and Import of Currency) Regulations, 2015 framed with clause (g) of sub-Section (3) of Section 6 and under sub-section (2) of Section 47 of the Foreign Exchange Management Act, 1999 and had attempted to take it out of the country without declaring the same to Customs at the point of departure. The Government notes that admittedly the applicants had made more than 25-30 foreign trips in the past year and were well versed with the law. They had knowingly attempted to export large amount of foreign currency worth Rs. 1,32,50,000/- collectively. Further, the applicants had used an ingenious and clever method to conceal the foreign currency and hoodwink the authorities. The currency notes had been concealed inside the side walls of the carton box filled with packets of Vermicelli. 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 applicants is correct and therefore, the confiscation of the foreign currency ordered, is justified.

9. Government finds that the case of Commissioner of Customs v/s. Savier Poonolly [2014(310 E.L.T. 231 (Mad)] 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.

10. Once goods are held to be prohibited, Section 125 still provides discretion to consider release of goods on redemption fine. Hon'ble Supreme Court in case of M/s. Raj Grow Impex has laid down the conditions and circumstances under which such discretion can be used. The same are reproduced below.

71. Thus, when it comes to discretion, the exercise thereof has to be guided by law; has to be according to the rules of reason and justice; and has to be based on the relevant considerations. The exercise of discretion is essentially the discernment of what is right and proper; and such discernment is the critical and cautious judgment of what is correct and proper by differentiating between shadow and substance as also between equity and pretence. A holder of public office, when exercising discretion conferred by the statute, has to ensure that such exercise is in furtherance of accomplishment of the purpose underlying conferment of such power. The requirements of reasonableness, rationality, impartiality, fairness and equity are inherent in any exercise of discretion; such an exercise can never be according to the private opinion.

71.1. It is hardly of any debate that discretion has to be exercised judiciously and, for that matter, all the facts and all the relevant surrounding factors as also the implication of exercise of discretion either way have to be properly weighed and a balanced decision is required to be taken.

11. Government finds that considering that such huge amount of foreign / currency was being carried in the baggage, currency remained unaccountable, method of concealment being ingenious, there being organized attempt to smuggle currency, thus discretion used by OAA to absolutely confiscate the currencies is appropriate and judicious. Facts and circumstances of the case warrants absolute confiscation of foreign currency as held by the adjudicating authority and upheld by the appellate authority. The penalty of Rs. 7,00,000/- imposed on applicant no. 1 and 2 each is reasonable and judicious.

Government therefore finds no reason to interfere in the Order passed by the Appellate Authority.

12. Accordingly, both the revision applications are dismissed.

Shrawan
27/7/23
(SHRAWAN KUMAR)

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

ORDER NO. ^{SH2-} _{SH3} /2023-CUS (WZ)/ASRA/MUMBAI DATED 27.07.2023

To,

1. Shri. Ajmer Khaja Katubawa, O.No.25/2, New No. 12, Thahir Sahib, 1st Lane, Ellis Road, Chennai-600002.
2. Shri. Sahubar Sathik Mohamed Kareem, O.No.55/32, Bagathur Alam Street, Pudur Post, Ilayangudi Taluka, Sivganga-630702
3. Commissioner of Customs, CSI Airport, Terminal-2, Mumbai-400099.

Copy To,

1. Commissioner of Customs (Appeals), Mumbai-III, Awas Corporate Point (5th Floor), Makwana Lane, Behind S. M. Centre, Andheri-Kurla Road, Marol, Mumbai-400059
2. Sr. P.S. to AS (RA), Mumbai.
3. File Copy.
4. Notice Board.

