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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. 371/71/B/2022-RA/6038:

Date of Issue 01.08.2023

ORDER No. 577/2023-CUS (WZ)/ASRA/MUMBAI DATED 31.07.2023.
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. Abdul Rasheed Kalanad Abbas

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-CUSTM-PAX-APP-1049/2021-22[S/49-957/2020]
dated 18.11.2019 [Date of issue: 23.11.2021] passed by
the Commissioner of Customs (Appeals), Mumbai Zone-
III.

ORDER

This Revision Application has been filed by Mr. Abdul Rasheed Kalanad Abbas (herein referred to as 'Applicant') against the Order-in-Appeal No. MUM-CUSTM-PAX-APP-1049/2021-22 [F.No. S/49-957/2020] dated 18.11.2019 [Date of issue: 23.11.2021] passed by the Commissioner of Customs (Appeals), Mumbai Zone-III.

2. Brief facts of the case are that the Applicant who was bound for Muscat by Oman Airways Flight No. WY 0206 was intercepted by officers of AIU, Customs, CSI Airport on 16.04.2019 after he had cleared the Immigration counter. On being asked whether he was carrying any foreign or Indian currency on his person or in his baggage, the Applicant replied in the negative. Not being satisfied with the reply, the personal search of the Applicant was conducted, which resulted in the recovery of 8000 Omani Riyals (148 notes of 50 Omani Riyal denomination and 30 notes of 20 Omani Riyal denomination) equivalent to Rs. 13,12,800/-, were recovered from the shoes worn by him. The said foreign currency was seized under the reasonable belief that the same were being attempted to be smuggled out of India and hence were liable to confiscation under the contravention of the provisions of the Customs Act, 1962 read with FEMA, 2000 and Regulations made thereunder. The Applicant had informed that the foreign currency belonged to him and had brought the currency when he had come to India in April 2019 and that he had concealed in his shoes to avoid detection and admitted knowledge, possession, carriage, non-declaration, concealment and recovery of the seized foreign currency.

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/SKR/ADJN/22/2020-21 dated 02.06.2020 issued through F.No. [S/14-6-34/2019-20 Adjn SD/INT/AIU/174/2019 AP 'A'] ordered absolute confiscation of the foreign

currency i.e 8000 Omani Riyals equivalent to Rs. 13,64,544/- under Section 113 (d) & (h) of the Customs Act, 1962 read with relevant provisions of FEMA, 1999 and FEM (Export & Import of Foreign Currency) Regulations, 2015. A penalty of Rs. 1,50,000/- was imposed on the Applicant under Section 114(i) of the Customs Act, 1962.

4. Aggrieved by this order, the Applicant filed an appeal with the Appellate Authority viz, Commissioner of Customs (Appeals), Mumbai Zone-III, who vide his order Order-in-Appeal No. MUM-CUSTOM-PAX-APP-1049/2021-22[S/49-957/2020] dated 18.11.2019 [Date of issue: 23.11.2021] upheld in toto, the order of the Original Adjudicating Authority.

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

5.01. That the Order in Appeal suffers from the vice of excessive use of powers and jurisdiction vested with the Appellate Authority, which did not take into consideration all the aspects of the case and thus the impugned order is arbitrary and unilateral and is liable to be set aside;

5.02. That the reasons are the life and blood of any quasi-judicial Order including an OIA and in both the orders passed by the lower authority there are no proper reasoning given by both the lower authorities on vital submissions made by the Applicant before them;

5.03. That the findings also does not exhibit as to how and in what manner the imposition of such heavy and harsh penalty on him has been justified;

5.04. That there were various documents which were generated and prepared such as statements, call records, video footage of CCTV cameras and all such other documents which were requested by the Applicant since the same are relevant and part of the investigation proceedings/file, and hence requested and was never furnished which has resulted in gross miscarriage of justice. The Applicant has relied on the decision in Shalu Chadha, [2018 (359) E.L.T. 28 (Bom.)]

5.05. That the Applicant has in relation to any goods not done or omitted to do any act which act or omission would have rendered the goods liable to confiscation or have abetted the doing or omission of such an act and hence no penalty could have been imposed upon them under section 114 (1) of the Act;

5.06. That the burden lies on the customs department to show that the person have acted dishonestly or contumaciously or with deliberate of distinct object of breaching the law. The Applicant relies on the decision of Akbar Badruddin Jivani, [1990 (47) ELT 161 (SC)] which clearly states that imposing of penalty in such circumstances is unwarranted.

5.07. Further the Applicant has relied on the following case laws in support of his contention:

- (i) Jaisukh Gobarbhai Savalia reported in 2019 (367) E.L.T. 290 (Tri. Ahmd.)
- (ii) Elektronik Lab Vs. CC(P), Mumbai [2005 (187) ELT 362 (Tri. Mum.)]
- (iii) Joseph Itteyara Vs. CC, Mumbai [2004(176) ELT 165 (Tri. Mum)]
- (iv) Calcutta Ahmedabad Carriers Vs. CC, New Delhi [2004(164) ELT 367 (Tri. Del.)]

5.08. That even otherwise some logical reasoning was required to be made while imposing penalty. The penalty has been imposed equally on all the noticee. Penalty should commensurate with the role played by each person.

5.09. That the Respondent erred in proceeding to adjudicate the case hurriedly without considering the prayer for redemption;

5.10. That even otherwise goods not being notified as prohibited, and are importable 'freely' are not absolutely confiscable and Applicant is entitled for conditional release thereof. The Applicant has relied on the case of Nihar Samir Mehta where the Commissioner of Customs, Airport, Mumbai has given the option for redemption;

5.11. That so far as Section 125 of the Customs Act is concerned, unless the importation or exportation of goods is expressly "prohibited", the Adjudicating Authority is bound to give to the Owner of the goods an option to pay fine in

lieu of confiscation and since the export of currency is not expressly prohibited under section 11 of the Customs Act, 1962 or by any other statutory the option to redeem the goods, on payment of fine in lieu of confiscation should have been granted. The Applicant has placed reliance on the following case laws:

- (i) Decision of the Supreme Court in the case of Mukesh K. Tripathi v. Senior Divisional Manager, LIC
- (ii) Ramesh Mehta vs. Sanwal Chand Singhvi
- (iii) State of Maharashtra vs, Indian Medical Association

5.12. That the purpose of invoking Section 111(d), the word 'prohibition' has been liberally interpreted in the light of the words 'improperly imported' for confiscation of all goods, however, when it comes to section 112() or section 125, if the definition is applied, the same would result in absurdity and would render the provisions redundant and otiose. A clear distinction is made for dutiable goods, other than "prohibited goods" In section 112(i).

5.13. That in view of the two options conferred on the Adjudicating Authority under Section 125, if the word "prohibited" is construed as to apply in respect of every violation of any regulation or restriction or statutory procedural requirement, the said section would be rendered redundant and meaningless, and no such interpretation can thus be given in the context of section 125, in light of the judgment of Hon'ble Supreme Court in Asian Food Industries (supra) r/w the above referred binding precedents on interpretation of words "unless the context otherwise requires". Therefore, the judgments relied in the impugned Order are not applicable in the context that the aforesaid arguments and binding precedent of Hon'ble Apex Court have not been considered therein;

5.14. That the Applicant is ready to pay on the confiscated goods nominal Redemption fine/ Personal Penalty as deemed fit

Under the circumstances the Applicant prayed for setting aside the impugned Order-in-Appeal and allow the Applicant to redeem the currency on nominal redemption fine and penalty or issue any order as deemed fit.

6. Personal hearing in the case was scheduled for 12.07.2023. Shri Yogesh Rohira, Advocate for the Applicant appeared for the hearing and submitted that the foreign currency recovered from the Applicant was well below the limit of USD 2,50,000/- fixed by RBI for capital or current account. He submitted that the Applicant is not a habitual offender and requested to return the currency on nominal fine and penalty.

7. Government has gone through the records and facts of the case and the submissions of the Applicant. 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 seized foreign currency were concealed in the shoes worn by the Applicant with the express intention of hoodwinking the Customs. The Applicant in his statement had admitted the knowledge, possession, carriage, concealment, non-declaration and recovery of the foreign currency. The Applicant had claimed that the currency belonged to him and explained the purpose for attempting to take it out of the country. The Applicant admitted that he was aware that carrying such currency and not declaring the same was an offence under the Indian law. Therefore, the confiscation of the foreign currency was justified as the Applicant 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. 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, 2000 have

been violated by the Applicant is correct and therefore, the confiscation of the foreign currency ordered, is justified.

9. Further the Madras High Court in the case of Commissioner of Customs, Chennai v/s. Savier Poonolly [2014(310 E.L.T. 231 (Mad)] at Para 13 has held 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....."

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. 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”.*

12. The Government finds that the amount involved in this case is not substantial and the Applicant has claimed ownership of the currency after explaining the source and purpose of taking it out of the country by keeping the currency in the shoes worn by him. This case is at best a case of mis-declaration rather than smuggling. Government finds that the discretion not

to release the foreign currency under the provisions of Section 125 of the Customs Act, 1962 is excessive and unjustified. The order of the Appellate authority is therefore liable to be modified and the foreign currency is liable to be allowed redemption on suitable redemption fine.

13. The Government finds that the personal penalty of Rs. 1,50,000/- imposed on the Applicant under Section 114 (i) of the Customs Act, 1962 is commensurate with the omissions and commissions committed.

14. In view of the above, the Government modifies the impugned order of the Appellate authority in respect of the absolute confiscation of the foreign currency and allows the same to be redeemed on payment of redemption fine. The foreign currency totalling to 8000 Omani Riyals (148 notes of 50 denomination and 30 notes of 20 denomination) equivalent to Rs. 13,12,800/- is allowed redemption on payment of a fine of Rs. 2,60,000/- (Rupees Two Lakh Sixty Thousand only). The penalty of Rs. 1,50,000/- imposed under section 114 (i) of the Customs Act, 1962 by the lower adjudicating authority and upheld by the Appellate Authority is sustained.

15. The Revision Application is disposed of on above terms.

Shrawan
31/7/23
(SHRAWAN KUMAR)

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

ORDER No. 577/2023-CUS (WZ)/ASRA/MUMBAI DATED 31.07.2023.

To,

1. Mr. Abdul Rasheed Kalanad Abbas, Al Badar Villa, Parammal Road, PO Kalanad, Kasargod, Kerala 671 317
- 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 Yogesh Rohira, Advocate, C/o SMJ Legal, 1 Aban House, Ropewalt Street, Kala Ghoda, Fort, Mumbai 400 001.
3. Sr. P.S. to AS (RA), Mumbai.
4. File Copy.
5. Noticeboard.