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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. 371/492/B/2022-RA / 6933 Date of Issue : 21.09.2023

ORDER No. 675/2023-CUS (WZ)/ASRA/MUMBAI DATED 20.09.2023.
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. Suhrad Thakkar

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-1384/2022-23 dated
04.10.2022 [Date of issue: 06.10.2022] [F. No S/49-
961/ 2022] passed by the Commissioner of Customs
(Appeals), Mumbai Zone-III.

ORDER

This Revision Application has been filed by Mr. Suhrad Thakkar (herein referred to as 'Applicant') against the Order-in-Appeal No. MUM-CUSTOM-PAX-APP-1384/2022-23 dated 04.10.2022 [Date of issue: 06.10.2022] [F. No S/49-961/ 2022] passed by the Commissioner of Customs (Appeals), Mumbai Zone-III.

2. Brief facts of the case are that on intelligence, the Applicant, holder of an Indian passport, who was bound for Singapore by Air India Flight No. AI-342, was intercepted by officers of AIU, Customs, CSI Airport on 15.02.2020 after he had cleared the Immigration counter at departure. On being asked as to how much foreign/Indian currency he was carrying on his person or baggage, the Applicant replied in the negative. Based on suspicion, personal search of the Applicant resulted in the recovery of US\$ 6000 in denomination of 100 dollars. Further, examination of the backpack of the Applicant resulted in the recovery US\$ 13500 in denomination of 125 notes of 100 USD and 20 notes of 50 USD which were concealed in three books. The total recovered foreign currency of 19500 USD, equivalent to Rs. 13,65,000/- 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, 1999 and the rules and regulations made thereunder. The Applicant had informed that the foreign currency belonged to him and he had tried to take it out of the country for monetary gains.

3. After following the due process of 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/AAK/ADJN/324/2020-21 dated 28.02.2022 [Date of issue: 01.03.2022] ordered the confiscation of the foreign currency i.e USD 19,500 equivalent to Rs. 13,65,000/- under Section 113 (d), (e),(h) and (i) of the Customs Act, 1962 read with FEMA, 1999 and Foreign Exchange Management (Export & Import

of currency) Regulation, 2015. The OAA gave the Applicant the option to redeem the said seized foreign currency on payment of redemption fine of Rs. 2,75,000/- in lieu of confiscation under Section 125(1) of the Customs Act, 1962. Personal penalty of Rs. 1,36,500/- was imposed on the Applicant under Section 114 and (iii) of the Customs Act, 1962.

4. Aggrieved by this order, the Respondent 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-1384/2022-23 dated 04.10.2022 [Date of issue: 06.10.2022] [F. No S/49-961/ 2022] set aside the Order-in-Original and ordered the absolute confiscation of the foreign currency. The personal penalty imposed by the OAA was upheld.

5. Aggrieved with the aforesaid Order passed by the AA, the Applicant has preferred this revision application inter alia on the following ground:

5.01. That under Section 125 of the Customs Act, 1962, a discretion has been conferred on the AA to give the option to the importer/exporter/owner of the goods to pay fine in lieu of confiscation in cases of goods, the importation or exportation whereof is prohibited under the Act or any other law for the time being in force and where the goods are not prohibited the authorities have no choice but to allow redemption. The Applicant has relied on the following case laws in support of his contention:

- (i) CC(Prev) vs. Uma Shankar Verma
- (ii) Gauri Enterprises vs. Commr. of Customs (Prev) [2002(145)ELT 706 (Tri-Bang)]

5.02. That while exercising his discretionary power under the provisions of Section 125 of the Customs Act, 1962 the OAA considered and found that the Applicant was the rightful owner of currency and also held that foreign currency is not a dutiable item and is not dangerous or harmful item and in the light of judgements allowed redemption of currency on a fine;

5.03. That Board vide Circular No. 9/2001-Customs dated 22.02.2001 stated that the 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 the AA failed to take into consideration the decisions relied upon by the OAA and also the Applicant;

5.05. That while exercising the power of judicial review against the lower authority being supervisory, the AA would be justified in interfering with the decision of the OAA only when the AA should record a finding that the decision of the OAA is based upon exclusion of some admissible evidence or consideration of some inadmissible evidences or the lower authority has no jurisdiction at all;

5.06. That discretionary power conferred on an OAA under Section 125 of CA, 1962 is a special power and not an ordinary power and such a special power cannot be lightly interfered by a higher authority or Court in appeal or writ proceedings. The Applicant has relied upon the following case laws in support of his contention:

- (i) Order of the Gujarat High Court dated 19.03.2008 in the case of Foreign Petrochemical Corpn vs. General Secretary
- (ii) Nocil Ltd vs. Policy Relaxation Committee [2018(359) ELT 316(Del)]
- (iii) New Bharat Rice Mill vs. UOI [2008(229) ELT 502]
- (iv) Binani Zinc Ltd vs. AC,CEX, Cochin [1995(77) ELT 514(Ker)]
- (v) Navsari Oil Products vs AC.CEX [1992 (60) ELT 550(Guj)]
- (vi) Koshambh Multired Pvt Lte vs. UOI [2018(361) ELT 604(Guj)]
- (vii) M.K.Govinda Pillai vs Collector of Customs and C.Excise, Cochin [1994(71) ELT 881(Ker)]
- (viii) Kashish Silk Mills Pvt Ltd vsl UOI [2005(183) ELT 134]
- (ix) Corporation of Calcutta vs, Mulchand Agarwal
- (x) UOI vs. Raj Grow Impex & ors

5.07. That 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 motive which is not there in the instant case; Further the Applicant has relied on order of the GOI in the case of Ravish Chawre and Aisha Ravish Chawre vs. PC, Customs (Airport), Mumbai.

5.08. 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;

5.09. That there are no specific guidelines demarcating the cases where absolute confiscation should be ordered in similar cases and in such a situation the judicial precedence along with overall circumstances of the case are taken into account for adjudicating the matter and in the instant case there are no enough grounds for withholding the decision of redemption of the goods. The Applicant has relied upon the following case laws in support of his contention:

- (i) Commr. of Customs (AP) vs. Alfred Menezes [2009 (242) ELT 334(Bom)]
- (ii) Nine Star exports vs. Commr. of Customs (Ports) [2003(151) ELT] 265]
- (iii) Dhanak Ramji vs. Commr. of Customs (Airport), Mumbai [2009(237) ELT 280(Tri-Mum)] and UOI vs. Dhanak Ramji [2010(252) ELT A102(SC)]
- (iv) In RE: Mohd Zia Ul Haque [T2014/314/849 GOI]
- (v) Yakub Ibrahim Yusuf vs. Commr. of Customs [2011(263) ELT 685]
- (vi) Commr. of Cus & CEx. Delhi IV vs. Achiever International [2012(286) ELT 180(Del)]
- (vii) National Insurance Co Ltd vs. Keshav Bahadur [(2004) 2 SCC 370]
- (viii) Shri Rama Sugar Industries vs. State of A.P [(1974) 1 SCC 534]
- (ix) Rajaram Bohr vs. UOI [2015(322) ELT 337 (Cal)]

5.10. That as per judgements the absolute confiscation is warranted in cases having special circumstances and it has not been brought out in the present

appeal as to how the case of the Applicant can be categorized in any of the special circumstances

5.11. That foreign currency is not prohibited and its import or export is subject to laws and rules and regulations issued by a competent authority and foreign currency is not notified as 'prohibited' under the Customs Act, 1962 and FEMA and in view of this, the foreign currencies carried by the Applicant cannot be considered as prohibited goods;

5.12. That the intention behind Section 125 of the Customs Act, 1962 is clear that the import of such goods under any circumstances would cause danger to the health, welfare or morals of the people as a whole and would not apply to a case where import/export of goods is permitted subject to certain conditions or to a certain category of persons and which are ordered to be confiscated for the reason that the condition has not been complied with and import or export of currency would not fall under the category of 'prohibited'. The Applicant has relied on the following case laws in support of his contention:

- (i) Commr of Customs (Prev), West Bengal vs. India Sales International [2009(241) ELT 182(Cal)]
- (ii) In RE: Chellani Mukesh [2012(276) ELT 129(GOI)]

That ratio of decisions relied upon by the AA cannot be equated with the case of the Applicant;

5.13. That in a common law system, judges are obliged to make their rulings as consistent as reasonably possible with previous judicial decisions on the same subject. Under the doctrine of stare decisis, a lower court must honour findings of law made by a higher courts and it binds courts to follow legal precedents set by previous decisions;

5.14. That under the doctrine of stare decisis, 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. This decision becomes an example, or authority for judges deciding similar issues later. That while applying the ratio of one case to that of the other, the decisions of the Hon'ble Supreme Court are always required to be borne in mind;

5.15. That while applying the ratio of one case to that of the other, the decisions of the Hon'ble Supreme Court are always required to be borne in mind. The applicant has relied upon the following case laws in support of their contention:

- (i) CCE, Calcutta vs. Alnoori Tobacco Products [2004(170) ELT 135 (SC)]
- (ii) Escorts Ltd vs. CCE, Delhi [2004 (173) ELT 113 (SC)].
- (iii) CC (Port), Chennai vs. Toyota Kirloskar [2007 (213) ELT 4 (SC)]
- (iv) Sri Kumar Agency vs. CCE Bangalore [(2008(232)ELT 577(SC)]

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

5.17. 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;

5.18. That if the earlier decision was wrong, then the person 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;

5.19. 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;

5.20. That as regards allowing redemption of the seized goods, Section 125 of the Customs Act, 1962 provides the option of redemption can be given in the case of seized goods are not prohibited and gold is not a prohibited item and can be imported and such imports are subject to certain conditions and restrictions including the necessity to declare the goods on arrival at the Customs station and make payment at the rate prescribed. Reliance has been placed on the following case laws:

- (i) Shaik Jamal Basha vs. Government of India [1992(91) ELT 277(AP)]
- (ii) Mohd Zia Ul Haque vs. Addl. Commissioner of Customs, Hyderabad [2014(214) E.L.T 849 (GOI)]
- (iii) Mohammed Ahmed Manu vs. CC, Chennai [2006(205) E.L.T 383(Tri-Chennai)]

5.21. That the Applicant has relied upon the following case laws in support of the contention that when goods are not eligible for import as per the import policy, re-export of such goods is permitted on payment of penalty and redemption fine. The Applicant has relied on the following case laws in support of their contention:

- i) CC vs. Elephanta Oil [2003(152) ELT 257 (SC)]
- ii) Collector vs. N Patel [1992 (62) ELT 674 (GO1)]
- iii) Kusumbhai Dahyabhai Patel vs. CC (P) [1995 (79) ELT 292 (CEGAT)]
- (iv) K&K Gems vs. CC [1998(100) ELT 70 (CEGAT)]

5.22. That in the instant case the Commissioner (Appeals) failed to discuss as to how the facts of the case of Om Prakash Bhatia and other cases relied upon by her fit the factual situation of the case of the Applicant;

5.23. That while reading a case law for the purpose of deciding a similar case, the reader should centralize his attention majorly towards the legal issues rather than focusing upon the factual issues though the factual findings have

to be noted for having a clear picture of the case but the prime concern must be made for those substances which have some relevance to law;

5.24. That the AA should have examined the judgements/decisions relied upon by the Applicant, facts of the cases, legal issues involved in the cases, arguments raised and cases cited by the parties, legal reasoning that is relevant to resolve those issues, judicial opinions given by the Courts, ruling of the court on questions of law, the result of the case, the court's order, and which party was successful and the applicability of ratio of the said judgements in the case being dealt:

- (i) Bombay Dyeing and Mfg Co vs BEAG
- (ii) CIT vs. Sun Engineering Works (P) Ltd
- (iii) Madhav Rao Scindia vs. Union of India

5.25. That as held in the case of Commissioner of Customs vs. Atul Automation Pvt Ltd, wherein the Hon'ble Supreme Court clearly distinguished between what is prohibited and what is restricted and held that restricted goods can be redeemed on payment of fine, in the instant case gold should not be considered as prohibited goods and order of absolute confiscation is not sustainable;

Under the circumstances the Applicant prayed for setting aside the Order-in-Appeal and release the foreign currency under absolute confiscation on payment of reasonable fine and penalty.

The Advocate for the Applicant, vide letter dated 13.02.2023 requested for early hearing in the matter.

6. Personal hearing in the case was scheduled for 28.07.2023. Shri Prakash Shingrani, Advocate appeared for the hearing on behalf of the Applicant, on the scheduled date and submitted that the Original Authority has passed a correct order. He further submitted that Applicant was taking

out small amount of currency for business purpose. He requested to restore the OIO as the same was legal and proper,

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 was kept on the person of the Applicant and in three books kept in the baggage of the Applicant, with the express intention of hoodwinking the Customs. The Applicant in his statement had admitted the knowledge, possession, carriage, concealment, knowledge non-declaration and recovery of the foreign currency. The Applicant had claimed that the currency belonged to him and stated that the purpose for attempting to take it out of the country was for monetary gains and he did not have any legal/valid documents for purchase of the foreign currency. 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. 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."

10. 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”.*

11. 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 purpose of taking it out of the country by keeping the currency on his person and in books being carried in his baggage. There are no allegations that the Applicant is a habitual offender and was involved in similar offence earlier or there is nothing on record to prove that the Applicant was part of an organized smuggling syndicate. This case is at best a case of mis-declaration rather than smuggling. Government finds that the discretion to allow the redemption of the foreign currency under Section 125 of the Customs Act, 1962 by the Original Adjudicating Authority is judicious and fair and the order absolute confiscation by the Appellate Authority is excessive and is therefore liable to be modified and the foreign currency is liable to be allowed redemption on suitable redemption fine.

12. The Original Adjudicating Authority while allowing redemption of the foreign currency, has at 5.7 of the Order-in-Original has ruled as under

“Once the seized goods are held to be liable for confiscation, the next question before me to decide is whether to allow the release of the impugned goods on redemption fine or not? I find that sub-section (1) of Section 125 of the Customs Act, 1962 stipulates that:

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

It is 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 based on the facts and circumstances involved. Accordingly, I proceed to decide the issue of redemption or absolute confiscation of the impugned goods.

In the instant case, I find that the foreign currency is not dutiable and its export and import is freely allowed, subject to fulfillment of conditions regarding the source of its acquisition and limit per year as prescribed by RBI. It is also observed that the passenger has claimed ownership of the seized FC since the day of the seizure. Also, no other owner has been traced or has come forward to claim the seized FC. Further, there is no evidence on record to establish that he is a carrier and he is involved in the smuggling of FC.

5.8 The defence has requested for release of the seized FC on the basis of the various judgements:

- Kishin Shewram Loungain vs. CC, ACC, Mumbai- 2002 (146) ELT 180 (Tri-Mum) -CESTAT upheld confiscation but allowed redemption on payment of fine.*
- Felix Fernandes vs CC, ACC, Mumbai- 2000 (118) ELT 639 (Tri-Mum) - The Revisionary Authority in several similar cases has allowed redemption and maintenance of similar approach by Tribunal was desirable.*
- Philip Fernandes vs. Commissioner (Airport), Mumbai- 2002 (146) ELT 180 (Tri-Mum) The adjudicating authority confiscated the FC and allowed redemption on fine and imposed penalty. Department filed appeal praying for absolute confiscation. Deptl. appeal was dismissed by CESTAT in the light of earlier orders of CESTAT and the Government of India where redemption was allowed. It also reduced the redemption fine by observing that currency is a restricted goods, is not dutiable and offense is of technical in nature.*
- Kawaljit Singh Bala- 2012 (275) ELT 272 (GOI)*
- Yakub Ibrahim Yusuf vs CC, Mumbai-2011 (263) ELT 685 (Tri-Mum)*

5.9 As per the legal precedents in respect of the foreign currency where redemption has been granted treating it as non-dutiable item, I consider granting redemption of the seized FC under Section 125 (1) of the Customs Act, 1962"

13. The Government finds that the personal penalty of Rs. 1,36,500/- imposed on the Applicant under Section 114 of the Customs Act, 1962 is commensurate with the omissions and commissions committed.

14. In view of the above, the Government is in agreement with the OAA and restores the Order-in-Original passed by the OAA and 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 US\$ 19,500 equivalent to Rs. 13,65,000/- is allowed redemption on payment of a fine of Rs. 2,75,000/- (Rupees Two Lakh Seventy Five Thousand only). The penalty of Rs. 1,36,500/- imposed under section 114 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 the above terms.


(SHRAWAN KUMAR)

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

ORDER No. 675/2023-CUS (WZ)/ASRA/MUMBAI DATED 26.09.2023.

To,

1. Mr. Suhrad Thakkar, S/o Mr Madhusudan Thakkar, 62, Shreeji Darshan, S.V.Road, Kandivali (West), Mumbai 400 067.
2. The 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 K. 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.

