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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. 371/392/B/WZ/2022-RA

7367

Date of Issue: 17.10.2023

ORDER No. 724 /2023-CUS (WZ)/ASRA/MUMBAI DATED. 12.10.2023.
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 : Shri Abdul Rahiman Vadakekara

Respondents: Principal Commissioner of Customs (Airport), Mumbai

Subject : Revision Application filed, under Section 129DD of the
Customs Act, 1962 against the Orders-in-Appeal No.
MUM-CUSTM-PAX-APP-1589/2021-22 dated
31.01.2022 [DOI: 03.02.2022] [F.No. S/49-1119/
2020-Appeal] passed by the Commissioner of Customs
(Appeals), Mumbai, Zone-III.

ORDER

This Revision application has been filed by the Shri Abdul Rahiman Vadakekara (hereinafter referred to as the Applicant) against the Order-In-Appeal No. MUM-CUSTOM-PAX-APP-1589/2021-22 dated 31.01.2022 [DOI: 03.02.2022] [F.No. S/49-1119/2020-Appeal] passed by the Commissioner of Customs (Appeals), Mumbai, Zone-III.

2. Brief facts of the case are that on 03.10.2020, Shri Abdul Rahiman Vadakekara, the Applicant, holding Indian Passport No. T 1265844 was intercepted by the officers of the Air Intelligence Unit (AIU), CSMI Airport, while he was proceeding to depart to Dubai by Spice Jet Flight No. SG 173, after he had cleared himself through Security and Immigration. During the personal search and the search of the checked-in baggage, the AIU officers recovered assorted foreign currency equivalent to Indian Rupees amounting to Rs.9,53,798/-. The AIU Officers took over and seized the recovered foreign currency in the reasonable belief that the same were attempted to be smuggled out of India and hence were liable for confiscation under the provision of Customs Act, 1962 read with the provisions of Foreign Exchange Management Act, 2000 and Foreign Exchange Management (Export and Import of Currency) Regulation, 2000.

3. After due process of law, the Original Adjudicating Authority (OAA) viz, Deputy Commissioner of Customs, CSMI Airport, Mumbai vide Order-In-Original No. AirCus/49/T2/03/ETC/2020-UNI A-Batch dated 03.10.2020 confiscated the impugned foreign currency equivalent to Indian Rupees amounting to Rs.9,53,798/- under section 113(d) and (h) read with relevant provisions of FEMA, 1999. However an option was given to the applicant to redeem the impugned foreign currency on payment of redemption fine of Rs.1,00,000/- under section 125(1) of Customs Act, 1962. Personal penalty of Rs. 1,00,000/- was also imposed under section 114(i) of Customs Act, 1962.

4. Being aggrieved by the impugned order passed by the Deputy Commissioner, CSMI Airport, Mumbai, the respondent-department filed appeals with the Appellate Authority (AA) viz, Commissioner of Customs (Appeals), Mumbai Customs, Zone-III who vide Orders-in-Appeal No. MUM-CUSTOM-PAX-APP-1589/2021-22 dated 31.01.2022 [DOI: 03.02.2022] [F.No. S/49-1119/2020-Appeal] allowed the department's appeal and ordered absolute confiscation of the foreign currency, making the payment of redemption fine redundant and upheld the penalty imposed by the OAA.

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

5.1 That the Commissioner (Appeal)'s Order is not a speaking order; that the said Order-in-Appeal in pursuance of the Review Order No.04/2020-21 dated 22.10.2021 is liable to be dismissed as not maintainable as the same is not in accordance with law in as much as the appeal was not filed by the department within the time limit as per Section 129D of the Customs act, 1962.

5.2 That the applicant had declared about the foreign currency he possessed to the officers of customs who had initially allowed him to carry the same however the said currency was later seized by the customs; That the applicant submitted that since the amount brought by him every time was less than 5000 US Dollars/equivalent necessity to declare the same in CDF had not arisen because of which he was not in possession of any CDF. However, since the amount brought by him had remained unspent he was taking it back for his bonafide purpose and not for any illegal purpose; That hence the OAA vide his Order-in-Original had rightly given the applicant an option to redeem the seized foreign currency on payment of redemption fine of Rs. 1,00,000/- as per Section 125(1) of the Customs Act, 1962 and imposed a penalty of Rs.1,00,000/- under Section 114(i) of the Customs Act, 1962.

5.3 That the applicant submitted that carrying foreign currency abroad, is generally not prohibited item of export in terms of the FTP (Foreign Trade Policy) and only treated as a restricted item of export and should ordinarily be allowed to be redeemed on payment of redemption fine and penalties.

5.4 That the AA has only relied upon the submissions made by the department without considering the orders of appellate and revisionary authority in similar cases wherein option to redeem the seized goods has been on payment of redemption fine in catena of cases.

5.5 That the AA has not considered the fact that the applicant is a bonafide passenger with a valid passport and valid visa of UAE, and he was going back to Dubai carrying back his own unspent amount brought by him on his previous visits for issuance of his new visa and to meet his expenses and for personal bonafide requirement as carrying back any unspent amount (FC) is not an offence.

5.6 That the Foreign currency is not a prohibited item; that the impugned order-in-appeal passed by the respondent absolutely confiscating the said currency without giving an option to redeem the same under Section 125(1) of the Customs Act, 1962 is not justifiable. Currency as such is not a prohibited item and can be released on imposition of redemption fine on the amount which exceeds the legally permissible limit.

5.7 That the applicant has no criminal antecedents nor any case of smuggling or money laundering against him in any of the airports in India or abroad;

5.8 That although as per Section 2(33) of the Customs Act, "prohibited goods" includes restricted goods in respect of which the conditions have not been fulfilled, the Government of India allowed redemption on the gold which was smuggled by the passenger ingeniously concealing it, in the under mentioned cases.

- i) In the case of Ashok Kumar Verma, -2019 (369) E.L.T. 1677 (GOI) Government of India allowed redemption of gold that was not only NOT DECLARED but ingeniously concealed in trolley bags.
- ii) In the case of Commissioner of Customs, New Delhi vs Ashwini Kumar Alias Amanullah, CESTAT, Principal Bench, New Delhi, 2021 (376) E.L.T.321 (Tri-Del) - Upheld the order passed by the Commissioner allowing redemption of confiscated 12000 grams of gold valued at Rs.3,56,64,000/- under Section 125, held the same is not only permissible under Section 125 but is consistent with current stand of the Government of India regarding smuggled gold.

5.9 That the applicant has claimed the ownership of the foreign currency seized from his possession while traveling to Dubai via CSMI Airport Mumbai on 03.10.2020. The foreign currency has not been declared as prohibited under the Customs Act, 1962 or FEMA. Regulation 5 of Foreign Exchange management (Export and import of Currency) Regulations 2015 wherein Reserve Bank of India may by regulations, prohibit, restrict or regulate the export, import or holding of currency notes. That even if the goods in question is attempted for improper export the same can be released on payment of redemption fine as per Section 125(1) of the Customs Act, 1962.

5.10 That it has been held by the Hon'ble courts, Tribunals and Revisionary Authority of Government of India that if the import of commodities is not completely banned, then such commodities or articles could be released on payment of redemption fine. Reliance in this regard is placed on some of such decisions which are mentioned below:

- i) 2017 (346) E.L.T.9 (Bom.) IN THE HIGH COURT OF JUDICATURE AT BOMBAY, COMMISSIONER OF CUSTOMS Versus RAJINDER NIRULA Customs Appeal No. 60 of 2006 wherein Court had released Foreign Currency of US \$ 70,000 found from carrier and same was released to the carrier by the Hon'ble Court.
- ii) The Hon'ble High Court of Calcutta in the matter of Commissioner of Customs (Preventive), West Bengal versus India Sales international reported in 2009 (241) E.L.T. 182(Cal) has observed that: Confiscation and redemption fine Prohibited goods,

export of- Word used by legislators under section 125 of the Customs Act, 1962 cannot be read as "prohibited absolutely" Word which has not been used in section 125 ibid by legislators cannot be inserted by Court - Option given under section 125.

iii) The Hon'ble Revisionary Authority in the case of KANWALJIT SINGH BALA reported in 2012 (275) E.L.T. 272 (G.O.I). In this case the passenger was trying to take out foreign currency without making proper declaration. The adjudicating authority ordered absolute confiscation. The Revisionary Authority upheld the confiscation but reduced redemption fine and penalty.

iv) Kishin Shewaram Loungain V/s Commissioner of Customs, ACC Mumbai-2002(146) E.L.T 180 (Tri-Mumbai). In this case, the passenger was intercepted on 28.03.1997 and was found carrying foreign currency equivalent to INR 28,01,257/- of someone else for monetary consideration, the adjudicating authority confiscated the currency absolutely. CESTAT upheld confiscation but allowed redemption on payment of fine.

v) The hon'ble Tribunal in the case of DHANAK MADHUSUDAN RAMJI Versus COMMISSIONER OF CUSTOMS (AIRPORT), MUMBAI reported in 2009 (237) E.L.T. 280 (Tri.- Mumbai) held that "Confiscation Absolute confiscation Non- declaration of - jewellery and foreign currency Order of absolute confiscation assailed pleading that jewellery and foreign currency not prohibited items and that only charge was non- declaration - HELD: Assessee to be given option to redeem goods on payment of redemption fine-

This order of the Hon'ble Tribunal has been upheld by the Hon'ble Bombay High Court reported in 2009 (248) EL.T. 127 (Bom) and the Hon'ble Apex Court reported in 2010(252) E.L.T. A 102(S.C) on the issue of granting option of redemption.

vi) The Hon'ble Supreme Court of India in Hargovind Das K. Joshi Versus Collector of Customs reported in 1992 (61) E.L.T. 172(S.C.) has observed that: Redemption fine Customs Absolute confiscation of goods by Collector without considering question of redemption on payment of fine although having discretion to do so Matter remanded

to Collector for consideration of exercise of discretion for imposition of redemption fine-Section 125 of Customs Act, 1962.

vii) The Hon'ble Revision Authority IN RE MOHD.ARIF in 2018(361) E.L.T.959 (G.O.I) has observed that: reported Fine on absolute confiscation of foreign currency being exported out of India-Imposition of-Foreign currency though prohibited goods, can be allowed to be redeemed on payment of fine- Section 125 of The Customs Act, 1962.

viii) The Hon'ble Tribunal in the case of - ALFRED MENEZES v/s COMMISSIONER OF CUSTOMS, MUMBAI reported in 2011(236) E.L.T. 587 (Tri. -Mumbai) held that "Redemption fine, Prohibited/restricted goods, confiscation of-Power of adjudicating authority under the provisions of Customs Act, 1962 to offer redemption fine in lieu of confiscation of prohibited/restricted goods confiscated- Section 125(1) ibid clearly mandates that it is well within the power of adjudicating authority to offer redemption of goods even in respect of prohibited goods - Order of commissioner not giving any reason for concluding that adjudicating authority's order is wrong, set aside-Section 125 ibid. [para6]"

This order of the Hon'ble Tribunal has been upheld by the Hon'ble Bombay High Court on the issue of granting option of redemption

ix) The Hon'ble Tribunal in the case of YAKUB IBRAHIM YUSUF v/s COMMISSIONER OF CUSTOMS, MUMBAI reported in 2011 (263) E.L.T. 685 (Tri-Mumbai) held that: "Confiscation-prohibited goods - Term prohibited goods refers to goods like arms, ammunition, addictive drugs, whose import in any circumstance would danger or be detriment to health, welfare or morals of people as whole, and makes them liable to absolute confiscation- it does not refer to goods whose import is permitted subject to restriction, which can be confiscated for violation of restriction, but liable to be released on payment of redemption fine since they do not cause danger or detriment to health-

x) 2000(118) E.L.T. 639 (Tribunal) IN THE CEGAT, WEST ZONAL BENCH, MUMBAI, FELIX DORES FERNANDES v/s COMMISSIONER

OF CUSTOMS.ACC, MUMBAI Order No.915/2000-WZB/C-II, dated 23-03-2000, held that absolute confiscation of foreign currency done by adjudicating authority was over ruled by CESTAT with observation that Government of India (Revisionary Authority) in several similar cases has allowed redemption and maintenance of similar approach by Tribunal was desirable.

xi) IN THE CESTAT, SOUTH ZONAL BENCH, CHENNAI T.SOUNDARAJAN Versus COMMISSIONER OF CUSTOMS CHENNAI Final order No.618/2007, dated 19-04-2007 held that Option to redeem confiscated goods to be provided on payment of reasonable fine- Penalty to be decided afresh- Section 113,114 and 125 of Customs Act, 1962.

xii) Philip Fernandes Vs Commissioner of Customs, ACC,Mumbai-2002 (146) ELT 180 (Trib-Mum). In this case passenger while departing to Dubai was intercepted with assorted foreign currency worth Rs.86,44,140/-. He admitted that the currency was given to him by someone else and he was carrying it for monetary consideration. The giver of currency was also traced. The adjudicating authority confiscated and allowed redemption on fine and imposed penalty. Department filed appeal praying absolute confiscation. The departmental appeal was dismissed by CESTAT in light of earlier orders of CESTAT and Govt. of India where redemption was allowed. It also reduced redemption fine by observing that currency is a restricted goods, is not dutiable and offence is of technical in nature

xiii) Etc.

5.11 The applicant concluded by requesting that on humanitarian grounds the applicant may be given an Option to pay fine in lieu of confiscation as per Section 125(1)of the Customs Act, 1962, on the amount which was in excess of the allowed limit and the said foreign currency seized from his possession may kindly be allowed to be redeemed on payment of redemption fine as per Section 125(1) of the Customs Act, 1962 by restoring/upholding the OAA's Order-in-Original.

The Applicant has also filed an application for condonation of delay in filing the impugned Revision Application.

6. Personal hearing in the case was scheduled for 09.08.2023. Mr Sameer Kashimji, Advocate appeared for the hearing on behalf of the applicant. He submitted that some foreign currency was recovered from the applicant. He further submitted that original authority has correctly allowed redemption of foreign currency on redemption fine and penalty. He further submitted that on departmental appeal, Appellate Authority has absolutely confiscated. He also submitted that applicant is not a habitual offender.

7.1 Government observes that the applicant has filed for condonation of delay. Applicant has stated that the OIA was received by him on 14.02.2022 and that there was delay in filing the application as they were in correspondence with the department seeking a copy of the Order in Original as they did not have it and wanted to include the same with the Revision Application. Government observes that the applicant was required to file the revision application within 3 months i.e. by 14.05.2022. Considering, the further extension of 3 months which can be condoned, the applicant was required to file the revision by 14.08.2022. The applicant had filed the revision application on 10.08.2022 which is within the extendable period and hence the Government condones the delay and goes into the merits of the case.

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. Further, in their statement the applicant had admitted the possession, carriage, concealment, non-declaration and recovery of the foreign currency. Thus, it has been rightly held that in 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 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 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. Section 125 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.**

9. In a similar case of confiscation of Currency, Delhi High Court in the case of *Raju Sharma v/s. Union of India* [2020(372) ELT 249 (Del.)] while allowing release of currency observed,

"18. the actual grievance of the Revenue before the Revisionary Authority, was that the seized currency was "prohibited", redemption thereof ought not to have been allowed at all, and the currency ought to have been absolutely confiscated. This submission directly flies in the face of Section 125 of the Customs Act whereunder, while allowing the redemption, in the case of goods which are not prohibited, is mandatory, even in the case of goods, which are prohibited, it is open to the authorities to allow redemption thereof, though, in such a case, discretion would vest with the authorities. The Commissioner (Appeals), while rejecting the appeal of the revenue, correctly noted this legal position, and observed that, as the AC had exercised discretion in favour of allowing redemption of the seized currency, on payment of redemption fine of Rs. 50,000/-, no occasion arose to interfere therewith. We are entirely in agreement with the Commissioner (Appeals). 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 motives [Mangalam Organics Ltd. v. UOI - (2017) 7 SCC 221 - 2017 (349) E.L.T. 369 (S.C.)]. No illegality, much less perversity, is discernible in the decision, of the AC, to allow redemption of the seized currency on

payment of redemption fine of ₹ 50,000/-. The Commissioner (Appeals) rightly refused to interfere with the said decision, and the Revisionary Authority, in an order which reflects total non-application of mind, chose to reverse the said decision.

19. We are unable to sustain the order of the Revisionary Authority. We uphold the decision of the Commissioner (Appeals) as well as the order of the AC, which stands affirmed thereby. The seized currency shall, therefore, forthwith be returned to Petitioner No. 2".

9. The Government finds that the amount involved in the instant case is not large. There is no case made out that the applicant are habitual offenders. The Government relies on the case laws viz i) Omprakash Jhunjhunwala Vs. Commissioner-2017 (353) E.LT. A95(Tri-Mum); ii) Order No. 43/2018 dated 23.03.2018 of Mohd. Arif reported in 2018 (361) E.L.T.959 (G.O.I.) and Hon'ble High Court of Bombay vide its recent judgment dated 27.10.2016 in case of CC, Mumbai Vs Rajinder Nirula (Customs Appeal No 60/2006).

10. The Government finds that the amount involved in this case is not very large. Also, the applicant claimed ownership of the same and has submitted that he is taking his own money for personal use. This case is at best a case of mis-declaration rather than smuggling. Government finds that the discretion not to release the foreign currency with reasonable Redemption Fine under the provisions of Section 125 of the Customs Act, 1962 would be harsh and unreasonable. Government therefore does not agree with the AA's Order of absolute confiscation and is inclined to set aside the said Order in Appeal. Government notes that the OAA's Order of allowing redemption of the

foreign currency is legal and judicious order. Hence, Government is inclined to restore the same.

11. Government finds that the penalty of Rs. 1,00,000/- imposed on the applicant for the impugned assorted foreign currency equivalent to Indian Rupees amounting to Rs.9,53,798/- under Section 114(i) of the Customs Act, 1962, commensurate with the omissions and commissions committed.

12. For the aforesaid reasons, Government sets aside the absolute confiscation held in the OIA. Government restores in to-to, the OIO passed by the OAA.

13. Accordingly, the OIO passed by the OAA is restored and the Revision Application is allowed.


(SHRAWAN KUMAR)

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

ORDER No. 724/2023-CUS (WZ/SZ)/ASRA/MUMBAI DATED 10.10.2023.

To,

1. Shri Abdul Rahiman Vadakekara, H. No. 1/441 A, Vadakekara House, Bevinje PO Thekkilferry, Kasargod, Kerala-671541
2. Commissioner of Customs (Airport), CSMI Airport, Sahar, Andheri (East), Mumbai-400099.
3. The Commissioner of Customs (Appeals), Mumbai-III, 5th Floor, Avs Corporate Point, Makwana Lane, Behind S.M.Centre, Andheri Kurla Road, Andheri (East), Mumbai 400 059.

Copy to:

4. Shri Sameer Kashimji, Advocate, 12/334, 22, Sweet Home Apartments, Britto Lane, Falnir, Karnataka, Mangaluru-575001
5. Sr. P.S. to AS (RA), Mumbai.
6. File copy
7. Noticeboard.



