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सत्यमेव जयते

GOVERNMENT OF INDIA
MINISTRY OF FINANCE
(DEPARTMENT OF REVENUE)

8th Floor, World Trade Centre, Centre – I, Cuffe Parade,
Mumbai-400 005

F.No. 371/209/B/WZ/2022-RA/रदु: Date of Issue : 29.01.2024

ORDER No. 76/2024-CUS (WZ)/ASRA/ DATED. 24.01.2024.
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.

F.No. 371/209/B/WZ/2022-RA

Applicant : Shri. Muhammed Bassam Jubapu

Respondent : Principal Commissioner of Customs, CSMI Airport,
Sahar, Andheri East, Mumbai – 400 099.

Subject : Revision Application filed, under Section 129DD of the
Customs Act, 1962 against the Order-in-Appeal No.
MUM-CUSTM-PAX-APP-681/2021-22 dated
08.09.2021 issued on 29.09.2021 through F.No.
S/49-341/2020 passed by the Commissioner of
Customs (Appeals), Mumbai – III, Marol, Mumbai –
400 059.

ORDER

This revision application has been filed by the Shri. Muhammed Bassam Jubapu, (herein referred to as Applicant) against the Order-in-Appeal No. MUM-CUSTM-PAX-APP-681/2021-22 dated 08.09.2021 issued on 29.09.2021 through F.No. S/49-341/2020 passed by the Commissioner of Customs (Appeals), Mumbai – III, Marol, Mumbai – 400 059.

2. Brief facts of the case are that the applicant who was bound for Dubai by Indigo Airlines Flight no. 6E-1768 / 31.01.2020 was intercepted by Customs Officers on 30.01.2020 at CSMI Airport, Mumbai after he had checked in to board the flight Personal search of the applicant led to the recovery of USD 11,200/- and Bahraini Dinar (BHD) 1000/- equivalent to INR 9,65,390/-.

3. After due process of the law, the Original Adjudicating Authority (OAA) viz, Deputy Commissioner of Customs, CSMI Airport, Mumbai vide Order-In-Original No. Air Cus/49/T2/1572/2020/INI-B-Batch dated 31.01.2020, ordered for the confiscation of the impugned foreign currency viz, USD 11,200/- and BHD 1000/- under Section 113 (d), (e) & (h) of the Customs Act, 1962. However, an option to redeem the same on payment of a redemption fine of Rs. 10,000/- was granted to the applicant. Further, a penalty of Rs. 10,000/- was imposed on the applicant under Section 114(i) and (ii) of the Customs Act, 1962.

4. Aggrieved by this order, the Respondent filed an appeal with the Appellate Authority (AA) viz, Commissioner of Customs (Appeals), Mumbai – III, Marol, Mumbai – 400 059, who vide her Order-in-Appeal No. MUM-CUSTM-PAX-APP-681/2021-22 dated 08.09.2021 issued on 29.09.2021 through F.No. S/49-341/2020 set aside the impugned OIO and ordered for

the absolute confiscation of the impugned foreign currency viz, USD 11,200/- and BHD 1000/-.

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 AA had erred both on facts and on law, in passing the impugned order and holding absolute confiscation of the foreign currency; that applicant had submitted that he had not declared the foreign currency to the Customs; that the OAA after carefully going through the facts had granted an option to redeem the foreign currency on payment of a fine in terms of Section 125 of the Customs Act, 1962; that the Hon'ble High Court of Calcutta in CC(Prev) vs. Uma Shankar Verma had held that where the goods were not prohibited, the authorities had no choice but to all the option of redemption of goods on payment of a fine; that reliance has been placed in the Tribunal's Order in the case of Gauri Enterprises vs. Commr. Of Customs, Pune reported in 2002-145-ELT-706-Tri.Bang; where it was held that resort to absolute confiscation should be an exception and not a rule.

5.02. Reliance has been placed on an exhaustive list of case laws, a few are as given below;

- (a). Indian Petrochemicals Corporation vs. General Secretary, Gujarat High Court dated 19.03.2008;
- (b). Halithu Ibrahim vs. C.C (Airport), Chennai passed by Tribunal in Final Order no. 172/02 dated 22.02.2002 in Appeal No. C/453/98.
- (c). Prem Kumar Vs Customs in the High Court of Delhi reported in 2016 (334) ELT 498 (Del.)
- (d). Sh. T. Soundrarajan Vs Commissioner of Customs, Chennai -in CESTAT, Chennai.
- (e). UNION OF INDIA Vs HARISH MULJIMAL GANDHI in Bombay High Court at Goa
- (f). Md. LIAKAT ALI Versus COMMR. OF CUSTOMS (PREV.), KOLKATA, WEST BENGAL in 2008(22) ELT 295 (Tri. Kolkatta)
- (g). Customs, Excise and Gold Tribunal – Mumbai in Kishin Shewaram Loungam And others... vs Commissioner Of Customs, Acc, ... on 12 September, 2001

- (h). Delhi High Court in Mohd Ayaz vs Union Of India (Uoi) on 30 August, 2000
- (i). Customs, Excise and Gold Tribunal – Mumbai in Shri Rajinder Nirula And Tilak Raj ... vs Commissioner of Customs on 25 April, 2006
- (j). Customs, Excise and Gold Tribunal – Mumbai in Commissioner Of Customs (Ahd), vs Harshavadan Bhagvanji Varia on 5 October, 2001.
- (l). Yakub Ibrahim Yusuf vs CC, Mumbai 2011 (263) ELT 685
- (m). Universal Traders v. Commissioner – 2009 (240) ELT A78 (SC)
- (n). Gauri Enterprises vs CC, Pune 2002 (145) ELT (705) (Tri-Bangalore)
- (o). CC (Airport), Mumbai vs Alfred Menezes 2009 (242) ELT 334 (Bom)
- (p). Shaikh Jamal Basha vs Government of India 1997 (91) ELT 277 (AP)
- (q). VP Hameed vs Collector of Customs, Mumbai 1994 (73) ELT 425 (Tri)
- (r). T. Elavarasan vs Commissioner of Customs (Airport), Chennai 2011 (266) ELT 167 (Mad)
- (s). Kadar Mydin vs Commissioner of Customs (Preventive), West Bengal 2011 (136) ELT 758
- (t). Sapna Sanjeeva Kohli vs Commissioner of Customs Airport, Mumbai 2008 (23) ELT 305
- (u). Vattakkal Moosa vs Collector of Customs, Cochin 1994 (72) ELT (GOI)
- (v). Halithu Ibrahim vs CC 2002-TIOL 195-CESTAT-MAD
- (x). Krishna Kumara vs CC, Chennai 2008 (229) ELT 222 (Tri-Chennai)
- (y) Hargovind Das K. Joshi vs. Collector of Customs, 1992(61) ELT 172(SC).
- (z). etc

5.03. that the discretionary power of an quasi-judicial authority cannot be inferred lightly;

5.04. that decision in the case of Om Prakash Bhatia was not relevant to the present case; that they rely on the case of Commr. Of Customs vs. M/s. Atul Automations Pvt. Ltd passed by the Apex Court on 24.01.2019.

5.05. that the decisions of the Tribunal, High Courts and Apex Court relied upon by the applicant had been rejected by the AA without proper application of mind; that factual situation of the applicant fitted in the case relied upon; that the Order of the AA was vitiated because it was biased,

violated principles of natural justice and fair play; that the OIA was not sustainable; 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; that they have cited the undermentioned case laws;

- (a). CCE, Calcutta Vs Alnoori Tobacco Products [2004 (170) ELT 135 (SC)];
- (b). Escorts Ltd. Vs CCE, Delhi [2004 (173) ELT 113 (SC)];
- (c). CC (Port), Chennai Vs Toyota Kirloskar [2007 (213) ELT 4 (SC)];
- (d). Sri Kumar Agency vs CCE, Bangalore 2008 (232) E.L.T. 577 (S.C.),
- (e). etc.

5.06. that the OIA passed by the AA was not on order o merits and not a speaking order; Apex Court's Order in the case of State of Punjab vs. K.R Erry,

- (a) Liberty Oil Mills vs. Union of India,
- (b) C. L Tripathi vs. State Bank of India
- (c) Pitchaiah vs. Andhra University
- (d) A.K Kraipak vs. UOI
- (e) Chintamoni Pradhan vs. PaikaSamal
- (f) CESTAT, New Delhi's order in Sahara India TV Network vs. CCE, Noida, relying upon the Apex Court's Order in the case of JT. Commr. IT, Surat vs. Saheli Leasing & Industries Ltd [2010-253-ELT-705-SC ; CESTAT, New Delhi order M/s. Vikas Enterprises vs. CCE, Allahabad ; M/s. Sharp Carbon India vs. Commr. Of C.Ex, Kanpur,
- (g) M/s. International Woollen Mills Ltd. Vs. Standard Wool (UK) Ltd
- (h) Master Circular on Show Cause Notice, Adjudication and Recovery' issued by the Board under F.NO 96/1/2017-CX.1 dated 19-1-2017,
- (i) Decision of Cestat, New Delhi in M/s. Sahara India TV Network vs. CCE, Noida,
- (j) Kranti Assoiates Pvt. Ltd vs. Masood Ahmed Khan {2011-273-ELT-345-SC},
- (k) M/s. Mahabir Prasad Santosh Kumar vs. State of Up and otrs, reported in AIR-1970-SC-1302,
- (l) M/s. Travancore Rayons Ltd vs. UOI and otrs AIR-1971-SC-862,

- (m) Woolcombers of India Ltd. Vs. Woolcombers Workers Union and anr {AIR-1973-SC-2758},
- (n) Siemens Engg & Mfg. Co. India Ltd vs. UOI and anr {AIR-1976-SC-1785},
- (o) Etc.

Under the above circumstances of the case, the applicant has prayed to Revision Authority to dismiss the OIA passed by the AA and to implement the OIO passed by the OAA and to release the foreign currency on payment of a redemption fine.

6. Applicant has filed an application for condonation of delay and has attributed the same to the extraordinary situation at that time due to Covid pandemic.

7. Personal hearings in the case was scheduled for 31.10.2023, 16.11.2023. Shri. Prakash Shingrani, Advocate appeared for personal hearing on 31.10.2023 and submitted that OIO has correctly appreciated the facts and law in the case. He requested to restore the OIO and set aside the OIA.

8. On the issue of condonation of delay, Government notes that the revision application has been filed on 25.04.2022. The OIA was issued on 29.09.2021. Government notes that during this period, the restrictions due to Covid pandemic had been imposed in the country. Due to the prevalent Covid conditions, Government observes that the Apex Court had granted a moratorium for filing appeals etc from 15.03.2020 to 28.02.2022 [Misc. Appln. No 21/2022] The applicant has filed the Revision Application on 25.04.2022. Considering the said moratorium period granted by the Apex Court, it is seen that the applicant had filed the revision application within time.

9. 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 his averments before the lower authorities, the applicant had admitted the possession, carriage, non-declaration and recovery of the foreign currency. The applicant was unable to coherently give, the source of how he came in possession of the foreign currency. The fact remains that the applicant had not disclosed the impugned foreign currency and the source of the foreign currency had remained unaccounted. Applicant was unable to show that the impugned foreign currency in his possession was procured from authorized persons as specified under FEMA. Thus, it has been rightly held by the lower authorities that in the absence of any valid document / proof 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.

10. 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 authorities 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. In doing so, the lower adjudicating authority has applied the ratio of the judgement of the Madras High Court in the case of Apex Court in the case of Commissioner of Customs, Chennai v/s. Savier Poonolly [2014(310 E.L.T. 231 (Mad))] wherein it was held at para 13 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.

11. Government finds that the ratio of the judgement of the Apex Court in the case of Sheikh Mohd. Umar v/s. Commissioner of Customs, Calcutta [1983(13) ELT 1439 (SC)] wherein it is held that non-fulfilment of the restrictions imposed would bring the goods with the scope of "prohibited goods" is applicable in this case.

12. 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.

13. The Government finds that the amount involved in this case is small. A case that the concealment adopted by the applicant was ingenious had not been made out. Also, a case that the applicant was a habitual offender had not been made out. Government finds that under such circumstances, the OAA had rightly allowed to redeem the foreign currency under the provisions of Section 125 of the Customs Act, 1962. The absolute confiscation of the impugned foreign currency is excessive and unjustified. The order of the Appellate authority is therefore liable to be set aside and the Government is inclined to allow redemption of the currency.

14. The Government finds that the personal penalty of Rs. 10,000/- imposed on the applicant under Section 114(i) and (ii) of the Customs Act, 1962 is commensurate with the omissions and commissions committed.

15. In view of the above, the Government modifies the OIA passed by the AA to the extent that the absolute confiscation of the foreign currency is set aside and the release of the foreign currency on payment of a redemption fine of Rs. 1,75,000/- is allowed. The quantum of penalty imposed on the applicant under Section 114(i) and (ii) of the Customs Act, 1962 by the OAA and upheld by the AA, is sustained.

16. Accordingly, the Revision Application is allowed on the above terms.


(SHRAWAN KUMAR)

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

ORDER No. 76/2024-CUS (WZ)/ASRA/MUMBAI DATED 24.01.2024.

To,

1. Mr. Muhammed Bassam Jubapu, Bhatkal, Karnataka [full address not available in the records; Service to his Counsel].
- 2 Pr. Commissioner of Customs, Adjudication Cell, Chhatrapati Shivaji Maharaj International Airport, Sahar, Andheri East, Mumbai – 400 099.

Copy to:

1. Shri. Prakash Shingrani, Advocate, 12/334, Vivek, New MIG Colony, Bandra East, Mumbai – 400 051.
2. Sr. P.S. to AS (RA), Mumbai.
3. File Copy.
- 4 Notice Board