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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. 371/78-80/B/WZ/2021-RA / 7704 Date of Issue : 30-10-23

ORDER NO. 787/788/794 / 2023-CUS (WZ)/ASRA/MUMBAI DATED 26.10.2023
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.

F.No. 371/78-80/B/WZ/2021-RA

Applicant No. 1 / (A1) : Shri. Kamal Motwani,

Applicant No. 2 / (A2) : Ms. Ayushi Jain,

Applicant No. 3 / (A3) : Shri. Avi D. Kachhwani.

.....APPLICANTS.

Respondent : Pr. Commissioner of Customs, CSMI Airport, Mumbai.

Subject : Revision Application filed, under Section 129DD of the
Customs Act, 1962 against the Orders-in-Appeal No.
MUM-CUSTOM-PAX-683 to 685/2020-21 dated 14.01.2021
issued on 21.01.2021 through F.No. S/49-756, 757 &
758/2019 passed by the Commissioner of Customs
(Appeals), Mumbai - III.

ORDER

These three revision applications have been filed by (i) Shri. Kamal T. Motwani, (ii). Ms. Ayushi B. Jain and (iii) Shri. Avi D. Kachhwani [hereinafter referred to as the Applicants or alternately and more specifically as Applicant no. 1 (A1), Applicant no. 2 (A2) and Applicant no. 3 (A3), resp.], against the Orders-in-Appeal No. MUM-CUSTOM-PAX-683 to 685/2020-21 dated 14.01.2021 issued on 21.01.2021 through F.No. S/49-756, 757 & 758/2019 passed by the Commissioner of Customs (Appeals), Mumbai - III. Government notes the OIAs, OIOs and their submissions are common, hence the said 3 Revision Applications are being taken up together for a decision.

2(a). Brief facts of the case are that the applicants were intercepted on 06.10.2017 by Customs Officers at CSMI Airport as they were about to depart to Dubai. A1 and A2 were scheduled to depart by Indigo Flight No. 6E-63 / 06.10.2017 while A3 was scheduled to depart by Jet Airways Flight No. 9W-542 / 06.10.2017. To the query put to A1 and A2 whether they were carrying any contraband, foreign currency etc, they had replied that they were carrying USD 2000 and USD 2100 respectively. On examination of their baggage, USD 2000, Rs. 6500/- and AED 805 were found in the pouch carried by A1 and USD 2100 and Rs. 6000 were found in the hand bag carried by A2. As there was specific intelligence, that A1 and A2 were carrying foreign currency, they were questioned consistently and persistently. However, they maintained that did not possess any more foreign currency. It was decided to take A1 and A2 to the Magistrate for obtaining permission for taking X-ray. When they were about to be taken to the Magistrate, they both disclosed that they had concealed EURO 25,000/- each in their body cavity i.e. rectum.

2(b). In the meantime, A2 received an incoming call on her mobile who she identified as her brother. She informed that he was also departing to Dubai by

Jet Airways departing at 09.30 am on same day. A1 informed that A3 was his wife's nephew and that A2 and A3 were both related to him. Thereafter, A3 was also intercepted after he had crossed the immigration area and was near boarding gate no. 69. Search of A3 resulted in recovery of USD 3000, Rs. 9100/- and AED 100. To query whether he was carrying any more foreign currency, A3 replied in the negative. Thereafter, he was informed that his uncle and cousin i.e. A1 and A2 both had confessed to having concealed foreign currency in their body cavity, he too confessed that EURO 35,000/- was concealed in his rectum. The applicants were all offloaded from the aircrafts. The applicants ejected out the foreign currency. From A1, in all, 50 currency notes of EURO in denomination of 500 were recovered from his body cavity; from A2, in all 50 currency notes of EURO in denomination of 500 were recovered from her body cavity and from A3, 70 currency notes of EURO in denomination of 500 were recovered from his body cavity. Thus, in all assorted foreign currency totaling i.e. EURO 85,000/-, USD 7100 and AED 905 equivalent to Rs. 68,64,051 were recovered from the applicants.

2(b). The applicants in their statements recorded under Section 108 of the Customs Act, 1962 admitted to knowledge, possession, carriage, non-declaration, recovery and seizure of the foreign currency recovered from them. Foreign currency equivalent to Rs.20,22,406/-, Rs. 20,15,030/-; Rs. 28,26,615/-. They were unable to provide details of the source of the possession of the foreign currency. A2 and A3 admitted that the foreign currency did not belong to them and they were acting at the behest of their Uncle and family friend, viz, A1.

3. After due process of the law, the Original Adjudicating Authority (OAA), viz Additional Commissioner Of Customs, CSMI Airport, Mumbai, vide common Order-In-Original No. ADC/AK/ADJN/520/2018-19 dated 25.03.2019 issued through S/14-6-29/2017-18/Adjn (SD/INT/AIU/263/2017-APB) ordered for

the absolute confiscation of the assorted foreign currency equivalent to Rs. 68,64,051/- under Section 113(d), 113(e) & 113(h) of the Customs Act, 1962 read with Section 6(3)(g) of FEMA, 1999 and a personal penalty of Rs. 5,00,000/-, Rs. 2,50,000/- and Rs. 3,50,000/- were imposed on the applicants respectively under Section 114(i) and (jii) of the Customs Act, 1962.

4. Aggrieved by the said order, the applicants filed appeals before the appellate authority (AA) viz, Commissioner of Customs (Appeals), Mumbai – III, who vide common Orders-In-Appeal Nos. MUM-CUSTOM-PAX-683 to 685/2020-21 dated 14.01.2021 issued on 21.01.2021 through F.No. S/49-756, 757 & 758/2019 did not find any reason to interfere in the impugned OIO and upheld the same in toto.

5. Aggrieved with the above order, all the Applicants have filed similar grounds of revision which are as under;

- 5.01. that the OIA is not on merits and not a speaking order. Principles of natural justice had not been followed. On these issues, to buttress their defense, they have relied upon the undermentioned case laws;
- (a) Apex Court's Order in the case of State of Punjab vs. K.R Erry,
 - (b) Liberty Oil Mills vs. Union of India,
 - (c) C. L Tripathi vs. State Bank of India
 - (d) Pitchaiah vs. Andhra University
 - (e) A.K Kraipak vs. UOI
 - (f) Chintamani Pradhan vs. PaikaSamal
 - (g) 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,
 - (h) M/s. International Woollen Mills Ltd. Vs. Standard Wool (UK) Ltd
 - (i) 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,
 - (j) Decision of Cestat, New Delhi in M/s. Sahara India TV Network vs. CCE, Noida,

- (k) Kranti Associates Pvt. Ltd vs. Masood Ahmed Khan (2011-273-ELT-345-SC),
- (l) M/s. Mahabir Prasad Santosh Kumar vs. State of Up and otrs, reported in AIR-1970-SC-1302,
- (m) M/s. Travancore Rayons Ltd vs. UOI and otrs AIR-1971-SC-862,
- (n) Woolcombers of India Ltd. Vs. Woolcombers Workers Union and anr {AIR-1973-SC-2758},
- (o) Siemens Engg. & Mfg. Co. India Ltd vs. UOI and anr {AIR-1976-SC-1785},
- (p) Etc.

5.02. that some of the important issues and defense submissions as given below were neither discussed nor countered in the impugned OIO and OIA,

(a). Examination of the baggage, personal searches, recovery of foreign currency had not been carried out in the presence of panchas; (b). the CCTV footage of the departure hall at relevant time would prove that panchas were not present at 06.40 hrs to 16:00 hrs of 06.10.2017; (c). that the panchas were called for only after the completion of the panchanama; (d). CCTV was a crucial piece of evidence, which was not produced; (e). that the foreign currency had only been detained and not seized, therefore seizure was not sustainable; (f). that the applicants had been forced to admit that the currency was concealed in their rectums;

5.03. that foreign currency was not a prohibited item and the same was not liable for absolute confiscation; that A1 claimed ownership of the foreign currency;

that they relied on the undermentioned case laws;

(a). Final Order No.172/02 dated 22.2.02 in Appeal No.C/453/98 in the case of Halithu Ibrahim Vs. CC (Airport), Chennai Bench of the Tribunal.

(b). In Felix Dores Fernandes vs. CC, ACC, Mumbai,

(c). Prem Kumar Vs Customs in the High Court of Delhi reported in 2016

(334) ELT 498 (Del.),

(d). 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 Loungani 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
- (k). Customs, ... vs Harshavadan Bhagvanji Varia on 5 October, 2001
- (j). The Hon'ble High Court of Delhi in the case of Raju Sharma vs Union of India - 2020 (372) E.L.T. 249 (Del.),
- (l). Etc.
- 5.04. that the decision relied upon by the applicant had been rejected by the AA without proper application of the mind, that the applicants had discussed cases that *factually fit their case*; that the the decisions of the Tribunals, High Courts and Supreme Court relied upon by the applicant had been rejected without assigning any reasons and without proper application of mind; that the AA had *read the decisions in isolation and had failed to apply the same in the case of the applicants*; that the applicants have relied upon the Apex Court's Order in the case of CCE, Calcutta Vs Alnoori Tobacco Products 2004 (170) ELT 135 (SC) where it has been stressed that *the facts of decision relied upon should actually fit factual situation of a given case and to exercise caution while applying the ratio of one case to another*; this was also reiterated by the Apex Court in the case of Escorts Ltd. Vs CCE, Delhi [2004 (173) ELT 113 (SC)], wherein it has been observed that *one additional or different fact may make difference between conclusion in two cases*; and so, disposal of cases by blindly placing reliance on a decision is not proper; that *further in the case of CC (Port), Chennai Vs Toyota Kirloskar [2007 (213) ELT 4 (SC)]*, it has been observed by the Hon'ble Supreme Court that *the ratio of a decision has to be understood in factual matrix involved therein and that the ratio of decision has to be culled out from facts of given case*; that many other cases have been relied upon by the applicants on this contention.
- 5.05. that A3 claimed ownership of the foreign currency and prayed for its redemption;
- 5.06. that the penalties imposed on the applicants was disproportionate to the value of the currency confiscated.; that they have relied on a host of case laws;

Under the circumstances of the case, the applicants have prayed to the Revisionary Authority to set aside the OIA and to release the foreign currency on payment of fine and penalty and to drop proceedings.

6. Personal hearing was scheduled for 18.07.2023, 25.07.2023. Shri. Prakash Shingarani, Advocate, appeared on 25.07.2023 and submitted that foreign currency is not prohibited goods under the Customs Act, 1962. He requested for release of goods on reasonable redemption fine and penalty.

7. Government has gone through the facts of the case and the submissions, records including the SCN furnished alongwith the revision applications. 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 to 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 fact remains that the applicant had not disclosed the impugned foreign currency and the source of the foreign currency had remained unaccounted. Applicants were unable to show that the impugned foreign currency in their possession was procured from authorized persons as specified under FEMA. Further, all the applicants had adopted an ingenious and risky method to conceal the foreign currency and avoid detection. This method adopted for concealment shows their determination not to declare the foreign currency. Thus, it has been rightly held by the lower authorities y 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 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

applicants could not account for the legal procurement of the foreign currency and that no declaration as required under section 77 of the Customs Act, 1962 had been filed, and the method adopted was not only ingenious but also bestial.

8. A substantial amount of foreign currency was recovered from the applicants. In this case, the applicant had adopted an ingenious and risky method of concealment to dodge the authorities and smuggle the foreign currency out of the country. This method shows their determination to take the currency out of the country. The foreign currency had been kept concealed in their body cavity and they admitted to possession only after persistent questioning. Had it not been for the intelligence gathered and alertness of the Officers, the applicants would have been successful in taking out the foreign currency.

9. *The concealment adopted clearly indicates that the applicants harboured no intention to take 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 appellate authority that the said provisions of Foreign Exchange Management (Export & Import of Currency) Regulations, 2015 which warrants that the foreign currency should be sourced from legal channels has been violated by the applicant is correct and therefore, the confiscation of the foreign currency ordered, is justified. In doing so, the Government finds that the appellate authority had rightly applied 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".*

10. 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.

11. 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.

12. The Government finds that the amount involved in this case is substantial; that the foreign currency had been ingeniously concealed. The manner of concealment is important as it indicates that the applicants had no intention to declare the foreign currency. Government finds that this is a pre-meditated and well thought-out, conscious plan of the applicants to smuggle out substantial quantity of foreign currency. The applicant had not produced any evidence suggesting that the foreign currency was garnered / accumulated from authorized persons. Quantity, unaccounted source, manner of keeping, syndicated operation, non-declaration and applicants not being able to explain, concealment being ingenious, etc are factors relevant for using discretion not to allow goods to be released on redemption fine.

13. The Government finds that the quantum of the currency is substantial and the appellate authority has rightly upheld the absolute confiscation of the

foreign currency held by the OAA and had denied the redemption of the assorted foreign currency. Facts and circumstances of the case especially, the ingenious and risky concealment resorted to by the applicants and syndicated operation, warrants absolute confiscation of foreign currency as held by the OAA and upheld by the Appellate Authority. Government finds the order passed by the AA is legal and judicious and does not find it necessary to interfere in the same.

14. Considering both the quantum of foreign currency and the ingenious and risky concealment, the Government finds that the personal penalty imposed on the applicants under Section 114 of the Customs Act, 1962 is commensurate with the omissions and commissions committed and is not inclined to reduce the same. Government notes that the quantum of penalty imposed on the applicant no. 1 is higher as he was the owner of the currency and had engaged both A2 and A3 in the smuggling of foreign currency.

15. In view of the above, the Government finds that the 3 revision applications filed by the applicants fails.

16. Accordingly, the three Applications are hereby, dismissed.


(SHRAWAN KUMAR)

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

ORDER No. ^{787-788,794} /2023-CUS (WZ) /ASRA/MUMBAI DATED ²⁶.10.2023

To,

1. Shri. Kamal Motwani, 503, 5th Floor, Bajrani Pride, Near C.H.M College, Ulhasnagar - 431 003.
2. Ms. Ayushi B. Jain, 201, Sai Bhakar, A Wing, Pulse Hospital, Sandeep Hotel, Kalyan West, Thane 421 301.,

3. Shri. Avi Kachhwani, 201, Sai Bhakar, A Wing, Pulse Hospital, Sandeep Hotel, Kalyan West, Thane 421 301.
4. Pr. Commissioner of Customs, Level - II, Terminal - 2, Chhatrapati Shivaji Maharaj Airport, Sahar, Andheri West, Mumbai - 400 099.

Copy To,

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