

SPEED POST

GOVERNMENT OF INDIA
MINISTRY OF FINANCE
(DEPARTMENT OF REVENUE)

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F.No. 371/361/B/2021-RA : Date of Issue 18.12.2023
371/362/B/2021-RA / 8432

ORDER NO. 917/2023-CUS (WZ)/ASRA/MUMBAI DATED 14.12.23 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 : 1. Mr. Kabeer Abdulla
2. Mr. Abdul Lathif Eriyal Mohammed

Respondent : Commissioner of Customs, Goa

Subject : Revision Application filed under Section 129DD of the
Customs Act, 1962 against the Order-in-Appeal No. GOA-
CUSTM-000-APP-021-022-2021-22 dated 30.09.2021
passed by the Commissioner of Appeals, CGST & Customs,
Goa.

ORDER

These two revision applications have been filed by Mr. Kabeer Abdulla (here-in-after referred to as Applicant-I) and Mr. Abdul Lathif Eriyal Mohammed (here-in-after referred to as Applicant-II) against the Order-in-Appeal (OIA) No. GOA-CUSTOM-000-APP-021-022-2021-22 dated 30.09.2021 passed by the Commissioner of Appeals, CGST & Customs, Goa.

2. Briefly stated, the facts of the case are that on 25.03.2018 the officers of Customs, AIU, Dabolim Airport, on a specific intelligence, intercepted two international transit passengers, viz. Applicant-I & Applicant-II, inside the Air India Flight No. AI-993, travelling from Bengaluru to Dubai via Goa. They were found in possession of Saudi Riyals equivalent to Rs.11,39,000/- without any document showing legal acquisition of said foreign currency. The recovered foreign currency was therefore placed under seizure
3. After due process of the law, vide Order-in-Original (OIO) No. 11/2019-20-JC(CUS) dated 31.12.2019, the Joint Commissioner of Customs, Goa, the Original Adjudicating Authority (OAA), confiscated the seized foreign currency absolutely and imposed a penalty of Rs. 90,000/- each on the Applicant-I and Applicant-II under section 114(i) of the Customs Act, 1962.
4. Aggrieved by this order, the Applicants filed separate appeals, which were rejected by the Appellate Authority (AA) vide the impugned OIA.
5. Hence, the Applicants have filed these two revision applications, mainly on the following grounds:

Applicant-I

- (i) that the Ld. Respondent has not taken into the consideration that the goods belonged to the co-accused.
- (ii) that the applicant was merely carrying the goods on behalf of his friend and the goods belonged to his friend.

Applicant-II

- (i) that the impugned order has been passed without giving due consideration to the documents on record and facts of the case;
- (ii) that this is the first time that the Applicant was carrying this type of goods and there is no previous case registered against him;
- (iii) that the Adjudicating Authority has not taken into consideration that the foreign currency carried by the Applicant is neither restricted nor prohibited and can be released on payment of Redemption Fine u/s. 125 of Customs Act, 1962 and no other person has claimed the recovered Foreign Currency;
- (iv) that a bare perusal of the sub-section (1) of Section 125 of the Customs Act, 1962, makes it crystal clear that the Respondent is required to give the Applicant an option to pay fine in lieu of confiscation in respect of the impugned goods;
- (v) that there are a number of judgments of the Hon'ble Apex Court, the Hon'ble High Courts and the Hon'ble Tribunal, wherein it has been held that Foreign Currency is not prohibited and therefore it should not be confiscated absolutely and option to redeem the same on Redemption fine ought to be given to the person from whom it is recovered.
- (vi) that some of the judgments are - Hargovind Das K. Joshi Versus Collector of Customs reported in 1992 (61) E.L.T. 172 (S.C.); Commissioner of Customs (Preventive), West Bengal versus India Sales International reported in 2009 (241) E.L.T. 182 (Cal.); Alfred Menezes versus Commissioner of Customs, Mumbai reported in 2011 (236) E.L.T. 587 (Tri. - Mumbai).

In view of the above the Applicants have prayed for redemption of the seized currency and substantial reduction in penalty.

6. Personal hearing in the case was held on 08.09.2023. Mr. N. J. Heera, Advocate appeared for the personal hearing on behalf of the applicants and submitted that the applicants were carrying small amount of foreign currency while going abroad. He further submitted that there was no concealment and

applicants have no past history of any offence. He requested to allow redemption of same on nominal fine and penalty. No one appeared for the personal hearing on behalf of the Respondent.

7. Government has gone through the facts of the case. Totally 68000 Saudi Arabian Riyals amounting to Rs.11,39,000/- were found with the applicants. 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 the possession, carriage, 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 applicants 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. The OAA also found that once the applicant-II was caught at Cochin International Airport in a case of Cigarettes and was penalised Rs.10,000/- for the offence. Thus, it has been rightly held by the OAA 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 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. 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.....

9. 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.

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. Government observes that 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 (CIVIL APPEAL NO(s). 2217-2218 of 2021 Arising out of SLP(C) Nos. 14633-14634 of 2020 – Order dated 17.06.2021) has laid down the conditions and circumstances under which such discretion can be used. The relevant paras 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. In a similar case, Hon'ble Bombay High Court in case of Commissioner 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 authorization. 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”.

13. In another 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 Indian 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 Rs.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”.

14. Government observes that Section 125 stipulates that:

Option to pay fine in lieu of confiscation. –

(1) Whenever confiscation of any goods is authorised 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 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 :

Provided that where the proceedings are deemed to be concluded under the proviso to sub-section (2) of section 28 or under clause (i) of sub-section (6) of that section in respect of the goods which are not prohibited or restricted, the provisions of this section shall not apply: Provided further that, without prejudice to the provisions of the proviso to sub-section (2) of section 115, such fine shall not exceed the market price of the goods confiscated, less in the case of imported goods the duty chargeable thereon.

(2) Where any fine in lieu of confiscation of goods is imposed under sub-section (1), the owner of such goods or the person referred to in sub-section (1), shall, in addition, be liable to any duty and charges payable in respect of such goods.

(3) Where the fine imposed under sub-section (1) is not paid within a period of one hundred and twenty days from the date of option given thereunder, such option shall become void, unless an appeal against such order is pending.

Government observes that there is no bar on the OAA allowing redemption of prohibited goods. This exercise of discretion will depend on the nature of the goods, nature of the prohibition, quantum of goods, manner of concealment, applicant being a repeat offender, etc. For instance, spurious drugs, arms, ammunition, hazardous goods, contaminated flora or fauna, food which does not meet the food safety standards, etc. are harmful to the society if allowed to find their way into the domestic market. On the other hand, release of certain goods on redemption fine, even though the same becomes prohibited as conditions of import have not been satisfied, may not be harmful to the society at large.

15. The Government finds that the amount found with the applicants in this case is below the prescribed limit set by the RBI. Further, both the applicants had kept the seized currency in the pocket of their trousers, thus, there was no concealment, proving that they had no malafide intentions. Government finds that under such circumstances, not using the discretion to release the foreign currency under the provisions of Section 125 of the Customs Act, 1962 is unfair 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 and penalty.

16. The Government finds that the penalty of Rs.90,000/- each imposed on the applicants under Section 114 of the Customs Act, 1962 does not commensurate with the act committed and admitted by them and considering that foreign currency amounting to Rs.4,94,125/- and Rs.6,44,875/- only was recovered from the Applicant-I and Applicant-II respectively.

17. In view of the above findings, the Government sets aside the impugned OIA. The seized 29,500 Saudi Arabian Riyals is allowed redemption on payment of fine amounting to Rs.1,00,000/- to Applicant-I and the seized 38,500 Saudi Arabian Riyals is allowed redemption on payment of fine amounting to Rs.1,25,000/- to Applicant-II. The penalty under Section 114 of the Customs Act, 1962 is modified to Rs.50,000/- each on both the applicants.


 (SHRAWAN KUMAR)
 Principal Commissioner & ex-officio
 Additional Secretary to Government of India

ORDER NO. **917/2023-CUS (WZ)/ASRA/MUMBAI DATED 14.12.23**

To,

1. Mr. Kabeer Abdulla,
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2. Mr. Abdul Lathif Eriyal Mohammed,
Raseela Manzil, P.O.Kudlu,
Kasargod, Kerala - 671 124.
3. Commissioner of Customs, Goa
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Vasco-da-Gama, Goa - 403 803.

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2. Sr. P.S. to AS (RA), Mumbai.
3. Guard file.