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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. 371/278/B/2021-RA /dscp Date of Issue : 19.12.2023

ORDER No. 928/2023-CUS (WZ)/ASRA/ DATED. 18.12.2023.
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. 371/278/B/2021-RA

Applicant : Ms. Wigdan Siddig Ismail Mohamed

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-1765/2020-21 dated
25.02.2021 issued on 05.03.2021 through F.No. S/49-
1310/2019 passed by the Commissioner of Customs
(Appeals), Mumbai – III, Marol, Mumbai – 400 059.

ORDER

This revision application has been filed by the Ms. Wigdan Siddig Ismail Mohamed, (herein referred to as Applicant) against the Order-in-Appeal No. MUM-CUSTOM-PAX-APP-1765/2020-21 dated 25.02.2021 issued on 05.03.2021 through F.No. S/49-1310/2019 passed by the Commissioner of Customs (Appeals), Mumbai – III, Marol, Mumbai – 400 059.

2. Brief facts of the case are that the applicant a Sudanese national was bound for Dubai by Indigo Flight no. 6E-1768 was intercepted by Customs Officers on 20.11.2019 after she had cleared the Immigration counter and was about to board the flight. Her personal search resulted in the recovery of foreign currency of USD 10,000/- i.e. 100 notes in denomination of 100 from her checked in baggage.

3. After due process of the law, the Original Adjudicating Authority (OAA) viz, Deputy Commissioner of Customs, CSMI, Mumbai vide Order-In-Original No. Air Cus/T2/49/1355/2019/UNI-A dated 21.11.2019, confiscated the foreign currency viz, USD 10,000/- equivalent to Rs. 7,03,000/- under Section 113 (d), (e) & (h) of the Customs Act, 1962. However, the foreign currency was allowed to be released on payment of a redemption fine of Rs. 70,000/-. A penalty of Rs. 25,000/- was imposed on the applicant under Section 114(i) 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 – III, Marol, Mumbai – 400 059 vide his Order-in-Appeal No. MUM-CUSTOM-PAX-APP-1765/2020-21 dated 25.02.2021 issued on 05.03.2021 through F.No. S/49-1310/2019 who set aside the impugned OIO dated 21.11.2019 and ordered

for the absolute confiscation of the foreign currency. The penalty imposed on the applicant, however, was upheld.

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 OAA had appreciated that the foreign currency belonged to the applicant and had allowed to redeem the same, however, the AA had failed to appreciate this and ordered for the absolute confiscation of the foreign currency; that it was her personal money; that due to non-declaration, fine and penalty had been imposed on her; that she was not acting as a carrier for anybody; that she was not aware of the regulations with regard to foreign currency; that the order has been passed on the basis of presumptions and assumptions without any cogent and clinching evidence; that the orders are illegal and bad in law;

Under the above circumstances of the case, the applicant has prayed to Revision Authority to quash and set aside the OIA passed by the AA and to restore the OIO or pass any other order as deemed fit.

6(a). Personal hearing was scheduled for 29.08.2023. Smt. Shivangi Kherajani, Advocate appeared on 29.08.2023 and submitted that applicant is a foreign national who was carrying small amount of foreign currency. She submitted that currency was rightly allowed to be redeemed by original authority. She requested to restore the OIO.

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 her statement and submissions the applicant had admitted the possession, carriage, concealment, non-declaration and recovery of the foreign currency. The applicant was unable to give the source of how she 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 her possession was procured from authorized persons as specified under FEMA. Thus, it has been rightly held by the lower adjudicating authority 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, Chennai 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 small. Also, a case has not been made out that the concealment adopted by the applicant was ingenious. Government finds that under such circumstances,

the OAA had rightly used his discretion and granted the foreign currency to be released on payment of a redemption fine under the provisions of Section 125 of the Customs Act, 1962 is excessive and unjustified. Government notes that the OIO passed by the OAA is legal and judicious. Government is inclined to set aside the order of the Appellate authority and restore the OIO passed by the OAA.

13. The Government finds that the personal penalty of Rs. 25,000/- imposed on the applicant under Section 114(i) of the Customs Act, 1962 is commensurate with the omissions and commissions committed.

14. In view of the above, the Government sets aside the OIA passed by the AA and restores the OIO passed by the OAA.

15. The Revision Application is disposed of on above terms.


(SHRAWAN KUMAR)

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

ORDER No. 928/2023-CUS (WZ)/ASRA/MUMBAI DATED 18.12.2023.

To,

1. Ms. Wigdan Siddig Ismail Mohamed, Sudanese National, records not available in the records. Service to C/o. Ms. Kiran Kanal, Advocate. Satyam 2/5, R.C Marg, Opp. Vijaya Bank, Chembur, Mumbai - 400 007.
2. Pr. Commissioner of Customs, Adjudication Cell, Chhatrapati Shivaji Maharaj International Airport, Sahar, Andheri East, Mumbai - 400 099.

Copy to:

1. Smt. Shivangi Kherajani, Advocates, 501, Savitri Navbahar CHS, 19th Road, Khar West, Mumbai - 400 052.

2. Sr. P.S. to AS (RA), Mumbai.
3. File Copy.
4. Notice Board.