

REGISTERED
SPEED POST

GOVERNMENT OF INDIA
MINISTRY OF FINANCE
(DEPARTMENT OF REVENUE)
8th Floor, World Trade Centre, Centre - I, Cuffe Parade,
Mumbai-400 005

F.No. 371/248/B/2021-RA/8495 Date of Issue 19.12.2023

ORDER NO. 942/2023-CUS (WZ)/ASRA/MUMBAI DATED 18.12.23 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 : Shri Mukesh Kumar
Respondent : Pr. Commissioner of Customs, CSMI, Mumbai
Subject : Revision Application filed under Section 129DD of the
Customs Act, 1962 against the Order-in-Appeal No. MUM-
CUSTM-PAX-APP-103/2021-22 dated 17.05.2021 [Date of
issue: 24.05.2021] [F. No. S/49-1224/2019] passed by the
Commissioner of Customs (Appeals), Mumbai Zone-III.

ORDER

This revision application has been filed by Shri Mukesh Kumar (hereinafter referred to as the Applicant) against the Order in Appeal No. MUM-CUSTOM-PAX-APP-103/2021-22 dated 17.05.2021 passed by the Commissioner of Customs (Appeals), Mumbai - III.

2. Brief facts of the case are that the applicant who was bound for Dubai by flight No. IX-247 was intercepted by Customs Officers on 06.03.2019 at CSMI Airport, Mumbai. A personal search of the applicant led to the recovery of assorted foreign currency equivalent to Rs.15,47,216/-.

3. After completion of investigations, a show cause notice dated 03.09.2019 was issued to the applicant and was adjudicated by the Original Adjudicating Authority (OAA) i.e., Additional Commissioner of Customs, CSMI Airport, Mumbai, vide Order-in-Original (OIO) No. ADC/AK/ADJN/166/2019-20 dated 18.01.2020 whereby he ordered confiscation of the assorted foreign currency equivalent to Rs.15,47,216/- under Section 113(d),(e) & (h) of the Customs Act, 1962 with an option to redeem it on payment of fine amounting to Rs.2,65,000/- under Section 125 of the Customs Act, 1962. Further a penalty of Rs. 1,85,000/- was imposed on the applicant under Section 114 of the Customs Act, 1962.

4. Aggrieved by the impugned OIO, the Department filed an appeal for absolute confiscation of the impugned foreign currency which was allowed by the Appellate Authority (AA), vide impugned OIA.

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

- i. that the Ld. Appellate authority ought to have appreciated that said foreign currency carried by the Applicant is neither restricted nor prohibited.

- ii. that it is the first time that the Applicant was carrying any foreign currency and there is no previous case registered against him.
- iii. that non-declaration of the foreign currency is only a technical violation.
- iv. that the Appellate Authority has not taken into consideration the points and citations raised by the applicant against the departmental appeal.
- v. that in various similar types of cases, various authorities have allowed to release foreign currency on payment of redemption fine under Section 125 of The Customs Act, 1962.
- vi. that the applicant is relying on the following Judgements on the observance of Judicial Discipline:
 - a. Judgements of the Hon'ble Supreme Court in the case of Birla Corporation Ltd. v/s. Commissioner of Central Excise reported in 2005 (186) ELT 266 (S.C.) wherein it is held that "Judicial Discipline — Discrimination — When question arising for consideration and facts are almost identical to previous case, revenue cannot be allowed to take a different stand. "
 - b. Judgement of the Hon'ble Bombay High Court in the case of Commissioner of Central Excise, Nasik v/s. Jain Vanguard Polybutylene Ltd. Reported in 2010 (256) ELT 523 (Bom) wherein it is held that "Appeal by Department Judicial Discipline — Binding Precedent — Supreme Court in Birla Corporation Case [2005 (186) E.L. T. 266 (S.C.)] held that the Revenue cannot be allowed to take different view when question raised identical to previous case — High Court in present case cannot take view different from that of Karnataka High Court in 2006 (201) E.L. T. 559 as approved by Supreme Court — Appeal dismissed — Section 35G of Central Excise Act, 1944."
 - c. Judgement of the Hon'ble Tribunal in the case of Nirma Ltd. v/s. Commissioner of Central Excise, Nasik reported in 2012 (276) E.L.T. 283 (Tri. — Ahmd.) wherein it is held that "Judicial discipline — Issue covered by earlier decision of Tribunal — Commissioner (Appeals) cannot say that reliance in that decision on High Court judgments was misplaced - If Revenue was aggrieved with earlier order of Tribunal, it was open for them to file appeal against it before higher appellate forum — Judicial discipline required Commissioner (Appeals) to follow declaration of law by higher appellate forum."

On these grounds, the applicant has prayed to set aside the impugned OIA and restore the OIO.

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 applicant and submitted that the applicant was carrying some foreign currency for business purpose. He requested to restore Order of Original authority as the same is reasonable, fair and legal. No one appeared for the personal hearing on behalf of the Respondent.

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, the applicant has not denied the possession, carriage, non-declaration and recovery of the foreign currency. The applicant during the departure was unable to show that the impugned foreign currency in his possession was procured from authorized persons as specified under FEMA and in the absence of any valid document for the possession of the foreign currency, it is clear that 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 Regulation 5 of the Foreign Exchange Management (Export and Import of Currency) Regulations, 2000 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 respondent had been carrying foreign currency in excess of the permitted limit and no declaration as required under section 77 of the Customs Act, 1962 was filed.

8. 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 within the scope of "prohibited goods" is applicable in this case.

9. 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.

10. 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.

11. 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".

12. 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 ` 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”.

13. 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.

14. In this case, the Government finds that the OAA has used his discretion in allowing the foreign currency to be redeemed on payment of a reasonable redemption fine. Considering the afore-stated facts and the case laws relied upon, Government is inclined to uphold the redemption of the foreign currency allowed by the OAA.

15. For the aforesaid reasons, the Government finds that the impugned OIO passed by the OAA is legal and proper and restores the same and sets aside the impugned OIA. The instant revision application is allowed.


(SHRAWAN KUMAR)

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

ORDER NO. 942/2023-CUS (WZ)/ASRA/MUMBAI DATED 18.12.23

To,

1. Mr. Mukesh Kumar,
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2. The Pr. Commissioner of Customs,
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Copy to:

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