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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. 371/06/B/2022-RA / 8602

Date of Issue 27.12.2023

ORDER No. 948/2023-CUS (WZ)/ASRA/MUMBAI DATED 20.12.2023.
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.

Applicant : Mr. Rafat Jahan Shoukat Ali

Respondent : Pr. Commissioner of Customs, C.S.I Airport, Mumbai

Subject : Revision Application filed, under Section 129DD of the
Customs Act, 1962 against the Order-in-Appeal No.
MUM-CUSTM-PAX-APP-778/2021-22 [F. No S/49-994/
2020] dated 26.10.2021 [Date of issue: 27.10.2021]
passed by the Commissioner of Customs (Appeals),
Mumbai Zone-III.

ORDER

This Revision Application has been filed by Ms. Rafat Jahan Shoukat Ali (herein referred to as 'Applicant') against the Order-in-Appeal No MUM-CUSTOM-PAX-APP-778/2021-22 [F. No S/49-994/ 2020] dated 26.10.2021 [Date of issue: 27.10.2021] passed by the Commissioner of Customs (Appeals), Mumbai Zone-III.

2. Brief facts of the case are that on 05.09.2019, the Applicant, was intercepted by officers of Customs, D Batch, CSI Airport when she was going through the checking in security area at the departure. Personal search of the Applicant resulted in the recovery of assorted foreign currency like Saudi Riyal and AED of assorted denominations, equivalent to Rs.4,26,187/-. The said foreign currency was seized under the reasonable belief that the same were being attempted to be smuggled out of India and hence were liable to confiscation under the contravention of the provisions of the Customs Act, 1962 read with FEMA, 1999 and Regulations made thereunder. The Applicant had informed that the foreign currency belonged to her and she had tried to take it out of the country in order to buy cosmetics, perfume, beauty products abroad and sell it India for monetary gains.

3. The case was adjudicated after the Applicant requested for waiver of show cause notice and the Original Adjudicating Authority (OAA) viz, Deputy Commissioner of Customs, Chhatrapati Shivaji International (C.S.I) Airport, Mumbai vide Order-In-Original No. AirCus/49/T2/1085/2019/UNI-D dated 05.09.2019, absolutely confiscated the assorted foreign currency like Saudi Riyal and AED of assorted denominations, equivalent to Rs.4,26,187/-, under Section 113 (d) (e) & (h) of the Customs Act, 1962 read with Section 6(3) (g) of FEMA, 1999. Penalty of Rs. 60,000/- was imposed on the Applicant under Section 114(i) and (iii) of the Customs Act, 1962.

4. Aggrieved by this order, the Applicant filed an appeal with the Appellate Authority viz, Commissioner of Customs (Appeals), Mumbai Zone-III, who vide her Order-in-Appeal No. CUSTM-PAX-APP-778/2021-22 [F. No S/49-994/2020] dated 26.10.2021 [Date of issue: 27.10.2021]] upheld the order of absolute confiscation but reduced the penalty amount from Rs.60,000/- to Rs.30,000/-.

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

5.01. That Applicant was carrying this type of goods first time and there is no previous case registered against her and they have claimed the ownership of the seized foreign currency and purchased from the local market. Foreign currency is not prohibited and its import or export is subject to laws and rules and regulations issued by a competent authority and foreign currency is not notified as 'prohibited' under the Customs Act, 1962 and FEMA and in view of this, the foreign currencies carried by the Applicant cannot be considered as prohibited goods;

5.02. That, in a catena of judgements, Tribunals and GOI, in its orders of revision have directed that confiscated currencies be allowed to be redeemed on payment of appropriate fines by the persons from whom they were seized and confiscated. The Applicant has placed reliance on the following cases:

- (i) Alfred Menezes vs. Commissioner of Custom ,Mumbai [2011(236) E.L.T. 587(Tri.-Mumbai)]
- (ii) Philips Fernandes vs. Commissioner of Custom, Airport, Mumbai[2002(146) E.L.T(Tri-Mumbai)
- (iii) Felix Dores Fernandes vs Commr. of Customs ACC,Mumbai [2000(118) E.L.T.639(Tri-Mumbai)

5.03. That Section 125 of the Customs Act, 1962 vests the power to grant redemption of confiscated goods and the adjudicating authority has the discretion to give an option of redemption fine in case of prohibited goods but for other goods, it is mandatory to give the option of redemption of goods on

payment of fine. The Applicant has placed reliance on the following cases in support of their contention:

- (i) Kishin Shewaram Loungani vs Commissioner of Custom,ACC, Mumbai[2002(140) E.L.T.225(Tri-Mumbai)
- (ii) T.Soundrarajan vs. Commissioner of Custom,Chennai [2008(221)E.L.T.258(Tri-Chennai)
- (iii) Yakub Ibrahim Yusuf vs - Commissioner of Custom, Mumbai [2011(263)E.L.T.685(Tri-Mumbai) and cases relied upon in the order

5.04. That in a common law system, judges are obliged to make their rulings as consistent as reasonably possible with previous judicial decisions on the same subject. Under the doctrine of stare decisis, a lower court must honour findings of law made by a higher courts and it binds courts to follow legal precedents set by previous decisions;

5.05. That while applying the ratio of one case to that of the other, the decisions of the Hon'ble Supreme Court and other High Court are always required to be borne in mind. The Applicant has relied upon the following case laws in support of their contention:

- (i) Hargovind Das vs Collector of Customs [1992(61) E.L.T 172(S.C)
- (ii) Commissioner of Customs vs. Rajinder Nirula, (Bombay High Court 2017(346)/E.L.t.9(Bom).
- (iii) Commissioner of Customs(Pre) West BEgnal vs India Sales Ineternational, [2009(241)E.L.T.182(Cal)

5.06. That under the doctrine of stare decisis, a lower court should honour findings of law made by the higher court that is within the appeals path of case the court hears and precedent is a legal principle or rule that is created by a court decision. This decision becomes an example, or authority for judges deciding similar issues later. 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;

5.07. That the AA failed to read the judgements relied upon by the Applicant in their entirety, the legal issues and the factual matrix involved therein and the context in which the observations were made and the said judgements were passed;

5.08. That a complete and comprehensive appreciation of all vital features of the case and the entire evidence on record with reference to broad and reasonable probabilities of the case as carefully scanned and the contentions raised by the Applicant may be taken into consideration while adjudicating the case;

5.09. That the Applicant is from a respectable family and law abiding citizen and has never come under any adverse remarks

Under the circumstances the Applicant prayed for a reasonable order for the redemption of the currency on payment of reasonable fine and penalty.

6. Personal hearing in the case was scheduled for 19.10.2023. Shri N.J.Heera, Advocate appeared for the hearing on behalf of the Applicant on the scheduled date and submitted that the Applicant was carrying small amount of foreign currency for personal use. He further submitted that the currency was not concealed and the Applicant was not a habitual offender. He requested to allow unconditional release of the foreign currency as amount is below the RBI limit

7. Government has gone through the records and facts of the case and the submissions of the Applicant. 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. The Applicant had admitted that the currency belonged to her and she did not have any legal/valid documents for purchase of the foreign currency as it was purchased in the black market and that she tried to take it out of the country in order to buy cosmetics, perfume, beauty products abroad and sell it India for monetary gains. 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 by the Applicant

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.

9. 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."

10. In a similar case, Bombay High Court in case of Commr. 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 authorisation. 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”.*

11. The Government finds that the amount involved in this case is not substantial and the Applicant has claimed ownership of the currency after explaining the purpose of attempting to take it out of the country. There is nothing on record to prove that the Applicant was part of an organized smuggling syndicate. This case is at best a case of mis-declaration rather than

smuggling. Government finds that the discretion not to allow redemption of the foreign currency under the provisions of Section 125 of the Customs Act, 1962 is excessive 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.

12. The Government finds that the personal penalty of Rs. 30,000/- under Section 114 (i) and (iii) of the Customs Act, 1962, which was reduced by the Appellate Authority is commensurate with the omissions and commissions committed and needs no interference.

13. In view of the above, the Government modifies the impugned order of the Appellate authority in respect of the absolute confiscation of the foreign currency and allows the same to be redeemed on payment of redemption fine. The assorted foreign currency like Saudi Riyal and AED of assorted denominations, equivalent to Rs.4,26,187/- is allowed be redeemed on payment of a fine of Rs. 85,000/- (In Rupees Eighty Five Thousand only). The penalty imposed under section 114 (i) and (iii) of the Customs Act, 1962 which was reduced to Rs. 30,000/- by the Appellate Authority is sustained.

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


(SHRAWAN KUMAR)

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

ORDER No. 948/2023-CUS (WZ)/ASRA/MUMBAI DATED.20.12.2023.

To,

1. Ms. Rafat Jahan Shoukat Ali, Room No. 211, 2nd Floor, Islamiya Building, Meghraj ST.Marg,Opp. Khatu Mill,Agripada,Mumbai-400011.
- 2 The Pr. Commissioner of Customs, Chhatrapati Shivaji International Airport, Terminal 2, Level-II, Sahar, Andheri (East), Mumbai 400 099.

Copy to:

1. The Commissioner of Customs (Appeals), Mumbai-III, Awas Corporate Point, 5th Floor, Makwana Lane, Behind S.M.Centre, Andheri-Kurla Road, Marol, Mumbai - 400 059.
2. Shri N.J.Heera , Advocate, Nulwala Building ,41,Mint Road, Opp.G.P.O Fort,Mumbai -400001.
3. Sr. P.S. to AS (RA), Mumbai.
4. File Copy.
5. Noticeboard.

