

SPEED POST



F. No. 380/09/B/2019-RA
GOVERNMENT OF INDIA
MINISTRY OF FINANCE
(DEPARTMENT OF REVENUE)

14, HUDCO VISHALA BLDG., B WING
6th FLOOR, BHIKAJI CAMA PLACE,
NEW DELHI-110 066

Date of Issue...04/01/2022

Order No. 01/22-Cus dated 03-01-2022 of the Government of India passed by Sh. Sandeep Prakash, Additional Secretary to the Government of India, under Section 129DD of the Custom Act, 1962.

Subject : Revision Application filed, under Section 129 DD of the Customs Act 1962 against the Order-in-Appeal No. KOL/CUS(Airport)/AKR/818/2019 dated 27.12.2019 passed by the Commissioner of Customs (Appeals) Kolkata.

Applicant : The Commissioner of Customs, NSCBI Airport, Kolkata.

Respondent : Shri Sangam Kumar Gupta, Jamshedpur, Jharkhand.

ORDER

A Revision Application No. 380/09/B/2019-RA dated 16.07.2020 has been filed by the Commissioner of Customs, NSCBI Airport, Kolkata (hereinafter referred to as the Applicant) against the Order-in-Appeal No. KOL/CUS(Airport)/AKR/818/2019 dated 27.12.2019 passed by the Commissioner of Customs (Appeals), Kolkata. Commissioner (Appeals) has allowed the appeal filed by the Respondent, Sh. Sangam Kumar Gupta and set aside the order of original authority and ordered release of the foreign currency confiscated absolutely by the Additional Commissioner of Customs, NSCBI Airport, vide Order-in-Original No. 61/2017-ADC dated 29.05.2017.

2. The brief facts of the case are that the Respondent was intercepted by the Customs Officers, after completion of emigration formalities, when he was scheduled to depart to Bangkok, on 27.02.2015. In the search proceedings, conducted in the presence of two independent witnesses, foreign currency (USD 100 X 100 pcs), USD 10,000/- equivalent to Rs. 6,18,000/-, was recovered and the Respondent herein could not produce any licit documents for its legal acquisition, possession or exportation. The recovered foreign currency was detained at the request of the Respondent without completing subsequent procedures as the Respondent had to fly to Bangkok as scheduled. The Respondent did not appear for release of detained goods and, hence, summons were issued to him to appear on 15.05.2015 and on 20.05.2015, but he failed to appear on the fixed dates. Thereafter, on 15.06.2015, the

● sealed foreign currency was examined in the presence of the witnesses to ascertain its genuineness and for inventorisation. As the Respondent failed to appear and did not submit any documents for licit possession of the recovered foreign currency, hence, the same was seized on the reasonable belief that the same was attempted to be exported illegally out of India in contravention of the provisions of the Customs Act, 1962 read with provisions of FEMA, 1999 (as amended) and regulations made thereunder. A show cause notice dated 26.06.2015 was issued to the Respondent, followed by a personal hearing, which was attended by the Respondent on 25.01.2017. The original authority after considering the written reply dated 01.09.2015 and the submissions made during personal hearing, ordered for absolute confiscation of the foreign currency under Section 113(d), 113(e) and 113(h) of the Customs Act, 1962, vide the Order-in-Original dated 29.05.2017. A penalty of Rs. 65,000/- was also imposed under Section 114 of the Act, *ibid*. Aggrieved, the Respondent herein filed an appeal before the Commissioner (Appeals), who upon remand by the Government, vide the impugned Order-in-Appeal, set aside the order of the original authority and allowed the release of the confiscated foreign currency, release of USD 2000/-, being within the permissible limit, and redemption of remaining foreign currency amounting to USD 8000/-, on payment of a fine of Rs. 2 Lakh. Penalty imposed on the Respondent was also reduced to Rs. 50,000/-.

3. The revision application has been filed, mainly, on the grounds that the Respondent was not eligible to take seized

foreign currency outside India, without declaring the same before the Customs authorities and attempted to clear the same clandestinely; that the Respondent failed to produce any licit documents in support of acquisition, possession and/or legal exportation of the detained/seized currency; that he also failed to procure any licit document in support of his claim that the detained/ seized foreign currency belonged to 04 passengers (03 co-passengers); that the foreign currency was attempted to be smuggled out of India and was covered under the ambit of 'prohibited goods', and, hence, aptly confiscated absolutely by the original authority. It has, accordingly, been prayed to set aside the OIA dated 27.12.2019 and uphold the OIO. A reply dated 10.11.2020 has been filed by the Respondent.

4. Personal hearing, in virtual mode, was held on 31.12.2021. Sh. Jitendra Kumar, Superintendent, appeared for the Applicant department and reiterated the contents of the RA. Sh. Sangam Kumar Gupta, Respondent, appeared and supported the Order of Commissioner (Appeals).

5. The revision application has been filed with a delay which is attributed to non-receipt of impugned Order-in-Appeal as it was addressed wrongly. Delay is condoned.

6. The Government has carefully examined the matter. The Respondent was intercepted while he was approaching to board the flight after completion of emigration formalities and it is evident that the he did not declare the foreign currency to

the Customs authorities at the time of his departure, as required under Section 77 of Customs Act, 1962. Further, the Respondent has admitted the recovery of foreign currency from him but also claimed that the part of the recovered currency belong to his 3-4 co-passengers who were also travelling with him. From the records, it is evident that the customs authorities had intercepted only the Respondent and none of the co-passengers have come forward, at any stage, to claim the ownership of any part of the recovered currency. It is also a matter of record that the Respondent herein did not respond to the summons issued and failed to join the investigations. Further, the Respondent failed to produce any licit documents for valid possession of the foreign currency either for himself or any other person. Thus, it is apparent that the submissions made by the Respondent are nothing but afterthought.

6.1 The Government observes that as per Regulation 5 of the Foreign Exchange Management (Export and Import of Currency) Regulations, 2000, "Except as otherwise provided in these regulations, no person shall, without the general or special permission of Reserve Bank, export or send out of India, or import or bring into India, any foreign currency." Further, in terms of Regulation 3(iii) of the Foreign Exchange Management (Possession and Retention of Foreign Currency) Regulations, 2000, any person resident in India could retain foreign currency not exceeding US \$ 2000 or its equivalent in aggregate subject to the condition that such currency was acquired by him by way of payment for services outside India or as honorarium, gift, etc. In the present case, the

Respondent has not produced any permission from the Reserve Bank of India for export of foreign currency found in his possession. He has also not shown compliance with the provisions of Regulation 3 (iii) of the FEMA (Possession and Retention of Foreign Currency) Regulations, 2001. Thus, it is clear that the conditions in respect of possession and export of foreign currency (seized from the Applicant) are not fulfilled. The Respondent has also not shown compliance with Regulation 6 of the Foreign Exchange management (Realization, repatriation and surrender of foreign exchange) Regulations, 2015.

6.2 In the case of Sheikh Mohd. Omer vs Collector of Customs, Calcutta & Ors {1971 AIR 293}, the Hon'ble Supreme Court has held that for the purpose of Section 111(d) of the Customs Act, 1962, the term "*Any prohibition*" means every prohibition. In other words, all types of prohibition. Restriction is one type of prohibition". The provisions of Section 113(d) are in pari-materia with the provisions of Sections 111(d). In the case of *Om Prakash Bhatia Vs. Commissioner of Customs, Delhi* {2003(155)ELT423(SC)}, which is a case relating to export of goods, the Hon'ble Supreme Court has held that "*if the conditions prescribed for import or export of goods are not complied with, it would be considered to be prohibited goods*". In its judgment dated 17.06.2021, in the case of *UOI & Ors vs. M/s Raj Grow Impex LLP & Ors (2021-TIOL-187-SC-CUS-LB)*, the Hon'ble Supreme Court has followed the judgments in Sheikh Mohd. Omer (supra) and Om Prakash Bhatia (supra) to hold that "*any restriction on import or export is to an extent a*

- *prohibition; and the expression "any prohibition" in Section 111(d) of the Customs Act includes restrictions."*

6.3 The original authority has correctly brought out that in this case the conditions subject to which subject foreign currency could have been legally exported have not been fulfilled. Thus, following the ratio of the aforesaid judgments, there is no doubt that the subject goods are 'prohibited goods'.

7. The original adjudicating authority has denied the release of offending foreign currency on payment of redemption fine under Section 125 of Customs Act, 1962. The Government observes that the option to release seized 'prohibited goods', on redemption fine is discretionary, as held by the Hon'ble Supreme Court in the case of Garg Woollen Mills (P) Ltd vs. Additional Collector of Customs, New Delhi [1998 (104) E.L.T. 306 (S.C.)]. In the case of Raj Grow Impex (supra), the Hon'ble Supreme Court has held "*that 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 relevant considerations*". In the case of *Commissioner of Customs (Air), Chennai-I Vs P. Sinnasamy* {2016(344) ELT1154 (Mad.)}, the Hon'ble Madras High Court, after extensive application of several judgments of the Apex Court, has held that "*non-consideration or non-application of mind to the relevant factors, renders exercise of discretion manifestly erroneous and it causes for judicial interference*". Further, "*when discretion is exercised under Section 125 of the Customs Act, 1962, the twin test to be satisfied is 'relevance and*

reason". It is observed that the original authority has, after appropriate consideration of facts of the case, reply to show cause notice, submissions made during personal hearing, and rules governing foreign exchange, passed a reasoned order whereby option to redeem the offending goods has not been granted in the background of attempted smuggling. Thus, the discretion exercised by the original authority could not have been interfered with and the Commissioner (Appeals) has erred in doing so.

8. Further, in the facts and circumstances of the case, the reduction in penalty amount to Rs. 50,000/- is also not justified.

9. In view of the above, the impugned Order-in-Appeal dated 27.12.2019 is set aside and the revision application is allowed.



(Sandeep Prakash)

Additional Secretary to the Government of India

The Commissioner of Customs,
NSCBI Airport, Kolkata – 700052.


Order No. _ 01/22-Cus dated 03-01-2022

Copy to:

1. Shri Sangam Kumar Gupta, S/o Shri Brij Behari, R/o 14/411, Kasidih, Sakshi, Jamshedpur, East Singhbhum, , Jharkhand - 831001.
2. Commissioner of Customs (Appeals), 3rd Floor, Customs House, 15/1, Strand Road, Kolkata-700001.

3. PA to AS(RA).
4. ~~Guard~~ File.
5. Spare Copy.

ATTESTED



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