

SPEED POST



F. No. 372/06/B/2020-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. 02/22-Cus dated 04/01/2022 of the Government of India passed by Sh. Sandeep Prakash, Additional Secretary to the Government of India, under Section 129DD of the Customs 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/ 31/2020 dated 24.01.2020 passed by the Commissioner of Customs (Appeals), Kolkata.

Applicant : Sh. Mohammad Sufyan, North 24 Parganas, West Bengal.

Respondent : The Commissioner of Customs (Airport), Kolkata.

ORDER

A Revision Application No. 372/06/B/2020-RA dated 01.07.2020 has been filed by Sh. Mohammad Sufyan, North 24 Parganas, West Bengal (hereinafter referred to as the Applicant) against the Order-in-Appeal No. KOL/CUS(Airport)/AKR/31/2019 dated 24.01.2020 passed by the Commissioner of Customs (Appeals), Kolkata. The Commissioner (Appeals) has upheld the Order-in-Original No. 44/2019-AC dated 23.10.2019, passed by the Assistant Commissioner of Customs, NSCBI Airport, Kolkata, vide which USD 5000/- recovered from the Applicant were confiscated absolutely under Section 113(d), 113(e) and 113(h) of the Customs Act, 1962, along with 17,920 pouches of Gutkha which were confiscated under Section 113(d) of the Act but allowed to be redeemed on payment of Rs. 5,000/- as fine under Section 125 of the Act. A penalty of Rs. 3,18,500/- was also imposed on the Applicant under Section 114 of the Act.

2. Brief facts of the case are that the Applicant, who was scheduled to depart to Dhaka from NSCBI Airport, Kolkata, on 30.09.2017, was intercepted while he was passing through the Customs area for entering the security hold area of departure level of NSCBI Airport, Kolkata, after completion of immigration formalities. He was asked specifically whether he was carrying any contraband or Indian/foreign currency beyond permissible limit with him to which he replied in negative. The customs officers, thereafter, checked his hand bag and recovered USD 5000 (Five Thousand USD only) found concealed in newspaper cuttings. On demand, he failed to produce any licit documents in support of legal acquisition, possession and/or exportation of the said foreign currency and, hence, the same was seized under Section 110 of the Customs Act, 1962. The total convertible value of recovered foreign currency worked out to be Rs. 3,18,500/-. Two cardboard bags containing 17,920 pouches of Gutkha (Premium Shudh Plus, Pan Masala) were also seized, being non- bonafide baggage items. The Applicant tendered his statement, under Section 108 of the Customs Act, 1962, on 30.09.2017, vide which he admitted the recovery of the foreign currency and stated that foreign currency was his own, which was taken from Suddar market but he did not remember the name of the shop. A show cause notice was issued to the Applicant, which was adjudicated by the

lower authority, vide de-novo OIO No. 44/2019 AC dated 23.10.2019, vide which USD 5000/- recovered from the Applicant were confiscated absolutely under Section 113(d), 113(e) and 113(h) of the Customs Act, 1962, while 17,920 pouches of Gutkha, which were confiscated under Section 113(d) of the Act, but were allowed to be released on payment of Rs. 5,000/- as redemption fine under Section 125 of the Act. A penalty of Rs. 3,18,500/- was also imposed on the Applicant under Section 114 of the Act. Aggrieved, the Applicant filed an appeal before Commissioner (Appeals), which has been rejected, vide the impugned OIA.

3. The instant revision application has been filed, mainly, on the grounds that the show cause notice (SCN) was served on the Applicant after the expiry of the statutory time limit of six months and, thus, the confiscated goods be released to him.

4. The personal hearing was held on 31.12.2021, in virtual mode. Sh. Mohammad Sufiyan, Applicant, appeared and reiterated the contents of the revision application. Sh. Jitendra Kumar, Superintendent, appeared for the respondent department and supported the orders of the lower authorities.

5. The Government has examined the matter carefully. The recovery of foreign currency from the Applicant is not contested. It is not disputed that the Applicant did not declare the currency to the Customs officers at the airport under Section 77 of the Customs Act, 1962 and did not have any documents or evidence showing lawful possession of the currency.

6.1 Regulation 5 of the Foreign Exchange Management (Export and Import of Currency) Regulations, 2000, specifies that *"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 Applicant has not produced any permission from the Reserve Bank of India for export of foreign currency found in the 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.

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'. As such, read with the provisions of Section 125 of the Act *ibid*, the absolute confiscation of the seized foreign currency is in order.

7.1 As regards the issue of non-receipt of SCN by the Applicant within stipulated time period of six months from the date of seizure, it is observed that the seizure took place on 30.09.2017 and the SCN was dispatched to

the Applicant on 28.03.2018. Thus, the notice was sent within six months from the date of seizure. The original authority has relied upon the judgement of Hon'ble Calcutta High Court, in the case of UOI Vs. Kanti Tarafdar [1997 (91) ELT (51) Cal.], to hold that the SCN was given within the statutorily specified time period of 06 months. The Government observes that in the case of Kanti Tarafdar, the Hon'ble High Court has held that:

"39. In the event of the notice is tendered, the date on which the same was tendered should be taken as the date of giving of notice, but if the other option is exercised and the notice is served by registered post the date of sending the notice should be date of giving notice as contemplated by Section 110(2) of the Act."

The Commissioner (Appeals) has, in addition, relied upon the judgment of Hon'ble Karnataka High Court in the case of K. Abdulla Kunhi Abdul Rehman [2015 (330) ELT 148 (Kar.)]. The Government observes that Hon'ble Calcutta High Court has, in the case of Rajesh Kumar Jain Vs. UOI [1999 (113) ELT 57 (Cal.)], relied upon the judgment in Kanti Tarafdar (supra), and held that service of notice is complete either by tendering or sending the same by registered post. Thus, the ratio of these judgments is that a notice is given once the same is sent by registered post and, consequently, the notice would be treated to have been sent within time if the date of sending by registered post is within six months of date of seizure. The Applicant has, on the other hand, cited several judgments of other High Courts wherein it is held that the notice can be regarded as 'given' only when it is received by the party. There being different views of different Hon'ble High Courts in the matter, the Government considers it appropriate to follow the view taken by the jurisdictional High Court, i.e., the Hon'ble Calcutta High Court as reflected in Kanti Tarafdar (supra) and Rajesh Kumar Jain (supra).

7.2 Before parting with this issue, the Government considers it appropriate to observe that while Section 153 of the Customs Act, 1962, at the relevant time, provided for service of notice by "registered post", in the present case the service has been made by "speed post". Thus, it can be argued that the service not having been made by "registered post", the department cannot

be allowed the benefit of judgments above. However, the Government finds that the Hon'ble Orissa High Court has, in the case of Jay Balaji Jyoti Steels Ltd. Vs. CESTAT, Kolkata [2015 (37) STR 673 (Ori.)], held that both "speed post" and "registered post" satisfy the requirement of Section 28 of the Indian Post Office Act, 1898, and, hence, "speed post" also has to be treated as "registered post". Further, in the case of Shyam Ferro Alloys Ltd. [2016 (340) ELT 488 (AP)], the Hon'ble Andhra Pradesh High Court has held that *"the expression "registered post" appearing in Section 153(a) of the Customs Act, 1962, have to be construed as including within its purview, the method of registering an article, to be taken by speed post."*

8. A penalty of Rs. 3,18,500/- has been imposed on the Applicant herein under Section 114 ibid. The Government finds that the penalty imposed is on a higher side, specifically keeping in view the absolute confiscation of the offending foreign currency. The penalty imposed is, therefore, reduced to Rs. 80,000/-.

9. In view of the above, the impugned Order-in-Appeal is upheld, except to the extent of reduction in penalty as above. The revision application is disposed of, accordingly.



(Sandeep Prakash)

Additional Secretary to the Government of India

Sh. Mohammad Sufyan,
S/o Sh. Mohasin Mohammad,
43/1, Bhagwan Mondal Street, Ariadaha,
North 24 Pgns, West Bengal – 700057.

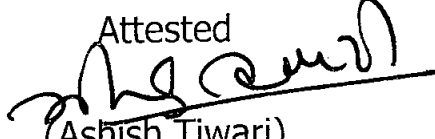
Order No. _ 02/22-Cus dated 04/01/2022

Copy to:

1. The Commissioner of Customs (Airport), Kolkata, 15/1, Strand Road, Custom House, Kolkata – 700001.
2. The Commissioner of Customs (Appeals), 15/1, 3rd Floor, Strand Road, Customs House, Kolkata-700001.

3. Sh. S C Ratho and Barinder Singh, Customs Consultants, Tara Trade Centre, Room No. 9, 1st Floor, 14, Hare Street, Kolkata – 700001.
4. PA to AS(RA).
5. ~~Guard File.~~
6. Spare Copy.

Attested



(Ashish Tiwari)

Assistant Commissioner (RA)