

SPEED POST

F. No. 372/16/B/2019-R.A.
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..10/8/21..

ORDER NO. 147/21-Cus dated 9-8-2021 of the Government of India, passed by Sandeep Prakash, Additional Secretary to the Government of India, under Section 129DD of the Customs Act, 1962.

SUBJECT : Revision Application filed under section 129DD of the Customs Act, 1962 against the Order-in-Appeal No. KOL/CUS(Airport)/AA/73/2019 dated 01.02.2019, passed by the Commissioner of Customs (Appeals), Kolkata.

APPLICANT : Mr. Rohit Kumar Shaw, Kolkata.

RESPONDENT : Commissioner of Customs (Airport & Admn.), Kolkata.

ORDER

A Revision Application No. 372/16/B/2019-R.A. dated 02.04.2019 has been filed by Mr. Rohit Kumar Shaw, Kolkata (hereinafter referred to as the Applicant) against Order-in-Appeal No. KOL/CUS(Airport)/AA/73/2019 dated 01.02.2019, passed by the Commissioner of Customs (Appeals), Kolkata. Commissioner (Appeals) has upheld the order of the Additional Commissioner of Customs, AIU, NSCBI Airport, Kolkata, bearing No. 190/2018 ADC dated 15.10.2018, wherein foreign currency cumulatively equivalent to Rs. 12,84,415/-, which was recovered from the Applicant, has been confiscated absolutely. The adjudicating authority has also imposed a penalty of Rs. 12,84,415/- under Sections 114 of the Customs Act, 1962 on the Applicant.

2. Brief facts of the case are that the Applicant, scheduled to depart to Bangkok by Flight SG-83 on 09.07.2016, was intercepted at the NSCBI Airport, Kolkata, carrying in his knee caps, foreign currency amounting to USD 19,300/-, equivalent to Rs. 12,84,415/-. The Applicant, in his voluntary statement dated 09.07.2016, under Section 108 of the Customs Act, 1962, stated that the foreign currency was given to him by one Mr. Rajiv Kumar and he would get Rs. 5000/- for carrying it; that he was carrying the foreign currency without any valid document; that he was a regular visitor to Bangkok and brought clothes from there.

3. The revision application has been filed by the Applicant canvassing that import & export of Indian & foreign currency is not prohibited; that absolute confiscation is therefore illegal; and that, accordingly, seized currency may be released on payment of redemption fine and penalty, as deemed fit.

4. Personal hearing in the matter was held, in virtual mode, on 05.08.2021. Sh. Rohit Kumar Shaw, Applicant, appeared and reiterated the contents of the revision application and written submissions dated 31.07.2021. Sh. Jitendra Kumar, Superintendent, appeared for the respondent and supported the orders of the lower authorities.

5. The Government has carefully examined the matter. It is evident from record that the foreign currency was recovered from the Applicant, which was concealed by him under his knee caps to evade detection. It is not disputed that he 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. Further, Applicant produced a 'Manual Cash Memo Receipt' dated 16.05.2016 for US \$700 in the name of 'Chandni Forex Tour Pvt. Ltd.' after two years from the date of seizure. In para 16 of the instant revision application, it is stated that the Applicant "acquired the seized foreign currencies by way of honorarium or gift while on his visit to Bangkok in his previous trip." As discussed in Para 10 of the Order-in-Appeal, the voluntary statement of the Applicant recorded under Section 108 of Customs Act was retracted only in the form of reply to the Show Cause Notice, filed after nearly 6 months from the date of seizure. As such, it is apparent that the contentions of the Applicant are self-contradictory and, hence, cannot be sustained.

6. 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 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. The contention that the seized currency was acquired by way of honorarium and gift, has already been found to be unacceptable. Thus, it is clear that the conditions in respect of possession and export of foreign currency (seized from the Applicant) are not fulfilled.

7.1 The question of law that arises for consideration is whether the import or export of foreign currency is 'prohibited'. 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)}, 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 one of its latest judgments dated 17.06.2021, in the case of UOI & Ors vs. M/s Raj Grow Impex LLP & Ors (CA Nos. 2217-2218 of 2021), 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."*

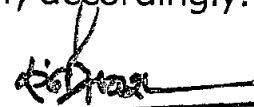
7.2 The original authority has correctly brought out that in this case the conditions subject to which subject currency could have been legally exported have not been fulfilled. Thus, following the ratio of the aforesaid judgments, there is no doubt that the subject goods are 'prohibited goods'.

8. The original adjudicating authority has denied the release of impugned goods on redemption fine under Section 125 of Customs Act, 1962, which has been assailed in the instant Revision Application. The Government observes that the option to release seized goods on redemption fine, in respect of "prohibited goods", 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 UOI & Ors vs. M/s Raj Grow Impex LLP & Ors (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 the relevant considerations"*. In the present case, the redemption has been refused in the background that the Applicant acted merely as a carrier of the seized currency. No case for interference with the

discretion so exercised by the original authority, as upheld by the Commissioner (Appeals), is made out.

9. The Commissioner (Appeals) upheld the penalty of Rs.12,84,415/- imposed by the original authority but has mentioned the amount as Rs. 32,07,500/- in Para 18 of the Order-in-Appeal, which appears to be a clerical error. The Government observes that the Applicant was a carrier, who worked for small consideration and imposition of equal amount of penalty appears to be unjustified, especially when the foreign currency has been confiscated absolutely. Thus, the penalty imposed on the Applicant is reduced to Rs. 5 lakhs.

10. The impugned Order-in-Appeal is modified in above terms, and the revision application is disposed of, accordingly.



(Sandeep Prakash)

Additional Secretary to the Government of India

Mr. Rohit Kumar Shaw, S/o Janeshwar Shaw

54/3/1F, Debendra Chandra Dey Road, Tangra, Kolkata-700015

Order No. 147/21-Cus dated 9-8-2021

Copy to:

1. Commissioner of Customs (Airport & ACC), N.S.C.B.I.
Airport, Kolkata-700001
2. Commissioner of Customs (Appeals), Custom House, 15/1,
Strand Road, Kolkata-700001
3. PA to AS(RA)
4. ~~Guard File.~~
5. Spare Copy

ATTESTED


(Laxmi Raghvan)

Section Officer (Revision Application)