

SPEED POST

F. No. 372/11/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. 27/8/21.

ORDER NO. 160/21-Cus dated 26-8-2021 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/(A/P)/02/2018 dated 20.12.2018, passed by the Commissioner of Customs (Appeals), Kolkata.

APPLICANT : Sh. Subrata Barman, North 24 Parganas.

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

ORDER

A Revision Application No. 372/11/B/2019-R.A. dated 28.02.2019 has been filed on 06.03.2019 by Sh. Subrata Barman, North 24 Parganas (hereinafter referred to as the Applicant) against Order-in-Appeal No. KOL/CUS(A/P)/02/2018 dated 20.12.2018, passed by the Commissioner of Customs (Appeals), Kolkata. Commissioner (Appeals) has upheld the order of the Deputy Commissioner of Customs, AIU, NSCBI Airport, Kolkata bearing No. 59/2018 DC dated 17.05.2018 wherein foreign currency amounting to USD 6000 equivalent to Rs.3,77,100/-, has been confiscated absolutely and a penalty of Rs.3,77,100/- has been imposed under Section 114 of the Customs Act, 1962, on the Applicant.

2. Brief facts of the case are that the Applicant, scheduled to depart to Bangkok on 10.08.2017, was intercepted by the DRI officers at the NSCBI Airport, Kolkata. An examination of his baggage and personal search of the applicant resulted in recovery of US Dollars 6000 which were concealed in three MDH Kitchen King (Mixed Spices Powder) packets. The Applicant could not produce any evidence of lawful acquisition/possession/or legal exportation of the said currency. In his voluntary statement dated 10.08.2017, recorded under Section 108 of the Customs Act, 1962, the Applicant stated that the foreign currency was given to him by someone outside Kolkata Airport, to be handed over to another person at the Bangkok Airport; that he had done this mistake for greed of some money.

3. The revision application has been filed by the Applicant canvassing that import & export of foreign currency is not

prohibited; that absolute confiscation is therefore illegal; and that, USD 2000 which was legally imported as gift during previous visits may be released without fine & penalty and the remaining USD 4000 seized currency may be released on payment of redemption fine and penalty.

4. Personal hearing in the matter was fixed on 22.07.2021, 13.08.2021 and 23.08.2021. None appeared for the Applicant and no request for adjournment has also been received. Sh. Jitender Kumar, Superintendent, appeared for the Respondent in the hearing held on 23.08.2021 and supported the orders of the lower authorities. Since sufficient opportunities have been granted, the matter is taken up for final disposal on records.

5. The Government has carefully examined the matter. It is evident, from the evidence on record, that the foreign currency was recovered from the Applicant, which was concealed by him in three MDH Kitchen King (Mixed Spices Powder) packets. 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. The Applicant has stated that he acquired/possessed the seized US dollars by way of gifts or honorarium and had imported USD 3000 per visit from Bangkok during the last 2 trips. No evidence has been produced to substantiate this claim. Further, this claim was not made at the time of recording his voluntary statement dated 10.08.2017. Thus, it appears to be nothing but an afterthought.

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. Thus, it is clear that the conditions in respect of possession and export of foreign currency (seized from the Applicant) are not fulfilled.

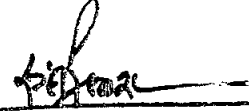
7. Applicant has contended that the seized foreign currency is not 'prohibited goods'. In the case of *Sheikh Mohd. Omer vs Collector of Customs, Calcutta & Ors* {1971 AIR 293}, the Hon'ble Supreme Court has held that for the purpose of Section 111(d) of the Customs Act, 1962, the term "*Any prohibition*" 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) ELT 423 (SC)}, which relates to exports, 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 & Others 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." In view of the position explained in para 6 above, the conditions subject to which the currency could have been exported, have not been met in the present case. Hence, the seized foreign currency is '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 & Others vs. M/s Raj Grow Impex LLP & Others (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 original authority has refused to grant redemption in the background that the Applicant acted merely as a carrier of the seized currency who intentionally attempted to smuggle currency. No case for interference with the discretion so exercised by the original authority is made out.

9. It is observed that a penalty of Rs. 3,77,100/- has been imposed on the Applicant which is equal to the convertible value of the foreign currency seized. The penalty imposed is on a higher side, specially keeping in view the fact that the foreign currency has been confiscated absolutely. Accordingly, the penalty imposed, under Section 114 of the Customs Act, 1962, is reduced to Rs. 1.25 lakhs.

10. The revision application is allowed partly to the extent of reduction in penalty, as above.



(Sandeep Prakash)

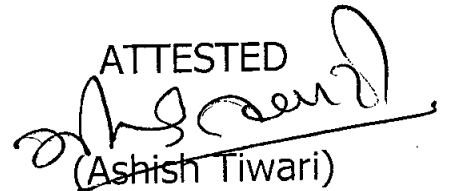
Additional Secretary to the Government of India

Sh. Subrata Barman,
S/o Sh. Anjan Barman,
2, Motilal Colony, P.O. Rajbari
North 24 Parganas-700081 (W.B.)

Order No. 160/21-Cus dated 26-8-2021

Copy to:

1. Commissioner of Customs (Airport & Admn), 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

(Ashish Tiwari)

Assistant Commissioner (RA)