

SPEED POST



F.No. 380/08/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...20/01/22

Order No. 20/22-Cus dated 20-01-2022 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/805/2019 dated 17.12.2019 passed by the Commissioner of Customs (Appeals), Kolkata.

Applicant : Commissioner of Customs (Airport), Kolkata.

Respondent : Sh. Nagendra Sharma, Howrah, West Bengal.

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**ORDER**

A Revision Application No. 380/08/B/2020-RA dated 26.05.2020 has been filed by the Commissioner of Customs (Airport), Kolkata (hereinafter referred to as the Applicant) against the Order-in-Appeal No. KOL/CUS(AIRPORT)/AKR/805/2019 dated 17.12.2019, passed by the Commissioner of Customs (Appeals), Customs House, Kolkata. The Commissioner (Appeals) has modified the Order-in-Original No. 03/2019-AC dated 16.01.2019 passed by the Assistant Commissioner of Customs, AIU Cell, NSCBI Airport, Kolkata, wherein, USD 9,500/-, convertible value INR Rs. 6,05,150/-, recovered from Sh. Nagendra Sharma, Howrah, West Bengal (hereinafter referred to as the Respondent), were confiscated absolutely by the original authority. The Commissioner (Appeals) has allowed the release of USD 2000/-, as being within permissible limits, USD 2250/-, being covered by three cash memos produced by the Respondent and USD 5250/-, on payment of redemption fine of Rs 2 Lakhs. Penalty of Rs. 6,05,150/-, imposed by the original authority, has been reduced to Rs. 50,000/- by the Commissioner (Appeals).

2. The brief facts of the case are that the Respondent was intercepted, on 10.12.2017, while departing for Bangkok from NSCBI Airport, Kolkata. The Customs officers asked him specifically if he was carrying any Indian/foreign currency beyond the permissible limit, to which he replied in negative. On search of his person, USD 9500/-, equivalent to Rs. 6,05,150/-, were recovered. He could not produce any licit document in support of acquisition, possession and/or legal exportation of the said foreign currency. The Respondent, in his statement dated 10.12.2017, tendered under Section 108 of the Customs Act, 1962, admitted that he had not declared the said foreign currency to the Customs even on being specifically asked; that the said currency was recovered from him

upon a search in the presence of two witnesses; and that the foreign currency was not his own but was handed over to him by an unknown person to be handed over to some unknown person in Bangkok, for which he would be given Rs. 4000/-. The original authority, vide the OIO dated 16.01.2019, confiscated absolutely the foreign currency, under Sections 113(d) and 113(h) of Customs Act, 1962 and imposed a penalty of Rs. 6,05,150/- under Section 114(i) of the Act *ibid*. Aggrieved, the Respondent filed an appeal before the Commissioner (Appeals), who, vide the impugned OIA, has allowed the release of USD 2000/-, being within permissible limits, USD 2250/-, being covered by three cash memos produced by the Respondent and USD 2250/-, on payment of redemption fine of Rs 2 Lakhs. Penalty of Rs. 6,05,150/, imposed by the original authority, has been reduced to Rs. 50,000/.

3. The revision application has been filed with a delay which has been attributed to postal delay. Delay is condoned.

4. The revision application has been filed canvassing that the Respondent was not an eligible passenger to take the said foreign currency out of India in terms of Notification. No. FEMA 6/RB-2000 dated 03.05.2000; that he had not declared the currency to the Customs officers, violating Section 77 of the Customs Act, 1962; that he had admitted his offence in his statement recorded under Section 108 of the Customs Act and also that he was not the owner of the said currency but was only carrying it for pecuniary benefit; and that the absolute confiscation of the said foreign currency was correctly done by the original authority as the currency came into the ambit of 'prohibited goods', being attempted to be smuggled out by an ineligible person. Hence, the impugned OIA may be set aside and OIO may be restored.

5. Personal hearing, in virtual mode, was held on 17.01.2022. Sh. Jitendra Kumar, Superintendent appeared for the Applicant department and reiterated the contents of the RA. He highlighted that the Applicant failed to declare the FC and had admitted in his statement to be only a carrier of the FC. Sh. Shovendu Banerjee, Advocate, appeared for the Respondent and reiterated the contents of written reply dated 31.08.2019. He submitted that there is nothing on record to establish that the FC was concealed or not declared. Further, Cash Memos towards purchase of USD 2250/- had been placed on record even before issuance of SCN.

6. The Government has carefully examined the matter. It is observed that the foreign currency, which was recovered from the Respondent, was not declared to the Customs officers under Section 77 of the Customs Act, 1962. It has been admitted by the Applicant in his statement tendered under Section 108 of the Customs Act, 1962, that he did not declare the currency to the Customs officers at the airport and did not have any documents or evidence showing lawful possession of the currency. The Applicant has, however, subsequently produced cash memos evidencing purchase of USD 2250/-. However, these Cash Memos were not produced at the time of seizure and this claim was not made at the time of recording of his statement dated 10.12.2017, which has not been retracted. Thus, it appears to be an afterthought. Hon'ble Supreme Court has, in the case of Surjeet Singh Chhabra Vs. U.O.I. [ 1997 (89) E.L.T. 646 (S.C.)], held that a confession statement made before a Customs officer is an admission and is binding.

7.1 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.

7.2 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."*

7.3 Thus, following the ratio of the aforesaid judgments, there is no doubt that the subject goods are 'prohibited goods'. Being 'prohibited goods', the redemption thereof is discretionary, in terms of Section 125 of the Customs Act, 1962. Further, the discretion exercised by the original authority can be interfered with only if it has <sup>not been</sup> done for relevant and reasonable considerations, as held by the Apex Court in Raj Grow Impex (supra). The Commissioner (Appeals) has, on the other hand, interfered with the discretion exercised by the original authority on the grounds that are found to be non-sustainable, as brought out in para 6 and 7.1 above.

8. In view of the above, the impugned Order-in-Appeal dated 17.12.2019 is set aside and the Order-in-Original No. 03/2019-AC dated 16.01.2019 is restored. However, the penalty imposed by the original authority is reduced to Rs. 1,50,000/-.

  
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(Sandeep Prakash)

Additional Secretary to the Government of India

The Commissioner of Customs, Airport & General,  
NSCBI Airport,  
Kolkata-700052.

Order No. \_ 20/22-Cus dated 20-01-2022

Copy to:

1. Sh. Nagendra Sharma, S/o Sh. Shardanand Sharma, 25, Debendra Ganguly Road, P.O. – B. Garden, Howrah, West Bengal – 711103.
2. The Commissioner of Customs (Appeals), 15/1, 3rd Floor, Customs House, Strand Road, Kolkata – 700001.
3. Sh. Shovendu Banerjee, Advocate, High Court Calcutta, 10, Old Post Office Street, Room No. 80D, 3rd Floor, Kolkata – 700001.
4. PA to AS(RA).
5. Guard File.
6. Spare Copy.

ATTESTED

  
(Ashish Tiwari)

Assistant Commissioner (RA)