



F. No. 375/10/B/2022-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... 25/7/22

Order No. 244/22-Cus dated 25-7-2022 of the Government of India passed by Shri Sandeep Prakash, Additional Secretary to the Government of India, under section 129DD of the Custom Act, 1962.

Subject : Revision Applications under Section 129 DD of the Customs Act 1962 against the Order-in-Appeal No. CC(A)/Cus/D-I/Air/3919/2021-22 dated 21.12.2021 passed by the Commissioner of Customs (Appeals), New Delhi.

Applicant : Sh. Mohd. Asef, Delhi.

Respondent : Commissioner of Customs, IGI Airport, New Delhi.

ORDER

A Revision Application No. 375/10/B/2022-RA dated 10.03.2022 has been filed by Sh. Mohd. Asef, Delhi, (hereinafter referred to as the Applicant), against the Order in Appeal No. CC(A)/Cus/D-I/Air/3919/2021-22 dated 21.12.2021, passed by the Commissioner of Customs (Appeals), New Delhi. The Commissioner (Appeals) has upheld the order of the Assistant Commissioner of Customs, IGI Airport, New Delhi, bearing no. 80/ADJ/2019 dated 20.03.2019, ordering absolute confiscation of foreign currency, amounting to USD 9102, Hongkong Dollar of 2890 and Chinese Yuan of 396, equivalent to Rs. 6,94,447/-, under Section 113 of the Customs Act, 1962. Besides penalty of Rs. 70,000/- was also imposed on the Applicant, under Section 114 of the Act, *ibid*.

2. Brief facts of the case are that the Applicant, who is a foreign national, was scheduled to depart for Hongkong from IGI Airport, New Delhi, on 08.10.2018. The Applicant was intercepted by the officers of Customs at Airport after he had crossed the immigration and was taken for examination and investigation. During personal search and examination of baggage of the Applicant, assorted foreign currency, i.e., USD 9102, Hongkong Dollar of 2890 and Chinese Yuan of 396 (equivalent to Rs. 6,94,447/-), was recovered. The Applicant did not have any evidence in support of legal possession of the subject foreign currency. The Applicant, in his statement dated 08/09.10.2018, recorded under Section 108 of the Customs Act, 1962, stated that he was in the business of mining minerals and semi-precious stones and that the subject foreign currency belonged to him and the receipt was in his Hongkong office; that he had brought the subject currency first time to meet his personal expenses and to explore business opportunities; and that he

was aware that taking foreign currency in huge amount without proper legal documents and declaration is punishable offence.

3. The revision application has been filed, mainly, on the ground that there was no concealment or mis-declaration; that the currency was not liable for confiscation; that the Applicant has never accepted the act of smuggling of foreign currency; that Section 125 of the Customs Act, 1962 mandates release of confiscated goods; that re-export may be allowed; that question of declaration of the same in terms of Section 77 of the Customs Act, 1962 does not and cannot arise; and that penalty imposed under Section 114 of the act, *ibid* is highly excessive and harsh.

4. A personal hearing, in virtual mode, was held on 22.07.2022. Sh. Shiv Kumar, Advocate appeared on behalf of the Applicant and reiterated the contents of the RA. He prayed that the Applicant is a foreign national and seized foreign currency may be allowed to be re-exported. Sh. Mahender Singh, Supdt. appeared for the department and highlighted that foreign currency upto USD 5000/- only, is allowed to be imported without declaration whereas in the instant case the currency was far in excess of this amount. He supported the orders of lower authorities.

5. The Government has carefully examined the matter. It is evident that the foreign currency was recovered from the Applicant. It is also on record that the Applicant did not declare the currency, as required under Section 77 of the Customs Act, 1962, and also did not have any documents or evidence showing lawful possession of the currency. The

contents of the statement dated 08/09.10.2018 does not appear to have been retracted by the Applicant.

6.1 Regulation 5 of the Foreign Exchange Management (Export and Import of Currency) Regulations, 2000 (as amended), 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."*

Second proviso to clause (b) of Regulation 6 specifies that a person may bring into India from any place outside India without limit foreign exchange and has to make a declaration in the Currency Declaration Form (CDF) ~~if~~ the aggregate value of foreign currency notes exceeds USD 5000/-. Further, as per the Regulation 7(4), any person resident outside India may take out of India unspent foreign exchange not exceeding the amount brought in by him and declared in accordance with the proviso above. In the present case, the Applicant admittedly brought foreign currency notes in excess of USD 5000/-. He also did not declare the confiscated currency at the time of his arrival and no Currency Declaration Form (CDF) was placed on record. Thus, it is clear that the conditions in respect of possession and export of foreign currency (seized from the Applicant) are not fulfilled. 137

6.2 The Government observes that 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 its judgment, 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 Thus, following the ratio of the aforesaid judgments, there is no doubt that the subject goods are 'prohibited goods', as the conditions subject to which the currency could have been exported are not fulfilled in the present case. The Applicant's contentions, if any, to the contrary are incorrect.

7. The Applicant has prayed that the foreign currency should be released on payment of redemption fine. 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"*. Further, *"when discretion is exercised under Section 125 of the Customs Act, 1962, ----- the twin test to be satisfied is "relevance and reason"*. Hon'ble Delhi High Court has, in the case of Raju Sharma [2020 (372) ELT 249 (Del)], relying upon the judgment of Apex

Court in Mangalam Organics Ltd. [2017 (349) ELT 369 (SC)], held that "Exercise of discretion by judicial, or quasi-judicial authorities, merits interference only where the exercise is perverse or tainted by patent illegality, or is tainted by oblique motive." Thus, the discretion exercised by the original authority could have been interfered with, only if it suffered from any of the vices indicated by the Hon'ble Courts. Such a case is not made out. Thus, the Commissioner (Appeals) has correctly refused to interfere in the matter. The case laws relied upon by the Applicant are not applicable in view of the dictum of Hon'ble Supreme Court and Hon'ble High Courts, as above.

8.1 As regards the request for allowing re-export of the confiscated goods, it is observed that Section 80 of the Customs Act, 1962, which permits temporary detention of baggage for subsequent re-export, reads as under:

"SECTION 80. Temporary detention of baggage – Where the baggage of a passenger contains any article which is dutiable or the import of which is prohibited and in respect of which a true declaration has been made under section 77, the proper officer may, at the request of the passenger, detain such article for the purpose of being returned to him on his leaving India and if for any reason, the passenger is not able to collect the article at the time of his leaving India, the article may be returned to him through any other passenger authorised by him and leaving India or as cargo consigned in his name. "

8.2 Thus, on a plain reading of Section 80, it is apparent that a declaration under Section 77 is a pre-requisite for allowing re-export. The Hon'ble Allahabad High Court has,

in the case of Commissioner of Customs (Preventive), Lucknow vs. Deepak Bajaj {2019 (365) ELT 695 (All.)}, held that a declaration under Section 77 is a sine-qua-non for extending the benefit of Section 80. Therefore, in the present case, the benefit of re-export cannot be allowed since declaration under Section 77 was not made. Hence, the request for re-export is rejected.

9. Keeping in view facts and circumstances of the case, the penalty imposed is just and fair.

10. In view of the above, the revision application is rejected.



(Sandeep Prakash)


Additional Secretary to the Government of India

Sh. Mohd. Asef,
C/o Sh. S.C. Puri & Shiv Kumar, Advocate,
Chamber No.82, Patiala House Court,
New Delhi-110001.

Order No. 244/22-Cus dated 25-7-2022

Copy to:

1. The Commissioner of Customs (Appeals), N.C.H., Near IGI Airport, New Delhi-110037.
2. The Commissioner of Customs (A&G)), T-3, IGI Airport, New Delhi-110037.
3. Sh. Sh. S.C. Puri & Shiv Kumar, Advocate, Chamber No.82, Patiala House Court, New Delhi-110001.
4. PA to AS(RA).
5. Guard file.
6. Spare Copy.

ATTESTED

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