

**SPEED POST**



F. No. 380/08/B/2019-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. 17/11/21

Order No. 26/21-Cus dated 17-11-2021 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(A/P)/10  
/2019 dated 22.02.2019 passed by the  
Commissioner of Customs (Appeals),  
Kolkata.

Applicant : The Commissioner of Customs, NSCBI  
Airport, Kolkata.

Respondent : Shri Karandeep Singh, Sri Muktsar Sahib,  
Punjab.

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**ORDER**

A Revision Application No. 380/08/B/2019-RA dated 24.09.2019 has been filed by the Commissioner of Customs, NSCBI Airport, Kolkata (hereinafter referred to as the Applicant) against the Order-in-Appeal No. No. KOL/CUS(A/P)/10/2019 dated 22.02.2019 passed by the Commissioner of Customs (Appeals), Kolkata. Commissioner (Appeals) has allowed the appeal filed by the Respondent, Sh. Karandeep Singh and ordered release of the foreign currency confiscated absolutely by the original authority, Joint Commissioner of Customs, NSCBI Airport vide Order-in-Original No. 148/2017-JC(AIU) dated 15.12.2017.

2. The brief facts of the case are that on specific information, Kolkata Customs AIU, checked the passenger list of Bhutan Airlines Flight No. B3-700 dated 19.05.2016 wherein the Respondent was found to be on board the said flight. He was offloaded as his details matched with the information received and his baggage was searched after he replied in negative when asked about presence of any contraband items or Indian/foreign currency. This resulted in the recovery of foreign currency (USD 100 X 147 pcs, EURO 50 X 15 pcs and THAI BAHT 1000 X 7 pcs.), cumulatively equivalent to Rs. 10,41,562.50 and the respondent could not produce any licit documents for its legal acquisition, possession or exportation. The same was confiscated absolutely by the original authority under Section 113(d), 113(e) and 113(h) of the Customs Act, 1962 vide the Order-in-Original dated 15.12.2017. A penalty of Rs. 10,41,562.50 was also imposed under Section 114(i) of the Act, *ibid*. Aggrieved, the Respondent herein filed an appeal before the Commissioner (Appeals), who, vide the impugned

Order-in-Appeal, allowed the release of the confiscated foreign currency, USD 2000/- as permissible in compliance to the general instruction of RBI, USD 3000/- as legally acquired and the remaining foreign currency consisting of USD 9700/-, EURO 750/- & THAI BAHT 7000/-, on payment of redemption fine of Rs. 1,75,000/- and penalty of Rs. 70,000/-.

3. The revision application has been filed, mainly, on the grounds that the Respondent had attempted to export the foreign currency without declaring the same before the Customs authorities; that the fact was admitted by him in his statement tendered under Section 108 of the Customs Act which was not retracted; that since the Respondent had admitted that the foreign currency was given to him by one Gagan, the same should not have been released to him on payment of redemption fine as he was not the owner; and that the Respondent acted as a carrier of the confiscated goods and that the foreign currency was attempted to be smuggled out of India and was covered under the ambit of 'prohibited goods', aptly confiscated absolutely by the original authority. It has, accordingly, been prayed to set aside the OIA and to restore the OIO. A reply dated 20.12.2019 has been filed by the Respondent.

4. Personal hearing, in virtual mode, was held on 15.11.2021. Sh. Jitendra Kumar, Superintendent, appeared for the Applicant department and reiterated the contents of the Revision Application. He highlighted that the Respondent had, in his statement, accepted that the currency recovered from him was not owned by him. Further, as per the Inventory, the currency was in running serial numbers and as such the contention that this was collected over previous visits is not acceptable. Sh.

Karandeep Singh, Respondent reiterated the contents of the reply dated 20.12.2019. Upon being asked, he claimed that his statement before the department was not voluntary but admitted that he had not retracted the statement, till date.

5. The revision application has been filed with a delay which is attributed to non-receipt of impugned Order-in-Appeal as it was addressed wrongly. Delay is condoned.

6. The Government has carefully examined the matter. The Respondent was offloaded from the flight and it is evident that he did not declare the foreign currency to the Customs authorities at the time of departure, as required under Section 77 of Customs Act, 1962. Further, the Respondent has admitted the recovery of foreign currency from him and the fact of non-declaration in his statement dated 19.05.2016, tendered under Section 108 of Customs Act, 1962. The Respondent also admitted being a carrier and failed to produce any licit documents for valid possession of the of the foreign currency.

6.1 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 their 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.

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 (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."

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'.

7. The original adjudicating authority has denied the release of impugned goods on redemption fine under Section 125 of Customs Act, 1962. 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 present case, the original authority has refused to grant redemption as the Respondent attempted to illegally export the foreign currency in violation of FEMA Regulations. In the case of Raj Grow Impex (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 relevant considerations*". In the case of Commissioner of Customs (Air), Chennai-I Vs P. Sinnasamy {2016(344) ELT1154 (Mad.)}, the Hon'ble Madras High Court, after extensive application of several judgments of the Apex Court, has held that "*non-consideration or non-application of mind to the relevant factors, renders exercise of discretion manifestly erroneous and it causes for judicial interference*". Further, "*when discretion is exercised under Section 125 of the Customs*

Act, 1962, the twin test to be satisfied is 'relevance and reason' ". It is observed that the original authority has, in the instant case, after appropriate consideration of facts of the case, statement tendered by the Respondent and rules governing foreign exchange, passed a reasoned order disallowing redemption in the background of attempted smuggling. Thus, the discretion exercised by the original authority could not have been interfered with and the Commissioner (Appeals) has erred in doing so.

9. In view of the above, the impugned Order-in-Appeal dated 22.02.2019 is set aside. However, it is observed that the penalty of Rs. 10,41,562.50, imposed by the original authority, is excessive, especially when the foreign currency has been confiscated absolutely. The penalty is reduced to Rs. 2.5 Lakhs and the Order-in-Original No. 148/2017-JC(AIU) dated 15.12.2017 is restored except for the reduction of penalty, as above.

(Sandeep Prakash)

Additional Secretary to the Government of India

The Commissioner of Customs,  
NSCBI Airport, Kolkata.

Order No. \_ 261 /21-Cus dated 17-11-2021

Copy to:

1. Shri Karandeep Singh, S/o Shri Harinder Pal Singh, Mohan Lal Street, Opp. Gurdwara, Anand Garh Sahib, Sri Muktsar Sahib, Punjab-152026.
2. Commissioner of Customs (Appeals), 3<sup>rd</sup> Floor, Customs House, 15/1, Strand Road, Kolkata-700001.
3. PA to AS(RA).
4. Guard File.
5. Spare Copy.

ATTESTED  
@BLP

(लक्ष्मी राघवन)  
(Lakshmi Raghavan)  
अनुभाग अधिकारी / Section Officer  
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Ministry of Finance (Deptt. of Rev.)  
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