

SPEED POST



F. No. 372/10/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... 8/8/22

Order No. 261/22-Cus dated 08-08-2022 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. KOL/CUS/Airport/AKR/185/2022 dated 31.03.2022 passed by the Commissioner of Customs (Appeals), Kolkata.

Applicant : Sh. Anil Rameshlal Keshwani, Ulhasnagar, Thane.

Respondent : Commissioner of Customs (Airport), Kolkata.

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ORDER

A Revision Application No. 372/10/B/2022-RA dated 27.05.2022 has been filed by Sh. Anil Rameshlal Keshwani, Ulhasnagar, Thane (hereinafter referred to as the Applicant), against the Order-in-Appeal No. KOL/CUS/Airport/AKR/185/2022 dated 31.03.2022, passed by the Commissioner of Customs (Appeals), Kolkata. The Commissioner (Appeals) has rejected the appeal filed by the Applicant against the order of the Additional Commissioner of Customs (Airport), Kolkata, bearing no. 24/2021/ADC dated 15.06.2021, ordering absolute confiscation of foreign currency, amounting to EURO 14,200/- (equivalent to Rs. 10,96,240/-) and SWISS FRANC (CHF) 1,000/- (equivalent to Rs.70,300/-), totally amounting to Rs.11,66,540/-, under Sections 113(d), 113(e) and 113(h) of the Customs Act, 1962 along with one piece of deep green coloured lower undergarment (Brief) of 'MACHO' brand used for concealing the foreign currency notes, under Section 119 of the Customs Act, 1962. Besides penalty of Rs. 3,00,000/- was also imposed on the Applicant, under Section 114 of the Act, *ibid*.

2. Brief facts of the case are that the Applicant was scheduled to depart for Yangon from Kolkata, on 16.11.2019. He was intercepted by the officers of Customs at Airport after he had completed the Check-in and emigration formalities. The Applicant was asked specifically whether he was carrying any contraband or Indian/ Foreign currency beyond the permissible limit, to which he replied in negative. Thereafter his personal search was conducted, which resulted in recovery of 71 pieces of currency notes of denomination of EURO 200, amounting to EURO 14,200/- (equivalent to Rs. 10,96,240/-) and 01 piece of currency note of denomination of 1000 SWISS FRANC (CHF) (equivalent to Rs.70,300/-),

totally amounting to Rs.11,66,540/- in three black-coloured bundles form, from the lower undergarment (brief), which the Applicant was wearing. The Applicant in his statement dated 16.11.2019, recorded under Section 108 of the Customs Act, 1962, stated the foreign currency was recovered from his lower undergarment worn by him; that he could not produce the legal documents in support of legal acquisition, possession or/ and exportation of the recovered foreign currency; that he had purchased the foreign currency notes from the black market to purchase clothes from Yangon; that he knew that it was a punishable offence and did this for greed of money and accepted his guilt and requested to take lenient view in the case.

3. The revision application has been filed, mainly, on the ground that there is no concealment and the currency was kept in undergarment for safety purpose; that the Applicant is the owner of the confiscated currency; that foreign currency confiscated absolutely be released under Section 125 of the Customs Act, 1962 on fine when the foreign currency is neither banned nor restricted under the Baggage Rules, 2016 & FEMA, 1999; that penalty be waived/reduced.

4. A personal hearing, in virtual mode, was held on 08.08.2022. Sh. O.M. Rohira, Advocate appeared for the Applicant and reiterated the contents of the RA. Sh. Rohira highlighted that it is not a case of ingenious concealment and is merely a technical lapse. Hence, the currency may be released on payment of fine and nominal penalty. Sh. D. K. Ramuka, Supdt. highlighted that Applicant had admittedly obtained foreign currency through illegal means and had ingeniously concealed it to smuggle for pecuniary gains.

5. The Government has carefully examined the matter. It is evident that the foreign currency was recovered from the Applicant, which was concealed in the lower undergarment (brief). It is brought out that the Customs officers asked the Applicant as to whether he was carrying any foreign currency to which he replied in negative. Thus, it is evident 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. Rather, it is admitted that the currency was obtained illegally from black market. The contents of the statement dated 16.11.2019 do not appear to have been retracted by the Applicant. The defence that the currency was kept in the undergarment for safety purpose and not for concealment is disingenuous to say the least, in as much as if the intention was not to conceal, the Applicant would have declared the currency when asked to do so by the officers.

6.1 Regulation 5 of the Foreign Exchange Management (Export and Import of Currency) Regulations, 2015 (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."* Further, in terms of Regulation 3(iii) of the Foreign Exchange Management (Possession and Retention of Foreign Currency) Regulations, 2015 (as amended), 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

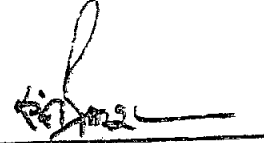
Applicant failed to produce any legal documents for licit possession of the confiscated currency or any permission from the Reserve Bank of India for export of foreign currency found in his undergarment (brief) in concealed manner. He has also not shown compliance with the provisions of Regulation 3 (iii) of the FEMA (Possession and Retention of Foreign Currency) Regulations, 2000, as amended. Thus, it is clear that the conditions in respect of possession and export of foreign currency (seized from the Applicant) are not fulfilled.

6.2 The contention of the Applicant is that the foreign currency is neither notified under Section 11-B (Chapter IVA & 123 of the Customs Act, 1962) nor banned/ restricted under the Baggage Rules, FEMA, 1999, thus it is not prohibited for export. 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 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.

8. The case laws relied upon by the Applicant, in support of his various contentions, are not applicable in view of the dictum of Hon'ble Supreme Court and Hon'ble High Courts, as above.
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

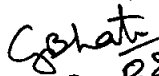
Sh. Anil Rameshlal Keshwani,
S/o Sh. Rameshlal Lakhomal Keshwani,
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Order No. 261/22-Cus dated 08-08-2022

Copy to:

1. The Commissioner of Customs (Appeals), 3rd floor, Custom House, 15/1, Strand Road, Kolkata-700001.
2. The Commissioner of Customs (Airport), NSCBI Airport, Kolkata-700052.
3. Sh. O.M. Rohira, Advocate, 148/301, Uphaar, 10th Road, Khar(W), Mumbai-400052.
4. PA to AS(RA).
5. Guard file.
6. Spare Copy.

ATTESTED


08/08/22
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