

SPEED POST



F. No. 380/06/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...23/12/21

Order No. 296/21-Cus dated 23-12-2021 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)/09/2019 dated 22.02.2019, passed by the Commissioner of Customs (Appeals), Kolkata.

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

Respondent : Shri Rakesh Kumar Ghai, Patiala, Punjab.

ORDER

A Revision Application No. 380/06/B/2019-RA dated 30.07.2019 has been filed by the Commissioner of Customs, NSCBI Airport, Kolkata (hereinafter referred to as the Applicant) against the Order-in-Appeal No. KOL/CUS(A/P)/09/2019 dated 22.02.2019, passed by the Commissioner of Customs (Appeals), Kolkata. Commissioner (Appeals) has allowed the appeal filed by Sh. Rakesh Kumar Ghai (herein after referred to as the Respondent) and ordered the release of foreign currency confiscated absolutely by the original authority, i.e., the Joint Commissioner of Customs, NSCBI Airport, vide Order-in-Original No. 81/2018-JC dated 15.03.2018.

2. The brief facts of the case are that, on specific information, Kolkata Customs AIU, intercepted the Respondent, who after completion of his immigration formalities, was scheduled to depart to Bangkok by Bhutan Airlines Flight No. B3-700 dated 19.05.2016, and while proceeding for security check at the departure hall of the airport. On being asked about carrying any contraband Indian/foreign currency more than permissible limit, the Respondent replied in negative. The search of hand baggage of the Applicant, resulted in the recovery of foreign currency (USD 100 X 120 pcs and THAI BAHT 1000 X 7 pcs.), cumulatively equivalent to Rs. 8,06,430/. The Respondent could not produce any licit documents for its legal acquisition, possession or exportation and the same was confiscated absolutely by the original authority under Section 113(d), 113(e) and 113(h) of the Customs Act, 1962, vide aforesaid Order-in-Original dated 15.03.2018. A penalty of Rs. 8,06,430/- 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 of 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 7000/- & THAI BAHT

7000/-, on payment of redemption fine of Rs. 1,19,000/- and penalty of Rs. 48,000/-.

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 Sachin, 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 31.08.2019 has been filed by the Respondent.

4.1 Personal hearing, in virtual mode, was fixed for 15.11.2021, 06.12.2021 and 22.12.2021. Sh. Jitendra Kumar, Supdt. appeared on 06.12.2021, for the Applicant department. He reiterated the contents of the RA and prayed for the OIO to be restored. Sh. Jitendra Kumar highlighted that the Respondent had admitted in his statement under Section 108 that the seized FC did not belong to him and he was merely a carrier.

4.2 Sh. Rajaram Meena, Superintendent, appeared on 22.12.2021, for the Applicant department and reiterated the contents of the Revision Application. He highlighted that the case is of seizure of USD 12000 and THAI BAHT 7000; that the USD were in US\$100 currency notes, with 88 notes being of running SI. No. Therefore, the contention that the FC was collected over visits in the past is not plausible; and that no legal source of acquisition has been produced in respect of any part of Thai Baht.

4.3 Respondent, vide letter dated 31.08.2019, submitted his written submissions. However, no one appeared for the Respondent on 15.11.2021, 06.12.2021 and 22.12.2021. Since, sufficient opportunities have been granted, the case is taken up for disposal based on written submissions.

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 intercepted while he was proceeding to board the flight after completion of his immigration formalities. 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 foreign currency. The contention that the foreign currency amounting to US\$3000/- was licitly acquired and the remaining was collected and retained over the previous foreign visits appears to be an afterthought in as much as the documents evidencing licit acquisition were neither claimed nor produced at the time of apprehension.

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 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 Respondent) 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 [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 As brought out above, 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 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*". Further, 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.

8. 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. 8,06,430/-, imposed by the original authority, is excessive, especially when the foreign currency has been confiscated absolutely. Accordingly, the penalty is reduced to 2,00,000/-. The

revision application is disposed of by restoring the Order-in-Original No. 81/2018-JC dated 15.03.2018, 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. _ 296/21-Cus dated 23-12-2021

Copy to:

1. Shri Rakesh Kumar Ghai, S/o Shri Subhash Chander, H. No. 158/6, Mohalla Suighran, Patiala-147001, Punjab.
2. Commissioner of Customs (Appeals), 3rd Floor, Customs House, 15/1, Strand Road, Kolkata-700001.
3. PA to AS(RA).
4. Guard File.
5. *Spare Copy.*

ATTESTED



(लक्ष्मी राघवन)
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अनुभाग अधिकारी (Section Officer)
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