

SPEED POST



F. No. 372/43/B/2019-R.A.
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. 28/11/22

ORDER NO. 32/22 - Cus dated 28-01-2022 of the Government of India, passed by Sandeep Prakash, Additional Secretary to the Government of India, under Section 129DD of the Customs Act, 1962.

SUBJECT : Revision Application filed under section 129DD of the Customs Act, 1962 against the Order-in-Appeal No. KOL/CUS/(Airport)/116/2019 dated 29.09.2019, passed by the Commissioner of Customs (Appeals), Kolkata.

APPLICANT : Sh. Arif Khan, Delhi.

RESPONDENT : Commissioner of Customs (Airport & Admn.), Kolkata.

ORDER

A Revision Application No. 372/43/B/2019-R.A. dated 25.11.2019 has been filed by Sh. Arif Khan, Delhi (hereinafter referred to as the Applicant) against Order-in-Appeal No. KOL/CUS/(Airport)/116/2019 dated 29.09.2019, passed by the Commissioner of Customs (Appeals), Kolkata. Commissioner (Appeals) has upheld the order of the Joint Commissioner of Customs, AIU, NSCBI Airport, Kolkata bearing No. 99/2018 JC dated 18.04.2018, whereby, foreign currency amounting to USD 19,000/- and Saudi Arabian Riyals 1,15,000/-, equivalent to Rs. 32,38,700/-, has been confiscated absolutely and a penalty of Rs. 32,38,700/- has been imposed on the Applicant.

2. Brief facts of the case are that the Applicant, scheduled to depart to Bangkok, on 07.08.2016, was intercepted by the customs officers at the NSCBI Airport, Kolkata while he was proceeding towards the security hold area after completion of immigration formalities. On being asked if he was carrying any foreign/Indian currency with him, he replied in negative. On examination of his hand baggage, assorted foreign currency of USD 19,000/- and Saudi Arabian Riyals 1,15,000/-, equivalent to Rs. 32,38,700/-, was recovered. The Applicant could not produce any evidence of lawful acquisition/possession/or legal exportation of the said currency. In his statement dated 07.08.2016, tendered under Section 108 of the Customs Act, 1962, the Applicant stated that the recovered currency did not belong to him and the same was handed over to him by one Niraj Kumar to hand over the same to one Sumit Kumar at Bangkok; that he would have got Rs. 4000/- for this job; and that he agreed to carry the foreign currency for greed. In another statement dated 08.08.2016

recorded under Section 108 of the Customs Act, 1962, he reiterated the contents of his earlier statement dated 07.08.2016. The said foreign currency was confiscated absolutely by the original authority under Sections 113(d), 113(e) and 113(h) of the Customs Act, 1962 read with Foreign Exchange Management (Export & Import of Currency) Regulations, 2015 and an equal penalty of Rs. 32,38,700/- was also imposed on the Applicant under Section 114 of the Customs Act. Aggrieved, the Applicant filed an appeal before the Commissioner (Appeals), who, vide the impugned Order-in-Appeal, rejected the appeal.

3. The revision application has been filed by the applicant canvassing that import & export of foreign currency is not prohibited and thus it should be released on payment of redemption fine under Section 125 of the Customs Act; and that the penalty should be reduced.

4. Personal hearing in the matter was held on 28.01.2022, in virtual mode. Sh. S.S. Arora, Advocate appeared for the Applicant and reiterated the contents of the revision application. Sh. Ram Narayan Meena, Superintendent, appeared for the respondent department and supported the orders of lower authorities. He highlighted that the Applicant was a carrier.

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

6. 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 Applicant 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.

7. The Applicant has contended that the seized foreign currency is not 'prohibited goods'. 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 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.*" In view of the position explained in para 6 above, the conditions subject to which the currency could have been exported, have not been met in the present case. Hence, the seized foreign currency is "prohibited goods".

8. The Applicant has prayed that the foreign currency should be released on payment of redemption fine. However, as per Section 125 of the Customs Act, 1962, the option to release 'prohibited goods', on redemption fine, 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*". In the present case, the absolute confiscation has been ordered as the Applicant, acting as a carrier, was smuggling large amount of foreign currency without declaration. Thus, no case for interference with the discretion exercised by the lower authorities is made out. The case laws relied upon by the Applicant are not applicable in the facts and circumstances of the present case as the redemption has been

denied for reasonable and relevant considerations and, as such, fulfils the test laid down in Raj Grow Impex.

9. It is observed that a penalty of Rs. 32,38,700/- has been imposed on the applicant which is equal to the convertible value of the foreign currency seized. The Government finds that the penalty imposed is on a higher side, specially keeping in view the fact that the foreign currency has been confiscated absolutely. Accordingly, the penalty imposed, under Section 114 of the Customs Act, 1962, is reduced to Rs. 8 lakhs.

10. The revision application is allowed partly to the extent of reduction in penalty, as above.


(Sandeep Prakash)

Additional Secretary to the Government of India

Sh. Md. Arif Khan, S/o Sh. Dilshad,
S-146/39, Kumhar Basti, Delhi-110 066.

Order No. 32/22-Cus dated 28-01-2022

Copy to:

1. Commissioner of Customs (Airport), N.S.C.B.I. Airport, Kolkata-700001
2. Commissioner of Customs (Appeals), Custom House, 15/1, Strand Road, Kolkata-700001.
3. Sh. S. S. Arora & Associates, B1/71, Safdarjung Enclave, New Delhi-110 029.
4. PA to AS(RA)
5. ~~Guard File.~~
6. Spare Copy

ATTESTED


(Ashish Tiwari)

Assistant Commissioner (RA)