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SPEED POST



F.No. 373/180/B/2016-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.....09/11/22.....

Order No. 340/22-Cus dated 09-11-2022 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 Application under Section 129 DD of the Customs Act, 1962 against the Order-in-Appeal No. C.Cus.No.276/2016 dated 04.07.2016, Passed by the Commissioner of Customs (Appeals), Chennai.

Applicant : Sh. Sivalingam, Permabalur, Tamil Nadu.

Respondent : Commissioner of Customs (Airport), Chennai

ORDER

A Revision Application No.373/180/B/2016-RA dated 01.09.2016 has been filed by Sh. Sivalingam, Perambalur, Tamil Nadu (hereinafter referred to as the Applicant), against the Order-in-Appeal No. C. Cus. No. 276/2016 dated 04.07.2016, passed by the Commissioner of Customs (Appeals), Chennai. The Commissioner (Appeals) has rejected the appeal filed by the Applicant herein against the Order of the Additional Commissioner of Customs (Airport), Chennai, bearing no. 490/2016-17-Airport dated 27.02.2016, ordering absolute confiscation of assorted foreign currency, equivalent to Indian Rs. 11,73,734/-, under Section 113(d), 113(e) and 113(h) of the Customs Act, 1962. Besides penalty of Rs.1,00,000/- was also imposed on the Applicant, under Section 114 (i) of the Act, *ibid*.

2. Brief facts of the case are that the Applicant was scheduled to depart for Singapore from Chennai, on 17.10.2015. The Applicant was intercepted by the Customs Officers at the security hold area and was asked specifically whether he was carrying any contraband or Indian/Foreign currency beyond the permissible limit, to which he replied in negative. On personal search of the Applicant and that of his baggage, foreign currency notes viz. 164 Nos. of 100 US Dollars & 7 numbers of 50 USD, 10 nos. of Australian Dollars of denomination 50/-, 17 nos. of Euro of denomination 50/- and 2 nos. of Euro of denomination 20/-, totally valued equivalent to Indian Rs. 11,73,734/-, which were kept concealed inside the inner pocket of the Pants, was recovered. On being asked, the Applicant could not produce any licit document in support of legal acquisition, possession and /or exportation of the foreign currency notes and, hence, the same were seized under Section 110 of the Customs Act, 1962. The Applicant in his statement dated 17.10.2015, recorded under Section 108 of the Customs Act, 1962, stated that he was carrying assorted foreign currency; that he was not in possession of any valid documents/permit from RBI as required under FEMA for legal export of the same; that he had attempted to smuggle the same out of India by concealment; that recovered foreign currencies were given to him by a person outside the Chennai airport to be handed over to a person outside Singapore airport; that he was well aware that smuggling of Indian/Foreign currencies by non-declaring to Customs and without any valid permit is an offence; that he further admitted his offence and stated that he did it for financial gain of Rs. 5000/-.

3. The revision application has been filed, mainly, on the ground that the export of foreign currency is neither prohibited nor notified under the Customs Act and hence the currency may be released; and that the penalty imposed may be set aside.

4. Personal hearing in the matter was fixed on 09.11.2022. None appeared on behalf of the Applicant or the Respondent Department nor any request for adjournment has been received. The Advocate for the Applicant has, *vide* letter

dated 22.10.2021, waived hearing. Hence, the case is taken up for final decision on the basis of available records.

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 inside pocket of the pant he was wearing and from inside of a pant kept in his baggage. It is brought out that the Applicant did not file any declaration in respect of the foreign currency and declined that he was carrying any currency when asked orally as well. 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.

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 has 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 with him in a 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 not a prohibited item. 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) of the Act *ibid* 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. The Government observes that, as per Section 125 of the Act, *ibid*, the option to release "prohibited goods", on payment of 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*". Further, "*when discretion is exercised under Section 125 of the Customs Act, 1962, ----- the twin test to be satisfied is "relevance and reason"*." The jurisdictional High Court, i.e., the Hon'ble Madras High Court has, in the case of P. Sinnasamy {2016 (344) ELT 1154 (Mad.)}, held that "*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, as above. Such a case is not made out. Thus, the Commissioner (Appeals) has correctly refused to interfere in the matter.

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

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


(Sandeep Prakash)

Additional Secretary to the Government of India

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C/o Sh. K. Mohamed Ismail, B.A.B.L.,
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Order No. 340/22-Cus dated 09-11-2022

Copy to:

1. The Commissioner of Customs (Appeals), 60, Rajaji Salai, Custom House, Chennai-600001.
2. The Commissioner of Customs, (Airport), New Custom House, GST Road, Meenambakkam, Chennai-600027
3. The Additional Commissioner of Customs (Airport), New Custom House, Meenambakkam, Chennai-600027.
4. PA to AS(RA).
5. Guard file.
6. Notice Board.

7. Spare Copy.

ATTESTED

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