

SPEED POST



F. No. 373/181/B/2021-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 22/11/22

Order No. 358/22-Cus dated 22-11-2022 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. HYD-CUS-000-APP-145-20-21(APP-I) dated 11.03.2021 passed by the Pr. Commissioner of Customs & Central Tax (Appeals-I), Hyderabad.

Applicant : Sh. Tenneti Prabhakar Rao, Hyderabad

Respondent : Pr. Commissioner of Customs, Hyderabad

ORDER

A Revision Application No. 373/181/B/2021-RA dated 28.05.2021 has been filed by Sh. Tenneti Prabhakar Rao, Hyderabad (hereinafter referred to as the Applicant), against the Order in Appeal No. HYD-CUS-000-APP-145-20-21(APP-I) dated 11.03.2021, passed by the Pr. Commissioner of Customs & Central Tax (Appeals-I), Hyderabad. The Commissioner (Appeals) has upheld the order of the Additional Commissioner of Customs Airport, Hyderabad, bearing no. 62/2020-Adjn-Cus (ADC) dated 28.09.2020, ordering absolute confiscation of seized foreign currency i.e. USD 55000/-, equivalent to Indian Rs. 38,47,250/-, under Sections 113(d), 113(e) and 113(h) of the Customs Act, 1962. Besides penalty of Rs. 7,70,000/- and Rs. 1,75,000 /- was also imposed on the Applicant, under Section 114(i) of the Act, ibid and Section 13(1) of the FEMA, 1999, respectively.

2. Brief facts of the case are that the CISF staff intercepted the Applicant, on 05.02.2020, who was scheduled to depart for Dubai from Hyderabad. The CISF officials upon scanning the hand baggage of the Applicant found that he was carrying foreign currency. The said foreign currency was inventorised in the presence of Panchas/witnesses and Air Intelligence Unit and it was found that the Applicant was carrying 550 pieces of currency of USD 100 each, totalling USD 55000/-. On being questioned about authorization to carry foreign currency, the Applicant replied in negative. Applicant also informed that the said currency is not obtained from any of the authorized currency exchange dealer. The Applicant informed the Customs Officials that the said currency is obtained from his friends during his previous visits to India. The Applicant in his statement dated 05.02.2020, recorded under Section 108 of the Customs Act, 1962, inter alia, stated that he was not aware about the rule position for carrying foreign currency while living in India; that he was carrying the foreign currency to meet family medical emergency in USA and stated that he procured the said foreign currency from his friends in parts during his previous visits and does not have any documentary proof for the same; and that he was carrying huge amount of foreign currency which was a mistake and is sorry for not following the rule position and further stated that this is the first

incidence of carrying foreign currency out of India and requested that a lenient view may be taken as he was not aware of the rule position.

3. The revision application has been filed, mainly, on the grounds that he collected the currency from his friends over a period of time during his visits to Hyderabad and from his bank accounts, which he had kept in the Church where he stayed; that he had visited India six times during September 2018 to February 2020; that the currency was kept in an open condition and was not concealed; that his only mistake was that he did not obtain authorization for carrying the currency; that there was no misdeclaration as he did not give any declaration to Customs; that the original authority is not an authorized/proper officer under Section 13 of FEMA, 1999; and that the confiscated foreign currency may be released and allowed to be re-exported.

4. Personal hearing was fixed on 21.11.2022. Dr. T. Satya Murthy, Advocate appeared for the Applicant. At the outset, it was pointed out to the Ld. Advocate that the impugned OIA has been passed by an officer of the same rank as the Revisionary Authority to which Dr. Satya Murthy replied that he had no objection to this Revisionary Authority deciding the matter. On merits, he reiterated the contents of the RA. No one appeared for the Respondent department nor any request for adjournment has been received. Hence, it is presumed that the department has nothing to add in the matter.

5.1 The Government has carefully examined the matter. It is evident that the foreign currency was recovered from the Applicant. It is on record and an admitted position that the Applicant had not made any declaration in respect of the currency carried by him, as required under Section 77 of the Customs Act, 1962. He also did not have any documents or evidence showing lawful possession of the currency or the authorization to carry the currency abroad. The statement dated 05.02.2020 also does not appear to have been retracted by the Applicant. As such, the contentions that there was no concealment or misdeclaration are factually incorrect.

5.2 The other contention of the Applicant is that the foreign currency had been acquired from the relatives and friends in India as well as friends abroad. It is also contended that part of the currency has been withdrawn from his Bank Account. The authorities below have not accepted this contention for the reasons, specifically brought out in para 8 of the OIA and para 27 of the OIO. The Government is also not persuaded to accept this contention for the following reasons:

(i) The foreign currency amounting to US\$ 55000/-, all in the US\$ 100 denominations, was recovered from the Applicant. It is implausible that whole of currency will only be in one denomination i.e of US\$ 100, if it was obtained from multiple sources.

(ii) At this stage, certificates from 04 persons from USA have been placed on record indicating that they had handed over US\$ 20000, US\$ 15000, US\$ 12000 and US\$ 11000, in cash, to the Applicant herein to serve the poor and needy in India. Thus, an amount of US\$ 58000 is said to have been sourced from these 04 persons. However, these certificates do not appear to be reliable for following reasons:

(a) These certificates are dated 22.04.2021, 18.04.2021, 27.04.2021 and 07.04.2021, i.e, the certificates have been issued much after the currency was seized and when the Applicant had already suffered two adverse orders. Therefore, these appear to be more in the nature of afterthought.

(b) All of these certificates, though claimed to have been issued by 04 different persons, are in identical fonts and, in fact, 03 of these certificates are identically worded.

(c) Substantial amount of cash is said to have been handed over to the Applicant herein at short intervals. For example, one Mr. Gary Fredric has, vide certificate dated 18.04.2021, stated that he purportedly handed over US\$ 3500 in cash to the Applicant on 19.11.2018 and thereafter within 03 days again handed over US\$ 4500 on 22.11.2018. Similarly, he handed over US\$ 5000 on 01.12.2018 and the very next day handed over US\$ 2000.

Thus, in a span of less than two weeks US\$ 15000 was handed over at short intervals. Needless to say that such transactions are implausible as normally a person capable of and willing to give such donation would rather give the donation in one go instead of giving it at an interval of a day or two.

(d) In today's time and age, such frequent cash transactions are unusual. Not one of the 17 transactions between these 04 persons and the Applicant is through regular banking channels.

(e) From the certificates, it is apparent that none of the donors are close friends of the Applicant but appear to be only acquaintances. Thus, such frequent and large donation by them are inexplicable.

(iii) The Applicant has, by his own admission, brought large amounts of foreign currency in cash into India on several occasions. No declaration appears to have been made at any of these occasions. Thus, Applicant is a repeat offender.

6.1 Regulation 5 of the Foreign Exchange Management (Export & Import of Currency) Regulations, 2015, 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, 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 show compliance with the Regulations, as above. 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 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 currency is 'prohibited goods', as the conditions subject to which the currency could have been exported are not fulfilled in the present case.

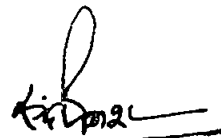
7. The Government observes that the option to release seized goods on redemption fine, in respect of 'prohibited goods', is discretionary, as held by the Hon'ble Supreme Court in the case of Garg Woollen Mills (P) Ltd vs. Additional Collector of Customs, New Delhi [1998 (104) E.L.T. 306 (S.C.)]. In the 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, as above. Rather, the original authority has, after due application of mind, ordered absolute confiscation for relevant and reasonable consideration, as recorded in paras 31, 32 & 33 of the Order-in-Original. Thus, the Commissioner (Appeals) has correctly refused to interfere in the matter.

8. A request for allowing re-export has been made. The Government observes that a specific provision regarding re-export of baggage articles has been made in Section 80 of the Customs Act, 1962. On a plain reading of Section 80, it is apparent that a declaration under Section 77 is a pre-requisite for allowing re-export. Hon'ble Allahabad High Court has, in the case of Deepak Bajaj ^{Delhi C.S. No. 1071 of 2019} {2019(365) ELT 695(All.)}, held that a declaration under Section 77 is a *sine qua non* for allowing re-export under Section 80 *ibid*. In this case, the Applicant had made no declaration in respect of the subject goods. Further, the Hon'ble Delhi High Court has, in the case of Jasvir Kaur vs UOI {2009 (241) ELT 521 (Del.)}, held that re-export "*cannot be asked for as of right.....The passenger cannot be given a chance to try his luck and smuggle..... and if caught he should be given permission to re-export.*" Hence, the request for permitting re-export does not merit consideration.

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

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Order No. 358/22-Cus dated 22-11-2022

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3. M/s. Mark Associates, Flat-203, Everest Block, Aditya Enclave, Ameerpet, Hyderabad-500038.
4. PA to AS(RA).
5. Guard file.
6. ~~Spare Copy.~~
7. Notice Board.


ATTESTED

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