

SPEED POST



F. No. 380/02/B/2020-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. 21/02/22

Order No. 58/22-Cus dated 21-02-2022 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)/101/2019 dated 27.09.2019, passed by the Commissioner of Customs (Appeals), Kolkata.

Applicant : Commissioner of Customs, NSCBI Airport, Kolkata.

Respondent : Sh. Rajkumar Vishandas Balwani, Ulhasnagar, Thane.

ORDER

A Revision Application No. 380/02/B/2020-RA dated 08.01.2020, has been filed by the Commissioner of Customs, NSCBI Airport, Kolkata (hereinafter referred to as the Applicant department) against the Order-in-Appeal No. KOL/CUS/(A/P)/101/2019 dated 27.09.2019, passed by the Commissioner of Customs (Appeals), Kolkata. The Commissioner (Appeals) has allowed the appeal filed by Sh. Rajkumar Vishandas Balwani, Ulhasnagar, Thane (hereinafter referred to as the Respondent) against the Order-in-Original, bearing no. 153/2017 JC dated 19.12.2017, passed by the Joint Commissioner of Customs, AIU, NSCBI Airport, Kolkata, wherein foreign currencies comprising Euro 30000 and INR 8,00,000/-, totally equivalent to Rs. 28,65,500/-, were confiscated absolutely under Sections 113(d), 113(e), & 113(h) of the Customs Act, 1962 read with Section 3(1)(a) & 7b(ii) of Foreign Exchange Management Act, 1999 and Foreign Exchange Management (Export and Import of Currency) Regulations, 2000. Besides, a penalty of Rs. 28,65,500/- was also imposed on the Respondent herein, under Section 114 of the Act, *ibid*. The Commissioner (Appeals) has allowed the redemption of the said foreign currency and Indian currency on payment of redemption fine of Rs. 6,83,875/- and a personal penalty of Rs. 3,00,905/- on the Respondent.

2. Brief facts of the case are that acting on spot intelligence, the officers of the Customs AIU (Air Intelligence Unit), NSCBI Airport, Kolkata, intercepted the Respondent herein who was scheduled to depart for Bangkok by the Spice Jet Airways flight number SG-83, dated 09.08.2015 after completion of his immigration formalities and while proceeding for security check at the departure hall of NSCBI Airport, Kolkata. The officers of AIU asked him specifically whether he was carrying any contraband items as well as Indian/foreign currency more than the permissible limit to which he replied in negative. The search of his checked-in baggage resulted in recovery of Euro 30,000/-(total value in convertible INR 20,65,500/-) and INR 8,00,000/-, having collective value of INR 28,65,500/-. The respondent could not produce any licit documents in support of acquisition, possession, and/or legal exportation of the above currency. In his statement dated 09.08.2015, tendered under Section 108 of Customs Act, 1962, the Respondent admitted the recovery of

the offending foreign and Indian currency. He also stated this was his own money and he was trying to carry it out of India for the purpose of buying readymade clothes, TV and to earn extra amount by exchanging foreign currency to local brokers at Bangkok and shopkeepers also; that the foreign currency carried by him was possessed from Mumbai grey market; that every time he used to go to Bangkok from Calcutta and come to Bangalore with readymade clothes and electronic goods; that this money was possessed by selling his family shop and he got share from the shop they had sold; that he admitted to committing a mistake for earning of some extra money; that he accepted his awareness that he could only carry Rs. 25,000/- out of India and any foreign currency with valid purchase documents; that he was carrying this amount of Rupees Eight Lakh and Euro 30,000 to earn some extra money. The original authority confiscated absolutely the Indian and foreign currency amounting to INR 28,65,500/- and imposed an equal amount of penalty. Aggrieved, the Respondent filed an appeal before the Commissioner (Appeals), which was allowed in the above terms vide impugned OIA.

3. The revision application has been filed canvassing that the foreign and Indian currency is a prohibited item; that the Respondent did not declare the currency at the time of departure; that the Respondent had admitted his offence in his voluntary statement leaving no doubt about his intention of smuggling; and that the Order of the Commissioner (Appeals) is not proper and merits to be set aside.

4. Personal hearings were fixed on 13.12.2021, 24.01.2022 & 17.02.2022. On 17.02.2022, Sh. Saurabh Das, Superintendent, appeared for the Applicant department and reiterated the contents of the RA and requested that the order of original authority may be restored. Sh. D.S. Chadha, Advocate, appeared for the Respondent and supported the order of Commissioner (Appeals). He relied upon the judgment of Hon'ble Delhi High Court in the case of Raju Sharma & Anr. {W.P. (C) No. 12110/2019}, in support of his contentions.

5. The revision application has been filed with a delay of 5 days, which is condoned.

6. The Government has carefully examined the matter. It is observed that the Indian and foreign currency, which was recovered from the Respondent, was not declared to the Customs officers as required in terms of Section 77 of the Customs Act, 1962. It has been admitted by the Respondent 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; that foreign currency was acquired in grey market; and that he did not have any documents or evidence showing lawful possession of the currency.

7.1 The Commissioner (Appeals) has accepted the contention of the Respondent that the Indian/foreign currency is not prohibited goods.

7.2 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, as required in terms of Regulation 5 of FEMA Regulations, 2000 nor has he shown compliance with the Regulation 3 (iii) *ibid*.

7.3 The Applicant admitted that he was aware that he could not carry IC in excess of Rs. 25,000/- but claimed ownership. However, he failed to produce any licit documents for valid possession of the confiscated Indian currency. The Government observes that as per Regulation 3(1)(a) of the Foreign Exchange Management (Export and Import of Currency) Regulations, 2000 issued under Notification No.

FEMA 6/RB-2000 dated 03.05.2000, "any person resident in India may take outside India (other than Nepal and Bhutan) Currency notes of Government of India and Reserve Bank of India notes up to an amount not exceeding Rs. 25000/- per person". Thus, it is clear that the Applicant was carrying Indian currency, which is over and above the permissible limit, as specified, with an intent to export the same to a place, outside India for monetary gains.

7.4 ✓ 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.*"

7.5 ✓ Thus, following the ratio of the aforesaid judgments, there is no doubt that the subject goods are 'prohibited goods' and the Commissioner (Appeals) has erred in holding otherwise. Further, being 'prohibited goods', the redemption thereof is discretionary, in terms of Section 125 of the Customs Act, 1962. The discretion exercised by the original authority can be interfered with only if it has not been exercised for relevant and reasonable considerations, as held by the Apex Court in Raj Grow Impex (supra). The Commissioner (Appeals) has, on the other hand, interfered with the discretion exercised by the original authority on the grounds that are found to be non-sustainable, as brought out hereinabove.

7.6 The Applicant has relied upon the judgment dated 23.12.2019 of the Hon'ble Delhi High Court, in the case of Raju Sharma and Anr. vs. Union of India and Ors. {W.P. (C) 12110/2019}. In the said case, Petitioner Raju Sharma was intercepted by the officers of Customs with Indian Currency of Rs. 4 Lakhs and Foreign Currency of 40 Dirhams. The Foreign Currency, being within the permissible limit for carriage abroad, was returned but as Raju Sharma was unable to produce any document evidencing the licit possession of the Indian Currency of Rs. 4 Lakhs, the Indian Currency was seized under Section 110 of the Customs Act, 1962. The original authority ordered for confiscation of the Indian Currency but permitted redemption on payment of redemption fine of Rs. 50,000/-. Penalties were also imposed. On an appeal filed by the department, the Commissioner (Appeals) upheld the order of the original authority. One of the contentions raised by the department before the Commissioner (Appeals) was that Raju Sharma was only a carrier and not the owner thereof and the redemption can be given only to the owner of the seized goods who was traced and was present before the Commissioner (Appeals). The Commissioner (Appeals) found that the redemption of currency can be given to the owner. In the revision application filed under Section 129DD, the Revisionary Authority allowed the revision application and set aside the order of Commissioner (Appeals). The Hon'ble High Court deprecated the order of the Revisionary Authority in the following manner:

"13. The contentions of the Revenue as advanced before the Revisionary Authority (as recorded in the impugned order), as well as the decision of the Revisionary Authority, thereon, defeat comprehension. It is undisputed that Petitioner No. 2 is the owner of the seized currency. Both the petitioners were before the AC, the Commissioner (Appeals), and the Revisionary Authority. The only issue agitated before the Revisionary Authority, by the Revenue, was that redemption of the currency ought not to have been granted to Petitioner No. 1, as he was only the carrier and not the owner, thereof. The impugned order of the Revisionary Authority, quite surprisingly, sets aside the Order-in-Appeal of the Commissioner (Appeals) by accepting this contention. The Revisionary Authority has held that, as the owner of the goods, i.e., Surender Gupta (Petitioner No. 2) was known, redemption of the currency could not have been granted to Petitioner No. 1.

14. Legally speaking, there can be no cavil with this proposition, inasmuch as Section 125 of the Customs Act requires redemption to be granted to the owner of the goods and, if the owner of the goods is not known, to the person from whose possession the goods were seized.....

15. The owner of the currency being Surender Gupta (Petitioner No. 2), there could, undisputedly, be no question of releasing the currency to Petitioner No. 1. We are, however, completely at a loss as to how, on this ground, the Revisionary Authority could allow the Revision Application of the Revenue. Both the petitioners were before him. A reading of the Order-in-Original of the AC does not indicate that option to redeem the currency had been granted, by the AC, to Petitioner No. 1. The Order-in-Appeal of the Commissioner (Appeals) makes the matter clear by observing that, as the owner, i.e., Petitioner No. 2, was known, redemption of the currency could be granted to Petitioner No. 2. In this backdrop, it is impossible to understand how the Revisionary Authority set aside the said order, by holding that redemption of the currency could not be granted to Petitioner No. 1.

16. At the cost of repetition, it may be noted that both the petitioners were before the Revisionary Authority. Even if, for a moment, it were to be assumed that the Revisionary Authority read the orders of the authorities below as allowing the redemption of the currency to Petitioner No. 1, all that he was required to do to remedy the situation, was to substitute the said direction by permitting redemption of the currency to Petitioner No. 2. There was no occasion, whatsoever, for the Revisionary Authority to set aside the Order-in-Appeal, wholesale, thereby rendering the seized currency irredeemable, even by Petitioner No. 2."

It is to be observed that in the present case the facts are different and there is no dispute of the nature involved as in the case of Raju Sharma. However, para 18 of the judgment, which is reproduced below, lays down certain legal propositions which are relevant.

"18. At the same time, Mr. Amit Bansal sought to contend, the actual grievance of the Revenue before the Revisionary Authority, was that the seized currency was "prohibited", redemption thereof ought not to have been allowed at all, and the currency ought to have been absolutely confiscated. This submission directly flied in the face of Section 125 of the Customs Act whereunder, while allowing the redemption, in the case of goods which are not prohibited, is mandatory, even in the case of goods, which are prohibited, it is open to the authorities to allow redemption thereof, though, in such a case, discretion would vest with the authorities. The Commissioner (Appeals), while rejecting the appeal of the revenue, correctly noted this legal position, and observed that, as the AC had exercised discretion in favour of allowing redemption of the seized currency, on payment of redemption fine of Rs.

50,000/-, no occasion arose to interfere therewith. We are entirely in agreement with the Commissioner (Appeals). 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 motives. No illegality, much less perversity, is discernible in the decision, of the AC, to allow redemption of the seized currency on payment of redemption fine of Rs. 50,000/-. The Commissioner (Appeals) rightly refused to interfere with the said decision, and the Revisionary Authority, in an order which reflects total non-application of mind, chose to reverse the said decision.” (emphasis supplied).

In the present case, the Commissioner (Appeals) has interfered with the discretion exercised by the original authority without in any way bringing out that the discretion so exercised was tainted by perversity, patent illegality or oblique motives. Rather as held hereinabove, the Commissioner (Appeals) has himself proceeded on an illegality and interfered with the discretion exercised by the original authority on an erroneous finding that the export of Foreign/Indian currency was not prohibited. In these facts and circumstances, the said order of the Hon'ble Delhi High Court is of no help to the Respondents and it rather supports the case of the Applicant department that the impugned Order-in-Appeal cannot be sustained.

8. In view of the above, the impugned Order-in-Appeal dated 27.09.2019 is set aside and the Order-in-Original No. 153/2017-JC dated 19.12.2017 is restored. However, the penalty imposed by the original authority is reduced to Rs. 7,00,000/-. The revision application is disposed of, accordingly.



(Sandeep Prakash)

Additional Secretary to the Government of India

The Commissioner of Customs,
(Airport & Admn.), NSCBI Airport,
Kolkata – 700052.

Order No. 58/22-Cus dated 21-02-2022

Copy to:-

1. Sh. Rajkumar Vishandas Balwani, S/o Sh. Vishandas Gopaldas Balwani, R/o Avtar Apt., Flat No. 702, 7th Floor, near 24C School, Ulhasnagar, Thane, Maharashtra – 421001.

2. The Commissioner of Customs (Appeals), 3rd Floor, Custom House, 15/1, Strand Road, Kolkata – 700001.
3. Sh. D.S. Chadha, Advocate, G-16, 2nd Floor, Lajpat Nagar-I, New Delhi – 110024.
4. PA to AS(RA).
5. Guard File.
6. Spare Copy.

ATTESTED

Am
21/02/2022

