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F. No. 373/525/B/2019-RA
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SPEED POST



F. No. 373/525/B/2019-RA
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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. 21/06/24.

Order No. 118-119/24-Cus dated 21-06-2024 of the Government of India passed by Smt. Shubhagata Kumar, 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. 94/2019 dated 17.06.2019, passed by the Commissioner of Customs (Appeals), Bengaluru.

Applicant : Sh. Sirajuddin Pallikke Kunhali, Kasaragod
The Commissioner of Customs, Mangaluru

Respondent : The Commissioner of Customs, Mangaluru
Sh. Sirajuddin Pallikke Kunhali, Kasaragod

ORDER

Revision Application Nos. 373/525/B/2019-RA dated 26.12.2019 & 380/72/B/SZ/2019-RA dated 09.10.2019 have been filed by Sh. Sirajuddin Pallikke Kunhali, Kasaragod (hereinafter referred to as the Applicant) and the Commissioner of Customs, Mangaluru, (hereinafter referred to as the department), against the Order-in-Appeal No. 94/2019 dated 17.06.2019, passed by the Commissioner of Customs (Appeals), Bengaluru. The Commissioner (Appeals) has, vide the impugned Order-in-Appeal, modified the Order-in-Original No. 19/2019 ADC dated 27.02.2019, passed by the Additional Commissioner of Customs, Mangaluru International Airport, Mangaluru by setting aside the penalty imposed upon the Applicant under Section 114AA of the Customs Act, 1962. Vide the aforementioned Order-in-Original, assorted foreign currency notes equivalent to Indian Rs. 25,82,686/- recovered from the Applicant were absolutely confiscated under Section 113 (d), (e) & (h) of the Customs Act, 1962. Besides, penalties of Rs. 8,50,000/- and Rs. 4,25,000/- were imposed upon the Applicant under Sections 114 & 114AA, respectively of the Act, *ibid*.

2. Brief facts of the case are that the Applicant who was travelling to Dubai from Mangaluru on 15.02.2018 was intercepted by Customs officers as he was proceeding towards boarding gate after completing his immigration and security check formalities. Upon being asked as to whether he had foreign currency either in his personal possession or in his baggage, he replied in the negative. Thereafter upon examination of his hand baggage nothing objectionable was found, however, upon the search of his person foreign currency was found concealed inside his both socks worn on both feet of the applicant. Further, upon the search of one of his check-in baggage it was found that the bottom of that trolley bag was bulging. The black plastic sheet placed in the bottom of the bag was broke open and upon opening of the same currency bundles covered in newspapers spread over the surface of the bag were found. On opening the bundles, assorted foreign currency notes were found. Furthermore, the officers broke open the pulling handles of the said trolley bag and found certain black coloured rolls concealed inside the hollow

tubular parts of the pulling handles. On removing the said rolls, it was observed that they were covered in black plastic film. On removal of the black plastic film, assorted foreign currency notes duly rolled and tied with white thread were found. Upon removing the said thread assorted foreign currency notes were recovered. The total assorted foreign currency was found to be equivalent to Rs. 25,82,686/- as per the prevalent exchange rate Notification No. 13/2018-Cus. (N.T) dated 15.02.2018.

In his statement dated 16.02.2018 recorded under Section 108 of the Customs Act, 1962, the Applicant, stated inter-alia that he is working for M/s. MSC Crewing Service Pvt. Ltd. Mumbai which cater to the need of ship crew for M/s. Mediterranean Shipping Company (MSC) as Motorman; that he got vacation for 3 months; that to undergo some advanced training, he went to Dubai where he met one Jasi Manji who slowly became his friend who offered him free tickets to and fro and some commission which he would handover personally at Dubai; that as he was in financial distress after buying new flat at Mangaluru and losing some money in share market, he thought of compensating for the same with some easy money; that Jasi Manji explained to him that he should undertake some trips to Dubai during his vacation by carrying some foreign currency concealed in trolley bags/suitcases and assured that the concealment will not be detected by Customs; that one Riyaz of Manjeshwar, Kerala would co-ordinate in India; that he returned to India on 10.02.2018 through Mumbai airport; that he received calls from a person who introduced himself as 'Riyaz' from Manjeshwar and told him that he had bought an air ticket to Dubai and that he should carry one trolley suitcase concealed with foreign currency which he should hand over to Jasi Manji at Dubai; that Riyaz handed over one light olive green coloured trolley suitcase concealed with foreign currency at Udyavar, near Manjeshwar alongwith the air ticket; that after collecting both the trolley suitcase and air ticket he went to his house in Mangaluru where he put one of his travel bags inside the trolley suitcase; that at that point he also concealed some foreign currency notes in his socks, which he had obtained from leasing out his flat at Mangaluru; that out of the total foreign currency recovered from his possession, foreign currency notes equivalent to Rs. 22,90,544/- belongs to Riyaz who concealed and packed the same in a light olive green coloured trolley bag and handed over to him; that he does not know the source of said

foreign currency and are not legitimately earned and procured from authorized forex dealers and wanted to smuggle out currency by using him; that the foreign currency notes found concealed in his socks belongs to him as he wanted to invest the same in Dubai for his small business.

The matter was adjudicated vide aforesaid order dated 27.02.2019. Aggrieved, the Applicant filed appeal before the Commissioner (A) who modified the OIO as mentioned above.

3. The Revision Application has been filed by the Applicant mainly on the grounds that the case against him is false and frivolous; that seized currency is nothing but his savings over the years which he was carrying for his personal purpose and to undergo some advanced training in Dubai; that foreign currency is not a prohibited item and carrying back any unspent amount is not an offence; and that he was intercepted near the check-in counter while he was proceeding to issue a boarding pass and not at the Customs area. It is further prayed that the foreign currency be allowed to be redeemed on payment of reasonable redemption fine on the amount which was in excess of the allowed limit and penalty imposed upon the applicant under Section 114 may kindly be dropped.

4. The Department has filed revision application on the ground that the penalty under Section 114AA was rightly imposed by the original adjudicating authority and needs to be restored as non-declaration amounts to filing of wrong declaration.

5. Personal hearing was held on 15.03.2024. Sh. Mitosh Raghavan, Deputy Commissioner appeared on behalf of the department and submitted that Sirajuddin had brought goods in excess of Rs. 25 lacs in a concealed manner and the original adjudicating authority correctly confiscated absolutely the impugned goods and also levied penalty including penalty under Section 114AA. The OIA has set aside this penalty under section 114AA which is unwarranted in view of the facts of the case and therefore the OIA should be set aside and OIO restored. No one appeared on behalf of the applicant, however vide email dated 14.03.2024, the authorized representative of the applicant

requested for postponement of the hearing as his counsel was out of station. Another request for adjournment was made by the authorized representative of the applicant vide email dated 21.04.2024 as he was not keeping well. The personal hearing was held on 05.06.2024. Sh. Sameer Kashimji, Advocate appeared on behalf of the applicant and submitted that the applicant is a Seaman who has worked for several shipping companies and visited several countries in the course of his work and acquired the impugned foreign currency in course of his work and related remuneration. He further stated that the applicant was intercepted at the check-in counter itself and not given any opportunity to declare the foreign currency, hence the charge of non-declaration to Customs is unjustified. He prayed for being given the option to redeem the impugned foreign currency on nominal RF and penalty and to set aside the order for absolute confiscation. Sh. Aravinda Raja, Assistant Commissioner appeared on behalf of the department and submitted that the impugned currency worth more than Rs. 26 lakhs was concealed and when asked, was not declared, hence the dropping of Section 114AA penalty is incorrect and sought that the OIO be upheld.

6. The Government has carefully examined the matter. It is observed that the OIA impugned herein was received by the Applicant on 06.07.2019 whereas subject revision application has been filed on 26.12.2019. As per sub-section (2) of Section 129DD, a revision application shall be made within a period of three months from the date of communication to the applicant of the order against which the application is being made. Further, in terms of proviso to said sub-section (2), the Central Government may, if it is satisfied that the applicant was prevented by sufficient cause from presenting the application within the aforesaid period of three months, allow it to be presented within a further period of three months. In the subject case, the revision application has not been filed within the normal limitation period of 03 months. There is an inordinate delay of about 80 days. The Government observes that there are three other revision applications filed by the same advocate wherein all identically worded applications for condonation of delay have been filed and the delay has been sought to be explained in following terms:

- "1. That the applicant was out of station for his job-related commitment and was not able to contact his counsel to file revision application.
2. That the applicant was not in a position to follow up the appeal immediately as he was unable to come to his home town because of his job commitment and was not aware about the time limit. Hence the delay.
3. That the said delay caused for filing this appeal is neither intentional nor deliberate, but only for the reason stated above. However, the said revision application has been filed will within the condonable period."

No documentary proof or substantiation of any kind has been placed on record to explain the delay. The statement that the delay falls within the condonable period does not constitute "sufficient cause" under Section 129DD of the Customs Act, 1962. It would, thus, appear that request for condonation of delay has been made in a mechanical and perfunctory manner, without any consideration for the factual position. In the conspectus of these facts and circumstances, the Government is constrained to hold that the request for condonation of delay cannot be accepted.

7. There has been delay of four days in filing revision application by the department which has been condoned.

8. It is observed that the foreign currency was ingeniously concealed in socks and check-in bag of the applicant. It is also on record that the Applicant had not made any declaration in this regard. Further, the Applicant did not have any documents or evidence showing lawful possession of the currency and he has admitted to the same.

9. As per Regulation 5 of the Foreign Exchange Management (Export & Import of Currency) Regulations, 2015, "*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 can retain foreign currency not exceeding US \$ 2000 or its equivalent in aggregate, subject to the condition that such currency was acquired by that person as 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 as he has admitted in his statement, he did not possess any valid documents for the licit purchase of the foreign currency, was to be paid Rs. 10,000 as remuneration and due to lure of money he carried the said foreign currency notes. Thus, it is clear that the conditions in respect of possession and export of foreign currency (seized from the Applicant) were not fulfilled.

10.1 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."*

10.2 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 cases.

11. The Government observes that the option to release seized goods on redemption fine, in terms of the provisions of Section 125 of the Customs Act, 1962, in respect of

"prohibited goods", is discretionary. The Hon'ble Supreme Court has affirmed this position in the case of Garg Woollen Mills (P) Ltd vs. Additional Collector of Customs, New Delhi [1998 (104) E.L.T. 306 (S.C.)]. 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.*" In the present case, the original authority has, after detailed consideration (as evident from paras 22.1 to 22.2 of the OIO), refused redemption. Further, the Hon'ble Delhi High Court in its order dated 21.08.2023 in W.P. (C) Nos. 8902/2021; 9561/2021; 13131/2022; 531/2022; & 8083/2023 held that "*.....an infraction of a condition for import of goods would also fall within the ambit of Section 2(33) of the Act and thus their redemption and release would become subject to the discretionary power of the Adjudging Officer*". Hence, keeping in view the ratio of the decisions aforesaid, the Commissioner (Appeals) has correctly refused redemption of the impugned currency.

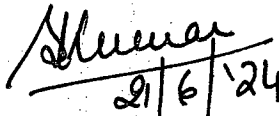
12.1 The Commissioner (Appeals) has relied upon an earlier Order of the Revisionary Authority wherein the Authority referred to the objective of introduction of Section 114AA, as explained in the para 63 of the report of Parliament's Standing Committee on Finance (2005-06), to hold otherwise. It is trite that in construing a statutory provision, the first and foremost rule of interpretation is the literal rule of interpretation {M/s. Hiralal Ratanlal vs. STO, AIR 1973 SC 1034 & B. Premanand & Ors. Vs. Mohan Koikal & Ors. (2011) 4SCC 266}. Where the words of a statute are absolutely clear and unambiguous, recourse cannot be had to other principles of interpretation {Swedish Match AB vs. SEBI AIR 2004 SC 4219}. In the present case, the words of Section 114AA are absolutely clear and unambiguous. There is nothing in the plain language of Section 114AA to even remotely suggest that the provisions thereof are not applicable in baggage cases. Revisionary Authority, Delhi vide its order 143/23-Cus dated 03.04.2023 also held the non-imposition of penalty under Section 114AA to be incorrect as the Applicant in that case was found to have made an incorrect declaration. In the instant case, the Applicant has failed to submit

proper declaration indicating the description and value of goods as required under the Customs Act and the same has been duly recorded in findings by the original authority. Further the applicant intentionally suppressed the correct information and did not make a proper declaration of the actual contents of the baggage; rather he attempted to smuggle out the impugned currency as bonafide baggage in violation of provisions of Customs Act, 1962. Hence, it has to be held that the Commissioner (Appeals) erred in his judgment.

12.2 Thus, the Government holds that the Order of Commissioner (Appeals) setting aside the penalty imposed under Section 114 AA, on the Applicant cannot be sustained and is set aside to this extent.

13. In the facts and circumstances of the case, the Government finds that the penalties imposed on the Applicant by the original authority are just and fair.

14. In view of the above, RA No. 380/72/B/SZ/2019-RA filed by the department is allowed and the Order-in-Original is upheld. RA No. 373/536/B/2019-RA is rejected on grounds of non-maintainability as barred by limitation.


21/6/24
(Shubhagata Kumar),
Additional Secretary to the Government of India

1. Sh. Sirajuddin Pallikke Kunhali
S/o. Sh. Kunhali Pallikke Mohammed
Mogar House, Ichilangode Pose
Via-Mangalpady, Kasaragod
Kerala-671324.
2. The Commissioner of Customs,
New Customs House, Panambur,
Mangaluru-575010.

Order No. 118-119 /24-Cus dated 21-06-2024

Copy to:

1. The Commissioner of Customs (Appeals), BMTC Building, Above BMTC Bus Stand, Old Airport Road, Domlur, Bengaluru-560071.
2. Sh. Sameer Kashimji, Advocate, 22, Sweet Home Apartments, Britto Lane, Falnir, Mangaluru-575001.
3. PPS to AS(RA)

4. Guard file.
5. Spare Copy.
6. Notice board.

Shailendra
21/06/24
ATTESTED
(शैलेन्द्र कुमार मीना)
(Shailendra Kumar Meena)
अनुभाग अधिकारी / Section Officer
वित्त मंत्रालय (राजस्व विभाग)
Ministry of Finance (Deptt. of Rev.)
भारत सरकार / Govt. of India
नई दिल्ली / New Delhi