

SPEED POST



F. No. 380/44/B/2019-RA
F. No. 380/66/B/2019-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.....18/07/24

Order No. 140-141/24-Cus dated 18-07-2024 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 Applications, filed under Section 129 DD of the Customs Act 1962 against the Order-in-Appeal Nos. 25/2019 dated 15.02.2019 & 70/2019 dated 30.04.2019, passed by the Commissioner of Customs (Appeals), Bengaluru.

Applicant : The Commissioner of Customs, Mangaluru

Respondent : Sh. Abdul Aleem Gawai, Bhatkal

ORDER

Revision Application Nos. 380/44/B/2019-RA dated 10.06.2019 & 380/66/B/2019-RA dated 07.08.2019 have been filed by the Commissioner of Customs, Mangaluru (hereinafter referred to as the Applicant department) against the Order-in-Appeal Nos. 25/2019 dated 15.02.2019 & 70/2019 dated 30.04.2019, passed by the Commissioner of Customs (Appeals), Bengaluru. The Commissioner (Appeals) has, vide the impugned Orders-in-Appeal, modified the Order-in-Original No. 29/2018 DC AP dated 04.12.2018, passed by the Deputy Commissioner of Customs, Mangaluru International Airport, Mangaluru. The Commissioner (Appeals) passed OIA No. 25/2019 dated 15.02.2019 on the appeal filed by Sh. Abdul Aleem Gawai, Bhatkal (hereinafter referred to as the Respondent) and passed OIA No. 70/2019 dated 30.04.2019 on the appeal filed by the Applicant department. Both the OIA were passed against the same OIO. Vide the aforesaid Order-in-Original, 59 notes of USD in denomination of 100 equivalent to INR 3,70,815/- were recovered from the Respondent, have been confiscated under Sections 113(d), 113(e) & 113(h) of the Act *ibid*. Besides, penalties of Rs. 60,000/- & Rs. 20,000/- were also imposed upon the Respondent under Sections 114 and 114AA, respectively, of the Act, *ibid*. The Commissioner (Appeals) has allowed the impugned foreign currency to be redeemed on payment of redemption fine of Rs. 20,000/- and reduced the penalty imposed under Section 114 to Rs. 25,000/-, while the penalty imposed under Section 114AA has been set aside.

2. Brief facts of the case are that on 07.02.2018, Customs officers intercepted the Respondent on the basis of a tip off. The respondent was destined for Dubai from Mangaluru International Airport and while he was proceeding towards security check after completing his immigration formalities, he was intercepted. When he was asked about the purpose of his visit to Dubai and as to whether he had anything to declare to Customs, he replied that he had nothing to declare to Customs and that he was proceeding to Dubai on tourist visa and that he was unemployed. When he was asked specifically as to whether he was carrying any contraband goods or any Indian/foreign currency, he replied that he was carrying no Indian currency and also that he had no foreign currency. Thereafter he was subjected to search and a bundle of currency notes was found secreted in front pocket of his trousers. On examination of currency notes, a total of 5900 US Dollars of denomination 100 were found.

In his statement dated 07.02.2018, recorded under Section 108 of the Customs Act, 1962, the Respondent, *inter-alia*, stated that he did not possess any documents to show licit possession of the said foreign currency; that he had no valid documents to show the purchase of currency from any authorized exchange dealers and accordingly, he did not declare the same to Customs at the time of departure to Dubai;

that the said foreign currency was given to him by one Yasir, when he was in Bhatkal, for handing over to a person in Dubai; and that Yasir had paid Rs. 10,000/- to him for carrying the said foreign currency notes by concealing in front pocket of his trousers without declaring to Customs while he attempted to pass through Customs at the Mangaluru International Airport. The matter was decided by the original adjudicating authority vide the aforesaid Order-in-Original dated 04.12.2018. Aggrieved, the Respondent filed an appeal before the Commissioner (Appeals), who modified the order of original authority as mentioned above.

3. The Revision Applications have been filed by the Applicant department mainly on the grounds that the Commissioner (Appeals) has exercised powers beyond the statutory provisions by way of allowing redemption of currency; that the finding of Commissioner (Appeals) that only Rs. 56565/- was more than the eligible limit and which can be carried without declaration, is illegal, improper and is in clear disregard to the facts and circumstances of the case; that the Respondent failed to establish licit purchase of the impugned foreign currency; that the findings that the Respondent is penalized under Section 114 and therefore he is not liable to penalty under Section 114AA is not correct; and that the issues raised and decided in both OIAs are different.

4. Personal hearing was held on 11.03.2024. Sh. Krishna Kumar, Assistant Commissioner appeared for the Applicant department and submitted that the Commissioner (Appeals) vide the OIA has wrongly granted redemption of the impugned currency against RF and also reduced penalty under section 114AA which is unwarranted. He reiterated the grounds stated in RA and sought restoration of the OIO. Ms. Sangeeta Bhayana appeared for the Respondent and submitted that the applicant is an NRI who has lived abroad for 45 years and is not a smuggler; that he brought the impugned currency on his earlier trips and that as per law he had no requirement to declare the same to Customs as long as it was within the limit of USD 5000. She also quoted several judgements and previous order of the Revisionary Authority and stated that the OIA was proper & should be upheld.

5. In the filing of revision application F. No. 380/44/B/2019 there has been a delay of 3 days in filing the revision application by the Applicant department and it has been stated that the delay is unintentional and due to oversight. The delay is condoned.

6. The Government has examined the matter. The Commissioner (Appeals) has passed two OIAs against the same OIO on the appeals filed by both the Applicant department and the Respondent. Since the issues raised in both the revision applications pertain to the same OIO, both the revision applications are therefore clubbed together for passing a common revision order.

7. 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. The Government notes that in the present case, the Respondent has failed to show compliance with the Regulations, as above, as he has admitted in his own statement that he did not possess any valid documents for the acquisition/purchase of the foreign currency and was trying to smuggle out the impugned currency due to the lure of money. Thus, it is clear that the conditions in respect of possession and export of foreign currency (seized from the Applicant) under Foreign Exchange Management Regulations, 2015 were not fulfilled.

8. It is also observed that the respondent was carrying foreign currency in a concealed manner which he failed to declare even when pointedly asked by Customs if he was carrying any. It is further noted that he has admitted to carrying this with full awareness that it was against the rules to do so, and did not declare it to Customs to evade detection. He has admitted this in his statement recorded under section 108 of the Customs Act, which is admissible evidence as per case of Surjeet Singh Chhabra vs. U.O.I {1997 (89) ELT 646 (SC)}, wherein the Hon'ble Court held that a confession statement made before the Customs Officer, though retracted within six days, is an admission and binding since Customs Officers are not Police Officers. In the case of K.I. Pavunny {1997 (90) ELT 241 (SC)}, the Hon'ble Supreme Court has held that the confessional statement of an accused if found voluntary, can form the sole basis for conviction. In the present case, the Applicant has admitted his involvement therefore there is no doubt that the statement tendered were voluntary. As such the culpability of the Applicant is well established.

9. 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."*

9.1 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.

10. 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 para 28 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"*. There is nothing in the OIA to suggest and establish that the order of the original adjudicating authority had any "patent illegality" or was "tainted by oblique motive".

11.1 The contention of the department is that the penalty under Section 114AA is merited in this case and the Commissioner (Appeals) has erred by dropping the same.

Section 114 AA clearly states that *if a person knowingly or intentionally makes, signs or uses, or causes to be made, signed or used, any declaration, statement or document which is false or incorrect in any material particular, in the transaction of any business for the purposes of the Customs Act, he shall be liable to a penalty not exceeding five times the value of goods.*

The Government observes that in the instant case, the Applicant falsely denied possession of the impugned goods even when specifically queried by Customs officers,

which was incorrect information as found when the search was conducted. Thus despite being well aware that carrying out foreign currency without declaring is against the law, a false and incorrect declaration was made contrary to the provisions of Section 77 of the Customs Act, 1962. Therefore, the imposition of penalty under Section 114 AA by the original authority was in order.

11.2 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 impugned 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 foreign currency as bonafide baggage in violation of provisions of Customs Act, 1962. Hence, it has to be held that the Commissioner (Appeals)'s stand is not correct.

11.3 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.

12. It is further observed that the Commissioner (Appeals) has allowed redemption on the ground that the seized foreign currency being equivalent of Rs. 3,70,815/- is a mere 56,565/- more than the eligible limit which can be carried without declaration. This ground is not correct as the Respondent had not fulfilled the requirement of regulation 5 and 3(iii) of Foreign Exchange Management Regulations, 2015 subject to which he could retain or export the impugned currency and hence was not eligible to carry the same out of India. He could have carried the same had he been able to

produce evidence of lawful purchase/acquisition of the impugned currency which he was unable to do. Further, in the case of P. Sinnasamy {2016 (344) ELT 1154 (Mad.)}, the Hon'ble Madras High Court has held that "*when discretion is exercised under Section 125 of the Customs Act, 1962, ----- the twin test to be satisfied is "relevance and reason".* In this case the reason for which discretion has been exercised is that the foreign currency was just Rs. 56,565/- more than the eligible limit, which is not in consonance with FEMA as discussed above.

13. In view of the above, the order of Commissioner (Appeals) is set aside and the OIO is restored.

14. Keeping in view the facts and circumstances of the case, the Government notes that the penalty imposed by the original authority under Section 114 is commensurate with the offence and as such, the penalty imposed by the original authority is restored.

15. The revision applications are, accordingly, allowed and the OIO is restored.

Shubhagata Kumar
18/7/24
(Shubhagata Kumar)

Additional Secretary to the Government of India

The Commissioner of Customs,
New Customs House, Panambur
Mangaluru-575010

Order No. 140-141/24-Cus dated 18-07-2024

Copy to:

1. Sh. Abdul Aleem Gawai, 621/1, Madina Manzil, Bunder Road, 6th Cross, Navayat Colony, Bhatkal-581320.
2. The Commissioner of Customs (Appeals), BMTC Building, Above BMTC Bus Stand, Old Airport Road, Domlur, Bengaluru-560071.
3. Smt. Sangita Bhayana, Advocate, Chamber No. 707, LCB-3, Delhi High Court, New Delhi.
4. PPS to AS(RA).
5. Guard File.
- ✓ 6. Spare Copy.
7. Notice Board.

Shailendra Kumar Meena
18/7/24
ATTESTED
(Shailendra Kumar Meena)
अनुभाग अधिकारी / Section Officer
वित्त मंत्रालय (राजस्व विभाग)
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