

SPEED POST



F. No. 380/45/B/2019-RA
F. No. 380/64/B/SZ/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. 26/07/24.

Order No. 146-147 /24-Cus dated 26-07-2024 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. 22/2019 dated 11.02.2019 & 66/2019 dated 26.04.2019, passed by the Commissioner of Customs (Appeals), Bengaluru.

Applicant : The Commissioner of Customs, Mangaluru

Respondent : Sh. Abdul Ahad, Bhatkal

ORDER

Revision Application Nos. 380/45/B/2019-RA dated 21.06.2019 & 380/64/B/2019-RA dated 14.08.2019 have been filed by the Commissioner of Customs, Mangaluru (hereinafter referred to as the Applicant department) against the Order-in-Appeal Nos. 22/2019 dated 11.02.2019 & 66/2019 dated 26.04.2019, passed by the Commissioner of Customs (Appeals), Bengaluru. The Commissioner (Appeals) has, vide the impugned Orders-in-Appeal, modified the Order-in-Original No. 20/2018 (AP) dated 05.09.2018, passed by the Deputy Commissioner of Customs, Mangaluru International Airport, Mangaluru. The Commissioner (Appeals) passed OIA No. 22/2019 dated 11.02.2019 on the appeal filed by Sh. Abdul Ahad, Bhatkal (hereinafter referred to as the Respondent) and passed OIA No. 66/2019 dated 26.04.2019 on the appeal filed by the Applicant department. Both the OIA were passed against the same OIO. Vide the aforesaid Order-in-Original, 80 notes of USD in denomination of 100 & 50 and 34 notes of Oman Riyals in denomination of 50,20 & 10 equivalent to INR 7,46,328/- were recovered from the Respondent, have been absolutely confiscated under Section 113(d) of the Act *ibid*. Besides, a penalty of Rs. 1,50,000/- was also imposed upon the Respondent under Section 114(i) of the Act, *ibid*. The Commissioner (Appeals) has allowed the impugned foreign currency to be redeemed on payment of redemption fine of Rs. 1,00,000/- and reduced the penalty imposed under Section 114(i) to Rs. 50,000/- vide OIA No. 22/2019 and set aside the appeal filed by the department as not sustainable on merits vide OIA No. 66/2019.

2. Brief facts of the case are that on 14.03.2018, Customs officers intercepted the Respondent on the basis of a tip off. The respondent was destined for Dubai from Mangaluru International Airport and was intercepted while he was about to board the flight after completing his immigration formalities. When he was enquired whether he was carrying any foreign currency either on his person or in his baggage to which he replied in negative. Thereafter upon examination of his checked-in baggage one duly sealed food packet marked as 'Milk & Elaichin Soan Papdi-Shri Renuka Sweets' was found. Upon opening the said food packet, one bundle packed with white paper/newspaper/adhesive tapes was found. Upon opening the said bundle the aforementioned assorted foreign currency was recovered.

In his statement dated 15.03.2018, recorded under Section 108 of the Customs Act, 1962, the Respondent, *inter-alia*, stated that he was having a garments and fancy items shop by the name PINK in Bhatkal but as he was not getting enough profit and hence he decided to go abroad for purchase of cosmetic items from Dubai; that accordingly he made plan to travel from Mangaluru International Airport to Dubai on 14.03.2018; that he did not possess any document to show licit possession of the said foreign currency notes; that the said foreign currency notes were handed over to him

by one of his customers in Bhatkal named Mujib which were to be handed over to his contact person at Dubai airport; that Mujib also promised him to pay Rs. 10,000/- after handing over the same to his contact person in Dubai; and that he accepted his offer due to lure of money and tried to smuggle the same without declaring it to Customs.

The matter was decided by the original adjudicating authority vide the aforesaid Order-in-Original dated 05.09.2018. 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. 424328/- 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 penalty under Section 114(i) be increased and penalty under Section 114AA be imposed; and that the issues raised and decided in both OIAs are different.

4. Personal hearing was held on 13.03.2024. Sh. Krishna Kumar, Assistant Commissioner appeared for the Applicant department and reiterated the grounds stated in both the RAs. He sought enhancement in penalty imposed and also sought imposition of penalty under Section 114AA of the Customs Act, 1962. No one appeared for the respondents. Another personal hearing was fixed on 22.03.2024. None appeared for either side. Since sufficient opportunities have been granted, the matter is being taken up for disposal.

5. In the filing of revision application F. No. 380/64/B/SZ/2019 there has been a delay of 5 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 was voluntary. Thus, the intent to smuggle and evade Customs duty is clear.

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. As far as imposition of penalty under Section 114AA is concerned the Government concurs with the findings of the Commissioner (Appeals) which he has noted in para 9 of his order that demand has not been raised in the Show Cause Notice to impose penalty under the said Section and hence he could not go beyond the scope of Show Cause Notice and impose penalty under Section 114AA.

12. It is further observed that the Commissioner (Appeals) has allowed redemption on the ground that the seized foreign currency being equivalent of Rs. 7,46,327/- is 4,24,328/- 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. 4,24,328/- more than the eligible limit, which is not in consonance with FEMA as discussed above.

13. In view of the above, penalty under Section 114AA cannot be imposed which has been rightly noted by the Commissioner (Appeals) in his order.

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(i) is commensurate with the offence and as such, the penalty imposed by the original authority is restored.

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

Shubhagata Kumar
26/7/24

(Shubhagata Kumar)

Additional Secretary to the Government of India

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

Order No. 146-147 /24-Cus dated 26-07-2024

Copy to:

1. Sh. Abdul Ahad, S/o Sh. Mohammed Ashraf Gawai, H.No. 41, MAB House, Sultan Street, Bhatkal-581320.
2. The Commissioner of Customs (Appeals), BMTC Building, Above BMTC Bus Stand, Old Airport Road, Domlur, Bengaluru-560071.
3. PPS to AS(RA).
4. Guard File.
5. Spare Copy.
6. Notice Board.

Shailendra Kumar Meena
26/7/24
ATTESTED

(शैलेन्द्र कुमार मीना)
(Shailendra Kumar Meena)
अनुभाग अधिकारी / Section Officer
निस मंत्रालय (आंतरिक विभाग)
Ministry of Finance (Internal Dept.)
भारत सरकार / Govt. of India
नई दिल्ली / New Delhi